

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application under the Equal Access)
to Justice Act 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 RECONSIDERATION OF
DENIAL OF AN EQUAL ACCESS TO JUSTICE ACT AWARD

In *Environmental Safety Consultants, Inc.*, ASBCA No. 51722, 11-2 BCA ¶ 34,848, we sustained this appeal from a default termination that occurred eleven months after the default without a new and reasonable completion date having been set. Pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, the appellant (ESCI) applied for an award of fees and expenses incurred in the litigation. In *Environmental Safety Consultants, Inc.*, ASBCA No. 51722, 13 BCA ¶ 35,352, we found that the government's position was substantially justified and denied the application. Familiarity with these decisions is presumed. ESCI now moves for reconsideration of our decision denying its EAJA application.

ESCI begins its motion with a litany of alleged government actions and failures to act allegedly causing delay and increased costs in performance of the contract. In a letter to the government dated 7 April 1997, ESCI, proposed a contract price increase of \$205,463.60 for the delays and increased costs (R4, tab 12). Any and all such claims against the government, however, were settled by the parties on 24 June 1997 in bilateral Modification No. P00006. See *Environmental Safety Consultants, Inc.*, 11-2 BCA ¶ 34,848 at 171,430.

Modification No. P00006 required ESCI to have the contract work completed by a subcontractor by 30 June 1997. ESCI's subcontractor (Rickmond), however, left the site on 16 June 1997 for lack of payment. No work was performed on the contract thereafter. 11-2 BCA ¶ 34,848 at 171,430. ESCI contends that it could not pay Rickmond because the government did not pay its 23 June 1997 invoice. The government did not pay

ESCI's 23 June 1997 invoice because it had been notified by the payment bond surety on 14 May 1997 that the surety was processing payment for four suppliers on Contract No. N62470-95-C-2399 who had not been paid by ESCI.

The surety's notice to the government put in question the validity of the prompt payment certification on ESCI's 23 June 1997 invoice. The prompt payment certification was required on every invoice by the FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989) clause of the contract. Paragraph 2 of the required certification stated in relevant part: "Payments to subcontractors and suppliers have been made from previous payments received under the contract, and timely payments will be made from the proceeds of the payment covered by this certification in accordance with subcontract agreements." (R4, tab 1 at 68)

On 30 June 1997, the contracting officer returned ESCI's 23 June 1997 invoice unpaid to ESCI with the following explanation:

Your prompt payment certification is invalid as we have received notification from your surety that they have paid several of your subcontractors on this project.

Please contact the surety to discuss an agreeable solution to this problem as no invoices will be paid until it is resolved.

11-2 BCA ¶ 34,848 at 171,430.

Considering the 14 May 1997 notice of the payment bond surety, the contracting officer was substantially justified in both fact and law for withholding any further payments to ESCI until the veracity of its certification as to the disposition of prior invoice payments could be resolved.¹

ESCI contends that the contracting officer acted in bad faith and failed "to do diligent duty" when she did not ask Rickmond to complete the work after its overdue invoices were paid by the surety. We disagree. ESCI was the prime contractor and pursuant to Modification No. P00006 was responsible, not the government, for procuring a subcontractor to complete the work.

ESCI also contends that the government is precluded by *res judicata* from arguing that its position was substantially justified when it withdrew voluntarily its appeal to the

¹ ESCI's Table A in its 3 September 1997 answer to the government's motion to strike ESCI's motion for reconsideration shows total costs claimed by Rickmond from October 1996 through June 1997 of \$171,067 for the contract work and total payments by ESCI to Rickmond for that work of \$13,680.

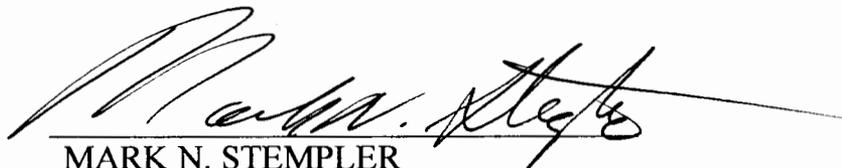
Federal Circuit of the Board's 28 September 2011 decision on the merits of the default termination. We disagree. *Res judicata* has no application because the decision appealed to and then withdrawn from the Federal Circuit was our decision on the merits which did not and could not address the issue of whether the government position was substantially justified for EAJA purposes.

We have considered ESCI's other arguments and find them without merit. On reconsideration of our decision denying ESCI's application in *Environmental Safety Consultants, Inc.*, 13 BCA ¶ 35,352, we affirm that decision.

Dated: 3 December 2013


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

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 on an application for fees and other expenses incurred in connection with ASBCA No. 51722, Appeal of Environmental Safety Consultants, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

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