

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access )  
to Justice Act of -- )  
 )  
Oscar Narvaez Venegas ) ASBCA Nos. 49291, 54164  
 )  
Under Contract No. 4128-161055-FBO )

APPEARANCES FOR THE APPELLANT: Eduardo Peña, Jr., Esq.  
Peña & Associates, P.C.  
Washington, DC

Emilio Martínez, Esq.  
Laredo, TX

APPEARANCE FOR THE GOVERNMENT: John C. Sawyer, Esq.  
Attorney/Advisor  
Department of State  
Rosslyn, VA

OPINION BY ADMINISTRATIVE JUDGE JAMES

Applicant seeks to recover attorneys’ fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, incurred in the appeals of *Oscar Narvaez Venegas*, ASBCA No. 49291, 98-1 BCA ¶ 29,690, *recon. denied*, 98-2 BCA ¶ 29,887, and ASBCA No. 54164 (unpublished).

BACKGROUND

ASBCA No. 49291. In December 1994 appellant submitted a certified claim for \$558,000 alleging breach of contract arising from respondent’s March 1993 notice of vacating the leased premises due to five alleged failures of appellant to maintain the leased property in accordance with the lease provisions. The contracting officer (CO) denied that claim in his 10 August 1995 final decision, which appellant timely appealed to this Board in November 1995. The Board’s 3 April 1998 decision on entitlement held that there were no uncured material failures to perform the specified maintenance by appellant, respondent had not proven a “constructive eviction” due to untenable conditions, respondent failed to justify its March 1993 termination of the lease, and appellant sustained its burden of proving its breach claim. The Board remanded the appeal to the parties to resolve quantum. 98-1 BCA at 147,141-42.

ASBCA No. 54164. After the parties were unable to agree on quantum, the Board reinstated the appeal in April 2003, assigning it a new docket number 54164. On 26 June 2003, the parties signed a Settlement Agreement, stipulating a \$750,000 recovery for appellant. On 27 June 2003, the Board issued an unpublished decision in ASBCA No. 54164, in the nature of a consent judgment, awarding \$750,000 to appellant.

### THE EAJA APPLICATION

On 28 July 2003 appellant applied for \$75,733.24 in EAJA attorneys' fees and expenses incurred over the period 30 October 1995 through 25 June 2003 by appellant's attorneys, Eduardo Peña and Emilio Martínez. Appellant included a one-page financial statement showing total assets and cash of \$495,836.00.

On 22 August 2003, respondent moved to dismiss the EAJA application on the grounds that the applicant did not: (1) file the application within 30 days after the "final disposition" of the aforesaid appeals, depriving the Board of subject matter jurisdiction of the application, and (2) submit a detailed net worth statement sufficient to show its EAJA eligibility. Our 10 November 2003 decision denied that motion, holding that applicant timely filed its EAJA application, the application contained averments addressing each of the statutory EAJA requirements, and any asserted deficiency in its net worth statement could be "fleshed out or corrected" by amendment of its application. *See Oscar Narvaez Venegas*, ASBCA No. 54164, 04-1 BCA ¶ 32,457 at 160,552.

In a 20 February 2004 conference call to the parties, the Board asked respondent whether it had any other objections to the EAJA application. Respondent requested, and was given, time to clarify and to verify the accuracy of certain items in the applicant's financial statement with respect chiefly to the applicant's possible co-ownership of certain listed assets, including item No. 2558, and applicant agreed to provide such clarification. On 29 March 2004 applicant amended its application, stating that Mr. Narvaez is the sole owner of the assets listed in his financial statement, and clarifying item No. 2558 and other assets. On the same date respondent submitted a reply, stating that it had no evidence "to indicate that Mr. Narvaez's financial statement as disclosed to the Board is not accurate."

In a 28 April 2004 conference call between the Board and the parties, the parties agreed that the Board shall decide both entitlement and quantum on the EAJA application, the applicant may amend its application to encompass the period after its original application not later than 28 May 2004, and respondent may reply thereto by 11 June 2004. Applicant timely filed its amended application, seeking to recover an additional \$30,229.65 for the period 19 July 2003 through 27 May 2004. Thus, applicant seeks to recover a total of \$105,962.89 (\$75,733.24 + \$30,229.65). Respondent timely replied thereto.

## DECISION

Eligibility. To be eligible for an EAJA award, when a “party” is an “individual,” such as applicant Oscar Narvaez Venegas, his net worth must not have exceeded \$2,000,000 at the time the adversary adjudication was initiated. *See* 5 U.S.C. § 504(b)(1)(B)(i). The adversary adjudication was initiated on 9 November 1995. 98-1 BCA ¶ 29,690 at finding 44. Applicant’s net worth of approximately \$495,800 was within the foregoing statutory limit. The government does not take issue with the accuracy of that net worth statement.

Prevailing Party. Respondent does not dispute that applicant was a “prevailing party” in both ASBCA Nos. 49291 and 54164. *See* 5 U.S.C. § 504(a)(1).

Substantial Justification. Respondent does not contend that its position in the adversary adjudications and its actions upon which those adversary adjudications were based, was substantially justified, nor does respondent assert that any special circumstances make an EAJA award unjust. *See* 5 U.S.C. § 504(a)(1), (b)(1)(E).

Reasonable Attorneys’ Fees and Expenses. Applicant’s amended legal fees, itemized by date and hours, encompass the period 30 October 1995 through 27 May 2004, and include 711.5 hours charged by Mr. Peña and 412 hours charged by Mr. Martínez. Both attorneys charged their hours through 25 June 2003 at \$75.00 per hour, but in the amended application have increased their hourly rates to \$125.00 per hour for their additional hours through 27 May 2004 on the ground that “this proceeding was initiated after March 29, 1996,” and so they are eligible for the \$125 rate. Their fees, as amended, total \$95,775. Applicant’s itemized expenses of travel, deposition and hearing transcripts, deliveries and miscellaneous expenses, as amended, total \$10,187.89. All such fees and expenses were incurred after the applicant received the 10 August 1995 final decision. *See ABS Baumaschinenvertrieb, GmbH*, ASBCA No. 48207, 01-2 BCA ¶ 31,549 at 155,827, and authorities cited therein.

Respondent questions the reasonableness of (i) fees exceeding \$75/hour, (ii) the 5.5 hours charged for six telephone calls on 17 September 2003 and on 4 and 6 March 2004, on five of which there was no answer, and (iii) the 18 hours charged for “research” from 21-26 May 2004, since the amended EAJA application contains “not one legal citation, and no evidence of any need to do legal research.” Respondent does not question the other litigation expenses applicant charged. (Gov’t reply at 1-3)

The original appeal in ASBCA No. 49291 was docketed on 13 November 1995. ASBCA No. 54164 reinstated that appeal for resolution of quantum under a new number. Accordingly, applicant may not recover attorney fees at the \$125 rate prescribed by Pub. L. 104-121, 29 March 1996, amending 5 U.S.C. § 504(b)(1)(A), but rather at the \$75 rate theretofore prescribed by the EAJA in that section. *See Commercial Energies, Inc.*,

ASBCA Nos. 47106, 50316, 00-1 BCA ¶ 30,907 at 152,491 (“When appellant filed its notice of appeal on 24 January 1994 in ASBCA No. 47106, the EAJA limited attorney’s fees to \$75 per hour. See 5 U.S.C. § 504(b)(1)(A). Public Law 104-121 . . . increased that limit to \$125 per hour for an ‘adversary adjudication’ commenced on or after 29 March 1996. The \$125 limit is inapplicable because appellant’s appeal commenced on 24 January 1994.”) The Board further finds that the 23.5 hours for phone calls and research questioned by respondent are not reasonable, and allows 1.5 hours for such services.

Conclusion. Applicant is entitled to recover under the EAJA the following amount:

Attorney fees, Mr. Peña, 689.5 hours @ \$75/hour	\$51,712.50
Attorney fees, Mr. Martinez, 412 hours @ \$75/hour	<u>\$30,900.00</u>
Subtotal, attorney fees:	\$82,612.50
Other expenses	<u>\$10,187.89</u>
Total amount	<u><u>\$92,800.39</u></u>

The Board grants the EAJA application to the foregoing extent, and denies the balance.

Dated: 23 June 2004

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DAVID W. JAMES, JR.  
 Administrative Judge  
 Armed Services Board  
 of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
 Administrative Judge  
 Acting Chairman  
 Armed Services Board  
 of Contract Appeals

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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 Nos. 49291 and 54164, Appeals of Oscar Narvaez Venegas, rendered in accordance with 5 U.S.C. § 504.

Dated:

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DAVID V. HOUPE  
Acting Recorder, Armed Services  
Board of Contract Appeals