

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application under the Equal Access)
to Justice Act of --)
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Lasmer Industries, Inc.) ASBCA No. 56411
)
Under Contract Nos. SPO750-02-D-7917)
SPO750-04-M-2800)
SPO750-04-C-3482)
SPO750-05-M-7797)
SPO750-04-C-3101)
SPO750-03-D-6A94)
SPO750-05-M-7793)

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APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.
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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Lasmer Industries, Inc. (Lasmer) seeks an award of attorney’s fees and costs under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, as a prevailing party in the captioned appeal. The appeal was taken on a government claim. When the government voluntarily rescinded the claim before decision on the merits, we dismissed the appeal with prejudice. We have requested the parties to brief the threshold issue of whether Lasmer was a prevailing party in the dismissed appeal. On consideration of the parties’ submissions, we have concluded that it was not and deny the application.

STATEMENT OF FACTS (SOF) RELEVANT TO THE APPLICATION

1. On 7 May 2008, Lasmer appealed a government claim dated 11 February 2008 for reimbursement of money paid for allegedly defective material. On 23 July 2008, we denied a government motion to dismiss the appeal for lack of jurisdiction. *Lasmer Industries, Inc.*, ASBCA No. 56411, 08-2 BCA ¶ 33,919.

2. On 6 October 2008, we ordered the government to file the initial pleading (complaint) in the appeal. On 18 November 2008, the government filed a complaint “solely to comply with the Board’s order and not out of any desire to continue with this litigation” (compl. at 9). The complaint was accompanied by a motion to dismiss. The stated ground for the motion was that “the Government has withdrawn the February 11, 2008 correspondence that the Board deemed to be a claim.” The motion requested the Board to “dismiss the appeal without prejudice or, in the alternative, dismiss the appeal with prejudice.” (Gov’t mot. at 3-4)

3. Attached to the government’s motion to dismiss was a letter dated 18 November 2008 from the contracting officer to the Lasmer president. This letter stated:

I am rescinding the letter dated February 11, 2008 that I sent to you requesting reimbursement for non-conforming material that Lasmer supplied under 16 contracts and purchase orders. I am taking this action not because we believe that the parts you supplied were conforming, but rather because we believe that monetary recovery for this material is unlikely at this point and it is in the government’s best interest to not pursue this matter any further. We do not intend to reinstitute a demand letter for this non-conforming material.

(Gov’t mot., ex. 2)

4. Lasmer opposed the motion to dismiss and filed cross-motions for summary judgment and discovery. By decision dated 1 April 2009, we denied Lasmer’s motions for summary judgment and discovery and granted the government alternative motion to dismiss the appeal with prejudice. *Lasmer Industries, Inc.*, ASBCA No. 56411, 09-1 BCA ¶ 34,115.

5. On 4 May 2009, Lasmer filed the captioned EAJA application with the Board. On or about the same date Lasmer appealed the Board’s 1 April 2009 decision to the Federal Circuit. On 5 May 2009, we suspended action on the EAJA application pending the Federal Circuit decision on the appeal. On 5 January 2010, the Federal Circuit

entered judgment affirming the Board's decision. *Lasmer Industries, Inc. v. Gates*, 360 Fed. Appx. 118 (Fed. Cir. 2010).

6. By order dated 6 April 2010, the Board notified the parties that, absent objection within 20 days, the Board would dismiss the EAJA application. By letter dated 13 April 2010, Lasmer timely objected on the ground that:

By (1) ordering DSCC to file its complaint; (2) denying DSCC's motion to dismiss without prejudice; and (3) dismissing DSCC's claims with prejudice, the Board definitively altered the legal relationship between the parties. DSCC can never assert the \$4.9 million in claims again. Lasmer has prevailed in defeating those claims.

7. By letter dated 19 April 2010, the Board noted Lasmer's contention that it was a prevailing party for purposes of EAJA and requested a government response. The government responded on 20 May 2010 asserting that Lasmer was not a prevailing party under EAJA because "there was no decision sustaining or denying the appeal, only dismissal following voluntary action by the contracting officer" (gov't resp. at 3). On 9 June 2010, Lasmer replied to the government's response with substantially the same argument as in its 13 April 2010 submission.

DECISION

To establish that it is a "prevailing party" for purposes of an EAJA award, Lasmer must show that there was a Board decision sustaining the appeal, or a Board decision in the nature of a consent judgment, providing a material alteration in the legal relationship of the parties. *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1380 (Fed. Cir. 2002); *Elrich Contracting, Inc.*, ASBCA No. 50867, 02-2 BCA ¶ 31,950 at 157,840. Our decision of 1 April 2009 did not sustain (or deny) the appeal on its merits. Neither was it in the nature of a consent judgment. Nor did the decision dismiss the complaint as Lasmer would have it (app. reply at 3). We dismissed the appeal because the government had voluntarily rescinded the claim from which the appeal was taken. That rescission deprived us of any further jurisdiction in the matter and left the parties without any Board-ordered material alteration in their legal relationship. *Chapman Law Firm Co. v. Greenleaf Construction Co.*, 490 F.3d 934, 939 (Fed. Cir. 2007).

Lasmer contends that as a result of the dismissal "with prejudice" the government "can never assert the \$4.9 million in claims again" (app. ltr. dtd. 13 April 2010). Lasmer is wrong. The term "with prejudice" in the Board's dismissal refers to the reinstatement of the same appeal or the filing of a new appeal on the 11 February 2008 claim that was rescinded. Our decision to dismiss did not put any judicial imprimatur on the government's voluntary rescission of its claim. It simply recognized that the Board no

longer had jurisdiction over the appeal. Lasmer accordingly has failed to show that it was a “prevailing party” in this appeal.

The application is denied.

Dated: 21 June 2010

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

I concur

I concur

MARK N. STEMLER
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. 56411, Appeal of Lasmer Industries, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

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