

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Environmental Safety Consultants, Inc.) ASBCA No. 51722
)
Under Contract No. N62470-95-C-2399)

APPEARANCE FOR THE APPELLANT: Mr. Peter C. Nwogu
President

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE GOVERNMENT'S MOTION
FOR RELIEF FROM JUDGMENT

Environmental Safety Consultants, Inc. (ESCI) appealed to this Board the government's termination for default of the captioned contract. In our decision of 28 September 2011, we sustained the appeal.¹ *Environmental Safety Consultants, Inc.*, ASBCA No. 51722, 11-2 BCA ¶ 34,848. Thereafter, the government did not move for reconsideration of the decision within the 30 days prescribed for by Board Rule 29, but did appeal that decision to the United States Court of Appeals for the Federal Circuit on 24 January 2012. *Navy v. Environmental Safety*, appeal docketed, No. 2012-1175 (Fed. Cir. Jan. 24, 2012). ESCI and the government agreed to voluntarily dismiss the appeal in the Federal Circuit under Federal Rule of Appellate Procedure 42(b), and the court so ordered. *Navy v. Environmental Safety*, No. 2012-1175 (Fed. Cir. June 5, 2012).

Dissatisfied with the Department of Justice's agreement to the dismissal of its appeal in the Federal Circuit, the contracting agency (Department of the Navy) returned to this Board on 28 September 2012 with a "Motion for Relief from Judgment" pursuant to FED. R. CIV. P. 60(b)(3) and 60(b)(6). The motion begins with a request that we:

[C]onsider the conduct of the ESCI's president in violating the Prompt Payment Act (PPA), submitting false certifications and false claims to the Government, and making repeated slanderous and offensive accusations, and threats directed at the Board, Government counsel, and other

¹ Judge Thomas who participated in the Board's decision has since retired.

Government officials and trial witnesses, as exceptional circumstances which warrant the exercise of the Board's discretion to grant this motion.

(Mot. at 1) The motion goes on to argue that the Board's 28 September 2011 decision should be vacated because (i) the Board did not fairly evaluate the alternative grounds asserted for termination, (ii) the Board did not correctly analyze the repudiation issue, (iii) the Board's analysis was flawed under the *DeVito* waiver doctrine, and (iv) the government was unfairly prejudiced because the author of the decision was not present at the hearing, could not determine the credibility of the witnesses and otherwise made numerous errors of fact and law (mot. at 3, 10, 14, 17).²

All of the grounds for relief in the government's motion are matters that could have been presented in a timely motion for reconsideration, or on appeal to the Federal Circuit. The government's present motion does not assert any newly-discovered, outcome-determinative facts leading up to the termination, and we otherwise find no extraordinary or exceptional circumstances pertinent to the merits of the case that, in the nature of an FED. R. CIV. P. 60(b)(6) motion, would justify vacating the decision. The government's Motion for Relief from Judgment is nothing more than an untimely motion for reconsideration, or attempt to argue its now dismissed appeal to the Federal Circuit.

The motion is denied.

Dated: 16 May 2013



MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures Continued)

² As recited in our decision, *Environmental Safety Consultant's, Inc.*, 11-2 BCA ¶ 34, 848 at n.1, Judge Van Broekhoven who presided over the hearing in this appeal, retired prior to our decision.

I concur



MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 51722, Appeal of Environmental Safety Consultants, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals