ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access to Justice Act of--	)	
Commercial Energies, Inc.	)	ASBCA Nos. 47106 and 50316
Under Contract No. N62472-88-D-0817	)	

APPEARANCES FOR APPELLANT: Sandy A. Roberts, Esq.
Capitol Heights, MD
Cecilia M. Serna, Esq.
Denver, CO

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
Chuck Kullberg, Esq.
Senior Trial Attorney
Naval Facilities Engineering
Command, Washington, DC

OPINION BY ADMINISTRATIVE JUDGE JAMES

ASBCA No. 47106 involved contractor claims, totaling $424,310.91, for breaches of the requirements contract ($130,703.51 claimed), invalid ceiling cost comparisons ($100,893.90 claimed), and transportation price adjustments ($192,713.50 claimed). Appellant was represented from 18 May 1994 to 10 July 1995 by attorney Cecilia M. Serna. Commencing on or about 19 July 1995 attorney Sandy A. Roberts represented applicant. The Board bifurcated the appeal and, after a hearing, issued a decision on 5 August 1996 on entitlement in favor of appellant on all three claims. 96-2 BCA ¶ 28,474.

The parties eventually settled the ceiling cost claim for $73,638.79 plus Contract Disputes Act (CDA) interest, but could not settle the breach and transportation claims. On 1 November 1996 the Board reinstated the appeal, redesignated as ASBCA No. 50316, to decide quantum on the two unsettled claims. After a June 1997 hearing, the Board's 26 January 1998 decision in 98-1 BCA ¶ 29,549, denied recovery on the breach claim, and sustained recovery of $1,145.79 plus CDA interest on the transportation claim. Appellant sought judicial review of that decision by the Court of Appeals for the Federal Circuit. On 10 March 1999 that court affirmed our decision in *Commercial Energies, Inc. v. Danzig*, 194 F.3d 1330 (Fed. Cir. 1999) (Table). On

4 October 1999 the U. S. Supreme Court denied *certiorari*. *Commercial Energies, Inc. v. Danzig*, 145 L.Ed.2d 54 (1999).

Timeliness. An EAJA application must be filed "within thirty days of a final disposition in the adversary adjudication." *See* 5 U.S.C. § 504(a)(2). On 3 November 1999, the 30th day after the Supreme Court denied *certiorari*, attorneys Serna and Roberts filed EAJA applications. The applications were timely.

Eligibility of Applicant. To be eligible to recover EAJA costs and fees, 5 U.S.C. § 504(b)(1)(B)(ii) requires that as of the time a corporation initiated an adversary adjudication its net worth must not exceed $7,000,000 and it must have not more than 500 employees. The contracting officer denied appellant's claims on 23 December 1993. Appellant filed notice of appeal in ASBCA No. 47106 on 24 January 1994. Lewis R. Dodds, applicant's president, states by affidavit that the applicant had five employees and a net worth of less than $7,000,000 in 1993, and it has no employees and a net worth less than $7,000,000 at present (ex. 1, as amended). Respondent does not challenge applicant's eligibility. We find that the applicant meets the eligibility requirements.

Prevailing Party. The parties agree that applicant prevailed on all three claims on entitlement. Regarding quantum, respondent argues that: (a) the parties settled the applicant's ceiling cost claim for $73,638.79 plus CDA interest, (b) on the applicant's breach claim the Board denied applicant recovery, and (c) on the transportation price adjustment claim the Board awarded applicant $1,145.79 plus CDA interest. Thus, the applicant prevailed on 17.35% of its $424,310.91 claim, and its EAJA recovery should be so apportioned, citing *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983) and *Contact International Corp.*, ASBCA No. 44636, 98-1 BCA ¶ 29,338. Applicant argues that on entitlement it prevailed on all three claims, which were contractually interrelated, so apportionment is inapplicable thereto, citing *Hensley* and *Crown Laundry & Dry Cleaners, Inc.*, ASBCA Nos. 28889, 31900, 87-3 BCA ¶ 20,034 at 101,423

In the entitlement phase, appellant correctly interpreted the transportation price adjustment provisions to permit an adjustment at each receipt point on the gas pipeline it purchased gas, whereas respondent erroneously interpreted those provisions to permit adjustment only for purchases at receipt point A-6. *See* 96-2 BCA ¶ 28,474 at 142,208. In the quantum phase, there was proof of the transportation price adjustments for only 12 of 24 deliveries of gas, leading to recovery of $1,145 of $192,713 claimed. *See* 98-1 BCA ¶ 29,549 at 146,477-79. We conclude (below) that respondent's position was reasonably justified on the quantum phase on both the breach and transportation price adjustment claims. Accordingly, we apportion applicant's recovery of fees and expenses only to the entitlement phase, including the transportation price adjustment claim for the reasons discussed above, and settlement of the ceiling cost claim.

Substantial Justification. EAJA fees and expenses are not recoverable if the Government's position was "substantially justified," that is, justified in substance or in the main to a degree that could satisfy a reasonable person, or if a reasonable person could think it correct, that is, if it has a reasonable basis both in law and fact. *See Pierce v. Underwood*, 487 U.S. 552, 565, n2 (1988). Respondent has the burden of establishing substantial justification. *See Community Heating & Plumbing Co., Inc. v. Garrett*, 2 F.3d 1143 (Fed. Cir. 1993).

Respondent contends that its position was substantially justified because in ASBCA No. 47106 the Board found entitlement on two of the three claims (transportation price adjustment and breach) on bases at variance with applicant's theories of recovery; and in ASBCA No. 50316 the Board denied recovery entirely on the breach claim and granted only $1,145.79 of applicant's transportation adjustment, which it variously calculated to be $200,995, $253,591, or $222,990.

In *Seaman Marine Co.*, ASBCA No. 36579, 91-1 BCA ¶ 23,653, cited by respondent, the Government's litigation position was held to be substantially justified because the contractor failed to put forth any plausible theory of recovery, and the Board's independent review of the contract found a specification provision which was the sole basis for the contractor's recovery. That rule does not apply here, because we found no new theory of liability undiscerned by the parties, but rather narrowed respondent's breach liability to fewer months than applicant claimed, decided the transportation price adjustment claim on the basis of contract §§ C.4 and H.14, as originally alleged by applicant, and rejected respondent's contract interpretations on all three claims. We conclude that respondent's litigation position on entitlement was not substantially justified.

Our decision in ASBCA No. 50316 reflects the complexity of the data and calculations offered by the parties, and the difficult and detailed weighing of those data related to the divergent proofs pursued by the parties in light of the contract provisions for the transportation price adjustment. Thus, respondent was reasonably justified in rejecting applicant's breach and transportation price data and litigating those damage claims. *See Keno & Sons Const. Co.*, ENG BCA No. 5837-F, 99-1 BCA ¶ 30,273 at 149,707-08 (evaluating substantial justification separately for entitlement and quantum).

Special Circumstances. Respondent argues that the parties agreed to mediate the appeal in the summer of 1995, at the conclusion of which applicant refused to consider respondent's lump sum settlement offer and withdrew from the mediation. The amount of respondent's 1995 settlement offer is not in the record of ASBCA No. 47106 or in respondent's Exhibit G-1 herein. Respondent did not substantiate this argument.

Respondent further argues that it "proposed a quantum award of $121,059 in its 25 November 1996 submission to the Board" (before the June 1997 hearing on quantum) which exceeded the $74,784.58 plus CDA interest thereon which applicant eventually recovered, so the attorney's fees and expenses incurred after that date were unreasonable, citing *Contact International Corp.*, ASBCA No., 98-1 BCA ¶ 29,338. In light of our conclusion that respondent's litigation position was reasonably justified on the quantum phase, we need not resolve respondent's further argument.

Fees and Expenses. Applicant seeks to recover a total of "$177,798.97" (actually $176,398.49 without duplicate entries), including: (a) Mr. Roberts' fee for 722.53 hours at $200 per hour, or $144,506, plus $223.86 in expenses (ex. 6); (b) Ms. Serna's fee for 256 hours at $100 per hour, or $25,600 (ex. 5), plus $1,353.21 in expenses (Serna application); and (c) Mr. David Falling's "expert" fees of $1,150.00 and $440.42 in transportation and other expenses, and Mr. Kerry Ramsey's $3,125 fee (ex. 4).

When appellant filed its notice of appeal on 24 January 1994 in ASBCA No. 47106, the EAJA limited attorney's fees to $75 per hour. *See* 5 U.S.C. § 504(b)(1)(A). Public Law 104-121, Title II, § 231, 110 Stat. 862, increased that limit to $125 per hour for an "adversary adjudication" commenced on or after 29 March 1996. The $125 limit is inapplicable because appellant's appeal commenced on 24 January 1994. The Board's jurisdiction, at the outset, embraced both entitlement and quantum, though we decided to limit the first hearing to entitlement only. No new contracting officer's final decision was needed to adjudicate quantum. Therefore, the EAJA provisions in effect in 1994 apply to this application. *See Keno & Sons*, 99-1 BCA at 149,709, n.6 ($75 rate applied when entitlement appeal began in 1991)*; Coastal Dry Dock & Repair Corp.*, ASBCA Nos. 31894, 36754, 92-1 BCA ¶ 24,494 at 122,243 (EAJA in effect at outset of appeal, rather than at beginning of quantum phase, applied to 500 employee eligibility requirement).

Ms. Serna's 256 hours and expenses were incurred on ASBCA No. 47106 from 4 May 1994 to 17 June 1995, of which 11 hours were allocated to the breach claim (ex. 5). Applicant is entitled to recover $18,375 ($75 X 245 hours), plus $1,353.21 in expenses, for a total of $19,728.21 incurred by Ms. Serna. Mr. Roberts charged 442.2 hours, including 3.6 hours allocated to appellant's breach claim, up to 31 October 1996, and $90.00 in photocopy expenses, on ASBCA No. 47106, and 280.33 hours and $133.86 in expenses incurred after the docketing of ASBCA No. 50316 on 4 November 1996, including 11,6 hours to settle the ceiling cost claim (ex. 6). Applicant is entitled to recover $33,765 ($75 X 450.2 hours - calculated as 442.2 + 11.6 - 3.6 hours) plus $90.00 in expenses, for a total of $33,855 incurred by Mr. Roberts on ASBCA No. 47106. Messrs. Falling and Ramsey were fact witnesses; neither was offered or accepted as an expert witness (ASBCA No. 50316, tr. 1/15-100, 2/110-21). Their fees and costs are not

recoverable under EAJA. *See South Georgia Cleaning Services, Inc.*, ASBCA Nos. 40972, 41219, 94-1 BCA ¶ 26,486.

We grant the application to the extent of $53,583.21, and deny the balance thereof.

Dated: 26 April 2000

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting 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. 47106 and 50316, Appeals of Commercial Energies, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

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