

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access)
to Justice Act --)
)
D.E.W., Inc. and D. E. Wurzbach,) ASBCA Nos. 50796 and 51190
A Joint Venture)
)
Under Contract No. DACA63-86-C-0043)

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OPINION BY ADMINISTRATIVE JUDGE TUNKS

D.E.W., Inc. and D. E. Wurzbach, A Joint Venture (applicant or DEW) seek an award of \$112,101.05 under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, for fees and other expenses incurred in connection with *D.E W., Inc. and D. E. Wurzbach, A Joint Venture*, ASBCA Nos. 50796, 51190, 00-2 BCA ¶ 31,104, *modified on reconsid.*, 01-1 BCA ¶ 31,150. ASBCA No. 50796 arises from the deemed denial of DEW’s termination settlement claim, and ASBCA No. 51190 is an appeal from a Government claim for costs resulting from DEW’s alleged “gross disregard” of its contractual obligations. The Government asserts that DEW is not entitled to an EAJA award because its positions in these appeals were substantially justified. *See* 5 U.S.C. § 504(a)(1). In the alternative, the Government argues that the costs claimed for paralegal expense should be reduced. Only entitlement is in issue. We do not address paralegal expense because it relates to quantum.

Background

These appeals arose from the default termination of a contract to build a fuel cell shop for C5-A aircraft. The hangar area of the facility was to be constructed of long span structural steel with trusses spanning up to 265 feet. The contract required that the trusses be connected with ASTM A325 bearing bolts, which have a tolerance of 1/16 inch. The Government terminated the contract for default on 26 October 1987, and DEW’s surety, Trinity Universal Insurance Company (Trinity), completed the work on 28 July 1989. Following a five-day hearing, we converted the termination for default to a termination for

convenience on the basis of technical impossibility. *D.E.W., Inc.*, ASBCA No. 35896, 94-3 BCA ¶ 27,182.

DEW submitted a termination for convenience proposal in the amount of \$15,211,956.10 to the contracting officer on 16 August 1995. In addition to the costs incurred by DEW, the proposal included the costs incurred by Trinity and Trinity's takeover contractor, Templeton Construction Company.

The contracting officer failed to issue a final decision. On 8 April 1996, DEW appealed the deemed denial of its claim to the Court of Federal Claims. The Court transferred the appeal to this Board on 29 May 1997, where it was docketed as ASBCA No. 50796. DEW filed a motion for partial summary judgment, and the Government cross-moved for summary judgment, or in the alternative, for partial summary judgment.

On 19 November 1997, the contracting officer issued a final decision asserting a Government claim of \$1,320,694.10 for costs resulting from applicant's alleged "gross disregard" of its contractual obligations. The appeal of that claim was docketed as ASBCA No. 51190. The Government later increased its claim to \$2,791,954.34.

We issued a decision on the summary judgment motions on 20 November 1997. *D.E.W. and D. E. Wurzbach, A Joint Venture*, ASBCA No. 50796, 98-1 BCA ¶ 29,385. After the decision was issued, DEW reduced its claim to \$8,406,381.00. Before the hearing, Trinity withdrew its portion of the claim. Thereafter, DEW reduced its claim to \$2,246,977.00. A five-day hearing was held in December 1997.

In ASBCA No. 50796, we held that DEW was entitled to termination costs of \$122,771.00. In ASBCA No. 51190, we held that the Government was not entitled to recover on its claim for "gross disregard." *D.E.W.*, 00-2 BCA ¶ 31,104. Thereafter, the parties filed a joint motion for reconsideration requesting us to increase the amount of DEW's termination settlement by \$1,758,065.00, the amount of progress payments withheld to secure liquidated damages. We granted the motion and increased the amount of DEW's termination settlement to \$1,880,836.00. 01-1 BCA ¶ 31,150.

Eligibility

The Government does not dispute that applicant met the eligibility requirements of EAJA at the time of the commencement of these appeals, and we so find. *See* 5 U.S.C. § 504(b)(1)(B).

Prevailing Party

The Government does not dispute that applicant was a prevailing party within the meaning of EAJA. Accordingly we find that applicant was a prevailing party. *See* 5 U.S.C. § 504(a)(1).

Substantial Justification

Under EAJA, the Government bears the burden of proving that its position was substantially justified. *Community Heating & Plumbing Co., Inc. v. Garrett*, 2 F.3d 1143, 1145 (Fed. Cir. 1993); *Campbell v. Bowen*, 800 F.2d 1247, 1249 (4th Cir. 1986). The Government's burden applies to the position asserted in the adversary adjudication as well as to the Governmental action or inaction upon which the adversary adjudication was based. 5 U.S.C. § 504(b)(1)(E); *Valenzuela Engineering, Inc.*, ASBCA No. 50019, slip op. at 2 (20 June 2001). The Government's position is substantially justified "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988). While the parties' positions on individual issues 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." *INS v. Jean, et al.*, 496 U.S. 154, 161-62 (1990) (construing 28 USC § 2412, the counterpart to 5 USC § 504 applicable to civil actions). Thus, in making an EAJA award, we look to the "entirety of the government's conduct and make a judgment call . . ." *Chiu v. United States*, 948 F.2d. 711, 715 (Fed. Cir. 1991).

ASBCA No. 50796: The Termination for Convenience Claim

The Government argues that its position in ASBCA No. 50796 was substantially justified for four reasons: (1) the positions it took in the summary judgment motions resulted in a significant reduction of applicant's claim; (2) it was justified in "proceeding to a hearing for a decision" (Gov't br. at 6); (3) our decision on the merits confirmed its position on the amount due DEW; and (4) it had a reasonable basis for claiming credits of \$1,647,698.00.

Although the Government was successful in part on the motions for summary judgment, its overall position in the litigation was not substantially justified. After we issued our decision on the summary judgment motions and Trinity withdrew its portion of the claim, there was so little in dispute that it is inconceivable to us that the Government did not settle these appeals without a hearing. Of the \$2,226,977.00 remaining in DEW's claim, there was a *bona fide* dispute over only three items. The Defense Contract Audit Agency (DCAA) questioned \$29,561.00 of the \$847,788.00 in material and subcontractor costs paid by Trinity because it was unable to verify that they had been incurred. DCAA questioned \$36,525.00 of the \$688,755.00 claimed for G & A because DEW used a revenue basis instead of a cost basis to calculate the expense. The Government took the position that DEW was not entitled to any profit which, given the impossibility of the design, was clearly unreasonable. In our view, these issues could and should have been

resolved without a hearing. Continued adherence by the Government to its position on the termination for convenience claim under these circumstances was not reasonable.

Moreover, the Board's decision on the merits does not support the Government's position. DCAA's last position on the amount due DEW was (\$417,325.00). We held that DEW was entitled to a termination settlement of \$122,771.00. The parties filed a joint motion for reconsideration requesting us to increase the amount of DEW's termination settlement by \$1,758,065.00, the amount withheld to secure liquidated damages. The Government had initially planned to credit these payments to Trinity's termination settlement claim but, after the hearing, it decided to apply them to applicant's claim. We granted the joint motion, increasing DEW's recovery to \$1,880,836.00.

In addition, the Government did not have a substantial basis for claiming credits of \$1,647,698.00. The first credit was for \$799,910.00, the amount denied in six previously denied equitable adjustment claims. As we indicated in the decision on the merits, the Government's *res judicata*, and/or law of the case arguments were legally unsound. The second credit was for \$847,788.00 in costs paid by Trinity on behalf of applicant. At the hearing, DCAA conceded that all but \$29,561.00 of these costs were recoverable. Thus, the Government did not have a substantial justification for arguing that it was entitled to these credits.

Considering "the entirety of the Government's conduct," *Chiu, supra*, we conclude that the Government has not established that its position in ASBCA No. 50796 was substantially justified.

ASBCA No. 57190: The Government's Claim for "Gross Disregard"

The Government's argument that it had a substantial basis for asserting a claim for "gross disregard" in ASBCA No. 51190 is without merit. In the decision on the termination for default, we stated as follows:

Throughout this dispute, the Government has been immovable in its opinion that poor workmanship was the cause of the alignment problems We are satisfied that poor workmanship neither caused nor contributed to the massive misalignment of bolt holes at the fuel cell shop.

D.E.W., 94-3 at 135,461. Thus, in order to prevail, the Government had to prove which of the defects in the fuel cell shop were caused by DEW's "gross disregard" of its contractual obligations as opposed to the Government's impossible design. The Government did not make this showing. What the Government did was recycle the evidence it submitted in connection with the termination for default and argue once again that all the defects were caused by DEW.

Conclusion

We find that the Government's positions in ASBCA Nos. 50796 and 51190 were not substantially justified. The matter is remanded to the parties for negotiation of quantum in accordance with this decision.

Dated: 26 July 2001

ELIZABETH A. TUNKS
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. 50796 and 51190, Appeals of D.E.W., Inc. and D. E. Wurzbach, A Joint Venture, rendered in accordance with 5 U.S.C. § 504.

Dated:

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