

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application under the Equal Access  
to Justice Act -- )  
)  
C.H. Hyperbarics, Inc., on behalf of ) ASBCA Nos. 49375, 49401, 49882,  
William J. Miller, Jr., Trustee ) 53077, 53078, 53079,  
) 53080, 53292  
Under Contract Nos. N47408-94-C-4025 )  
N47408-94-C-4036 )

APPEARANCES FOR THE APPELLANT: Joseph A. Camardo, Jr., Esq.  
Kevin M. Cox, Esq.  
Law Firm of Joseph A. Camardo, Jr.  
Auburn, NY

APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.  
Navy Chief Trial Attorney  
David L. Koman, Esq.  
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TODD

C.H. Hyperbarics, Inc., on behalf of William J. Miller, Jr., Trustee (CHHI), filed a timely application under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, for payment of fees and other expenses incurred in connection with the subject appeals after we held appellant entitled to a partial recovery of \$111,929, plus interest. *C.H. Hyperbarics, Inc.*, ASBCA No. 49375 *et al.*, 04-1 BCA ¶ 32,568. In our 9 June 2005 decision on the application, we held appellant entitled to a reasonable award. In an exercise of discretion on a jury verdict basis, we concluded that appellant was entitled to seven percent of the EAJA fees and costs it reasonably incurred and remanded the determination of the amount to the parties for their negotiation. *C.H. Hyperbarics, Inc.*, ASBCA No. 49375 *et al.*, 05-2 BCA ¶ 32,989. Familiarity with the Board's decision is presumed. We stated that the Board would determine the allowability and amount of fees and expenses in dispute if the parties failed to agree within 60 days from the date of the opinion.

STATEMENT OF FACTS

The government made an offer of settlement of the EAJA fees and expenses to appellant, but appellant neither accepted the offer nor made a counteroffer. On 3 August 2005, the government notified the Board that it was unable to reach agreement with

appellant and requested that the Board determine the allowability and amount of the fees and expenses. The government submitted to the Board that the amount of its offer of \$6,150 was the fair amount. The government calculated the amount as seven percent of the revised total amount of appellant's EAJA application of \$87,841.72.

Appellant did not provide any information to the Board upon receipt of a copy of the government's letter. On 10 August 2005, the Board ordered appellant to provide its agreement to the government's offer, or otherwise state its position, no later than 9 September 2005, to allow the Board to consider the record in this matter closed and ready for decision on 12 September 2005. Appellant requested an extension of time because counsel was having difficulty conferring with the trustees in bankruptcy. The Board granted the extension and advised the parties that the matter would be ready for decision on 20 September 2005.

On 19 September 2005, appellant submitted its response to the Board's Order. Appellant stated in pertinent part:

[The amount of \$6,150] is incorrect since it is based on a percentage of the *adjusted* EAJA figure. If the Board correctly applies the 7% to the Gross EAJA Amount of \$125,158.71, then the correct amount of the EAJA award according to the Board's order is \$8,761.11.

(App. ltr; emphasis in original; footnote omitted.)

### DECISION

CHHI's application was for 70 percent of a total amount of \$125,158.71, or \$87,611.10. Appellant eliminated certain charges from the amount of \$171,840.04 it stated CHHI was billed at attorney rates of \$85 to \$125 per hour and submitted an allocation method to justify 70 percent as the portion of the appeals on which it allegedly was the prevailing party (app. applic. at 11-13). Appellant included a 55-page Summary of Fees and Costs detailing billing date, description of work, hours, hourly billing rate, subtotal fees, travel expenses, and other direct costs in its application (app. applic., ex. 3). Appellant revised its application to make a downward adjustment for the attorney hourly rate and an upward adjustment for fees incurred for preparation of the EAJA application and reply brief. The revised amount of the application was \$87,841.72.\*

---

\* Appellant made an adjustment to the amount of \$125,158.71 claimed to have been reasonably incurred and multiplied it by 70.01 percent to change the amount of the application to \$77,909.08 (app. reply at 10). We calculate the revised amount of costs alleged to have been reasonably incurred as \$111,282.79. Appellant

The government opposed the application on the grounds that it was not responsible for costs that were for issues on which the government was the prevailing party, were for issues unrelated to any of the issues in the appeals, or were unreasonable for the tasks charged. The government made a detailed review of appellant's Summary of Fees and Costs to analyze the total amount that appellant should recover (gov't answer at 28-76). Appellant replied that its application was conservative, and it had incorporated discounts and adjustments in preparing the Summary (app. reply at 10).

Most of the government's reductions of recoverable costs in its analysis relate to issues on which it was the prevailing party which we have determined in the entitlement proceeding warrants application of a seven percent recovery. To the extent the tasks performed were unrelated to the issues or unreasonable in the time spent, we consider that the total amount of incurred costs should be reduced. The government's detailed assessment has enabled us to make a calculation of the appropriate amount of the reduction (gov't answer at 28-40, 45, 62-64). On the basis of appellant's Summary and the government's specific analysis, our determination is that appellant reasonably incurred the amount of \$86,054.25 in litigating the appeals ( $\$111,282.79 - 25,228.54 = \$86,054.25$ ). In addition, appellant reasonably incurred the amount of \$9,932.64 in fees in connection with the EAJA application, for a total of \$95,986.89. The Board allows reasonable fees incurred in the preparation and defense of the application, but reduces the amount proportionately to account for the positions on which the applicant was unsuccessful. *See INS v. Jean*, 496 U.S. 154, 163, n.10 (1990); *Prowest Diversified, Inc. v. United States*, 40 Fed. Cl. 879 (1998); *Walsky Construction Co.*, ASBCA No. 41541, 96-1 BCA ¶ 28,258 at 141,091-92. Accordingly, the seven percent entitlement recovery is applied to the amount of \$95,986.89 to calculate the award.

We conclude that appellant is entitled to a reasonable award of \$6,719 for EAJA fees and expenses.

Dated: 18 October 2005

---

LISA ANDERSON TODD  
Administrative Judge  
Armed Services Board  
of Contract Appeals

---

included a spreadsheet detailing the billing date, hours, and hourly rate, which the government did not oppose, showing the total amount of \$9,932.64 incurred in connection with the EAJA application (app. reply, ex. 1).

I concur

---

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

I concur

---

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. 49375, 49401, 49882, 53077, 53078, 53079, 53080, 53292, Appeals of C.H. Hyperbarics, Inc., on behalf of William J. Miller, Jr., Trustee, rendered in accordance with 5 U.S.C. § 504.

Dated:

---

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