ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
TMS Envirocon, Inc.	)	ASBCA No. 57286
	)	
Under Contract No. F44600-01-C-0029	)	

APPEARANCE FOR THE APPELLANT:	Neil S. Lowenstein, Esq. Vandeventer Black LLP Norfolk, VA
APPEARANCES FOR THE GOVERNMENT:	Alan R. Caramella, Esq. Acting Air Force Chief Trial Attorney Jeffrey Lowry, Esq. Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant TMS Envirocon, Inc. (TMS) has moved for reconsideration of our decision dismissing all but eight direct cost claim items for lack of Contract Disputes Act jurisdiction under 41 U.S.C. § 7103(a)(4)(A), reported as *TMS Envirocon, Inc.*, ASBCA No. 57286, 12-2 BCA ¶ 35,084. The government opposes the motion.

In deciding a motion for reconsideration, we consider whether the motion is based upon newly discovered evidence, mistakes in our findings of fact, or errors of law. *Computer Sciences Corp.*, ASBCA Nos. 56168, 56169, 09-2 BCA ¶ 34,261. Reconsideration is not granted absent a compelling reason. *Zulco Int'l, Inc.*, ASBCA No. 55441, 08-1 BCA ¶ 33,799 at 167,319.

TMS makes three arguments in support of its motion. First, it contends that the Board incorrectly relied upon Rule 4, tab 249, which TMS objected to under Board Rule 4(e) in relevant part on grounds it was duplicative of Rule 4, tabs 400-A, 400-B and 570, and which was constructively removed from the Rule 4 file by the Board's 26 April 2011 order. The government responds that duplication is merely a matter of administration, that TMS itself cited tab 249 several times in its opposition to the motion to dismiss and that, in any event, the objection was implicitly overruled in our decision. We agree with all of the arguments made by the government and further note that we used tab 249 because, unlike tabs 400-A, 400-B and 570, the pages in tab 249 were sequentially numbered, facilitating our citation references.

TMS next argues that it presented evidence that it was induced or tricked by the government and that the Board should have evaluated the motion to dismiss using the legal standards applicable to summary judgment. The government responds that its motion assumed the allegations of inducement were true for purposes of the motion and that the Board correctly ruled the allegations were insufficient. We are of the view that TMS is simply rearguing its position. *McDonnell Douglas Electronics Systems Co.*, ASBCA No. 45455, 99-1 BCA ¶ 30,132 at 149,056 (reconsideration not intended to provide a party with the opportunity to reargue its position). Nevertheless, the language TMS cites from *Colonna's Shipyard, Inc.*, ASBCA No. 56940, 10-2 BCA ¶ 34,494 at 170,139, is not applicable to motions to dismiss for lack of jurisdiction, but rather to motions to dismiss for failure to state a claim. The affidavit evidence alleging that TMS was encouraged by the contracting officer to wait until the end of contract performance to submit its claim relates to a jurisdictional matter, equitable tolling of the statute of limitations, not to the merits of TMS's claim.

Here, it was clear from the record that TMS failed to submit its claim to the contracting officer within six years after it accrued as required by 41 U.S.C. § 7103(a)(4)(A). The standards we are to apply in evaluating whether the statute of limitations should be tolled were recently re-stated in *Arctic Slope Native Ass'n v. Sebelius*, 2012 U.S. App. LEXIS 23174, at *16 (Fed. Cir. Nov. 9, 2012):

> Equitable tolling applies where the litigant proves: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 130 S. Ct. 2549, 2553, 177 L. Ed. 2d 130 (2010).

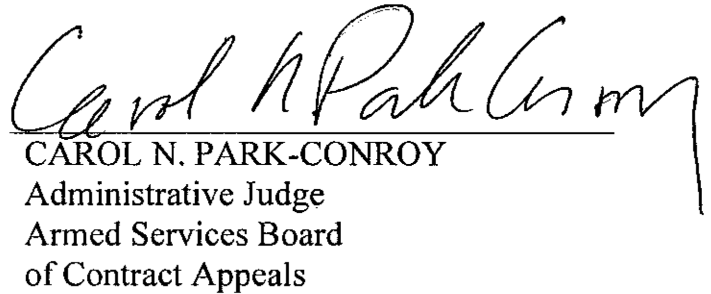
In our decision we examined whether TMS pursued its claim rights diligently and found that it had not and that, under *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990), it did not show an "extraordinary circumstance," e.g., that it was intentionally "induced or tricked" by the government. *TMS*, 12-2 BCA ¶ 35,084 at 172,296. We have no reason to change our conclusion.

Finally, TMS asserts that we should adopt the view as to when a claim accrues that was applied by the Court of Federal Claims in *M.E.S., Inc. v. United States*, 104 Fed. Cl. 620 (2012); namely, that a claim does not accrue until final payment. The government points out that the claim in that case was one by the United States Postal Service (USPS) for excess reprocurement costs which, under USPS regulations, could not be asserted until final payment was made to the reprocurement contractor. In finding the claim timely on the facts presented, the court expressed general agreement with the rule that a contract claim accrues when the aggrieved party knew or should have know it had incurred injury, but concluded that an excess reprocurement claim was "unique" and

separate and distinct from the underlying termination claim. *M.E.S.*, 104 Fed. Cl. at 636. We agree with the government that *M.E.S.* does not apply to this case.

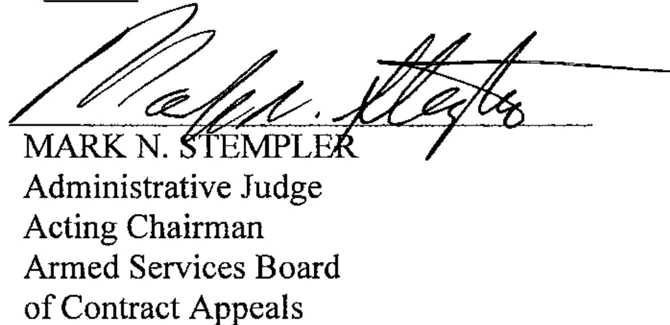
For the reasons stated, the motion for reconsideration is denied.

Dated: 12 December 2012



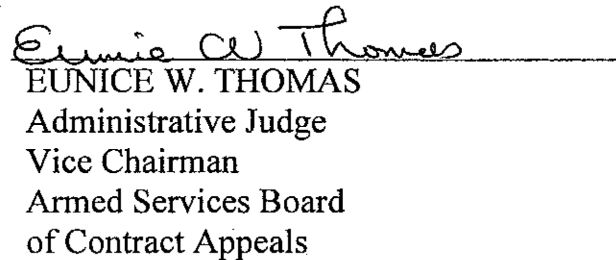
CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

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. 57286, Appeal of TMS Envirocon, Inc., rendered in conformance with the Board's Charter.

Dated:

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