ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access to Justice Act --	)	
Poly Design, Inc.	)	ASBCA Nos. 48591, 49823 50862
Under Contract No. N00164-94-C-0104	)	

APPEARANCES FOR APPELLANT: Daniel J. Riley, Esq.
O. Kevin Vincent, Esq.
Baker & Botts, LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Richard A. Gallivan, Esq.
Assistant Director
David L. Koman, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE THOMAS

Applicant Poly Design, Inc. (PDI) seeks attorney's fees and other expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. PDI filed the underlying appeals pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613. The Board dismissed the appeals with prejudice following a settlement. We decide that under *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) (*Buckhannon*), PDI does not qualify for an award because it is not a prevailing party.

PROCEDURAL HISTORY

Contract

On 5 May 1994, the Navy awarded PDI Contract No. N00164-94-C-0104 for the supply of dry nitrogen storage cabinets. The contract included standard clauses FAR 52.249-02 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984) and FAR 52.249-08 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984). (App. reply, binder 1, ex. 1 at 1, 20)

On 26 January 1995, the contracting officer terminated the contract for default. On 8 April 1996, the contracting officer notified PDI that it owed the Government $127,686 in excess reprocurement costs. (Gov't opp., binder 1, exs. G-67, -79)

On 11 February 1997, PDI submitted a termination for convenience settlement claim in the amount of $327,696.42 (ASBCA No. 50862, compl. and answer ¶ 10). On 9 April 1997, the contracting officer issued a final decision denying the claim (Gov't opp., binder 1, ex. G-81).

Appeals

On 28 March 1995, PDI timely appealed the termination for default. The appeal was docketed as ASBCA No. 48591. In its complaint, PDI requested that the Board find that the termination for default was "improper and unjustified" and remand the matter to the parties for negotiation of the amount of the convenience termination settlement to which PDI was entitled (compl. at 16).

On 9 May 1996, PDI timely appealed the assessment of excess reprocurement costs. That appeal was docketed as ASBCA No. 49823. In its complaint, PDI requested that the Board find that PDI was not liable to pay the sum of $127,686.

On 3 July 1997, PDI timely appealed the contracting officer's denial of its termination for convenience claim. The appeal was docketed as ASBCA No. 50862. In its complaint, PDI requested that the Board sustain the appeal in the amount of the convenience termination settlement to which PDI was entitled plus interest.

The Board consolidated the appeals and set them for hearing starting 11 May 1998. The Board also dismissed ASBCA No. 50862 without prejudice to reinstatement pursuant to Board Rule 30, determining that "judicial economy would not be served by allowing this appeal to be litigated concurrently with ASBCA Nos. 48591 and 49823." *Poly Design, Inc.*, ASBCA No. 50862, 98-1 BCA ¶ 29,458 at 146,229.

On 27 April 1998, the parties notified the Board that they had settled all three of the appeals but had been unable to resolve the issue of attorney's fees and other expenses under the EAJA. The hearing was canceled.

Settlement Agreement

Effective 1 June 1998, the contracting officer issued bilateral Modification No. P00006 incorporating the parties' "RELEASE AND ACCORD FOR THE PURPOSE OF SETTLING ALL CONTRACTOR CLAIMS UNDER CONTRACT NO. N00164-94-C-0104" (the Settlement Agreement). The parties agreed in the Settlement Agreement:

1. The Contractor [PDI] hereby agrees, within ten calendar days after it receives the payment contemplated by paragraph 8 below, to prepare and file a motion to dismiss with prejudice its appeals docketed as ASBCA Nos. 48591, 49823 & 50862.

. . . .

4. The Government [Navy] hereby agrees to convert the termination for default in Contract No. N00164-94-C-0104, (ASBCA No. 48591) into a termination for convenience, and dismiss its reprocurement claim which is the subject of ASBCA No. 49823.

. . . .

8. The Government hereby agrees to pay to the Contractor, and the Contractor agrees to accept, the sum of ONE HUNDRED AND TWENTY-FIVE THOUSAND DOLLARS ($125,000), as full payment of any and all past, present or future claims, or potential claims, arising out of or related to Contract No. N00164-94-C-0104 . . . except as specifically provided herein.

9. That this Agreement does not release, waive, settle, concede, or constitute an accord and satisfaction of the Contractor's right to seek the recovery of attorney fees, costs and other litigation expenses that it could potentially obtain under the Equal Access to Justice Act (5 U.S.C. § 504 and 28 U.S.C. § 2412) . . . .

10. That this Agreement does not release, waive, settle, concede or constitute an accord and satisfaction of the Contractor's right to assert that it was the prevailing party in these appeals or that the Government's positions in these appeals were not substantially justified.

11. That this Agreement does not release, waive, settle, concede or constitute an accord and satisfaction of the Government's right to assert that it was the prevailing party and/or substantially justified in its positions in these appeals, or right to challenge the reasonableness of any

> requests for attorney fees, costs or expenses which the Contractor may seek pursuant to paragraph 9 of this Agreement.

(ASBCA No. 48591, Corresp. file, Vol. II, App. Motion to Dismiss dated 12 Aug. 1998, Ex. A)

Dismissal of the Appeals

On 12 August 1998, PDI filed a motion to dismiss all three of the appeals with prejudice. PDI stated:

> Appellant Poly Design, Inc. hereby advises the Board that the claims underlying the disputes between the parties that are the subject of ASBCA Nos. 48591, 49823 and 508[62] have been compromised and fully settled. Accordingly, pursuant to the parties' settlement agreement dated June 1, 1998 . . . Appellant moves the Board to dismiss each of these appeals with prejudice to the refiling of same.

On 13 August 1998, the Board's Recorder signed an "ORDER OF DISMISSAL" of the appeals. The order stated in full text:

> The disputes in the above-referenced appeals having been settled by the parties, the appeals are dismissed with prejudice.

Appellant did not seek a consent decree or judgment from the Board and the Board did not issue such a judgment.

EAJA Application and Response

On 29 June 1998, PDI filed an application for fees and other expenses under the EAJA with respect to the three appeals. PDI requested an award in the amount of $234,737.05.

In its opposition to the application, the Navy argued that the application should be denied in its entirety because its position was substantially justified in all three appeals and because PDI was not a prevailing party in ASBCA No. 50862 (relating to the termination for convenience claim). The Navy did not dispute PDI's eligibility for an award or the timeliness of the application.

Following issuance of *Buckhannon*, the Navy filed a memorandum arguing that PDI was not a prevailing party in any of the appeals. PDI responded that *Buckhannon* had not changed its status as a prevailing party.

DECISION

The EAJA provides that:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1). An adversary adjudication includes any appeal of a contracting officer's decision pursuant to section 6 of the CDA, 41 U.S.C. § 605, before an agency board of contract appeals. 5 U.S.C. § 504(b)(1)(C). The issue before the Board is whether, in light of *Buckhannon*, PDI was a prevailing party in the appeal proceedings before the Board. In view of our disposition of that issue, we do not reach the question whether the Government's positions were substantially justified.

1. The *Buckhannon* Case

In *Buckhannon*, petitioners sued the State of West Virginia and other parties. Petitioners alleged that certain provisions of the West Virginia Code violated the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601 *et seq*., and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq*. Following changes to the West Virginia Code which eliminated the provisions, the District Court dismissed the action as moot. Petitioners then sought attorney's fees under 42 U.S.C. §§ 3613(c)(2) and 12205 as the "prevailing party." Petitioners proceeded "under the 'catalyst theory,' which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." 149 L. Ed. 2d at 861. The District Court denied an award of fees and the Court of Appeals for the Fourth Circuit affirmed.

The Supreme Court affirmed the Circuit's denial of fees. The Court stated that the question presented was whether the term "prevailing party" as used in federal fee-shifting statutes "includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." 149 L. Ed. 2d at 860. The Court first noted that Black's Law Dictionary defines "'prevailing party' as '[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded (in

certain cases, the court will award attorney's fees to the prevailing party). — Also termed *successful party*.'" 149 L. Ed. 2d at 862. The Court said that this "view that a 'prevailing party' is one who has been awarded some relief by the court can be distilled from our prior cases" (footnote omitted). It continued that "[i]n addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees," citing *Maher v. Gagne*, 448 U.S. 122 (1980). The Court explained that "[a]lthough a consent decree does not always include an admission of liability . . . it nonetheless is a court-ordered 'chang[e] [in] the legal relationship between [the plaintiff] and the defendant.'" 149 L. Ed. 2d at 862 (citation omitted).

The Court contrasted consent decrees with private settlements:

> We have subsequently characterized the *Maher* opinion as also allowing for an award of attorney's fees for private settlements. . . . But this dicta ignores that *Maher* only "held that fees *may* be assessed . . . after a case has been settled by the entry of a consent decree." *Evans v Jeff D.*, 475 U.S. 717, 720, 89 L. Ed. 2d 747, 106 S. Ct. 1531 (1986). Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal. See *Kokkonen v Guardian Life Ins. Co. of America*, 511 U.S. 375, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994).

149 L. Ed. 2d at 863 n.7 (citations omitted).

After discussing the examples of judgments on the merits and consent decrees, the Court stated:

> We think, however, the "catalyst theory" falls on the other side of the line from these examples. It allows an award where there is no judicially sanctioned change in the legal relationship of the parties. . . . A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change.

149 L. Ed. 2d at 863. The Court concluded that "we hold that the 'catalyst theory' is not a permissible basis for the award of attorney's fees . . . ." 149 L. Ed. 2d at 867.

2. Application of *Buckhannon* to PDI's Case

It is correct that prior to *Buckhannon* our case law did not distinguish for EAJA purposes, applicants who requested dismissal of their appeals without the issuance of a consent judgment, and those who requested and received the issuance of a consent judgment. *Compare Lucia E. Naranjo*, ASBCA No. 52084, 00-2 BCA ¶ 30,937 *with Arapaho Communications, Inc./Steele & Sons, Inc., Joint Venture*, ASBCA No. 48235, 98-1 BCA ¶ 29,563.

However, the Court's construction of "prevailing party" in *Buckhannon* is applicable not only to the specific statutes before it but also to the use of that term in other federal statutes such as the EAJA allowing courts and administrative tribunals to award attorney's fees and expenses to the "prevailing party." *See* 149 L. Ed. 2d at 862 n.4; *Commissioner, INS v. Jean*, 496 U.S. 154, 160-61 (1990); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Brewer v. American Battle Monuments Comm'n*, 814 F.2d 1564, 1567 n.1 (Fed. Cir. 1987).

In *Buckhannon*, the Court struck a line of demarcation between judgments on the merits and court-ordered consent decrees on the one hand and other cases where there is no judicially sanctioned change in the legal relationship of the parties. The Court noted explicitly that private settlements "do not entail the judicial approval and oversight involved in consent decrees." It also noted that "federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal." 149 L. Ed. 2d at 863 n.7. In PDI's case, following a settlement two weeks before the scheduled hearing, the Board dismissed the appeals with prejudice as requested by PDI. PDI did not request, and the Board did not issue, a decision on the merits or a consent decree. The Board did not approve or assume oversight of the settlement or incorporate the terms of the settlement agreement in the order of dismissal. We conclude, therefore, that the Board's disposition does not qualify as a judgment on the merits or consent decree which would pass muster under *Buckhannon*.

CONCLUSION

We deny the application.

Dated: 26 October 2001

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board

of Contract Appeals

I concur

I concur

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

JACK DELMAN
Administrative Judge
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. 48591, 49823, 50862, Appeals of Poly Design, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals