

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access)
to Justice Act of --)
)
PNL Commercial Corporation) ASBCA No. 53816
)
Under Contract No. NAFTJ3-00-C-0010)

APPEARANCE FOR THE APPELLANT: Michael T. Haire, Esq.
Fisher, Rushmer, Werrenrath,
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APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON RESPONDENT'S MOTION TO DISMISS

PNL Commercial Corporation (PNL) has applied for an award of \$43,453.09 in attorney's fees and expenses incurred in pursuing its appeal seeking additional time and money under a construction contract with a nonappropriated fund instrumentality. We sustained the appeal in part, *PNL Commercial Corp.*, ASBCA No. 53816, 04-1 BCA ¶ 32,414, and familiarity with our decision is presumed. Respondent has moved to dismiss the application for lack of subject matter jurisdiction on the ground that the appeal was not subject to the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* and hence fees and costs may not be awarded under the Equal Access to Justice Act, 5 U.S.C. § 504. We grant the motion and dismiss the application.

The relevant facts are not now in dispute. Both parties pleaded (*see* compl., ¶ 1; answer, ¶ 1), tried and briefed the case on the premise that it was subject to the Contract Disputes Act. However, that position is at odds with the contract, as both parties now recognize in their motion papers. As set forth in finding 2 of our decision, PNL's contract contained a DISPUTES clause that provided in part:

- (a) This contract is subject to the rules and regulations prescribed by the Secretary of Defense and Secretary of the Army for NAF [nonappropriated fund] contracting.

(b) The contract is not subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613).

The Disputes clause also provided for an appeal and decision by this Board. *PNL Commercial Corp., supra*, 04-1 BCA at 160,452. The contract also contained clause 66, NONAPPROPRIATED FUND INSTRUMENTALITY, which provided:

The Nonappropriated Fund Instrumentality (NAFI) which is a party to this contract is a nonappropriated fund instrumentality of the Department of Army. NBO [sic] APPROPRIATED FUNDS OF THE UNITED STATES SHALL BECOME DUE OR PAID THE CONTRACTOR BY REASON OF THIS CONTRACT. This contract is NOT subject to the Contract Disputes Act of 1978.

(*Id.* capitalization in original)

The identity of the particular nonappropriated fund instrumentality involved in this appeal does not appear to be in the original record. Consistent with clause 66, the contract defines the contracting entity as “a nonappropriated fund instrumentality of the Department of the Army,” without further particularity. The contract was signed by an Army Corps of Engineers contracting officer, but he appears to have been acting as agent for the nonappropriated fund instrumentality. *See Dae Lim Industries Co., Ltd.*, ASBCA No. 28416, 86-3 BCA ¶ 19,244 at 97,318 n.4, *vacated in part on other grounds*, 87-3 BCA ¶ 20, 110. The motion papers also do not disclose the contracting activity. Given this state of the record, we directed counsel to identify the nonappropriated fund instrumentality by order dated 6 February 2004. Thereafter, both parties advised, in the words of respondent’s counsel, that “[t]he Air Force Lodging Fund . . . is the NAF instrumentality that approved and funded the Temporary Lodging Facility at Patrick AFB” (letter to Recorder from respondent’s counsel dated 12 February 2004; *see also* letter to Acting Recorder from PNL’s counsel dated 13 February 2004). Respondent’s counsel also opined that the Air Force Lodging Fund “is the equivalent of the Army/Air Force Exchange Service [AAFES]” (letter to Recorder from respondent’s counsel dated 12 February 2004).

In its motion to dismiss, respondent embraces the contract’s Disputes clause, as well as clause 66, and asserts that the nonappropriated fund instrumentality involved is “unrelated to the exchange services” (Respondent’s Motion to Dismiss Appellant’s Application for Attorney’s Fees and Costs Under the Equal Access to Justice Act (Motion) at 1). Respondent contends that “the underlying appeal was not subject to the Contract Disputes Act,” and that our jurisdiction derived solely from the Disputes clause. Respondent notes that our jurisdiction to award fees and costs under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, is confined to appeals adjudicated under the Contract

Disputes Act and, hence, the present application must be dismissed. (Motion at 2-3) For its part, PNL argues that it would be unjust and inequitable to “direct” it to apply for fees through our Interim Procedures under the Equal Access to Justice Act, and then to deny relief for lack of jurisdiction. (PNL’s Reply to the Order of the Board Dated December 3, 2003 (Reply) at 2) PNL also asserts that denying fees and costs to a prevailing party under a NAFI contract frustrates an alleged Congressional intent to permit any prevailing contractor to recover fees and costs under EAJA. (*Id.*) PNL urges that we read the contract to incorporate EAJA’s provisions. (*Id.*)

We grant the motion and dismiss the application for two reasons. *First*, the plain terms of EAJA itself confine awards to Contract Disputes Act appeals, and our jurisdiction here was founded on our charter and the Disputes clause. Under 5 U.S.C. § 504(a), fees and other expenses are limited to those awarded in an “adversary adjudication.” The relevant definition of an “adversary adjudication” in EAJA is “any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607).” 5 U.S.C. § 504(b)(1)(C). We have long given effect to this unambiguous statutory language. *E.g.*, *Maitland Brothers Co.*, ASBCA No. 24032, 86-2 BCA ¶ 18,796 at 94,722 (holding Board’s EAJA jurisdiction limited to Contract Disputes Act appeals).

Our jurisdiction over the underlying appeal here flowed from our charter and the contract’s Disputes clause. Considering the record as it now stands, we accept the representation that “[t]he Air Force Lodging Fund . . . is the NAF instrumentality that approved and funded the Temporary Lodging Facility at Patrick AFB.” (Letter to Recorder from respondent’s counsel dated 12 February 2004) Yet the only nonappropriated fund instrumentalities that are encompassed by the Contract Disputes Act are those that are specifically designated. Section 3(a) of the Act provides that the statute applies to certain express or implied contracts “of the nonappropriated fund activities described in sections 1346 and 1491 of title 28, United States Code.” 41 U.S.C. § 602(a). In turn, the latter two provisions are confined to the military exchange services, including AAFES, the Coast Guard Exchanges, and the Exchange Councils of the National Aeronautics and Space Administration. 28 U.S.C. §§ 1346, 1491.

The Air Force Lodging Fund cannot be regarded as one of the activities covered by 28 U.S.C. §§ 1346 and 1491. Despite respondent’s irreconcilable positions that the Fund, on the one hand, “is the equivalent” of AAFES (Letter to Recorder from respondent’s counsel dated 12 February 2004), and, on the other hand, is “unrelated to the exchange services” (Motion at 1), the present record affords no basis for equating the Fund to an exchange. Appellant has made no showing, and there is no reason to believe, that the Fund “is closely affiliated with a post exchange,” *Pacrim Pizza Co. v. Pirie*, 304 F.3d 1291, 1293 (Fed. Cir. 2002), and that it meets the three-part test of *McDonald’s Corp. v. United States*, 926 F.2d 1126, 1133 (Fed. Cir. 1991). The Fund appears

comparable to the Morale, Welfare and Recreation funds that do not fall within the enumerated exchange provisions. *Pacrim Pizza, supra*, 304 F.3d at 1293; *Computer Valley International, Ltd.*, ASBCA Nos. 39658, 40496, 94-1 BCA ¶ 26,297 at 130,796, *aff'd on reconsid.*, 94-1 BCA ¶ 26,528; *see also McDonald's Corp., supra*, 926 F.2d at 1132 (expressing doubt that “an organization serving the recreational needs of servicemen” would be included with those designated in 28 U.S.C. § 1491).

Inasmuch as the Fund is not one of the nonappropriated fund instrumentalities designated in 28 U.S.C. §§ 1346 and 1491, the appeal was not subject to the Contract Disputes Act. Under our charter, we have jurisdiction to decide appeals “pursuant to the provisions of contracts requiring a decision by the Secretary of Defense or by a Secretary of a Military Department or their duly authorized representative or board,” 48 C.F.R. Subchapter I Appendix A, ¶ 1 (2000), and the Disputes clause in the present contract so provided.

Second, PNL’s arguments in favor of jurisdiction need give us little pause. Contrary to PNL, our Interim Procedures do not “direct” parties to apply for fees and costs. Paragraph 2 of the Interim Procedures makes clear that they “are intended to assist the parties in adjudication of EAJA applications,” not to direct the parties. In addition, PNL’s contention that we should read EAJA expansively to fulfill the alleged Congressional intent disregards the fact that EAJA “amounts to a partial waiver of sovereign immunity,” and, as such, “must be strictly construed in favor of the United States,” *Ardestani v. INS*, 502 U.S. 129, 137 (1991); *see also Fanning, Phillips & Molnar v. West*, 160 F.3d 717, 721 (Fed. Cir. 1998).

Respondent’s motion to dismiss is granted. PNL’s application is dismissed for lack of jurisdiction.

Dated: 27 February 2004

ALEXANDER YOUNGER
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. 53816, Appeal of PNL Commercial Corporation, rendered in accordance with 5 U.S.C. § 504.

Dated:

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