

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access)
to Justice Act --)
)
Cajun Contractors, Inc.) ASBCA No. 49044
)
Under Contract No. DACA63-94-C-0138)

APPEARANCE FOR THE APPELLANT: Mr. Jan K. Lass
Vice President/Quality Control
Baton Rouge, LA

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
Charles L. Webster, III, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Fort Worth

OPINION BY ADMINISTRATIVE JUDGE SCHEPERS

This is an application for the reimbursement of litigation expenses, in the amount of \$42,897.29, under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, relating to our decision in *Cajun Contractors, Inc.*, ASBCA No. 49044, 98-2 BCA ¶ 30,062. In that decision, we sustained appellant's appeal of the contracting officer's decision denying appellant's request for an equitable adjustment based on a Type I Differing Site Condition. There is no contention that appellant did not prevail in the appeal. Therefore, appellant is entitled to an award of appropriate EAJA fees and expenses if it was a party as defined in the Act, unless the Government's position was substantially justified or unless special circumstances make an award unjust. *See* 5 U.S.C. § 504(a)(1).

The Government opposes the award of EAJA fees and expenses in this appeal on the grounds that: (1) appellant has not proven that it met the net worth requirements of the statute; (2) appellant has not established that it had no more than 500 employees on its payroll as of the date of the initiation of the adversary adjudication; (3) appellant has not alleged that the Government's position was not substantially justified; and (4) several of the expenses sought by appellant are not recoverable under the Act.

Eligibility

A “party” is defined under the Act, in pertinent part, as a “corporation, . . . the net worth of which did not exceed \$7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated . . .” 5 U.S.C. § 504(b)(1)(B). The combined net worth and number of employees of the contractor and any affiliates are considered in determining eligibility under the Act. *See D.E.W., Inc. & D.E. Wurzbach, a Joint Venture*, ASBCA No. 46075, 98-2 BCA ¶ 29,744 at 147,418. The “adversary adjudication” referenced in the Act, in this case, is the underlying appeal which was initiated by appellant on 10 August 1995. *See* 5 U.S.C. § 504(b)(1)(C). Appellant bears the burden of proof in establishing its eligibility under the Act. *See Defense Systems Corp.*, ASBCA Nos. 42939, 42940, 43530, 43705, 44131, 44551, 44835, 45115, 97-1 BCA ¶ 28,895 at 144,073.

In its EAJA application, appellant stated that it provided paychecks to 483 employees during the month of August 1994 and to 546 employees during the month of September 1994. Appellant also stated that the number of its employees typically fluctuates up or down by as many as 50 employees per week. Appellant did not state how many employees it had at the initiation of the underlying appeal and did not provide the number of employees of appellant’s affiliates.

To prove its net worth, appellant enclosed with its application a “balance sheet” which, appellant asserts, represents the net worth of the company. The Board has carefully reviewed the balance sheet and is unable to determine from it, with any degree of certainty, the net worth of appellant and its affiliates at the time the appeal was filed.

It appears from the EAJA application that appellant has not met its burden of establishing its eligibility under the Act. Paragraph 7(c) of the Board’s “Equal Access to Justice Act Interim Procedures” provides that the Board may require an applicant to file additional information in order to determine its eligibility for an EAJA award. Generally, in a situation such as this, we would require appellant to provide more information to determine its net worth and number of employees. However, in light of our discussion below on substantial justification, it is not necessary to require additional information from appellant in order to make a decision on the EAJA application.

Substantial Justification

In its application, appellant did not specifically allege that the Government’s position was not substantially justified. In turn, the Government, in its answer to appellant’s application, did not address this issue. The Government has the burden of proof on the issue of whether the Government’s position was substantially justified. *See*

Community Heating & Plumbing Co., Inc. v. Garrett, 2 F.3d 1143, 1145 (Fed. Cir. 1993). Although the issue was not addressed by the parties, the Board may still determine, on the basis of the record before us, whether the position of the Government was substantially justified. See *Henry Shirek d/b/a Shirek Constr. Co.*, ASBCA No. 28414, 87-2 BCA ¶ 19,765 at 100,011; *Campbell v. Bowen*, 800 F.2d 1247, 1249 (4th Cir. 1986).

The Government's position is considered to be substantially justified "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 566 n. 2 (1988). In determining whether the Government's position was substantially justified, we are "to look at the entirety of the government's conduct and make a judgment call whether 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 issue presented in the underlying appeal was whether appellant was entitled to an equitable adjustment due to a differing site condition because in excavating, appellant encountered hard rock which it did not anticipate. The area concerned with the contract work was approximately 1/4 by 1/8 to 1/4 mile, and was a part of an area approximately 1/2 by one mile in which the Government had made 31 borings. Reports from 26 of these borings were given to bidders (findings 5-7).

Of those 26 borings, 7 were for foundation design and were drilled to 20 feet or greater, and 19 were for paving information and were drilled to 10 feet or less. Appellant's deepest excavation was to 19.5 feet. Only 3 borings were located in the contract work area, one of which was a deep boring. Several other borings were within 1/4 mile of the contract work area, one of which was also a deep boring. (Findings 5-7, 11, 12). In preparing its bid, appellant made assumptions of the rock formations and depths. Those assumptions were based primarily on the borings, but also on other contract information and site surface appearance (finding 10).

At trial the Government argued that appellant should have anticipated removing the disputed rock because six of the seven deep borings showed rock in the form of limestone or conglomerate to the east, south, and west of appellant's work site as shallow as 6 feet, with an average depth of approximately 10 to 12 feet. The Board held for appellant primarily because in several Government documents not part of the contract, there were indications that Government representatives apparently reached some of the same conclusions of the rock formation and depth as did appellant while preparing its bid (findings 10, 13, 14). However, our ruling should not be read as a dismissal of the reasonableness of the Government's position. The question presented in the appeal on the merits was close, and the Government's position was reasonable in fact and law, and substantially justified.

We find, on the basis of the record before us, that the Government's position was substantially justified.

Based on the above discussion, the application is denied.

Dated: 14 September 2000

JEAN SCHEPERS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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. 49044, Appeal of Cajun Contractors, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals