

**DANRENKE CORPORATION****CONTRACT NO. V691C-1297  
3721E,****VABCA-3601E,  
3722E & 3736E****VA MEDICAL CENTER  
LOS ANGELES, CALIFORNIA**

*Harold C. Malloy, Esq.*, Austin, Texas, for the Appellant.

*John M. Manfredonia, Esq.*, Trial Attorney; *Phillipa L. Anderson, Esq.*, Deputy Assistant General Counsel; and *William E. Thomas, Jr., Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

**OPINION BY ADMINISTRATIVE JUDGE PULLARA**

Danrenke Corporation (Danrenke or Applicant), has filed a timely Application (Appl.), pursuant to the Equal Access to Justice Act (EAJA or Act), 5 U.S.C. § 504, to recover attorney fees and other expenses incurred in connection with its litigation of the above-captioned appeals which were settled without hearing. The Department of Veterans Affairs (VA or Government) filed a Reply to Applicant's EAJA Application (Gov't Rply.). Thereafter, the Applicant filed a Rebuttal (Appl. Rebuttal) and a Supplement in support of its Application (Appl. Supp.).

The Applicant has asserted that it meets the eligibility requirements of EAJA with respect to its net worth and number of employees, and has provided adequate supporting evidence in that regard. The Government has not contested that assertion and stipulates that Applicant's net-worth exhibits establish its eligibility as a "party" in accordance with 5 U.S.C. § 504(b)(1)(B). The Board finds that Danrenke is an eligible Applicant with respect to its business status.

The parties are in disagreement with respect to whether the EAJA application itself is barred by the terms of the Settlement Agreement entered into by the parties and whether the Government's position was substantially justified. Also, the Government contests the amount of attorney fees and costs.

**FINDINGS OF FACT**

The underlying appeal was taken from a Contracting Officer's final decision dated March 25, 1992, which terminated for default the Contractor's right to proceed with performance of certain electrical renovations at the VA Medical Center (VAMC), in Los Angeles, California. (R4, tab 80) The Appellant, Danrenke, was awarded a fixed price subcontract by the VA through the Small Business Administration (SBA), pursuant to Section 8(a) of the Small Business Act. The Notice to Proceed was issued on February 7, 1991, and the Contract completion date was July 5, 1991. (R4, tab 19) Two time extensions were issued during the course of performance, which extended the completion date to August 14, 1991. (R4, tabs 34 and 46)

Danrenke alleged that the work was essentially completed on time, however, the VA and Danrenke engaged in numerous meetings and exchanged correspondence from August 1991 to January 1992, concerning whether certain work had been performed in accordance with the Contract specifications and National Electrical Code (NEC). (R4, tab 49-75) The parties disagreed as to whether some work needed to be replaced and whether Danrenke was entitled to final payment.

In a letter dated January 23, 1992, the VA notified Danrenke of nine conditions that the Government considered to be deficiencies in violation of the NEC, and endangering performance of the Contract. Danrenke was informed that if these conditions were not cured within 10 days after receipt of the notice the Government might terminate the Contract for default. (R4, tab 73) Danrenke responded in a letter dated January 31, 1992, that seven of the alleged deficient items were not deficient, and that as to two of the items, an on-site meeting should be arranged between the parties. Danrenke further stated that:

[W]e have a serious disagreement as to interpreting the contract requirements. The nine citations are vague, ambiguous, and unsubstantiated with contractual references. We cannot determine from your letter precisely what it is you would have us do in order to "cure" these alleged conditions. . . . When we receive your direction, we will prepare our monetary claim covering your added requirements.

(R4, tab 74 at 6, ¶4)

On February 5, 1992, the VA met with Danrenke and SBA and was asked by the SBA to identify each of the deficiencies with a code violation. The VA electrical engineer stated that he could cite each deficiency but it would take at least a week. (R4, tabs 75-76) Thereafter, at a meeting held with Danrenke and SBA on February 27, 1992, the VA identified and discussed each violation by NEC code number and provided information regarding said violations. Three alleged deficiencies were deleted by the VA. The parties visited the site and Danrenke was shown the location of the remaining alleged deficiencies. The Contractor was "asked to correct all deficiencies and complete the job." (R4, tab 77) The Contractor disagreed that there were any outstanding deficiencies.

In a letter dated March 5, 1992, Danrenke informed the VA that there were no deficiencies, furnished a letter in support of its position from the cable manufacturer, and stated:

Danrenke has completed the project; the installation has operated in accordance with the contract requirements since August 3, 1991; it represents a good job by the contractor under the circumstances, and we deserve to have the work accepted and our final bill paid. Danrenke strongly believes that the information contained in this letter is sufficient to bring this contract to a conclusion. It was our expressed preference to resolve our differences amicably thereby avoiding the necessity to escalate our disputes to the Veterans Administration Board of

Contract Appeals. We have taken much time to research and consult with the appropriate authorities concerning the alleged deficiencies and by doing so, we have incurred costs beyond the scope of the work required for our contract. Please give this matter your immediate attention so that this contract can be concluded. Regretfully, if the Government insists on compliance with orders to complete work not required or substantiated by the contract, we will proceed to the board for the resolution of these matters.

(R4, tab 78)

On March 16, 1992, the VAMC's Chief, Engineering Service, informed the Contracting Officer by memorandum, that he did not agree with Danrenke's justifications provided in the above-mentioned March 5, 1992 letter, and recommended that the Contracting Officer take appropriate action to correct the deficiencies noted above. (R4, tab 79) Thereafter, in a letter dated March 25, 1992, the Contracting Officer notified Danrenke that its right to proceed with performance under the Contract was terminated for default. The default notice was considered effective immediately. The Contracting Officer further informed Danrenke that:

[Y]ou have taken no action to correct the remaining five (5) deficiencies listed in my "CURE LETTER" dated January 23, 1992. Per your request, references of NEC Code Violations were supplied to you at our meeting on February 27, 1992. We disagree with all the justification provided as none of the responses satisfied the requirements of the contract drawings and specifications as documented. As a result the following deficiencies still exist (items b, d, e, f, and g).

(R4, tab 80)

The Contractor's Notice of Appeal of the Contracting Officer's final decision for termination for default was received by the Board on April 28, 1992, and assigned appeal number VABCA No. 3601. The Contractor alleged that the decision was erroneous for the following reasons:

1. The contractor is not in default and to the extent, if any, there has been any non-conformance with the terms and conditions of the subject contract, such occurred beyond the control and without the fault or negligence of the contractor;
2. Deficiencies cited by the Contracting Officer are not deficiencies but are perceived as such because the Contracting Officer has construed the contract requirements erroneously;
3. Deficiencies, if any, were the result of actions by the Government in its contractual capacity in preparing, or having prepared for it, defective specifications and drawings for the contract work;

4. The Contracting Officer breached her duty to aid the contractor in its performance by refusing to inform the contractor precisely what the Government wanted the contractor to do in order to correct the alleged deficiencies.

(Notice of Appeal at 1)

The Contractor had also previously submitted claims in the amount of \$1,645.32 for an alleged change order concerning an additional 150 amp breaker (VABCA No. 3721) and \$5,883.11 for final payment (VABCA No. 3722), in November 1991. (R4, tab 67) On April 1, 1992, the Contracting Officer denied Danrenke's demand for \$1,645.32, stating that she had previously denied the request for a change proposal in a meeting held on July 8, 1991 and by letter dated July 10, 1991. (R4, tab 81) In so deciding, the Government reasoned that although it had instructed Danrenke that a breaker was not needed, Danrenke nevertheless purchased and installed the breaker. Therefore, Danrenke's proposal was denied. The Contracting Officer also informed Danrenke that its demand for final payment was denied because the work wasn't performed in accordance with the specifications and drawings and an inspection determined that the work was unacceptable due to many deficiencies. These appeals were docketed on July 7, 1992, and assigned docket numbers VABCA Nos. 3721 and 3722, respectively, and consolidated.

On July 9, 1992, the Appellant filed a Motion for Summary Judgment asserting that there were no genuine issues as to any material facts, that it was entitled to judgment as a matter of law, and that the termination for default should be converted to a termination for the convenience of the Government. The Contractor asserted that the Contracting Officer waived the schedule and completion date of the Contract by insisting that correction of alleged deficiencies be made by the Appellant after the Contract completion date had passed and that the Appellant relied on such waiver to its detriment. Danrenke also argued that the Contracting Officer's "cure notice" provided no specific directions as to what Danrenke should do to cure the alleged deficiencies, and that the Contracting Officer did not set a new completion date for performance. Finally, Danrenke alleged that the Contracting Officer failed to consider Federal Acquisition Regulations (FAR) pertaining to factors the Contracting Officer should consider before issuing a termination for default.

In response, the Government asserted that Danrenke did not complete the work in a professional manner and abandoned the job by refusing to take corrective action as directed by the VA. It further contended that the Contracting Officer acted within a reasonable time and did not waive the completion date. The Government also denied that its "cure notice" was deficient, or that the Contracting Officer failed to consider the FAR provisions relating to termination for default.

Thereafter, in a letter dated August 10, 1992, Contracting Officer Helen Rivers informed the Appellant that the Government was asserting a claim against Danrenke for a credit owed under the Contract in the amount of \$17,205.04 due to the Contracting Officer's "determination that as a result of a deductive change, Danrenke was no longer required to install the #500 mcm wires at Building 114." The Contractor was informed that this was the Contracting Officer's final decision and that payment should be made

within 14 days. On August 12, 1992, the Appellant responded to the Contracting Officer's claim asserting *inter alia*, that Danrenke had installed the wires in Building 114, that the installation had been certified, and that the certification acknowledged that the services and articles were received and a progress payment had been made. Government counsel responded by facsimile on August 13, 1992, that the Contracting Officer's decision inadvertently mistook Building 114 as the location where the wiring was not installed rather than the actual location, Building 117. The Contractor's attorney was informed that the VA was investigating the matter and would revise the Contracting Officer's final decision to the extent necessary. However, rather than await the Government's investigation or further response to this issue, on August 18, 1992, Danrenke filed a Notice of Appeal (VABCA No. 3736).

In the meantime, on August 18, 1992, the Board issued a decision denying the Appellant's Motion for Summary Judgment. We held that there were factual issues raised as to whether the Appellant, in not proceeding, would have done so if clearly directed or had abandoned performance of the Contract. The Board also determined that although the cure notice lacked specificity, there were questions of fact as to whether Danrenke still did not understand what the VA expected to be corrected after several meetings and discussions ensued following the issuance of the cure notice. We also rejected the Appellant's argument that the failure of the Contracting Officer to set a new schedule or delivery date was a violation of FAR 49.402-3(c) since this was a construction contract rather than a supply contract. There were also questions of fact as to the extent if any that the Contracting Officer failed to comply with various FAR provisions.

On August 20, 1992, the Board received from the Government, by facsimile, a memorandum notifying us that the parties had agreed to settle the appeals. (Gov't Rply., Exh. 3) Thereafter, the parties took steps to convert their agreement into writing. The Government submitted a proposed settlement agreement to Danrenke which included in pertinent part the following language:

2. Respondent agrees to convert the termination for default of Contract No. V691C-1297 to a termination for convenience at no fu[r]ther cost to either party.
3. Respondent hereby releases Appellant from any and all claims, future and present, arising out of Contract No. V[691C-1297]. This includes, but is not limited to, excess procurement costs, deductive change order work, and all other claims.
4. Appellant hereby releases Respondent from any and all claims, future and present, arising out of Contract No. V[691C-1297]. This includes but is not limited to, change order work, reimbursement of contract retainage, and all other claims.

(Gov't Rply., Exh. 1)

On September 1, 1992, Danrenke provided its version of a proposed settlement agreement to the Government which included in pertinent part the following language:

2. Respondent agrees to convert the termination for default of Appellant under Contract No. V691C-1297 to a termination for convenience of the Government at no further cost to either party hereto.

3. Respondent agrees to and does hereby release Appellant from any and all claims whatsoever, present and future, arising out of or relating to Appellant's performance of Contract No. V691C-1297, including, but not limited to, claims for excess procurement costs and deductive change order.

4. Appellant agrees to and does hereby release Respondent from any and all claims whatsoever for loss or damages arising out of the performance of Contract No. V691C-1297, including claims for change order work and reimbursement of contract retainage.

(Gov't Rply., Exh. 2).

Further negotiations took place but ultimately the Government Counsel and Contracting Officer executed the Appellant's September 1 version of the settlement agreement, on September 2 and 8, 1992, respectively. The agreement was forwarded to the Appellant and signed by Keith Howell on September 14, 1992. (Appl., Exh. B) Whereupon, on September 23, 1992, Attorney Malloy forwarded to the Government *another redraft* of his proposed settlement agreement, this time reserving the Appellant's right to assert its claim "for reimbursement of contract retainage in the amount of \$5,883.11." The Government refused to sign the redraft. (Gov't Rply., p. 4 and 5, Exh. 4) Ultimately, Attorney Malloy signed his September 1 draft of the settlement agreement on September 28, 1992. (Appl., Exh. B) The fully executed settlement agreement, referred to in our further discussion as the Settlement Agreement, was filed with the Board on October 6, 1992, as an attachment to the EAJA Application.

It is noted that the draft settlement agreements which were circulated among the parties, and the Settlement Agreement which was ultimately executed, did not make specific reference as to whether the Applicant was precluded from submitting an EAJA Application to this Board. Although the Government asserts that "Respondent informed Appellant that the final version of the settlement agreement precluded all claims whatsoever, including attorneys fees," (Gov't Rply. at 2) there is no documentation verifying this assertion nor is there evidence that Danrenke orally agreed to this request or intended for the settlement to include said fees and costs.

Thereafter, on November 4, 1992, Danrenke submitted an "Application for Fees and Expenses" seeking \$6,635.33 in attorney fees, \$2,675 for consultant fees, \$393.75 for secretarial costs, and \$574.24 for miscellaneous costs such as postage, telephone calls, photocopying and federal express mailings, for a total EAJA claim of \$10,278.32. (Appl.) (The Application incorrectly totaled the amount of attorney fees and expenses as \$9,994.57.) The Application is based, in part, on an hourly rate of \$60 per hour for Attorney Malloy's legal services. The Applicant asserted that it was the prevailing party and that the Government's position was not substantially justified. The Government submitted a Reply in opposition to Danrenke's Application and asserted that said

Application was barred under the terms of the Settlement Agreement and that the Applicant had not shown that the Government's position was not substantially justified. The Government also contested the amount of attorney fees and costs.

The Applicant subsequently filed a Rebuttal to the Government's Reply and a Supplement to its EAJA Application. In its Supplemental EAJA Application, the Applicant acknowledged that it did not prevail on the monetary claims pursued in VABCA Nos. 3721 and 3722. Therefore, Danrenke's counsel deleted 4.5 hours in attorney fees attributable to the drafting of its Complaint and Amended Complaint and 3.25 hours in secretarial services for typing these documents. (Appl. Rebuttal at 7, Appl. Supp. at 1). The Applicant's supplement also included an additional claim of \$1,736.25 for 26.25 hours in attorney fees for preparing its Rebuttal and 10.75 hours for secretarial services. Therefore, the fees and costs claimed in this EAJA proceeding total \$11,302.07.

### DISCUSSION

The first issue we must address is whether Danrenke's Application for attorney fees and costs pursuant to the Equal Access to Justice Act is barred by the negotiated settlement entered into by the parties. The parties disagree as to whether attorney fees and costs were precluded under the settlement. Each party contends that the language contained in the Settlement Agreement is "unambiguous" in support of their opposing opinions as to whether the final settlement addressed attorney fees and costs.

Applicant's attorney alleges that the revision to the Government's proposal, wherein the phrase "arising out of Contract No. V691C-1297" was deleted and the words "arising out of *the performance* of Contract No. V691C--1297" were inserted, created a "major change to the draft" proposed by the Government and that the purpose of the changed language was "to eliminate from release, costs and fees associated with the processing of the appeal of the Appellant." (Appl., Exh. C) The Applicant asserts that "[i]t is clear and unambiguous that the release specifically applies only to claims of the Respondent *arising out of (not relating to) performance* under the contract." (Appl., Claim at 2, ¶1) (Emphasis added.)

The Government submits that the Appellant's agreement to release it from "all claims whatsoever" includes attorney fees and that the use of the phrase "*arising out of the performance*" of the Contract instead of the words "*arising out of [the] Contract*" did not alter the liabilities of the parties. (Gov't Rply. at 3). The Government further states that "[i]f Appellant truly believed that it had just rendered a 'major change' to the settlement agreement, it would have presumably told [the Government]. Instead, Appellant remained silent until filing its EAJA application, hoping that the Board would later interpret the settlement agreement in its favor." (Gov't Rply. at 2, ¶2)

It is not disputed that the Applicant did not advise the Government that it wished to reserve the right to pursue legal fees. In fact, Government counsel contends that he verbally informed the "Appellant that the final version of the settlement agreement precluded all claims whatsoever, including attorney fees." (Gov't Rply. at 2, ¶2) The Government states that further evidence that the parties intended that all matters including attorney fees be settled is illustrated by the cover memorandum sent to the Board after settlement which stated all disputes under the Contract including all claims before the Board had been settled. (Gov't Rply., Exh. 3) The Government contends that

since Danrenke never informed it that Danrenke would later seek attorney fees, "Respondent thus reasonably *assumed* that the settlement agreement would bar attorneys fees." (Gov't Rply. at 3, ¶3) (Emphasis added.)

In its Rebuttal, the Applicant did not respond to the Government's assertion that Danrenke had been informed that the final version accepted by the parties precluded attorney fees. Instead, Danrenke's counsel asserted that the Government failed to carry its burden of proof that the "settlement included an expressed bar to an EAJA application or that there was consideration for release." He further stated that the Government may not attempt to "vary, by parole evidence, the plain meaning of the words . . . to create an unwritten, unspecified bar to appellant's EAJA application."

We disagree with the Applicant's attorney's contentions that its revised version is indisputably unambiguous as to exclude attorney fees from the release. However, we find that there is no compelling evidence that the parties specifically discussed the disposition of attorney fees in negotiations or that there was ever any meeting of the minds regarding this issue. Although the Government asserts that it informed Danrenke that the settlement included attorney fees, there is no evidence that Danrenke agreed to this request or intended for the settlement to include said fees. In fact, the Government's comment in its Reply - - that because Danrenke never informed the Government that it would seek attorney fees, it *reasonably assumed* the Settlement Agreement would bar attorney fees - - indicates that the parties did not discuss this issue or reach agreement as to whether fees were precluded.

The Government cites the appeal of *Nikiforos P. Kalfountzos*, in support of its position that attorney fees and costs should be barred by the executed settlement. In that case, the Department of