ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access to Justice Act of --	)	
Environmental Safety Consultants, Inc.	)	ASBCA Nos. 47498, 53485
Under Contract No. N62472-90-C-5164	)	

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

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Senior Trial Attorney
Naval Facilities Engineering Command
Litigation Headquarters
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE THOMAS

Appellant Environmental Safety Consultants, Inc. (ESCI) has applied for Equal Access to Justice Act (EAJA) fees and other expenses pursuant to 5 U.S.C. § 504 in the amount of $119,067. The government has answered the application. Appellant has replied. Only entitlement is before us.[1] We conclude the government has established that its position was substantially justified and deny the application.

FACTS RELEVANT TO THE APPLICATION

1. In ASBCA No. 47498, we held that appellant was entitled to an equitable adjustment for certain additional costs incurred in performance of the captioned contract. In ASBCA No. 53485, we held that appellant was entitled to recover $93,989 plus interest. *Environmental Safety Consultants, Inc.*, ASBCA No. 47498, 00-1 BCA ¶ 30,826 (ESCI I), ASBCA No. 53485, 05-1 BCA ¶ 32,903 (ESCI II), *modified on recon.*, 05-2 BCA ¶ 33,073 (ESCI III).

2. These appeals have a lengthy history which we outline briefly. On 23 May 1991, the United States Naval Facilities Engineering Command (NAVFAC) awarded appellant the

[1] Judge Todd, who heard these appeals, and Judge Dicus, who participated in the decision on ASBCA No. 47498, have retired.

captioned contract in the not to exceed amount of $299,125 for sludge removal, disposal and cleaning services in lagoon #1 and lagoon #2 at the Naval Air Development Center (the Center), Warminster, Pennsylvania. According to the contract, lagoon #1 had a density of 8% to 12% solids, and lagoon #2 had a density of 18% to 22% (by weight) dry solids. Lagoon #1 included nonhazardous industrial liquid waste and lagoon #2 included hazardous industrial wastes. The contractor was responsible for performing any sludge analyses that might be required. The contract did not include a Differing Site Conditions clause. The original contract completion date was 31 October 1991. (ESCI I at findings 1, 2, 4, 15)

3. Appellant is a small disadvantaged business founded in 1991. Mr. Nwogu is appellant's founder and owner. Mr. Nwogu has a college degree in chemistry, a graduate degree in environmental engineering, and a law degree. This contract was appellant's first business. (ESCI I at finding 17)

4. On or about 12 June 1991, appellant mobilized at the work site. A series of problems ensued, which are fully spelled out in ESCI I. Briefly, they included discovery of condensed stiff and solid materials at the bottom of lagoon #1, disagreements between appellant and the government about permissible methods to remove the materials, the termination of appellant's subcontractor WCI because it was suspended from government contracts, the disapproval of appellant's proposed subcontractor CNYIS because there was no proof it had required insurance, the disapproval of two other subcontractors (Clean Harbors and Aces), the initial disapproval of appellant's spill contingency plan, the discovery by appellant's subcontractor CWM of hazardous materials (as opposed to hazardous waste[2]) in the sludge from lagoon #1, the refusal of the government to allow appellant to proceed with lagoon #2 until it had made progress with lagoon #1, a dispute about the quantity of lagoon #2 sludge appellant indicated in a manifest, a spill of hazardous sludge from lagoon #2 which resulted in the government excluding Mr. Nwogu from the work site for one day (a Sunday), and the assessment of liquidated damages of $10,964 for nonperformance at lagoon #2. The parties successfully resolved issues relating to compensation for solids on the apron of lagoon #2 by modification. (ESCI I, 00-1 BCA at 152,133-41, 152,148 n.15)

5. Appellant, its prospective or approved subcontractors, and the government all obtained analyses of the sludge in lagoon #1. These analyses showed different percentages of solids. On 17 June 1991, Mr. Nwogu obtained a sample showing 10% to 20% suspended solids. A prospective subcontractor, Clean Harbors, analyzed the sample as containing 20.73% solids. On 3 July 1991, appellant's Mr. Wagner took waste samples which, according to a profile signed by Mr. Nwogu, included 8% to 12% solids.[3] On 19 July 1991, Mr. Kurdziel, the

[2] Hazardous materials and hazardous waste are distinct terms of art in the environmental industry. Only the latter is regulated by the Resource Conservation Recovery Act (RCRA). *See* ESCI I at 152,148 n.8.

[3] Mr. Nwogu may have been attempting to conform this profile to the contract. *See* ESCI I at finding 29.

Center's Environmental Programs Coordinator, certified the same samples as including 8% to 12% solids. In August 1991, subcontractor CWM, which was transporting the sludge, reported percentages ranging from 5.6% to 37.8%, with more than half in excess of 23%. In late August, appellant's testing laboratory Law & Company reported percentages of 33 and 58.2. In October 1991, the government's independent laboratory, QC, Inc., analyzed a sample in accordance with "E.P.A. methodology" and reported a solids content of 10.06%. (ESCI I, 00-1 BCA at findings 19, 27, 28, 29, 33, 34, 37, 53)

6. On 31 March 1992, appellant and NAVFAC entered into bilateral Modification No. P00003 terminating the contract at no cost to either party. Appellant reserved its right to submit the claim which became the subject of these appeals. (ESCI I at finding 59)

7. On 25 June 1992, Robert C. Chambers, Esq., of Smith Currie & Hancock, Atlanta, Georgia, submitted appellant's certified claim in the amount of $150,587.95 to the contracting officer. The claim was divided in two parts: $85,849.57 for lagoon #1 and $64,738.38 for lagoon #2, including release of the liquidated damages of $10,964. For lagoon #1, appellant claimed that the percentage of solids exceeded that indicated in the contract, that its subcontractor CWM had incurred unexpected surcharges because the sludge "contained significantly higher concentrations of suspended solids and also included heavy metals and petroleum hydrocarbons" than expected, and that it had incurred additional management costs and efforts including testing costs. For lagoon #2, appellant claimed that NAVFAC had wrongfully refused to allow it to begin on-site work before 29 August 1991, that there was a material difference in the consistency of the sludge as compared to what was represented in the contract, and that the government had improperly withheld liquidated damages. (Government's Opposition to Appellant's Fee Application (gov't opp'n), ex. 14 at 2-3, 8, 14-16, 25, 28-29)

8. On 2 February 1994, the contracting officer issued a final decision denying the claim with the exception of the release of the liquidated damages assessed on lagoon #2. With respect to the percentage of solids at lagoon #1, the contracting officer stated:

> You base this claim on the test results which allegedly show that the solids content of Lagoon 1 were much higher than the 8-12% indicated in the contract.
>
> However, you never provided documentation for any of these tests showing the manner in which the samples were taken or the chain of custody from the sampling to the testing facility. The PWO [Public Works Office] was never invited to observe the taking of the samples on which these tests were allegedly based. The PWO, on the other hand, has conclusive evidence as to the contents of Lagoon 1 which is consistent with the contract representations.

> The July 19, 1991 waste profile certified by Frank [Kurdziel] from a sample taken by an ESCI employee shows a solids content of 8-12%. This waste profile is reinforced by the report from an independent testing facility which found a solids content of just over 10%.
>
> Based on the above, this portion of your claim is denied.

(Gov't opp'n, ex. 25 at 2-3) With respect to CWM's claim for surcharges, the contracting officer relied upon the fact that the contract made no representation as to the presence or absence of heavy metals or petroleum hydrocarbons. He also pointed out that "[a]lthough your subcontractor claims that it was obligated to treat this waste as hazardous due to its POTW permit limitations, this permit has not been provided to the Government." With respect to lagoon #2, the contracting officer found "that your sampling procedures are wholly lacking in evidentiary support in terms of witnesses and chain of custody documentation," that appellant's tests were done on the sludge which had been stockpiled on the apron, where liquid could drain off, and that other evidence indicated the solids content was within the contractual limits. (Gov't opp'n, ex. 25 at 3, 5) We find that the final decision represents a good faith effort to analyze the issues as they were known to the government at the time.

9. On 2 May 1994, David B. Dempsey, Esq. of Akin, Gump, Strauss, Hauer & Feld, LLP, Washington, DC, filed an appeal on appellant's behalf from the final decision. The appeal was docketed as ASBCA No. 47498. Appellant's original complaint included four counts: Count I, Differing Site Conditions: Suspended Solids; Count II, Differing Site Conditions: Hazardous Waste; Count III, Failure to Cooperate: Government-Caused Delay; and Count IV, Failure to Compensate for Government-Ordered Changes. Count I alleged that the solid materials suspended in the lagoons were of significantly higher density than set forth in the contract. Count II alleged that contrary to the Navy's representations, Lagoon #1 contained hazardous waste. Count III alleged that "the Navy failed to act within a reasonable period of time to grant ESCI access to the Lagoons, to approve work plans and schedules, and to approve hazardous waste spill contingency plans." Count IV alleged that the Navy required ESCI "to remove waste sludge of a significantly greater density than warranted by the Contract and, in some cases, of hazardous content. . . . ESCI incurred significant cost overruns in performing the changes and additional work ordered by the Navy." (Gov't opp'n, ex. 15, ¶¶ 74, 78)

10. On 29 February 1996, appellant offered to settle the appeal for $150,000 (app. reply, ex. J). The government counter-offered to settle for $13,000 (gov't opp'n, ex. 41).

11. On 20 December 1996, Mr. Dempsey withdrew his representation of appellant (gov't opp'n, ex. 42).

12. On 3 January 1997, Mr. Nwogu entered an appearance as appellant's *pro se* representative, and continued in that capacity throughout the duration of ASBCA No. 47498. Appellant amended its complaint to add allegations of entitlement based on *quantum meruit*, procurement fraud, bad faith conduct, and conspiracy. (Gov't opp'n, ex. 43)

13. On 29 February 2000, following a hearing, the Board issued its entitlement decision sustaining the appeal in part and otherwise denying it, except for certain of the allegations in the amended complaint, which were dismissed for lack of jurisdiction (ESCI I, 00-1 BCA at 152,147-48). With respect to counts I, II and IV of the original complaint, the Board determined that there was a change in the physical characteristics of the sludge at the lagoons, and that the government should have disclosed the presence of heavy metals and petroleum hydrocarbons in the lagoon #1 sludge (ESCI I, 00-1 BCA at 152,144). Addressing the various surveys upon which these determinations depended, the Board found that "[t]here is a general absence of proof of the sampling methods used to obtain representative samples and parts of the chain of custody for analyses of samples made by both appellant and the Government during the performance of the contract." The Board accepted Mr. Nwogu's testimony as credible (ESCI I at finding 27). The Board also found that the government's test results from QC, Inc. were not persuasive because the report did not adequately explain the testing methodology (ESCI I at finding 53). The Board denied the appeal as to Counts I and II to the extent they depended upon a Differing Site Condition theory, since there was no Differing Site Condition clause, and the presence of hazardous waste at lagoon #1, since that had not been proved (ESCI I at findings 15, 39). With respect to Count III, the Board sustained the appeal as to the failure to approve two proposed subcontractors (Clean Harbors and Aces), the government's delay in providing independent test results after CWM claimed there were hazardous materials in lagoon #1, and the government's refusal prior to 29 August 2001 to permit appellant to take samples and begin work at lagoon #2 (ESCI I, 00-1 BCA at 152,145). The Board denied the appeal as to the remaining allegations. Appellant did not establish government-responsible delay to the work. It had not proved failure to cooperate in the government's disapproving its spill contingency plan, denying access to the lagoons for one day, failing to approve CNYIS (for which there was no evidence of current insurance), removal of sludge from the apron at lagoon #2 (for which there was a bilateral modification), and failure to respond timely to appellant's claim. (ESCI I, 00-1 BCA at 152,144-46) The Board denied the appeal, or determined it did not have jurisdiction, as to the allegations in the amended complaint. The Board specifically determined that appellant had not proved government bad faith or abuse of discretion. The Board found in this regard:

> [T]he Government spent considerable time meeting with Mr. Nwogu and trying to assist appellant in its performance of the contract. . . . On occasion Mr. Nwogu became emotional, verbally abusive, and profane if he was upset. . . . The Government had no plan to injure appellant or cause Mr. Nwogu to fail in performing the contract . . . .

(ESCI I at finding 41, footnote omitted; *see also* 00-1 BCA at 152,146-47) The Board remanded the appeal to the parties for negotiation of quantum.

14. On or about 1 January 2001, appellant, represented by Mr. Nwogu, submitted to the contracting officer an itemized list of damages based on the decision in ESCI I totaling $1,605,005.61 (gov't opp'n, ex. 44).

15. On 24 July 2001, Michael L. Sterling, Esq., of Vandeventer Black LLP, Norfolk, Virginia, submitted a revised quantum calculation totaling $353,417.16 (gov't opp'n, ex. 45).

16. The parties were not able to negotiate quantum. On 13 August 2001, the Board docketed the quantum phase of the appeal as ASBCA No. 53485.

17. James R. Harvey, III, Esq., of Vandeventer Black LLP, prepared appellant's Statement of Costs dated 21 September 2001. That Statement demanded damages of $212,354. (ESCI II at finding 9)

18. On 22 March 2002, Mr. Nwogu replaced Mr. Harvey as appellant's representative, and has continued as such at the Board since that time.

19. Appellant did not cooperate in quantum discovery. As the Board stated, *e.g.*, "Mr. Nwogu has not been fully cooperative in permitting the inspection and copying of all of appellant's 1991 financial records. Appellant's delay in providing its bank statements and cancelled checks from 1991 for government inspection is without justification." (ESCI II, 05-1 BCA at 163,019) The Board sanctioned appellant for failing to produce documents relating to litigation with subcontractor WCI (*id.* at 163,018).

20. Appellant's Statement of Costs reflected total contract costs (as opposed to the amount of its claim) of over $250,000. Appellant's financial statements showed $150,000 as the total cost incurred during 1991, the year of performance of appellant's contract. Neither the government auditor nor the Board was able to reconcile these documents. There were other discrepancies in appellant's documentation. (ESCI II at finding 12, *see also* findings 11, 13)

21. Following a hearing on quantum, the Board determined, in its initial decision, that appellant was entitled to an equitable adjustment of $103,399 plus interest (ESCI II, 05-1 BCA at 163,023). Both parties moved for reconsideration. The Board reconsidered the decision, and determined, by decision dated 15 September 2005, that appellant was entitled to an equitable adjustment of $93,989 plus interest (ESCI III, 05-2 BCA at 163,938).

22. On 12 October 2005, appellant filed an undated Notice of Application stating its intent to recoup attorney's fees and other expenses under EAJA. Appellant alleged that it was a prevailing party, that its assets at the time the contract was entered into were less than

$100,000, and that the government was not justified in its defense of the appeals. It stated that it intended to amend the application to include its fees and expenses.

23. On 19 October 2005, the Board notified the parties that the appeals had been reinstated to the Board's active docket for the sole purpose of determining whether appellant was entitled to EAJA fees and expenses. The Board stated that the government's answer to the application would be due 60 days after final disposition of the appeals (*i.e.*, after the time for any appeal to the Circuit court had run).

24. On 31 October 2005, appellant supplemented its Notice of Application with a one-page table headed "ESCI Appellant's Equal Access to Justice Act Expenses ASBCA No. 53485" and copies of various documents. On 18 November 2005, appellant further supplemented its filings.

25. Subsequently, the government and ESCI both appealed the Board's decisions to the United States Court of Appeals for the Federal Circuit. The Board suspended proceedings on appellant's EAJA application pending resolution of the appeals.

26. On 29 March 2006, the United States Court of Appeals for the Federal Circuit dismissed the appeals by agreement of the parties pursuant to Fed. R. App. P. 42(b). *Winter v Environmental Safety Consultants, Inc.*, No. 2006-1180; *Environmental Safety Consultants, Inc. v. Winter*, No. 2006-1292 (Fed. Cir. Mar. 29, 2006) (dismissal orders).

27. On 7 and 13 July 2006, appellant provided further information in support of its EAJA application.

28. On 29 September 2006, the government filed its answer opposing the application in its entirety. It argues that:

> As a *pro se* litigant, appellant is not entitled to recover. Furthermore, the Government's position was substantially justified and special circumstances exist that would make any award unjust.

(Gov't opp'n at 66)

29. On 11 December 2006, appellant filed a reply to the government's answer. Appellant alleged that its net worth was not more than $7 million and appellant had less than 500 employees at the time ASBCA No. 47498 was filed (reply at 31).

DECISION

EAJA requires that an applicant submit a timely application "which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount

sought, including an itemized statement from any attorney, agent, or expert witness . . . ." The applicant "shall also allege that the position of the agency was not substantially justified." 5 U.S.C. § 504(a)(2).

Appellant is a prevailing party. The Board sustained the appeals in part as to entitlement and awarded $93,989 plus interest. We also conclude that appellant is an eligible party. We turn to whether the position of the government was substantially justified.

EAJA provides in relevant part:

> An agency that conducts an adversary adjudication shall award . . . fees and other expenses . . . unless the adjudicative officer of the agency finds that the position of the agency was substantially justified . . . . Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative records, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.
>
> . . . .
>
> (E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; . . . .

5 U.S.C. §§ 504(a)(1), (b)(1)(E).

The Supreme Court has ruled that "a position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988). Only one threshold determination is to be made for the entire proceeding, including the underlying agency action. *INS v. Jean*, 496 U.S. 154, 159 (1990). *See also Hubbard v. United States*, 480 F.3d 1327, 1332 (Fed. Cir. 2007).

We have carefully reviewed the record. With respect to "the action or failure to act by the agency upon which the adversary adjudication is based" (5 U.S.C. § 504(b)(1)(E)), appellant and the government differed in their analysis of the facts and law relating to the characteristics of the sludge to be removed from the lagoons. We found above that the final decision represented a good faith effort to analyze the issues as they were known to the government at the time, not an unjustifiable agency action forcing litigation. *See INS v. Jean*, 496 U.S. at 159, n.7. In its amended complaint, appellant charged the government with bad faith, but the Board found in its entitlement decision that the government spent considerable time trying to assist appellant in its performance of the contract and had no plan to injure

appellant or cause Mr. Nwogu to fail in performing the contract. With respect to the entitlement phase of the adversary adjudication, the Board accepted Mr. Nwogu's testimony about the various samples as credible, and concluded that the government's test results were not persuasive because the report did not adequately explain the testing methodology. The Board decided the legal issue of whether the government was required to disclose the presence of hazardous materials, as opposed to hazardous waste, against the government. The government was reasonable, however, in evaluating the evidence and applicable law differently. The Board's holdings on the other issues in the original complaint were a mix, sustaining appellant's position in part and denying it in part. The Board sustained the government's position with respect to the amended complaint. With respect to the quantum phase of the adversary adjudication, appellant's documents were incomplete and inconsistent, and the Board ultimately determined that it was entitled to less than 50% of the amount claimed in its Statement of Costs. Balancing these various factors, we are persuaded that overall, the government has established that the "position of the agency" in the adversary adjudication was substantially justified. Accordingly, we do not reach the government's other defenses to the application.

CONCLUSION

The application is denied.

Dated: 9 August 2007

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

I concur

MARK N. STEMPLER
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 Nos. 47498, 53485, Appeals of Environmental Safety Consultants, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

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