ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access to Justice Act --	)	
Logics, Inc.	)	ASBCA Nos. 46914 and 49364
Under Contract No. DAAB07-90-C-U253	)	

APPEARANCE FOR APPELLANT: Kevin W. Mahoney, Esq.
Monteverde, McAlee, Fitzpatrick, Tanker & Hurd
Evesham, NJ

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Robert C. Spinnelli, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE COLDREN

This is an application under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, for payment of fees and other expenses allegedly related to appellant's appeals of the contracting officer's denial of appellant's claim for an equitable adjustment, and the Government's decision to terminate appellant's contract. *Logics, Inc.*, ASBCA Nos. 46914 and 49364, 97-2 BCA ¶ 29,125, *reconsid. denied*, 98-1 BCA ¶ 29,483.[1] In the cited decision, we held that the Government's specifications were defective; thus, appellant was entitled to an equitable adjustment based upon the contract's CHANGES clause (ASBCA No. 46914). We also found that the termination for default was improper because the underlying bases were flawed (ASBCA No. 49364).[2]

In its application, appellant seeks a total amount of $710,629.44. That amount is comprised as follows:

	DUTIES	FEES	EXPENSES	TOTAL
Mark Haltzman, Esq.	Initial counsel	$22,125.00	$3,141.85	$25,266.85
Klehr, Harrison, *et al*.	Counsel 9/95 to 7/97	$302,406.25	$32,664.05	$335,070.30
Monteverde, McAlee, *et al*.	EAJA application counsel	$1,787.50		$1,787.50
Nihill & Riedley, P.C.	Accountants	$21,325.70	$248.90	$21,574.60
Peter Scavello, P.E.	Engineering expert	$18,540.00	$1,348.00	$19,888.00

Tata & Tate	Court reporters	$5,689.44		$5,689.44
Stamper & Bufford	Court reporters	$602.75		$602.75
Allen & Assocs. Int'l, Inc	Government relations	$300,750.00		$300,750.00
			Grand Total	$710,629.44

DECISION

An eligible applicant which prevails against the Government is entitled to recover attorney's fees and other expenses under EAJA, unless the position of the Government was substantially justified. We examine the statutory requirements below.

Eligibility

In order to demonstrate eligibility for reimbursement under EAJA, appellant presented copies of certified financial statements, dated 24 February 1994, which had been filed with the U.S. Trustee in conjunction with appellant's Chapter 11 bankruptcy petition. (App. application at ex. B) Appellant also avers that it had employed "less than fifteen persons" at the relevant times. (App. application at 2) The Government has not challenged appellant's qualifications for an EAJA award based upon its number of employees or net worth. We find that appellant met the eligibility requirements at the time of commencement of the appeals.

Prevailing Party

Under EAJA, an applicant must be a "prevailing party." 5 U.S.C. § 504(a)(1). An applicant meets this requirement if it achieved some benefit that it sought in the litigation. *Texas State Teachers Assoc. v. Garland Indep. Sch. Dist*., 489 U.S. 782, 791-92 (1989) (interpreting 42 U.S.C. § 1988). In its appeals, appellant sought to overturn contracting officer's decisions denying an equitable adjustment and asserting a default termination. It achieved those goals. The Government has not advanced any argument that appellant was not a prevailing party. We find applicant qualifies as a prevailing party.

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). In determining whether the Government's position was substantially justified, we are "to look at the entirety of the government's conduct and make a judgment call whether the government's overall position had a reasonable basis in both law and fact." *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991). That determination must be made on the administrative record of the underlying adversary adjudication. 5 U.S.C. § 504(a)(1).

The Government argues strenuously that its contracting officer's decisions to deny an equitable adjustment and to terminate the contract were substantially justified. We examine each position below.

In its appeal of the denial of its equitable adjustment, appellant alleged:

> that the contract specifications were defective in specifying what appeared to be a stock, commercially available transformer for the test apparatus needed to test all of the rectifier filters to be produced and delivered under this contract when the transformer was unique, its specifications were known only to Hughes Aircraft, and Hughes would only sell transformers to the Government and not to other contractors.

Logics, Inc., supra, 97-2 BCA at 144,911. While admitting that the transformer was unique, the Government argued that the contract's provisions placed the risk upon appellant as to the availability of all parts and materials. *Id*. We found that the unique circumstances that the Government had had the transformer developed for it by another contractor under a prior contract placed the Government in a position of superior knowledge as to its availability, thereby shifting the risk of its unavailability to the Government and entitling appellant to an equitable adjustment. *Id*. at 144,911-12; 98-1 at 146,311.

We also found that the specifications "remained defective up to the time of contract termination." *Id*. 97-2 BCA at 144,912; 98-1 at 146,311. We based that conclusion on the fact that the "specifications did not depict, nor was the Government able to identify the appropriate electrical connections for appellant to connect the transformer to the test apparatus nor were several components of the test apparatus identified." *Id*.

In our discussion, we also noted that the contracting officer had written to appellant, assuring it that the Government would compensate appellant for increases in parts prices "resulting from delays in resolving the problems under the contract." *Id*. at 144,906 (citing

R4, tab 28; ex. A-144) ("the Government agrees to an equitable adjustment for material costs . . . .")

Based on the foregoing, we conclude that the Government's position concerning the delay claim was not reasonable in fact or in law. Therefore, the Government's position was not substantially justified in this regard.

In regard to the default termination, we found that default termination was improper because the specification for the test assembly remained defective up to the time of termination and the contracting officer had waived the delivery date. 97-2 BCA at 144,912-13; 98-1 at 29,483. As to waiver, the delivery date under the contract, as modified, was 31 August 1991. 97-2 BCA at 144,912. We also found that the default termination occurred on 19 May 1994. It was also clear from our discussion that the Government had encouraged appellant to perform well past the expired delivery date. *Id*. at 144,906-10. Thus, we found that the Government had waived the delivery date, and appellant had relied upon that waiver by attempting to resolve the problems of the defective specifications for the test assembly. *Id*. at 144,912-13. We also rejected the Government's argument that the termination could be justified on the basis of failure to make progress. We found appellant had not abandoned performance and that it had adequate resources to perform. *Id*. at 144,913.

The Government essentially argues that it was manifestly reasonable for the contracting officer to have concluded that appellant's progress was unacceptable. In support, it points to the fact that little work on the rectifiers, first articles, and the test station had been accomplished by the time of the termination. This argument ignores the plain fact that there was no established delivery schedule in place after 31 August 1991. It has long been settled that where there is no set delivery date, there is no basis for the conclusion that a contractor is not making satisfactory progress since there is no standard against which to measure. *Lanzen Fabricating, Inc.*, ASBCA No. 40328, 93-3 BCA ¶ 26,079 at 129,609 (*see also* cases cited therein).

Because the Government had waived the amended delivery schedule and had failed to establish a new one, any conclusion of insufficient progress as a justification for a decision to terminate for default was unreasonable in fact or in law, especially when the contract specifications also remained defective at the time of termination. Therefore, the Government's position was not substantially justified in this regard. Accordingly, we find that the Government's position with respect to the termination for default was not substantially justified.

Fees and Expenses

As described above, applicant seeks reimbursement of $710,629.44. The Government takes exception to many of the fees and expenses sought by appellant. As we

only have entitlement before us, we need not rule on all of the Government's specific exceptions. However, to guide the parties in their negotiations, we provide the following.

The Government challenges applicant's use of an hourly rate of $125 per hour for the attorney fees. 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 commencement of these appeals. *See 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, which increased the maximum reimbursable per hour fee amount from $75 to $125 (110 Stat. 863 (1996)). Section 233 limited the increase in attorney fee rates to appeals commenced on or after 29 March 1996. (110 Stat. 864 (1996)). Since these appeals were commenced prior to 29 March 1996, any recovery of attorney's fees is limited to a maximum of $75 per hour. *Hughes Moving & Storage, Inc.*, ASBCA No. 45346, 00-1 BCA ¶ 30,776 at 151,989.

The Government also objects to the recovery of any fees and expenses not specifically related to the proceedings before this forum. In that regard, the application includes fees and expenses incurred during the pendency of appellant's complaint before the United States Court of Federal Claims (COFC).[3] With respect to the Board's authority under the EAJA to award reasonable attorney's fees and other expenses incurred by appellant prior to the COFC's transfer of the suit to the ASBCA under 41 U.S.C. § 609(d), as amended, the issue appears to be one of first impression.

Applicant correctly points out that that COFC complaint was dismissed in part and transferred in part (to this forum) on the Government's motion. We also note that it was appellant which selected that forum, and the partial transfer was with the concurrence of plaintiff's counsel.

The Government, citing *E.W. Elkridge, Inc.*, ENG BCA No. 5269-F, 92-1 BCA ¶ 24,626, urges that "EAJA relief for [a]ppellant's dealings with the DOJ [Department of Justice] are beyond the jurisdiction of the Board to grant." (Gov't opp. at 13) The Government's faith in that citation is misplaced; that decision dealt with a fraud investigation. 92-1 BCA at 122,845. Nevertheless, EAJA does provide that "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party . . ., fees and other expenses incurred by that party in connection with that proceeding . . . ." 5 U.S.C. § 504(a)(1).

Fees and expenses for an "adversary adjudication" commence with analysis of the final decision of the contract officer and the preparation of the notice of appeal. *Building Services Unlimited, Inc.*, ASBCA No. 33283, 88-2 BCA ¶ 20,611. However, no notice of appeal was filed in this appeal because the "adversary adjudication" commenced with the filing of a timely suit in the United States Court of Federal Claims with the subsequent transfer of the suit by that Court to this Board. Thus, our jurisdiction in a transfer case is

predicated on timely suit rather than a notice of appeal. It would thus appear that EAJA recovery commences with the evaluation of the CO final decision and preparation of the suit to the Claims Court. "[T]he EAJA — like other fee-shifting statutes — favors treating a case as an inclusive whole, rather than as atomized line-items." *Immigration & Naturalization Serv. v. Jean*, 496 U.S. 154, 161-62 (1990).

In its application, appellant has included billings for Allen and Associates International, Inc., which "acted as government relations representatives on behalf of [appellant] with respect to this Appeal." (App. application at 5) EAJA only allows recovery for those fees and other expenses related to "any attorney, agent, or expert witness representing or appearing in behalf of the party . . . ." 5 U.S.C. § 504(a)(2). As noted above, those fees and other expenses must have been "incurred by that party in connection with that [adjudicatory] proceeding . . . ." 5 U.S.C. § 504(a)(1).[4]

The Government also challenges the amount sought for appellant's engineering expert. Without citation to any authority, the Government argues that any costs associated with the drafting of an expert's report which was not offered into evidence at hearing are not recoverable. EAJA provides that "fees and other expenses" includes "the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case . . . ." 5 U.S.C. § 504(b)(1)(A).

Per 5 U.S.C. § 504(b)(1)(A)(i), an expert witness may not be compensated at a rate in excess of the highest rate paid for expert witnesses by the agency. We note that appellant's engineering expert billed at a rate of $110 per hour. (App. application at ex. F) Neither party has addressed whether that rate is in compliance with the statute. *See also* DFARS 237.104(f)(i).

Upon reading the amended application and the Government's opposition thereto, it appears (but is, by no means, clear) that the accounting charges by Nihill & Reidley, P.C., are related only to the claim appellant submitted to the Government on 6 February 1996. (*See* app. application amendment at 17; Gov't opp. at 14-15; Gov't opp. to amended application at 9). If that is a correct reading, that claim was not before us in these proceedings and fees and expenses related to it are not recoverable herein.

To the degree any accounting charges are properly allocable to these proceedings, reimbursement of those fees would be limited to the $75 per hour rate. *See M. Bianchi of California*, ASBCA Nos. 26362 *et al.*, 90-1 BCA ¶ 22,369 at 112,404-05 (treating accounting fees as fees of agents for purposes of EAJA).

The Government also maintains that many of the entries in the attorneys' billing records are "not substantiated." (Gov't opp. at 12 n. 8) We take this to be a complaint that the billings lack sufficient detail. (*See* Gov't opp. at 13) In that regard, we note that the fee applicant "bears the burden of establishing entitlement to an award and documenting the

appropriate hours expended and the hourly rates." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). In EAJA fee applications, the U.S. Court of Appeals for District of Columbia Circuit has required attorneys to maintain "contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney." *Action On Smoking And Health v. C.A.B.*, 724 F.2d 211, 220 (D.C. Cir. 1984). The standard of record keeping established by the Supreme Court is that "billing time records [should be maintained] in a manner that will enable a reviewing court to identify distinct claims." *Hensley*, 461 U.S. at 437. Chief Justice Burger, in his separate concurring opinion, stated that "records [must be] in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed." *Id*. at 441.

CONCLUSION

To the extent indicated above, the application for EAJA fees and other expenses is sustained. The matter is remanded to the parties for negotiation of quantum in accordance with the guidance herein.

Dated: 25 June 2001

JOHN I. COLDREN, III
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

NOTES

[1] Judge Spector, who participated in the decisions on the merits, has since retired.

[2] The adjudication of the termination for default was transferred to the Board from the Court of Federal Claims by order dated 28 November 1995.

[3] The parties stipulated that the pleadings filed in the COFC would constitute the pleadings before this Board.

[4] In their negotiations, the parties shall also ensure that any entries from the attorneys' billing related to discussions, etc. with Allen and Associates are deleted from the application. Similarly, attorneys' fees for correspondence with other than clients, witnesses, experts, opposing counsel or the Board should be carefully reviewed.

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. 46914 and 49364, Appeals of Logics, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

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