ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access to Justice Act --	)	
Hughes Moving & Storage, Inc.	)	ASBCA No. 45346
Under Contract No. DAAH03-89-D-3007	)	

APPEARANCES FOR THE APPELLANT: John C. Garvin, Jr., Esq.
Henry L. Brown, Esq.
Huntsville, Alabama

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
MAJ Ralph J. Tremaglio, III, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE KIENLEN

We sustained the contractor's appeal from a termination for default of a household goods moving services contract. 98-1 BCA ¶29,693. The contractor timely filed this application on 3 August 1999. The underlying appeal was consolidated for hearing with, but decided separately from, an appeal from a denial of the contractor's claim for monies withheld for damage to household goods. 98-2 BCA ¶30,086. This EAJA application relates only to the termination for default appeal. The total amount sought is $52,000.

The Government contends that the applicant is not entitled to EAJA fees because the applicant is not a proper party, and because the applicant has not established that it meets the statutory net-worth and employee requirements. Assuming the applicant meets the statutory requirements, the Government concedes that the applicant is a prevailing party, but asserts that the Government's position in this appeal was substantially justified. Further, the Government challenges the attorney's fee rate of $125 per hour, the number of hours, and the consultant's fee.

As to the first issue, the Government questions whether the application was filed on behalf of Hughes Moving and Storage, Inc., or on behalf of Mrs. Hughes, who is the sole stock holder of the Hughes corporation. We find that the application was in fact filed on behalf of the corporation, Hughes Moving and Storage, Inc., a proper applicant for purposes of the EAJA.

The Government argues that the applicant has failed to produce enough evidence to prove that it meets the net-worth and employee requirements. The Government offers no evidence that the applicant in fact does not meet those requirements. The applicant's evidence, including court documents, the underlying record, *e.g*., R4, tabs 59, 103, and 109, and the new affidavit by Mrs. Hughes, is uncontroverted. We find that the applicant, Hughes Moving and Storage, Inc., meets the statutory eligibility requirements of having a net-worth of no more than $7,000,000 and no more than 500 employees at the time the underlying appeal was initiated, within the meaning of 5 U.S.C. § 504(b)(1)(B).

We turn now to discuss whether the Government's position was substantially justified. The EAJA requires the Government to prove that the positions it took had a reasonable basis in law and fact. *Pierce v. Underwood*, 487 U.S. 552, 566, n.2 (1988). This standard applies to the Government's position at the agency level and before the Board. 5 U.S.C. § 504(b)(1)(E).

The contracting officer terminated the contract for default because of the contractor's failure "to perform in accordance with the terms and conditions of the contract and your violation of Title 18 USC, Sec 287 in presenting a false claim to the Government." 98-1 BCA at 147,167. The Government now argues that a "reasonable person could believe that poor service, failure to settle claims, failure to maintain insurance, and false claims are sufficient to justify a default termination." (Gov. reply brief p. 9) The flaw in the Government's contention is that none of those grounds for default survived scrutiny.

The Government's position with respect to poor service rested on the number of contract deficiency reports (CDRs) issued during the life of the contract. We rejected the Government's allegation of poor service. In particular, we said:

> Although we found that the CDRs were not credible evidence of the underlying failures to perform, we note that even if the Government had offered credible evidence of those deficiencies, such deficiencies would not have supported a termination for default. There was no evidence from which we could find that the underlying alleged deficiencies exceeded the AQL [Acceptable Quality Level]

98-1 BCA at 147,169. Unsupported allegations of poor service can not serve as a reasonable basis for terminating a contractor for default.

The Government's position with respect to the contractor's failure to settle claims lacks merit. We found no merit here. Our decision was to the point:

> We turn now to the second ground urged by the Government in support of the termination for default: appellant's failure to properly settle HHG claims. The contract provides that the appellant is to pay, settle, or deny claims within 120 days. The clause reserves to the Government the right to setoff the amount claimed, if the appellant fails to pay or settle. The effect of this clause is to provide a 120-day period in which the Government cannot setoff amounts claimed. It is in effect a right granted to the appellant. The failure of the appellant to exercise this right cannot be the basis for the Government to terminate the contract for default.
>
> Moreover, even if a failure to timely pay or settle HHG claims were a basis for a termination for default, the Government did not give the appellant the opportunity to cure the alleged deficiency. Such failure to perform cannot be the basis of a termination for default without giving the appellant the contractually required ten-day cure notice. *Bailey Specialized Buildings, Inc. v. United States*, 404 F.2d 355, 363 (Ct. Cl. 1968).

98-1 BCA at 147,169. The contractor's decision to exercise or not exercise its rights under the contract cannot be a basis for terminating a contract for default. It was not reasonable for the Government to have thought that it could do so.

The Government's position with respect to the contractor's failure to maintain insurance is put forward, but not argued, in the Government's reply brief. We held:

> The third ground for the termination for default was appellant's repeated failure to maintain insurance. In its reply to the cure notice, Hughes provided proof that it had obtained proper insurance coverage. The contracting officer acknowledged that Hughes had provided proof of insurance. The contracting officer admitted that this deficiency was cured. The default clause provides that a contract cannot be terminated for default because of a deficiency which has been timely cured. *Chambers-Thompson Moving and Storage, Inc.*, 93-3 BCA ¶ 26,033, at 129,409.

98-1 BCA at 147,169. Under the attendant circumstances it was not reasonable for a contracting officer to conclude that a contract could be terminated for default due to a deficiency that was timely cured.

The Government's position with respect to terminating the contract for default due to the filing of a false claim is based on the allegation that the contractor submitted an improper weight ticket for the Otero-Vega move. As we noted in the appeal, a criminal conviction for fraud may be sufficient to warrant termination of the contract for default. *Joseph Morton Co., Inc. v. United States*, 757 F.2d 1273, 1279 (Ct. Cl. 1985). In this case there was no criminal conviction. Moreover, we made *de novo* findings using the "preponderance of evidence" standard. "We did not find any fraud with respect to the Otero-Vega move." 98-1 BCA at 147,169. It was not reasonable for the Government to have relied on this allegation for its decision to terminate for default.

There were no close evidentiary issues in this appeal, the significant facts were known to the Government before the Government issued its termination for default (*EAJA Application of Contact International Corporation*, ASBCA No. 44636, 98-1 BCA ¶ 29,338), there were no new or novel issues of contract law involved (*see EAJA Application of Fanning, Phillips & Molnar*, VABCA No. 3856E, 97-2 BCA ¶ 29,008 at 144,503-04), and none of the reasons given for the default was reasonably based in law or fact. The Government's position was not substantially justified.

We turn now to the Government's challenge of the hourly rate for the attorney's fee. The applicant seeks attorney's fees at the rate of $125 per hour. The maximum allowable rate for attorney's fees in proceedings before this Board is based upon the provisions of 5 U.S.C. § 504. This rate was $75 at the time of the appeal *See EAJA Application of Arapaho Communications, Inc./Steele & Sons, Inc., Joint Venture*, 98-1 BCA ¶ 29,563 at 146,544. *See also* section 231(b)(1) of Pub. L. 104-121 (Contract with America Advancement Act of 1996) (approved 29 March 1996), which substituted $125 for $75. Section 233 thereof applied the increase to appeals commenced on or after 29 March 1996. (5 U.S.C.A. 504 notes). Since this appeal was commenced prior to 29 March 1996, any recovery of attorney's fees is limited to $75 per hour.

As to the number of hours, counsel for Hughes states that "my total time on this case exceeded one-thousand hours." Counsel goes on to state:

> Definitive records are not available due to the dissolution of the law office and my retirement from the practice of law prior to the date of the decision. The statements are made from my recollection of the events and based upon the records

> which are available. . . . From its beginning, it was a very active case, almost on a daily basis. The Army representatives are aware of the time required. I am unable to provide a detailed statement of the time required.

(Counsel's statement, pp. 1 and 3). Because detailed time records "are not available," the applicant waived miscellaneous expenses and reduced the attorney time claimed to 350 hours. The applicant also seeks attorney's fees for 15 hours on the initial fee application, and for 11 hours on the response to the Government's reply. The applicant also seeks $5,000 for consultant fees on the underlying appeal.

The Government argues that the attorney's fee documentation is insufficient to assess the reasonableness of the hours worked. The Government argues that there should be an itemized fee statement containing the hours spent, a description of the services performed by specific date, and the total amount payable by the applicant. However, the Government has not claimed that the amount of the fee is unreasonable.

The applicant has provided an additional submission which divides up the 350 attorney hours into four groups: (1) the period from initial client interview on 10 November 1992 through filing of the complaint on 22 January 1993 @ 100 hours; (2) the period from submission of the complaint on 22 January 1993 through defending three depositions ending on 27 July 1993 @ 100 hours; (3) from the ending of depositions on 27 July 1993 through the trial of this appeal in April 1994 @ 125 hours; and (4) preparation of final post-trial briefs @ 25 hours.

The attorney's fee documentation is supported by an April 1999 billing statement to Mrs. Hughes of the hours spent and an affidavit by Henry L. Brown, applicant's counsel on the underlying appeal. Mr. Brown explains that his law practice was dissolved several years ago and that the time records are not available. Although we would ordinarily expect to see time records kept in the ordinary course of counsel's law practice, the statute does not require any particular form of documentation. The issue is the reasonableness of the amounts claimed. In that regard, we only are concerned with whether the hours were spent, and with whether the hours and services were reasonable.

In that regard, the applicant should provide additional itemization and documentation. For example, Mr. Brown's billing statement suggests that part of the time during the second period was spent on a related debarment issue and that part of the time during the third period was spent on the trial of the household goods appeal. Effort on those two items is not reasonably related to the appeal of the termination for default and is not recoverable. An allocation must be made for such items. Further itemization and documentation is appropriate. The applicant is entitled to recover the attorney's fees for

reasonable work on the fee application. *Immigration and Naturalization Service v. Jean*, 496 U.S. 154 (1990); *Schuenemeyer v. United States*, 776 F.2d 329 (Fed. Cir. 1985).

As to the consultant's fee, except for attending the first meeting between the appellant and its attorney, there is little evidence of involvement by the consultant with the case. More importantly, there is no evidence of the role played by the consultant in this case. There is no evidence from which we are able to conclude that the consultant's services were reasonable. Thus, we find that there is insufficient evidence to support the payment of any consultant fee.

The applicant is entitled to attorney fees consistent with this opinion. We remand to the parties the determination of the exact number of hours for which the applicant is entitled to recover at the rate of $75.00 per hour. If the parties fail to reach agreement within 90 days, they may return to the Board for a resolution of the exact number of hours.

Dated: 10 February 2000

RONALD A. KIENLEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

PAUL WILLIAMS
Administrative Judge
Chairman
Armed Services Board
of Contract Appeals

I concur

MICHAEL T. PAUL
Administrative Judge
Acting 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. 45346, Appeal of Hughes Moving & Storage, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

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