

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access )  
to Justice Act -- )  
 )  
Thomas J. Papathomas ) ASBCA Nos. 50895, 51352  
 )  
Under Contract No. N62745-92-C-3106 )

APPEARANCE FOR THE APPELLANT: Mr. Thomas J. Papathomas  
Owner

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.  
Navy Chief Trial Attorney  
John S. McMunn, Esq.  
Senior Trial Attorney  
Naval Facilities Engineering  
Command  
San Bruno, CA

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD\*

In 1992, the Naval Facilities Engineering Command awarded a construction contract to Thomas J. Papathomas for work on facilities in the area of Souda Bay, Crete, Greece. The amount of the contract was 184,000,000 drachmas. On 18 April 1994, appellant requested time extensions totaling 1,584 days for fifteen separate alleged causes of delay. Included among those fifteen alleged causes of delay were requests for 73 days for delayed delivery of five sets of drawings and specifications, 120 days for delayed availability of buildings and 180 days for delayed approval of air conditioners. Appellant also alleged in that correspondence that beneficial occupancy had taken place on 14 August 1993. No request for costs associated with delay was included in the request.

The Government responded to the request for time extensions by unilaterally issuing Modification No. P00007 (Mod. 7), granting a time extension of 221 calendar days. Included in that time extension granted were 77 days for delay in receipt of five sets of drawings and specifications, 31 days for delayed availability of buildings and 36 days for delayed approval of air conditioners. The Government, moreover, in Mod. 7 agreed with appellant that beneficial occupancy had occurred on 14 August 1993. No increase in contract price was included as a result of the time extensions granted and

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\* Judge Spector, who authored previous opinions in these appeals, has retired.

liquidated damages were assessed by the Government in the amount of 25,004,700 drachmas.

Appellant requested a final decision on his partially denied request for a time extension, and when a decision was not timely issued, filed an appeal to this Board which was docketed as ASBCA No. 49512.

On 15 February 1997, appellant demanded payment of liquidated damages which had been withheld from payments otherwise due to appellant, delay damages in the amount of 86,102,000 drachmas for the time extensions granted in Mod. 7, and damage for unspecified extra work in the amount of 2,600,000 drachmas. This 15 February 1997 claim was denied by the contracting officer on 7 May 1997, appealed to this Board on or about 16 July 1997 and docketed as ASBCA No. 50895.

Prior to appellant having appealed the final decision which became ASBCA No. 50895, a hearing was held on 2-4 June 1997 in Chania, Crete, Greece. By agreement between the parties and the Board, the scope of the hearing included entitlement to delay damages, the issue in 50895. It was also agreed during the hearing that when the second appeal was filed, the two dockets would be consolidated for decision. As it turned out, substantially the entire hearing was devoted to issues arising under ASBCA No. 49512.

We denied ASBCA No. 49512 as to entitlement because appellant failed to show entitlement to any time extensions beyond that granted by Mod. 7. We sustained in part the appeal in ASBCA No. 50895, finding entitlement to compensation for delays granted in Mod. 7 on three of the fifteen alleged causes of delay including late availability of buildings, late approval of air conditioners, and late furnishing of drawings and specifications. We remanded the matters sustained to the parties to negotiate quantum. *Thomas J. Papathomas*, ASBCA Nos. 49512 and 50895, 97-2 BCA ¶ 29,317, *aff'd on recon.*, 98-1 BCA ¶ 29,460.

The parties were unable to resolve quantum and thus, on 19 February 1998, we docketed the quantum aspect of ASBCA No. 50895 as ASBCA No. 51352. Appellant's delay claim of 15 February 1997 listed 19 categories to which specified quantities of drachmas were assigned for a total claim of 86,102,000 drachmas. For the three causes of delay for which we found entitlement to damages appellant sought 61,442,254 drachmas for seventeen categories of cost. We sustained the quantum claim on only three of the categories for a total of 6,128,232 drachmas, or about 7 percent of the amount originally claimed and 10 percent of the amount sought in the damages phase of the Board proceedings. *Thomas J. Papathomas*, ASBCA No. 51352, 99-1 BCA ¶ 30,349, *aff'd on recon.*, 99-2 BCA ¶ 30,451.

Appellant thereafter filed an application for attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, as amended. We denied a Government Motion to Dismiss, *Thomas J. Papathomas*, ASBCA Nos. 49512, 50895, 51352, 00-1 BCA ¶ 30,619, and later denied the application as to ASBCA No. 49512, because applicant was not a prevailing party as to that appeal, *Thomas J. Papathomas*, ASBCA No. 49512, 2 November 1999.

### DECISION

An eligible applicant is entitled to recover attorney's fees and expenses against the Government under the EAJA, 5 U.S.C. § 504, unless the position of the Government is determined to be substantially justified. We examine the EAJA requirements below.

#### Eligibility

Applicant has filed tax returns for 1996, 1997 and 1998. He also states that he has only three regular employees, owns a house valued at \$165,000, and owns no stocks or bonds. Based upon Mr. Papathomas' statement and our review of his tax returns, we find that applicant meets the net-worth and employee size criteria for an EAJA applicant set forth in 5 U.S.C. § 504(b)(1)(B).

#### Prevailing Party

The test for determining the prevailing party is whether the applicant achieved some of the benefit sought in the litigation. *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989); *Naekel v. Department of Transportation*, 884 F.2d 1378, 1379 (Fed. Cir. 1989); *ISC-Serco*, ASBCA No. 36397, 91-3 BCA ¶ 24,087. Applicant's efforts to increase his time extension and thus reduce the assessed liquidated damages were unsuccessful. While Papathomas was awarded only 7 percent of the amount claimed, to that small extent, he was a prevailing party.

#### Substantial Justification

Under EAJA, an award of fees and expenses to a prevailing party will not be made if the Government's position was substantially justified. 5 U.S.C. § 504(a)(1). The burden is on the Government to show that its position was substantially justified. *Community Heating & Plumbing Co. v. Garrett*, 2 F.3d 1143 (Fed. Cir. 1993); *Oneida Construction, Inc./David Boland, Inc., Joint Venture*, ASBCA Nos. 44194, 47914, 47915, 47916, 95-2 BCA ¶ 27,893. The Government's burden applies to the position it asserted in the adversary adjudication as well as to the Governmental action or inaction upon which the adversary adjudication was based 5 U.S.C. § 504(b)(1)(E); *Oneida, supra*. For the three causes of delay for which we found entitlement to compensation, the

Government argued that there was concurrent delay which would render the delay non-compensable. We found the Government failed to show the extent of concurrency and thus the evidentiary effect of Mod. 7 (*i.e.*, a presumption that the delay granted was Government caused) was not overcome. The Government contends in this EAJA proceeding that its position was substantially justified because the Board used a presumption of entitlement for the three causes of delay, while the overwhelming majority of the causes were rejected as to additional compensation.

We pointed out in our entitlement decision that the Government issued Mod. 7 after all the material events had taken place, thus allowing for deliberate consideration of the extent of Government-caused delay. Under those circumstances, the Government was not substantially justified in denying compensation for the three items on which appellant prevailed.

We find the Government has not met its burden to show its position was substantially justified as to the three causes for which damages were sustained.

#### Reasonableness

The fees and expenses claimed by Papatomas for ASBCA Nos. 49512 and 50895 are entirely for the services and expenses of Mr. Constandinidis and are as follows:

- a. 40 hours reading all the correspondence and also creating new correspondence with the contracting officer and the Board, in preparation for the Board's hearing.
- b. 50 hours preparing briefs, creating computer construction critical path lines, studying hearing transcripts.
- c. 20 hours post[hearing] briefs.
- d. 10 hours for motion for reconsideration, other correspondence [and] quantum negotiations with the contracting officer.
- e. 30 hours in Chania court hearings and studies.

**Total fees: 150 hours X \$100 = \$15,000**

- f. Expenses for airline tickets to Chania, Hotel, food in Chania, telephones and special courier Mail \$2000.

**Total fees and expenses \$17,000**  
(emphasis in original)

There are several problems with appellant's claim for fees and expenses for ASBCA Nos. 49512 and 50895. First of all, Mr. Constandinidis is not a lawyer, but he assisted Papathomas in presenting his case as if he were a lawyer. He examined witnesses at the hearing; he prepared and filed the briefs and corresponded with the Board and with Government counsel. With regard to the right to compensation under the EAJA for non-lawyers performing legal work, we have stated:

The purpose of EAJA is to provide eligible litigants with better access to adjudicative bodies by removing the obstacles of attorney's fees and expenses. It is well-settled that a non-attorney is not entitled to award of fees for performing legal work. *Union Precision & Engineering*, ASBCA No. 37549, 93-1 BCA ¶ 25,337. The intent of EAJA was to encourage representation by an attorney. If we were to award attorney's fees to a non-attorney, we would be thwarting the aims of EAJA.

*Joseph L. DeClerk & Associates, Inc.*, ASBCA No. 49595, 97-2 BCA ¶ 29,268 at 145,608; *aff'd on recon.*, 98-1 BCA ¶ 29,377. Since the services performed by Mr. Constandinidis are normally performed by an attorney, the fees requested on his behalf when performing lawyer-like services are not recoverable under the EAJA.

Secondly, the hearing which was held in June 1997 was concerned almost entirely with the issues raised in ASBCA No. 49512, the time extension claim, on which appellant did not prevail. Consequently, it is unreasonable to allocate any fees and expenses incurred in connection with the trial to applicant's minor success in ASBCA No. 50895. We previously denied Papathomas' application for EAJA fees and expenses under ASBCA No. 49512.

For ASBCA No. 51352, Papathomas claims the following fees and expenses on behalf of Mr. Constandinidis:

- a. Preparing Briefs and quantum records 50 hours.
- b. Preparing Reply Briefs 20 hours.
- c. Other correspondence including translations 30 hours.

**Total fees: 100 hours X \$100 = \$10,000**

- e. Telephone calls, courier mail, legal translations \$300

**Total fees and expenses: \$10,300**  
(emphasis in original)

In ASBCA No. 51352, applicant recovered 10 percent of the amount claimed in the quantum proceedings before the Board. It is appropriate to apportion the recovery in accordance with the degree of success, and thus, we award 10 percent of the reasonable fees and expenses incurred in ASBCA No. 51352. *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983).

Appellant is not entitled to recover the fee for Mr. Constandinidis when he performs legal services and that precludes recovery for preparing briefs and quantum records, preparing reply briefs, and for preparing correspondence. Papatomas seeks translation expenses both as part of Mr. Constandinidis' fee and as part of his expenses. Translation expenses are generally recoverable, *see, Peter Kraus Versorgungstechnik GmbH*, ASBCA No. 27256, 87-2 BCA ¶ 19,880, but here we do not know how many of the 30 hours sought at \$100 per hour were for translation services or how much of the \$300 in expenses were for legal translations. Moreover, it is unclear whether there is any duplication between the two items and applicant has not demonstrated that \$100 per hour is a reasonable cost for translation services. In any event, applicant is entitled to recover 10 percent of the reasonable cost of translation expenses it incurred.

#### Conclusion

The application is sustained as to entitlement to 10 percent of the reasonable cost of translation expenses and is remanded to the parties for negotiation of that expense. In all other respects the application is denied.

Dated: 10 March 2000

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RICHARD SHACKLEFORD  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signature Continued)  
I concur

MARK N. STEMLER  
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 in ASBCA No. 50895, 51352, Appeal of Thomas J. Papathomas, rendered in conformance with the Board's Charter.

Dated:

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