ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Environmental Safety Consultants, Inc.	)	ASBCA No. 54995
	)	
Under Contract No. DACW38-95-C-0102	)	

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

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Lanny R. Robinson, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Vicksburg

OPINION BY ADMINISTRATIVE JUDGE JAMES ON
APPELLANT'S MOTION FOR RECONSIDERATION

On 6 April 2006, appellant timely moved for reconsideration of our 7 March 2006 decision in *Environmental Safety Consultants, Inc.*, ASBCA No. 54995, 06-1 BCA ¶ 33,230, and amended its motion on 11 April 2006. Respondent replied thereto on 4 May 2006, and appellant submitted an "Answer" to such reply on 23 May 2006.

Appellant first requests reconsideration "by another Deciding Group" on the assertion that in eleven listed decisions—

> in the last five (5) years, Honorable Administrative Judge James, Junior, has demonstrated pattern of suspect of extremely sympathetic to government's side of the cases he reviewed. This extreme sympathy to government is more prevalent with appeals involving pro-se litigants. . . . [Appellant concludes that] in the last 5 years, 91% of minority, women owned and Administrative Judge James killed small business that filled appeal. [Syntax in original.]

(App. mot. at 1-2) Respondent replies that appellant's assertion "should be rejected on its face and is undeserving of further analysis or comment" (gov't reply at 1). The Board Chairman has declined to appoint another deciding group to rule on this motion for the reasons analyzed below.

This Board looks to 28 U.S.C § 455 for guidance on recusal issues. *AEI Pacific, Inc.*, ASBCA No. 53806, 04-2 BCA ¶ 32,635 at 161,483. A judge's decisions on the instant case or in past cases are not valid grounds for his recusal under 28 U.S.C. § 455. Movant has identified no statement or conduct of Judge James, or any of the other judges who concurred with the decisions in the eleven appeals movant cited, that show "personal bias or prejudice" concerning appellant, nor any evidence of error or partiality. *See* 28 U.S.C. § 455(b)(1).

"[A] motion for disqualification ordinarily may not be predicated on the judge's rulings in the instant case or in related cases, nor on a demonstrated tendency to rule in any particular way nor on a particular judicial leaning or attitude derived from his experience on the bench [citations omitted]." *Phillips v. State of Mississippi*, 637 F.2d 1014, 1020 (5th Cir. 1981); *see International Business Machines Corp. v. United States*, 618 F.2d 923, 930 (2d Cir. 1980):

> It seems evident that statistics alone . . . cannot establish extrajudicial bias. There is no authority for, and no logic in, assuming that either party to a litigation is entitled to a certain percentage of favorable decisions. The inquiry to be at all meaningful would necessarily require this court to examine each and every ruling to determine whether it was, initially, legally valid. If we determined that some adverse rulings were correctly made, obviously they could not be tainted by bias. Even if they were deemed to be incorrect, it of course does not follow that they were motivated by personal bias. We would next have to ask whether the error could be attributed to the judge's misunderstanding of the facts or the law. . . . If material legal or factual error has been committed it can be dealt with on plenary appeal.

See also Freedom NY, Inc., ASBCA No. 43965, 05-1 BCA ¶ 32,934 at 163,122, *aff'd*, No. 05-1500 (Fed. Cir. May 5, 2006).

Movant also argues that in the 7 March 2006 decision in issue, the Board failed to find various alleged "facts" with respect to the issuance of notice to proceed, the contract completion date, whether respondent's August 1996 default termination was valid, the existence of alleged constructive changes, and that appellant's claim was not for $98,639.18, but rather for $104,403.63 (app. mot. at 12) or $104,120.89 (app. mot. at 22). Movant calculates the $104,403.63 amount by adding a new element – "Invoices #1, #2 and #3 wrongfully withheld $5764.50" – which it allegedly omitted in its 23 September 2002 and 16 March 2003 claim. Movant's present assertion that it "intended" to include

that $5,764.50 element cannot retroactively modify the $98,639.18 amount stated in its 2002-2003 claim and correctly found in our 7 March 2006 decision. None of the other alleged facts were relevant or material to the issue presented, namely, whether appellant's 24 January 2005 "new offer" letter to the CO was a "new claim" timely appealed. The remainder of movant's contentions repeat the arguments appellant submitted on 29 July and 27 October 2005 in opposition to respondent's motion to dismiss, which have been decided in the 7 March 2006 decision, 06-1 BCA ¶ 33,230 at 164,665-66.

Accordingly, the motion for reconsideration is denied.

Dated: 19 June 2006

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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 in ASBCA No. 54995, Appeal of Environmental Safety Consultants, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals