

HOW TO GET PAID AND HOW NOT TO GET PAID!

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Environmental Safety Consultants, Inc. (“ESCI”) had a contract with the Navy to perform services. ESCI submitted to the payment office a routine progress payment request (invoice no. 7) for \$138,000 on June 24, 1997. The contracting officer requested a new prompt payment certification on the invoice because she had received information that a surety had paid several subcontractors. ESCI replied, but never stated that Invoice No. 7 was being converted to a claim under the Contract Disputes Act (“CDA”). ESCI’s contract included a payment clause stating that the due date for making progress payment was 14 days after receipt of the invoice by the designated payment office, therefore, if the invoice had not been disputed by the government, payment was due on July 8, 1997.

ESCI was not paid. Fourteen years later, ESCI submitted to the contracting officer an invoice dated Nov. 29, 2011 for the original amount of invoice no. 7 (\$138,000) plus \$433,000 in interest on that amount from Jan. 1, 1997 to Dec. 31, 2011, citing the Prompt Payment Act. When it wasn’t paid, ESCI submitted a notice of appeal to the Armed Services Board of Contract Appeals (“ASBCA”).

The ASBCA dismissed the appeal for lack of jurisdiction because ESCI had failed to follow the requirements of the Contract Disputes Act.

- Submission of a claim I writing for a contracting officer’s decision, and an appeal of the decision or a “deemed denial” after 60 days is a prerequisite under the CDA for Board jurisdiction. ESCI did not do this.
- ESCI submitted a routine monthly progress payment request that was *not* in dispute when it was submitted on June 24, 1997, and the CDA says an “invoice or other routine request for payment that is not in dispute when submitted is not a claim.”
- When ESCI responded to the Contracting Officer’s dispute about payment and prompt payment certification, ESCI never informed the contracting officer that ESCI was converting invoice no. 7 to a claim. (ESCI could have done this in its letters to the CO).
- ESCI’s Nov. 29, 2011 submission requesting payment was not presented as a CDA claim and was not certified as required by the CDA for a claim over \$100,000. Without the certification, the Board lacked jurisdiction to consider the appeal.

In short, ESCI did not get paid, and got nothing.

TIPS: How Could ESCI Have Gotten Payment? Simply stated, ESCI could have followed the CDA requirements and moved its demand for payment to the Board under proper jurisdiction. Here’s how:

- (1) When the Contracting Officer disputed its invoice (or simply when its invoice was not paid in 14 days as required by the Prompt Payment clause), ESCI should have written a letter to the CO stating “We are now in dispute over this invoice. You have

- refused to pay a lawful invoice. We are converting it to a claim and attaching a certified claim for the entire amount”
- (2) ESCI should have prepared a short claim with a proper CDA certification and submitted it to the CO along with the above letter.
 - (3) If the CO denied the claim, ESCI could then notice the appeal of non-payment to the ASBCA or alternatively, if the CO made no ruling in 60 days, the claim would be “deemed denied” and ESCI could have immediately noticed the appeal at the ASBCA.

It is essential that a contractor who is not paid raise the issue with its CO, state the invoice is in dispute because the government won't pay, and file a formal claim of nonpayment. If the invoice or payment request is over \$100,000, the claim must be certified. An invoice or progress payment is normally *not a claim*. Therefore you must file something separate from the invoice and follow the steps in the CDA. **That is how you can get paid if you did the work properly or provided satisfactory goods. Even if the Board denies your claim, you will still get your day in court to prove why you should be paid.** ESCI found the courtroom door closed because it failed to follow the CDA requirements.