

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access)
to Justice Act --)
)
Lucia E. Naranjo) ASBCA No. 52084
)
Under Contract No. 9030002700)

APPEARANCE FOR THE APPELLANT: Lester C. Cannain, Esq.
Albuquerque, NM

APPEARANCE FOR THE GOVERNMENT: Tamara M. Ribas, Esq.
Assistant Regional Counsel
Department of Health and
Human Services, Region IX
San Francisco, CA

OPINION BY ADMINISTRATIVE JUDGE ELMORE

FINDINGS OF FACT

On 28 October 1998, the contracting officer (CO) terminated Ms. Lucia E. Naranjo's (Ms. Naranjo or appellant) Purchase Order No. 9030002700 (PO 2700) to provide "CONSULTANT SERVICES TO THE NURSING DEPT. AND THE OUT-PATIENT CLINICS, NORTHERN NAVAJO MEDICAL CENTER, SHIPROCK, NM." The CO stated that PO 2700 was terminated effective immediately under Federal Acquisition Regulation (FAR) 52.249-12 TERMINATION (PERSONAL SERVICES) due to appellant's failure to comply with the terms of the purchase order. FAR 52.249-12 provides that the Government may terminate a contract upon 15 days' written notice. PO 2700, which was issued pursuant to simplified acquisition procedures, did not include this clause; rather, PO 2700 included FAR 52.249-1 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SHORT FORM) (APR 1984). The CO did not include a notice of appeal rights. (R4, tabs 1, 5)

On 7 December 1998, appellant, through her attorney, filed a claim for wrongful termination of her purchase order. Appellant disputed that she had failed to comply with the terms of the purchase order. Appellant pointed out that PO 2700 included FAR 52.249-1 rather than FAR 52.249-12. Appellant did not seek monetary relief. On 9 February 1999, a senior contracting officer denied the claim. (R4, tabs 2, 10)

Appellant filed a timely notice of appeal with the Board which was docketed as ASBCA No. 52084. On 22 April 1999, appellant filed her complaint seeking conversion of the alleged wrongful termination to one for the convenience of the Government and a termination settlement of \$9,664. On 15 June 1999 the Government notified appellant that PO 2700 was terminated for the Government's convenience, effective 28 October 1998. On 14 October 1999 the Board, at the request of the parties, issued an order dismissing ASBCA No. 52804 which appellant acknowledged receiving on 18 October 1999.

Appellant filed a timely application for attorney's fees and other expenses in the amount of \$1,124.25 under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, as amended. The Government has filed its opposition to appellant's EAJA application, averring appellant was not the prevailing party; respondent's position was substantially justified; and, in the alternative, appellant's EAJA claim is excessive and or unallowable. The Government does not take issue with appellant meeting the EAJA size and net worth requirements. Only entitlement is before us. We address each of the Government's contentions in turn.

DECISION

Prevailing Party

We see no reason to belabor this issue. It is black letter law that a party may be deemed to be a prevailing party for purposes of an award of attorney's fees under EAJA if an appeal serves as a catalyst to settlement of a dispute. Ms. Naranjo, seeking a conversion of the alleged wrongful termination to a termination for the convenience of the Government, achieved that result. The Government argues that she did not receive any monetary relief. A request for monetary relief was not, however, part of the underlying claim. Accordingly, we determine Ms. Naranjo to be the prevailing party in ASBCA No. 52084. *Cf. AIW - Alton, Inc.*, ASBCA No. 47439, 96-2 BCA ¶ 28,399 (Board's dismissal, based on the Government's request after the conversion of the default termination to a termination for convenience of the Government, constituted a final disposition in the adversary adjudication allowing appellant to make application for award for fees and other expenses pursuant to EAJA); *Astro Dynamics, Inc.*, ASBCA No. 28381, 89-3 BCA ¶ 21,938 (appellant was the prevailing party under the EAJA upon the Board's conversion of a default termination to a termination for the convenience of the Government entitled to fee award unless the Government's position was substantially justified).

Government's Position Not Substantially Justified

Under EAJA, an award of fees and expenses to a prevailing party will not be made if the Government's position was substantially justified. *See* 5 U.S.C. § 504(a)(1). The burden is on the Government to show that its position was substantially justified. *Community Heating & Plumbing Company v. Garrett*, 2 F.3d 1143 (Fed. Cir. 1993); *C&C Plumbing & Heating*, ASBCA No. 44270, 95-2 BCA ¶ 27,806. 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); *Oneida Construction, Inc./David Boland, Inc., Joint Venture*, ASBCA Nos. 44194 *et al.*, 95-2 BCA ¶ 27,893. 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). The determination must be made on the administrative record of the underlying adversary adjudication. 5 U.S.C. § 504(a)(1).

The Government argues that its position in terminating PO 2700 was substantially justified because appellant was in anticipatory breach of contract. In support of this argument, respondent relies on three documents which were constructively removed from the Rule 4 file under Board Rule 4(e). The Government continues that "[t]he termination notice incorrectly cited a default clause rather than the termination for convenience clause that was in the contract; however, the government's position was justified even though not correct in the clause it utilized. Thus, a reasonable person could agree with the government's termination." (Gov't answer to EAJA application at 4-5)

When, as here, a Contract Disputes Act appeal is settled on terms favorable to the applicant, either party in proceeding under EAJA may, for good cause shown, supplement the record established in the Contract Disputes Act appeal with affidavits and other supporting evidence relating to whether the position of the agency was substantially justified or other issues in the award proceeding. (Board's EAJA Interim Procedures, ¶ 13(b)) The Government did not submit affidavits and, accordingly, we have no basis on which to evaluate the argument with respect to anticipatory breach of contract. The record reflects that appellant's attorney pointed out the CO's error with respect to termination clauses prior to the appeal and that the error was not corrected at that time. Although the Government converted the termination to a termination for the Government's convenience relatively soon after the appeal was docketed, the Government has provided no support for a determination that its overall position had a reasonable basis in both law and fact. *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991). Accordingly, we determine that the Government's overall position was not substantially justified.

Fees and Expenses

Appellant's EAJA application seeks reimbursement of \$1,124.25 of which \$1,062.50 is for attorney's fees and \$61.75 for New Mexico Gross Receipt Tax. The Government contends, citing *AEC Corp., Inc.*, ASBCA Nos. 45713, 46348, 99-1 BCA ¶ 30,258, that appellant may only recover those fees and expenses which it can reasonably allocate to ASBCA No. 52084. Appellant does not dispute this point. Respondent also takes exception to all attorney's fees incurred before 9 February 1999, the date of the contracting officer's final decision, and to reimbursement of the New Mexico Gross Receipts Tax.

We do not have quantum before us. We note for the guidance of the parties on remand that, in order to be recoverable, fees must have been incurred in connection with the appeal to the Board. 5 U.S.C. § 504(a)(1), *see Brooks Lumber Company*, ASBCA No. 40743, 92-1 BCA ¶ 24,572 (to be recoverable, fees specifically must be shown to have been incurred in connection with the adversary adjudication).

With respect to the tax issue, under the statutes of New Mexico, attorneys are required to charge clients a "New Mexico Gross Receipts Tax," which is levied at 5.81 per cent in the city of Albuquerque. The Government has not explained to date why this tax does not qualify for reimbursement as a reasonable expense which is ordinarily charged to the client. *S.T. Research Corporation*, ASBCA No. 39600, 92-3 BCA ¶ 25,160, and cases cited therein. *See Jamco Constructors, Inc.*, VABCA Nos. 3271E & 3516E, 95-2 BCA ¶ 27,632 at 137,771.

The application is granted as to entitlement. The matter is remanded to the parties to negotiate quantum in accordance with the above discussion.

Dated: 22 May 2000

ALLAN F. ELMORE
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

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

EUNICE W. THOMAS
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. 52084, Appeal of Lucia E. Naranjo, rendered in accordance with 5 U.S.C. § 504.

Dated:

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