

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

As the prevailing party in the captioned appeal, Environmental Safety Consultants, Inc. (ESCI), applies for an award of fees and other expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, asserting that the government's position in the appeal was substantially unjustified. The government opposes ESCI's application on many grounds. We do not address them because our decision on the substantial justification issue disposes of the application. The appeal was taken from a termination for default for failure to make progress and complete the work at the specified time. It was undisputed that ESCI did not complete the work on the specified date (30 June 1997), that the parties negotiated over the following year without success to resume and complete the work, and that the contracting officer on 12 June 1998 terminated the contract without having set a new completion date. *See Environmental Safety Consultants, Inc.*, ASBCA No. 51722, 11-2 BCA ¶ 34,848.<sup>1</sup>

The government's position in the appeal was that it had repeatedly told ESCI that it was not waiving the 30 June 1997 completion date, that ESCI negotiated on the resumption of work in bad faith, and that the government had grounds for summary termination for ESCI's (alleged) false certifications, failure to pay subcontractors, and failure to comply with terms of the contract. For the reasons stated in our decision of 28 September 2011, we held that the 30 June 1997 completion date had been waived by a protracted year of negotiations, and that a new completion date was necessary to terminate the contract for default. Nevertheless, it was not unreasonable for the


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<sup>1</sup> Judge Thomas who participated in the decision has since retired.


government to believe in good faith and with some support in the case law that (i) its repeated disclaimers of waiver were effective, and (ii) a year of unsuccessful post-default negotiations with ESCI showed that a new completion date would serve no purpose. These reasonable beliefs are sufficient to meet the "substantial justification" provision precluding an EAJA award. *See Pierce v. Underwood*, 487 U.S. 552, 565 (1988). We conclude that the government's overall position had a reasonable basis in both law and fact. *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991).

The application is denied.

Dated: 26 June 2013

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

I concur

  
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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:

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