

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access)
to Justice Act of --)
)
Freedom NY, Inc.) ASBCA No. 55466
)
Under Contract No. DLA13H-85-C-0591)

APPEARANCE FOR THE APPELLANT: Gilbert J. Ginsburg, Esq.
Washington, DC

APPEARANCE FOR THE GOVERNMENT: Michael L. McGlinchey, Esq.
Chief Trial Attorney
Defense Supply Center (DLA)
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE JAMES

Appellant's (FNY) timely 23 July 2008 application (appl.) requests \$29,280.60 in attorneys' and paralegal fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, arising from *Freedom NY, Inc.*, ASBCA No. 55466, 08-1 BCA ¶ 33,751, *recon. denied* (slip op., 26 March 2008). The Board's 24 July 2008 letter to the parties stated that the Board intended to decide the issue of substantial justification and other questions related to entitlement to recovery raised by the record. The government responded to FNY's application on 22 August 2008. FNY replied to the government's response on 8 and 9 September 2008.

DECISION

Eligibility. Respondent does not dispute FNY's EAJA eligibility (answer at 1).

Prevailing Party. To be a "prevailing party," a party must succeed on any significant issue in litigation which achieves some of the benefit the party sought in bringing the suit. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 790 (1989) (noting that *Hensley v. Eckerhart* indicates that the degree of plaintiff's success in relation to other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, not to eligibility for a fee award at all). Where separate claims are involved, they should be treated as separate lawsuits, and no fee should be awarded for services on unsuccessful

claims. *BH Services, Inc.*, ASBCA No. 39460, 94-1 BCA ¶ 26,468 at 131,725, citing *Hensley v. Eckerhart*, 461 U.S. at 435.

FNY asserts that it was a prevailing party in ASBCA No. 55466, relying entirely upon its success in prior appeals (appl. at 6-7). Respondent argues that FNY prevailed only on some, but not all, of its claims in ASBCA No. 55466 (answer at 4).

Our published decision in ASBCA No. 55466 addressed four separate claims: (1) CDA interest on five unpaid invoices totaling \$246,947, (2) PPA interest on those five unpaid invoices, (3) CDA interest on \$262,569 in “Contract costs” and (4) CDA interest on the \$64,318 subcontractor settlement. Of these four claims, FNY prevailed only on numbers 1 and 2. 08-1 BCA at 167,078-79.

The operative facts for each of FNY’s denied claims are sufficiently distinct and severable from those in the successful unpaid invoice claims to justify allocation of EAJA fees and expenses only to the latter. *See Hensley*, 461 U.S. at 440 (when plaintiff failed to prevail on a claim distinct in all respects from his successful claims, hours spent on the unsuccessful claim should be excluded); *Decker and Co., GmbH*, ASBCA Nos. 33285, 38656, 93-3 BCA ¶ 26,140 at 129,952 (EAJA fees awarded for one of four claim items found “distinct and severable”). We believe that under such circumstances, FNY’s EAJA recovery must be apportioned to the unpaid invoice claims on which it prevailed. *See C.H. Hyperbarics, Inc.*, ASBCA Nos. 49375 *et al.*, 05-2 BCA ¶ 32,989 at 163,492 (recovery apportioned when contractor was prevailing party on 17 of 36 claims).

Substantial Justification. To avoid EAJA recovery, respondent must demonstrate that its position in the underlying agency action and in the adversary adjudication, with respect to the two claims on which FNY prevailed, was substantially justified. 5 U.S.C. § 504(b)(1)(E). FNY asserts that respondent’s position was not substantially justified (appl. at 7-9). Respondent asserts, citing *Decker & Co.*, ASBCA No. 38238, 92-2 BCA ¶ 24,815, that since the parties settled the amount due FNY for CDA and PPA interest for \$161,000 and FNY rejected respondent’s offers of \$293,000 and \$371,000 to settle the dispute before our decision, its position was “substantially justified.”

Decker was an unusual case in which the appellant failed to support the costs claimed and the Board found entitlement in the amount the contracting officer thought the claim was worth. We stated: “If appellant had accepted the Government’s offer instead of insisting before the Board on recovery of the full amount of its claim, this litigation would not have gone forward and the expenses would not have been incurred.” In the present case, respondent offered to settle five months after the contracting officer issued his final decision and over two months after the adversary litigation had commenced. Moreover, proof relating to rejection of government settlement offers normally is relevant to the reasonableness of the EAJA award. *See Kos Kam, Inc.*, ASBCA No. 34684, 88-3 BCA ¶ 21,049 (tender and refusal of a settlement offer may be

probative of the reasonableness of attorney's fees and other expenses incurred after the applicant has declined to accept a settlement); *Charles G. Williams Construction, Inc.*, ASBCA No. 42592, 93-3 BCA ¶ 25,913 at 128,914 (rejection of settlement offer is relevant to reasonableness of EAJA fees and expenses awarded, citing *Kos Kam* and distinguishing *Decker*); *Oneida Construction, Inc./David Boland, Inc., Joint Venture*, ASBCA Nos. 44194 *et al.*, 95-2 BCA ¶ 27,893 at 139,147 (rejected settlement offers are relevant to the reasonableness of the fee sought rather than to the issue of substantial justification). Hence, we address respondent's contention under the heading Reasonableness, *infra*.

Under the EAJA substantial justification requirement, "only one threshold determination for the entire civil action is to be made.... The 'substantial justification' requirement...properly focuses on the governmental misconduct giving rise to the litigation." *Commissioner v. Jean*, 496 U.S. 154, 159, 165 (1990). We held in ASBCA No. 55466, 08-1 BCA ¶ 33,751, that FNY was entitled to receive CDA and PPA interest on the \$246,947 principal amount FNY recovered in the 29 December 2000 convenience termination settlement. Defense Supply Center Philadelphia's (DSCP) refusal to pay CDA and PPA interest on that \$246,947 before the instant litigation arose (08-1 BCA at 167,078) weighs heavily in deciding whether a reasonable person could think such position was correct or had a reasonable basis in law and fact. *See Pierce v. Underwood*, 487 U.S. 552, 566, n.2 (1988) (reasonable person test); *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) (position encompasses the entirety of government conduct). We hold that respondent's position was not substantially justified on the two claims on which FNY prevailed.

Reasonableness. Respondent contends that, after the 9 June 2006 docketing of ASBCA No. 55466, on 21 August 2006 DSCP offered \$293,000 and on 11 October 2006 offered \$371,000, to FNY to settle this appeal and that FNY rejected both of those offers. FNY maintains that it accepted an amount of \$393,249.09 (\$371,000 plus a purported additional \$22,249.09) and was forced to continue litigation when the government withdrew the offer (app. reply at 3-4).

The parties disagree about whether FNY accepted respondent's settlement offers. We have reviewed the record and conclude, based on FNY's president's 20 November 2006 letter to DSCP, that FNY rejected respondent's offers. That letter referenced "DSCP Offer of \$393,249.09." It stated (R4, tab 34 at 1-2):

Commander
Defense Supply Center Philadelphia....

Dear General Cross:

This letter is in response to a DSCP settlement offer to settle the Freedom ASBCA claim number 55466 which was made to Freedom in a letter dated 11 October 2006 by Mr. Paul E. Zembrowski formerly of your office.

As background, I sent to you a letter dated April 10, 2006 requesting that you investigate the abuse of authority that was being perpetrated by members of your command against Freedom....

Since that time, I and members of my consulting and accounting team have met and or talked with Mr. Paul Zembrowski.... It now appears that we have come to an impasse and have not been able to satisfactorily resolve this matter. As it stands to date, Mr. Zembrowski in his last communication prior to his departure proposed to pay Freedom five per cent (5%) of the value of the five (5) invoices at issue [\$12,347.35]....

....

[I]t is Freedom's position that it is due the PPA and CDA interest as originally claimed in the amount of \$490,000 that is now approximately \$501,321 as of November 10, 2006.

It is apparent that on 20 November 2006 FNY rejected DSCP's prior settlement offers.

Since FNY rejected two very favorable settlement offers and continued to litigate, any fees and expenses incurred after 20 November 2006 must be reduced. *See AST Anlagen-und Sanierungstechnik GmbH*, ASBCA No. 42118, 93-3 BCA ¶ 25,979 at 129,182 (EAJA fees and expenses reduced considering the amount awarded, work on subcontractor claims on which AST did not prevail and AST's unreasonable rejection of government's prehearing settlement offer); *Charles G. Williams Construction, Inc.*, 93-3 BCA at 128,914; *Sage Construction Co.*, ASBCA No. 34284, 92-1 BCA ¶ 24,493 at 122,240 (rejection of \$46,055 settlement offer during trial to obtain an additional \$2,705 of recovery, while incurring \$14,000 in attorney's fees, "was a small victory for Sage at great expense").

For the guidance of the parties, we note that Mr. Ruttenberg's fees, which FNY incurred prior to March 2001 (appl., ex. 4B), are not recoverable in connection with ASBCA No. 55466, an adversary adjudication which commenced in 2006 (08-1 BCA at 167,077, finding 23).

We remand the application to the parties for resolution of quantum based on our foregoing decision.

Dated: 4 December 2008

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 No. 55466, Appeal of Freedom NY, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

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