

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access)
to Justice Act of --)
)
Clauss Construction) ASBCA Nos. 51707, 53953
)
Under Contract No. DACA21-96-C-0153)

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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 *Clauss Construction*, ASBCA No. 51707, 02-1 BCA ¶ 31,678, and ASBCA No. 53953, 04-1 BCA ¶ 32,627. Its application (appl.) dated 29 June 2004 claims a total of \$109,018. Pursuant to the Board's 30 June 2004 docketing notice, the Board will decide only the applicant's entitlement to an EAJA recovery.

In ASBCA No. 51707, the Board rejected respondent's "plain dictionary definition" of "demolition" and held that its refusal to allow Clauss to remove and relocate intact family housing units (FHUs) for sale to the public and to regard the salvageable wooden FHU structures as "unsalvageable" demolition debris, constituted a constructive change. We sustained the appeal on entitlement and remanded it to the parties to resolve quantum. 02-1 BCA at 156,546-47.

In ASBCA No. 53953, after the parties failed to resolve damages, the Board reviewed applicant's amended "Statement of Cost" of lost salvage value and additional demolition costs, and respondent's position on each of the cost elements in that Statement

of Costs. We rejected Clauss' "Appraised Value of FHUs" because the FHUs were sold "as-is," not as restored to their pre-salvage condition at Ft. Bragg. We determined the fair market value of the FHUs based on their sales prices, preparation costs, and sales commissions; rejected respondent's deduction of purchase deposits not yet refunded to purchasers; and determined additional demolition costs by refining Clauss' cost elements and applying the audited overhead and profit rates thereon. We awarded the amount of \$827,662, plus Contract Disputes Act (CDA) interest, 41 U.S.C. § 611. 04-1 BCA at 161,435-37.

DECISION

Eligibility. Clauss states that it is an "S Corporation" (appl., financial statements at 1). 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). Clauss' affidavit and information show that as of the date it filed its appeal, 24 August 1998, its net worth was less than \$7,000,000 and it employed less than 500 employees (Clauss affidavit). Respondent does not dispute Clauss' eligibility (answer at 2).

Prevailing Party. Claus asserted, and respondent does not dispute, that Clauss was a prevailing party in both ASBCA No. 51707 and No. 53953 (appl. at 1; answer at 2).

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 courts. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The government must prove that its position was substantially justified in the underlying agency action and in the adversary adjudication. See 5 U.S.C. §504(b)(1)(E); *Community Heating & Plumbing v. Garrett*, 2 F.3d 1143, 1145 (Fed. Cir. 1993) (agency has burden of proof to demonstrate its position was substantially justified).

Applicant avers that respondent's position was not substantially justified. Respondent contends that its interpretation of the contract in denying Clauss' claim and in litigating entitlement was not found "unreasonable" by the Board, and so its position was substantially justified (answer at 3-4). This conclusion does not follow from the premise. We held that it was not obvious that the specification provision that--

All (LBP) building materials are to be [demolished] with the building and disposed of with the building rubble and asbestos waste, as per North Carolina requirements . . . was reasonably intended to negate the contractor's title and right

to salvage materials including LBP materials . . . when such salvage did not violate North Carolina requirements.

02-1 BCA at 156,546. Respondent's agency action and litigation position were based on the word "demolition" in isolation from other pertinent contract provisions. We conclude that respondent has not established that a reasonable person could think that the contract's requirements for LBP abatement pursuant to North Carolina requirements forbade removal of the FHUs intact. *See Pierce, supra*, at 569-70 (when preponderance of relevant statutory provisions was mandatory, government's litigating position based on a single permissive provision was not substantially justified).

Respondent argues that its litigating position on quantum was substantially justified because the Board's determination of lost salvage value and additional demolition costs (\$827,662) was much nearer to respondent's position than to Clauss' Statement of Costs (answer at 4-8). The CO's final decision denied Clauss' claim in its entirety (ASBCA No. 51707, finding 14). On 30 June 2003, the first day of the quantum hearing, Clauss' position, excluding CDA interest, legal fees and costs, was \$3,072,046 (ex. A-43), and respondent's corresponding position was \$222,994 (ex. G-24). Respondent contends that the quantum of lost salvage value and of additional demolition costs were "discrete" phases in the quantum proceeding, and so the Board may determine that respondent was substantially justified in each such phase (answer at 19-20). We do not agree. In ASBCA No. 53953, the fair market value and additional demolition costs of the 86 FHUs were not discrete "phases," but rather dealt with related cost elements.

Although the Board assigns separate docket numbers to entitlement and quantum appeals for administrative convenience, there is only one "adversary adjudication." *See Nab-Lord Associates v. United States*, 682 F.2d 940, 943 (Ct. Cl. 1982) (when Board remands an appeal for quantum negotiations, the appeal is still pending before the Board for CDA purposes), cited in *Bogue Electric Manufacturing Co.*, ASBCA Nos. 25184, 29606, 89-3 BCA ¶ 21,951 at 110,428 (same principle).

Commissioner, INS v. Jean, 496 U.S. 154 (1990), provides guidance on applying the EAJA's substantial justification requirement. The Court stated (496 U.S. at 160, 161-62, 165-66):

The single finding that the Government's position lacks substantial justification, like the determination that a claimant is a 'prevailing party,' thus operates as a one-time threshold for fee eligibility. . . .

. . . .

Any given civil action can have numerous phases. While the parties' postures on individual matters may be more or less justified, the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than as atomized line-items. . . .

. . . .

The 'substantial justification' requirement of the EAJA establishes a clear threshold for determining a prevailing party's eligibility for fees, one that properly focuses on the governmental misconduct giving rise to the litigation. The EAJA further provides district courts discretion to adjust the amount of fees for various portions of the litigation, guided by reason and statutory criteria.

Jean's ruling that there is only a single determination of the threshold question of substantial justification was followed in *Chiu v. United States*, 948 F.2d 711, 715, 722 (Fed. Cir. 1991) (applying the 1985 EAJA amendments to determine whether the overall position of the United States is substantially justified, trial courts are instructed 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) and in *C&C Plumbing & Heating*, ASBCA No. 44270, 95-2 BCA ¶ 27,806 at 138,643 (only one threshold determination on substantial justification is to be made for the entire civil litigation, citing *Jean*). *Commercial Energies, Inc.*, ASBCA Nos. 47106, 50316, 00-1 BCA ¶ 30,907 at 152,490, is to the contrary. However, it did not address *Jean*, which is controlling.

We hold that respondent's overall position in the agency action and the adversary adjudication in ASBCA Nos. 51707 and 53953 was not substantially justified.

Special Circumstances. Respondent has not contended that there are any special circumstances that would make an award of fees and costs unjust with respect to this application. 5 U.S.C. § 504(a)(1).

The government's other arguments relate to quantum rather than entitlement and, accordingly, are not discussed. We remand the determination of the amount of attorneys' fees and expenses to the parties for their resolution in accordance with the foregoing decision.

Dated: 1 December 2004

DAVID W. JAMES, JR.
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 Nos. 51707, 53953, Appeals of Clauss Construction, rendered in accordance with 5 U.S.C. § 504.

Dated:

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