ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access to Justice Act --	)	
Centron Industries, Inc.	)	ASBCA No. 52581
Under Contract No. N00104-96-C-NA30	)	

APPEARANCE FOR THE APPELLANT: Sam Zalman Gdanski, Esq.
Suffern, NY

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

In *Centron Industries, Inc.*, ASBCA No. 52581, 02-2 BCA ¶ 32,022, we sustained this appeal from a default termination after the contracting officer unilaterally converted the termination to one for convenience. Centron now applies for an award of attorneys' fees and expenses incurred in connection with the appeal. We deny the application. Although Centron was a prevailing party, the government's position in the appeal was substantially justified.

Pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, Centron is eligible for an EAJA award as a prevailing party if (i) it did not have more than 500 employees and a net worth of more than $7,000,000 at the time it filed the appeal, and (ii) the appeal resulted in a board-ordered change, in appellant's favor, in the legal relationship of the parties. *See Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001); *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1380 (Fed. Cir. 2002). If eligible as a prevailing party, Centron is entitled to an award unless the government proves that its position in the appeal and in the events giving rise to the appeal was substantially justified or that special circumstances make an award unjust. *See* 5 U.S.C. § 504(a)(1) and *Dean Kurtz Construction Company*, ASBCA 35483, 89-3 BCA ¶ 22,001 at 110,616-17.

The government does not dispute Centron's eligibility with respect to number of employees and net worth. It does dispute Centron's status otherwise as a prevailing

party, and it also contends that its position was substantially justified. The government disputes Centron's prevailing party status on the ground that the change from a default to a convenience termination was the result of the contracting officer's voluntary act and not the result of the Board's decision. This argument is without merit. Centron's prevailing party status under *Buckhannon* and *Brickwood* turns on whether there was a board-ordered conversion of the default termination, and not on whether the board decision was preceded by and based upon the voluntary conversion by the government.

Buckhannon and *Brickwood* respectively held that, without a court-ordered change in the legal relationship of the parties, neither a statutory change nor a voluntary change by the government in the relationship conferred prevailing party status. *Buckhannon* and *Brickwood* did not hold that a court-ordered change in the legal relationship would not confer prevailing party status if preceded by and based upon a voluntary change by the government. The government's argument to the contrary is in substance an argument going to the board's jurisdiction. We rejected that argument in our previous decision. We reject it again for the reasons previously stated. *See* 02-2 BCA ¶ 32,022 at 158,260.

The government argues that our decision sustaining the appeal was not an enforceable decision on the merits because it contained no "review of the merits" (gov't resp. at 12). We disagree. The government's voluntary conversion of the default termination obviated any need for a review of the merits, and in that respect our decision was an adjudication on the merits in the same manner as a dismissal with prejudice for failure to prosecute. *See Bulloch International, Inc.*, ASBCA No. 44210, 93-2 BCA ¶ 25,692 at 127,808.

Our decision sustaining the appeal provided the finality and enforceability of a judicial imprimatur to the conversion of the default termination that was entirely lacking in the contracting officer's voluntary act standing alone. In *Elrich Contracting Inc.*, ASBCA No. 50867, 02-2 BCA ¶ 31,950, we denied an EAJA application where the applicant had not requested a decision sustaining the appeal and agreed to a dismissal after the government converted the default termination on the first day of the hearing. Our conclusion in that case was: "Elrich obtained success, but not formal judicial relief. Accordingly, we must deny its application for attorneys fees and expenses." 02-2 BCA at 157,844. The formal judicial relief that was lacking in *Elrich* is present in Centron's case and meets the judicial imprimatur requirement for Centron's prevailing party status under *Buckhannon* and *Brickwood*. *See* 532 U.S. at 605; 288 F.3d at 1380; *see also Rice Services, Ltd. v. United States*, No. 02-468C, 2004 U.S. Claims LEXIS 5 (Fed. Cl. January 13, 2004).

On the substantial justification issue, we agree with the government that its position was substantially justified both in the appeal and in the events giving rise to the appeal. The contract was awarded on 21 December 1995 with a first article test report (FATR) delivery date of 15 December 1996 (R4, tab 1 at 1, 20). Centron failed to deliver

a compliant FATR on that date. On 13 January 1999, Centron requested a change in two test requirements that it alleged were impossible to meet (R4, tab 31). After being informed by the responsible logistics personnel that previous suppliers of the same item had met the cited test requirements, the contracting officer denied Centron's request (R4, tabs 25, 32, 33).

On 29 November 1999, one day before its most recent extended FATR delivery date, Centron requested a convenience termination on the ground that: "[w]e have determined after over three years of unsuccessful attempts and the expenditure of a great deal of money, that it is neither feasible nor practicable to produce a multicoupler . . . meeting all of the required specifications . . . ." (R4, tab 48) On 13 December 1999, the government terminated the contract for default (R4, tab 8).

The appeal was filed on 18 January 2000. Discovery began in May 2000 (gov't status report, 11 July 2000). Four days after the scheduled close of discovery, the contracting officer on 28 September 2001 converted the default termination to a convenience termination (gov't resp., attach. 1). The contracting officer's affidavit states that, although he believed the default termination was justified, "after reviewing the termination for default against the circumstances imposed on the government by Centron's appeal, I decided that it would be in the best interests of the government to attempt to settle the dispute" (gov't resp., attach. 2).

The contracting officer's unilateral conversion of the default termination to a convenience termination is not by itself conclusive evidence that the government's position in the appeal up to that time was not substantially justified. *See Labelle Industries, Inc.*, ASBCA No. 44201, 98-2 BCA ¶ 29,829 at 147,679-80. The Rule 4 appeal file cited above contains substantial documentary evidence that previous suppliers had met the drawing requirements. After more than one year of discovery, Centron cites no evidence to the contrary. On this record, the government has carried its burden of proving that its position in the appeal was substantially justified.

The application is denied.

Dated: 5 February 2004

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

(Signatures continued)

I concur

ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur in result
(see separate opinion)

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

I concur in result
(see separate opinion)

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

OPINION CONCURRING IN RESULT BY ADMINISTRATIVE JUDGES THOMAS AND STEMPLER

We concur in result without joining in the discussion. Appellant does not qualify as a prevailing party. We do not reach the substantial justification issue.

In January 2000 appellant appealed from the termination for default of its contract. Appellant sought the conversion of the termination for default to one for convenience. On 5 February 2001, the Board issued a prehearing order setting dates for the close of discovery (24 September 2001), exchange of witness and exhibit lists (22 October 2001), and a hearing (26 November 2001). On 28 September 2001, the contracting officer converted the termination for default to one for convenience. According to his declaration, "after reviewing the termination for default against the circumstances imposed on the Government by Centron's appeal, I decided that it would be in the best interests of the Government to attempt to settle the dispute" (gov't resp., attach. 2, ¶ 8). The Board did not participate in any way in resolving the dispute.

Subsequent to the conversion of the termination for default to one for convenience, the Board issued an order asking the parties to show cause why the appeal should not be dismissed as moot. In reply, appellant requested that "an appropriate official document . . . be issued . . . so appellant may seek reimbursement of attorney's fees" (*Centron Industries, Inc.*, ASBCA No. 52581, 02-2 BCA ¶ 32,022 at 158,261 (dissent), quoting appellant's 23 December 2001 reply). The government moved to dismiss the appeal for lack of jurisdiction.

On 1 October 2002, the Board issued an opinion, from which we dissented, sustaining the appeal. *Id*. The Board stated that appellant's request that the appeal be sustained was in substance a motion for summary judgment on the merits. It continued that "[h]aving converted the default termination to one for convenience while the appeal was pending, the Government has failed to carry its burden of proof in the appeal." It concluded that appellant was entitled to a Board decision sustaining the appeal as a matter of law. (02-2 BCA at 158,260)

We pointed out that the appeal was moot and that appellant had requested that it be sustained for the purpose of establishing its eligibility for EAJA fees. Sustaining the appeal under these circumstances, where the parties had resolved the merits of the appeal without any participation by the Board, and thus qualifying the appellant as a prevailing party for purposes of EAJA, was inconsistent with *Buckhannon*. 02-2 BCA at 158,262. The majority responded that it was premature to reach the *Buckhannon* issue: "*Buckhannon* and *Brickwood* do not apply at this stage of the dispute." 02-2 BCA at 158,260.

In the current opinion, the majority argues that appellant is a prevailing party under *Buckhannon* because the prior decision "provided the finality and enforceability of a judicial imprimatur." In other words, while professing in the prior opinion that it would be premature to address the Supreme Court's decision, the majority now admits that it was attempting to decide the prevailing party issue by implication. The majority accepts the contracting officer's explanation in opposition to the EAJA application that he decided because of the circumstances of the appeal that it was in the best interests of the government to settle the dispute. The Supreme Court unmistakably held in *Buckhannon* that a voluntary change in conduct of this type would not support an award of attorney's fees (*see* 532 U.S. at 600, 604 n.7, 605, 609). The majority states that prevailing party status turns on "whether there was a board-ordered conversion of the default termination." There was no Board-ordered conversion; the conversion had already occurred. We conclude that appellant is not a prevailing party and that the majority's mistaken decision does not affect that result.

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

EUNICE W. THOMAS
Administrative Judge
Vice 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. 52581, Appeal of Centron Industries, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

DAVID V. HOUPE
Acting Recorder, Armed Services
Board of Contract Appeals