

Government Must Specifically Exclude EAJA Application In Settlement Agreement

The Equal Access to Justice Act (EAJA) gives qualified contractors the right to recover a portion of the legal expense of pursuing a contract claim against the Government. When the contractor is the prevailing party against the Government and the Government was not substantially justified in the actions that led to the claim or in the defense of its actions, the contractor is permitted by the statute to apply for compensation for the cost of prosecuting the claim.

In a contract with the Veteran's Administration for electrical renovations at a medical center, the work was completed, but a dispute arose about whether corrections were required for some of the work. The contractor maintained that the work met contract and electrical code requirements, and that it would file a claim for additional costs if it was required to perform the work the Government demanded. The Government then terminated the contract for default and demanded credit for a deductive change order for work it claimed was not done, and the contractor appealed those decisions to the Board of Contract Appeals.

The parties subsequently notified the Board that the dispute had been settled. The Government converted the default termination to one for the convenience of the Government and released the contractor from any claims, including procurement costs and deductive change orders. The contractor released the Government "from any and all claims whatsoever for loss or damages arising out the performance of [the] Contract ...including claims for change order work and reimbursement of contract retainage."

The contractor submitted an EAJA "Application for Fees and Expenses" to the Board, and the Government argued, among other points, that the Application was barred by the terms of the settlement agreement. The Government stated that the contractor agreed to release it from "all claims whatsoever" and that the use of the phrase "arising out of the performance of [the] Contract" did not change the liabilities of the parties.

Citing with approval a decision from the Armed Services Board of Contract Appeals, the Veteran's Administration Board held that an application under EAJA derives from a

statutory right independent from any rights granted by either the contract or the Contract Disputes Act. “EAJA applications do not constitute claims by a contractor ... relating to a contract.” “[A]lthough the parties may provide for an EAJA award in their Settlement Agreement, the Government has the burden of proving that the parties made such a provision or otherwise agreed to foreclose application for any EAJA award.” In this case, the Board held that the Government had failed to prove that the parties agreed during settlement discussions that an EAJA application would be precluded under the Settlement Agreement. *Danrenke Corp.*, 94-1 BCA 126,504.

The professional consultants at Excell Consulting International, Inc. can help you gain a better understanding of how the Equal Access to Justice Act works and help you understand what remedies may be available. When you partner with Excell Consulting, our consultants will conduct a specialized review of your particular situation and develop recommendations to guide you in making a business judgment towards potential recovery of funds

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