

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access)
to Justice Act --)
)
ABS Baumaschinenvertrieb, GmbH) ASBCA No. 48207
)
Under Contract No. DAJA02-94-C-0023)

APPEARANCE FOR THE APPELLANT: Reed L. von Maur, Esq.
Frankfurt/Main, Germany

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Gregg M. Schwind, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN

Applicant, ABS Baumaschinenvertrieb, GmbH, filed a timely application, pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, as amended (EAJA), for attorneys' fees and other expenses incurred in connection with its appeal to this Board under the Contract Disputes Act. In that appeal, *ABS Baumaschinenvertrieb, GmbH*, ASBCA No. 48207, 00-2 BCA ¶ 31,090, we sustained the appeal, overturning the Government's termination for default and converting it to one for the convenience of the Government. Familiarity with that decision is presumed. Having thus sustained the appeal in its entirety, applicant was the prevailing party.

The Government does not dispute that applicant was the prevailing party and that the Government's position was not substantially justified. Rather, the Government questions other areas of the application, namely, applicant's alleged failure to disclose its net worth and its fees and other expenses. Therefore, the Government contends that it is not possible to determine whether or not applicant has met the eligibility requirements of EAJA and whether its claimed expenses are, in fact, reimbursable.

First, in its application, ABS stated it "submits as a part hereof the Statement of Net Worth and Size executed by appellant's Managing Director under the provisions of 28 U.S.C. § 1746." According to ABS, its "net worth is and has been at all times relevant to this Application less than US\$7.0 million" and that the number of its employees never exceeded 20 people at any time relevant to the appeal. Attached to its application was its Statement of Net Worth and Size in which applicant stated that ABS is a limited liability

company established pursuant to the laws of the Federal Republic of Germany, that at the time the appeal was filed its net worth was approximately DM -43,408.64, or US\$ -21,740, and that at all times relevant to the appeal, its net worth was never more than \$7.0 million. Applicant further stated that at all times relevant to the application, it had never employed more than 500 people. Gerd Asel, Geschäftsführer/Managing Director, stated that this Statement of Net Worth was based on his review of the tax and financial statements for ABS for the relevant time periods, with which he was personally familiar, and that “this statement is made under penalty of perjury in accordance with 28 U.S.C. § 1746.” The application, as initially submitted, did not have the actual financial statements attached.

The Government correctly points out that applicant was required under 5 U.S.C. § 504(b)(1)(B) and paragraphs 7 and 8 of the Board’s Interim Procedures (24 June 1999) for EAJA applications to establish its eligibility to fees and expenses as of the time when “the adversary adjudication was initiated.” *Decker & Company, GmbH*, ASBCA No. 41089, 98-2 BCA ¶ 29,740. Applicant’s Statement of Net Worth and Size, dated 29 January 2001, submitted with its initial application does not satisfy the requirements of paragraph 8 of the Board’s Interim Procedures to provide a detailed Net Worth Exhibit showing the assets, liabilities, and net worth of the applicant and any affiliates.

However, applicant’s response to the Government’s answer to the EAJA application contained the financial statements for the period ending 31 December 1994 which established applicant’s net worth as of the time the adversary adjudication was initiated. According to these financial statements, applicant had total obligations (Verbindlichkeiten) in the amount of DM 1,757,004.50, and had a gross value of all assets (Sachanlagen) in the amount of DM 797,003.00, which was less than \$400,000. As we said in *Decker & Company, GmbH, supra* at 147,407:

It is well-established that applicants may supplement their original EAJA applications to demonstrate that they meet the Act’s eligibility requirements. *See, e.g. Ed Fields v. United States*, 29 Fed. Cl. 376 (1993); *Decker & Co.*, ASBCA No. 38072, 92-3 BCA ¶ 25,057. We accorded Decker that opportunity, and it supplemented its reply brief with affidavits and financial records which, taken together, establish its eligibility.

We hold that applicant has, in its original application and its supplement to its original application, established it has met the eligibility requirements of the Act.

Although the Government bears the burden of demonstrating that its position was substantially justified (*Pierce v. Underwood*, 487 U.S. 552, 575-76 (1988); *Community Heating & Plumbing Co. v. Garrett*, 2 F.3d 1143 (Fed. Cir. 1993)) and does not dispute

that its position was not substantially justified, we specifically hold that its position was not substantially justified, either in the adversary adjudication or in the Government action or inaction upon which the adversary adjudication was based. *Oneida Construction, Inc./David Boland, Inc., Joint Venture*, ASBCA Nos. 44194 *et al.*, 95-2 BCA ¶ 27,893. In our decision in *ABS Baumaschinenvertrieb, GmbH, supra*, we found that the contract specifications had been prepared by a competitor/bidder and submitted to sealed bidding with the intent to deceive both the contracting officer and potential bidders as to the drafter of the specifications, that the awarding of the contract to appellant under the circumstances described in our decision on the merits was improper, that the specifications were defective, that the Government rejected testing the tendered coal crushing machine, and that Government officials were in consultation with the competitor during the time they were recommending that the contracting officer terminate the contract for default, failing to disclose to the contracting officer their relationship and consultations with the competitor thereby tainting the contracting officer's decision to terminate the contract. We held that the contracting officer's termination of the contract was an abuse of discretion under these conditions.

Appellant seeks reasonable attorneys fees "in the amount of at least US\$39,687.50, and expenses of at least \$8,577.32," subsequently increased to \$11,182.32 (app. resp. at 9). The fees portion of the application was based on an hourly fee of \$125 for Mr. von Maur, for "at least 126.25 hours," and \$75 per hour fee for associate attorneys for "at least 318.75 hours." In accordance with our order issued upon receipt of the application, we decide only entitlement, and remand quantum to the parties for negotiation. Nevertheless, we provide the following to the parties to guide them in their negotiations.

Although applicant does not specifically and clearly set forth the basis for its claim to an enhanced fee for Mr. von Maur, it cites *Viktoria-Schaefer International Speditionsgesellschaft, mbH & Co. KG, et al. v. United States*, No. 86-0493, slip op. at 2, 9-10 (D.D.C. March 13, 1987), in which the Court held that the fee billed by Mr. von Maur should be adjusted to \$125 per hour because of the limited availability of qualified counsel, in that case, "a West German attorney, fluent in English, who specializes in U.S. contract litigation." In authorizing this enhancement, the Court exercised its authority under 28 U.S.C. § 2412(d)(2)(A), which provided in pertinent part that:

(The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except . . . (ii) attorney fees shall not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.)

However, this authority is unavailing for applicant in its application for fees and other expenses here. Our authority to grant attorney fees and other expenses is derived from 5 U.S.C. § 504, which limited the attorney fees to \$75 per hour at the time of the initiation of the adversary adjudication in the instant appeal. While 5 U.S.C. § 504(b)(1)(A) permitted the enhancement of fees for cost of living or a special factor, such as limited availability of qualified attorneys for the proceeding involved, that enhancement required an agency determination by regulation to authorize our granting of such a fee enhancement. As we have held in *Arapaho Communications, Inc./Steele & Sons, Inc., Joint Venture*, ASBCA No. 48235, 98-1 BCA ¶ 29,563 and *AST Anlagen-und Sanierungstechnik GmbH*, ASBCA No. 42118, 93-3 BCA ¶ 25,979, the Department of Defense has not issued such a regulation authorizing enhancement of fees based on cost of living or any other special factor. In *AST Anlagen-und Sanierungstechnik GmbH*, ATS argued that it was entitled to a fee enhancement based on Judge Harold Green's ruling in *Viktoria-Schaefer International Speditionsgesellschaft, mbH & Co. KG, et al. v. United States, supra*. We held that the EAJA subsection applicable to the *AST* litigation was 5 U.S.C. § 504(b)(1)(A)(ii) which authorized \$75 per hour, not the enhanced fee authorization of 28 U.S.C. § 2412(d)(2)(A), relied on by Judge Green in granting the \$125 per hour attorney fee sought in that case. Accordingly, applicant is not entitled to a fee in excess of \$75 per hour, the amount authorized by EAJA on the date applicant filed its notice of appeal.

We also note that we have held that as a general rule, fees incurred prior to the receipt of the contracting officer's final decision should not be reimbursed in the absence of a specific showing that they were attributable to the adversary adjudication which is the subject of the Act. *Arapaho Communications, Inc./Steele & Sons, Inc., Joint Venture, supra*; *Decker & Company, GmbH, supra*; *Harrell Patterson Contracting, Inc.*, ASBCA Nos. 30801 *et al.*, 88-1 BCA ¶ 20,510; *Benjamin S. Notkin & Associates*, ASBCA No. 29336, 87-1 BCA ¶ 19,483. As we said in *Benjamin S. Notkin & Associates*, at 98,456:

We read the Equal Access to Justice Act to permit reimbursement of only those attorney fees and expenses attributable to the adversary adjudication. This, by definition, covers fees and expenses incurred in preparing the appeal. Therefore, allowable fees and expenses may pre-date docketing of the appeal, Lacking evidence establishing that expenses incurred prior to receipt of the contracting officer's final decision were attributable to the adversary adjudication, we conclude that applicant is entitled to recover appropriate fees and expenses incurred after receipt of the contracting officer's final decision, plus any pre-decision fees and expenses which the applicant can demonstrate were incurred in connection with the adversary adjudication.

Accordingly, to the extent indicated herein, we sustain the application for EAJA fees and other expenses and remand the matter to the parties for negotiation of quantum in accordance with this decision.

Dated: 30 July 2001

ROLLIN A. VAN BROEKHOVEN
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 No. 48207, Appeal of ABS Baumaschinenvertrieb, GmbH, rendered in accordance with 5 U.S.C. § 504.

Dated:

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