

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access )  
to Justice Act of -- )  
 )  
Job Options, Inc. ) ASBCA No. 56698  
 )  
Under Contract No. HDEC08-02-C-0014 )

APPEARANCES FOR THE APPELLANT:

James F. Nagle, Esq.  
Anne Marie Tavella, Esq.  
Oles Morrison Rinker & Baker LLP  
Seattle, WA

APPEARANCES FOR THE GOVERNMENT:

Elliot J. Clark, Jr., Esq.  
Deputy General Counsel  
Helen J.S. White, Esq.  
Trial Attorney  
Defense Commissary Agency  
Fort Lee, VA

OPINION BY ADMINISTRATIVE JUDGE PEACOCK

Job Options, Inc. (JOI or the applicant) has filed an application under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, seeking recovery of fees and expenses incurred in connection with its appeal pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, involving government deductions for allegedly defective floor maintenance work. We sustained the underlying appeal and awarded appellant \$63,818.76, plus CDA interest. *Job Options, Inc.*, ASBCA No. 56698, 10-1 BCA ¶ 34,444, *aff'd on recon.*, 10-2 BCA ¶ 34,526. Familiarity with our decisions in the underlying appeal is assumed. The government does not dispute the timeliness of the application or that JOI “prevailed” in the underlying appeal. It does, however, challenge the applicant’s eligibility to receive an award under the EAJA. The government also alleges that its position with respect to the deductions and underlying litigation was “substantially justified.” Because we conclude that the government was “substantially justified,” we need not address issues pertaining to the applicant’s eligibility. *Cf. D.E.W., Inc. & D.E. Wurzbach, A Joint Venture*, ASBCA No. 46075, 98-2 BCA ¶ 29,744 at 147,419.

## DECISION

An EAJA award of fees and expenses to a prevailing party will not be made if the government's position in the underlying agency action and CDA appeal was substantially justified. See 5 U.S.C. §§ 504(a)(1), (b)(1)(E); *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 837 F.2d 465 (Fed. Cir. 1988). The government's position is substantially justified if it had a reasonable basis in fact and law. *Pierce v. Underwood*, 487 U.S. 552, 566 (1988). The burden is on the government to prove that its position was substantially justified. *Community Heating & Plumbing Co. v. Garrett*, 2 F.3d 1143, 1145 (Fed. Cir. 1993); *Oneida Construction, Inc./David Boland, Inc., Joint Venture*, ASBCA No. 44194 *et al.*, 95-2 BCA ¶ 27,893. However, prevailing on the merits does not necessarily entitle an appellant to an EAJA award as the statute was not intended as an automatic fee-shifting device. *Gavette v. OPM*, 785 F.2d 1568, 1578-79 (Fed. Cir. 1986); *Gava v. United States*, 699 F.2d 1367 (Fed. Cir. 1983). Whether the position of the contracting agency was substantially justified, "shall be determined on the basis of the administrative record, as a whole...made in the [CDA appeal]." 5 U.S.C. § 504(a)(1). *BH Services, Inc.*, ASBCA No. 39460, 94-1 BCA ¶ 26,468. In determining whether the government's position was substantially justified, we examine "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).

Here we consider that the government's conduct was reasonable and substantially justified because: the appeal involved our determination of close factual questions, the pre-hearing documentary record established a *prima facie* case supporting the government's deductions, and the government's position was supported by legal precedent involving the same agency on closely analogous, albeit distinguishable, facts.

As we emphasized, our decision in the underlying appeal turned on the "weight, persuasiveness and credibility that the Board assigned to conflicting evidence." 10-2 BCA ¶ 34,526 at 170,265. The burden of proving the deductions were justified was on the government and given the close factual questions presented, the Board determined on balance that the government had failed to sustain its burden of proof. In cases where the Board has decided such difficult close factual questions, it has often denied recovery under the EAJA. Cf. *Brand S. Roofing*, ASBCA No. 24688, 82-1 BCA ¶ 15,717; *Cajun Contractors*, ASBCA No. 49044, 00-2 BCA ¶ 31,110 at 153,656; *Burt Associates, Inc.*, ASBCA No. 25884-E, 83-1 BCA ¶ 16,213; *Zinger Construction Co.*, ASBCA No. 31858, 88-2 BCA ¶ 20,661, *aff'd on recon.*, 88-3 BCA ¶ 20,978; *K-Mor Construction Co.*, ASBCA No. 23397-D, 82-2 BCA ¶ 15,954.

The Board has also often denied recovery where the evidence supporting the contractor's position was primarily developed and established at a hearing. The factual grounds for the government's deductions were the contemporaneously recorded observations of government Quality Assurance personnel who monitored JOI's performance. Their records constituted the best evidence of the facts prior to the hearing and evidenced extensive problems and defects in JOI's floor maintenance work. *See Aerial Service Corp.*, ASBCA No. 36392, 91-1 BCA ¶ 23,582 at 118,230. To establish both entitlement and quantum further development of the record by appellant at the hearing was essential. It was only as a result of evidence adduced at the hearing that the evidentiary weight of the contemporaneous documentation was found insufficient to support the deductions claimed. *Cf. Morris Mechanical Enterprises, Inc. v. United States*, 728 F.2d 497 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 1033 (1984) (when certain pertinent facts not developed until trial and post trial briefing, government's position found substantially justified); *Jackson Engineering Co.*, ASBCA No. 36220, 91-3 BCA ¶ 24,178 (total cost claim not revised until appeal); *Tempo, Inc.*, ASBCA No. 35659 *et al.*, 89-1 BCA ¶ 21,439 (government's position substantially justified where appellant's theory of recovery not adequately explained until hearing); *Decker and Co., GmbH*, ASBCA Nos. 33285, 38656, 92-1 BCA ¶ 24,461.

In this case, “[c]lose questions were presented as to whether the Government’s documentary evidence and testimony were more or less persuasive than the testimony” of appellant’s witnesses and other evidence adduced at the hearing. *Cf. K-Mor*, 82-2 BCA at 79,083. Only after receiving oral testimony and briefing were the comparative strengths and weaknesses of the parties’ positions clarified. Although we sustained the underlying appeal, given the evidence of defective workmanship present in this case, the government had legitimate and well-founded reasons for litigating the case and its position was reasonable and substantially justified. *Cf. D.E.W.*, 98-2 BCA at 147,419.

We also reemphasize that the government QAE primarily responsible for the government measurements, determinations and deductions reflected in the contemporaneous pre-hearing record failed to appear and testify at the hearing despite a Board subpoena requiring his attendance. Moreover, he was not present at the place and time scheduled by the parties for the taking of a post-hearing deposition authorized by the Board and to be received into evidence. *Cf. Goetz Demolition Co.*, ASBCA No. 39129, 91-2 BCA ¶ 23,836 (where government technical advisors failed to explain and support their estimates and Board found appellant’s estimates more persuasive, government’s position based on the unsupported estimates was nevertheless substantially justified).

Finally, we consider that the reasonableness of the government’s legal position is supported by its reliance on the closely analogous and then recent case of *Pride Industries*, ASBCA No. 55771, 08-1 BCA ¶ 33,757 involving the same contracting agency. In that case we upheld government deductions associated, *inter alia*, with

defective commissary floor maintenance work. For the reasons stated in our decision in the underlying appeal, we concluded that the case was factually distinguishable. 10-1 BCA at 169,983. Nonetheless, it provides further support for our ultimate conclusion that the government's position in assessing the deductions and litigating the underlying appeal here was substantially justified.

The application is denied.

Dated: 12 January 2011

---

ROBERT T. PEACOCK  
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

---

EUNICE W. THOMAS  
Administrative Judge  
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. 56698, Appeal of Job Options, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

---

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