

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access)
to Justice Act of --)
)
Rex Systems, Inc.) ASBCA No. 54444
)
Under Contract No. SPO900-01-D-9720)

APPEARANCE FOR THE APPELLANT: Christopher M. Johnson, Esq.
Centre Law Group, LLC
McLean, VA

APPEARANCE FOR THE GOVERNMENT: Vasso K. Monta, Esq.
Agency Counsel
Defense Supply Center,
Columbus (DLA)
Columbus, OH

OPINION BY ADMINISTRATIVE JUDGE DELMAN

Rex Systems, Inc. (Rex or applicant) seeks to recover attorneys' fees and expenses incurred in the appeal of *Rex Systems, Inc.*, ASBCA No. 54444, 04-2 BCA ¶ 32,741 pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. We sustained the appeal, and granted Rex an equitable adjustment in the amount of \$25,350.58 for unabsorbed overhead resulting from the issuance of a government stop-work order. Familiarity with our decision is presumed.

Rex's timely application seeks attorneys' fees and expenses in the amount of \$16,550.00. Pursuant to the Board's rules, the government was given an opportunity to contest the application. By letter to the Board dated 19 November 2004, the government stated: "The government does not agree with the EAJA application, but has chosen not to respond." In accordance with the Board's docketing notice dated 6 October 2004, we decide only whether the applicant is entitled to an EAJA recovery.

DECISION

Eligibility

In order to be eligible for EAJA recovery, a corporation's net worth must not exceed \$7,000,000 and it must employ not more than 500 employees at the time the

adversary adjudication was initiated. 5 U.S.C. § 504(b)(1)(B)(ii). The evidence shows that Rex's net worth was less than \$7,000,000 and it employed less than 500 employees as of the date it filed its appeal (supp. decl. Waldusky). The government has not provided any facts or argument to contest Rex's eligibility. We conclude Rex is eligible to obtain an EAJA award.

Prevailing Party

An EAJA applicant must also show that it was a prevailing party in the adversary adjudication. 5 U.S.C. § 504(a)(1). Rex states that the Board's award made it a prevailing party. Rex claimed an equitable adjustment in the amount of \$29,652.57. The Board awarded \$25,350.58. The government has not provided any facts or argument to contest Rex's status as a prevailing party. We conclude that Rex was a prevailing party in the adversary adjudication.

Substantial Justification

Substantially justified means “‘justified in substance or in the main’ —that is, justified to a degree that could satisfy a reasonable person. That is no different from the ‘reasonable basis both in law and fact’ formulation” adopted by most federal appellate courts that have addressed the issue. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

The government must prove that its position was substantially justified in the underlying agency action upon which the adversary adjudication is based and in the adversary adjudication. 5 U.S.C. § 504(b)(1)(E). See *Community Heating & Plumbing Co. v. Garrett*, 2 F.3d 1143, 1145 (Fed. Cir. 1993). The government has not provided any facts or argument to show that its position was substantially justified. The contracting officer's decision from which Rex appealed contested the government's responsibility for the issuance of the stop work order, contending that Rex did not manufacture the patch board according to the specifications. The contracting officer provided no substantiation for this allegation in the decision. (R4, tab 36) On appeal, the government abandoned this position and stipulated to contractor entitlement, that is, that the stop work order was in fact the government's responsibility.

Based upon the record before us, we conclude that the government has not shown that its position was substantially justified in the underlying agency action. Having so concluded, we need not decide whether the government's position was substantially justified during the appeal. We conclude that the government has not shown substantial justification in the underlying agency action and in the adversary adjudication so as to defeat this EAJA application.

Special Circumstances

The government has not contended that there are any special circumstances that would make an award of fees and costs unjust. 5 U.S.C. § 504(a)(1). We conclude that no special circumstances exist to preclude an EAJA award.

CONCLUSION

We conclude that Rex is entitled to a recovery of attorneys' fees and expenses under EAJA. We remand the application to the parties to settle quantum. If the parties are unable to settle quantum within a reasonable time, Rex may return to the Board and we shall determine the EAJA award.

Dated: 22 April 2005

JACK DELMAN
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

RICHARD SHACKLEFORD
Administrative Judge
Acting 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. 54444, Appeal of Rex Systems, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

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