ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access to Justice Act --	)	
Valenzuela Engineering, Inc.	)	ASBCA No. 50019
Under Contract No. NAS4-50028	)	

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APPEARANCE FOR THE GOVERNMENT: Chauncey C. Williams, Esq.
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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 incurred in connection with an appeal of a request for an equitable adjustment under the CHANGES clause of the contract. Appellant submitted a claim after the contracting officer rejected a heating system appellant proposed and instead required a proprietary infrared heating system. On the merits, we held that insistence that appellant furnish a proprietary system was a constructive change to the contract, entitling appellant to an equitable adjustment. *Valenzuela Eng'g, Inc.*, ASBCA No. 50091, 98-1 BCA ¶ 29,553.[*]

In its application, appellant seeks a total amount of $6,445.50. (App. application at 3) This amount is comprised of $5,195.50, identified as attorneys' fees and law clerk expenses, and $1,250, invoiced by the firm employing appellant's expert witness. (App. application, Lindborg decl. at 3; Reyes decl. at 2)

DECISION

An eligible applicant which prevails against the Government is entitled to recover attorney's fees, expert fees, and other expenses under EAJA § 504, unless the position of the Government was substantially justified. We examine the statutory requirements below.

[*] Judge Spector, who participated in the decision on the merits, has since retired.

Eligibility.

In order to demonstrate eligibility for reimbursement under EAJA, appellant presented a sworn declaration that, as of 19 June 1998, appellant was corporation "with a net worth of less than $7,000,000, employing less than 500 persons." (App. application, Reyes decl. at ¶ 2) We find that appellant met the eligibility requirements at the time of commencement of the appeal.

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 substantive benefit that it sought in the litigation. *Texas State Teachers Assoc. v. Garland Indep. Sch. Dist*., 489 U.S. 782, 791-93 (1989) (interpreting 42 U.S.C. § 1988). In its appeal, appellant sought to overturn a contracting officer's decision denying an equitable adjustment. It achieved that goal. 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 Co. 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 has not averred that its position was substantially justified. That failure, however, does not relieve the Board of the responsibility to make such a determination, if it can do so. *Griffin Services*, Inc., GSBCA No. 11735-C (11171), 94-3 BCA ¶ 27,075 (and cases cited therein); *see also, Tumpane Services Corp*., ASBCA No. 43655, 92-3 BCA ¶ 25,202. We find that the record is adequate for such a determination, and find that the Government's position was not substantially justified.

In its appeal, appellant alleged that the contract specification was proprietary because its requirements could only be satisfied by one heating system. *Valenzuela, supra*, 98-1 BCA at 146,506. A propriety specification is treated under the MATERIAL AND WORKMANSHIP clause as specifying a brand name or equal, permitting the furnishing of an equal infrared heating system. *Id*. Our discussion on the merits noted that "what features [were] essential to the needs of the Government" were not indicated in either the specifications or anywhere else in the contract. *Id*. at 146,502-03 at finding 3. Nor did the contract identify any brand or trade name for the specified system. *Id*.

During the course of seeking the contracting officer's approval for an equivalent system, appellant submitted data for a Detroit Radiant Products system (after having had another system rejected). The submittal included a letter from an engineer of Detroit Radiant "indicating section by section the contract specifications how the proposed heating system either met the contract specifications or was the functional equivalent of those specifications." *Id*. at 146,504 at finding 15. After that submittal was initially rejected, appellant provided the Government with "a detailed rebuttal" from Detroit Radiant, which again asserted that the proposed system was functionally equivalent. *Id*. at finding 17. The Government again rejected the proposed substitute. *Id*.

Appellant offered expert testimony, unrebutted by the Government, that the specifications were proprietary, and that the system offered by appellant "presented the best product selection" for an infrared system. *Id*. at 146,505 at finding 23.

We, therefore, had little difficulty concluding that appellant's proposed system was the functional equivalent of the proprietary system the Government insisted upon. *Id*. at 146,507. Similarly, we now find that the Government's position was not reasonable in fact or law. Thus, we conclude the Government's position was not substantially justified.

Fees and Expenses.

As described above, applicant seeks reimbursement of $6,445.50. As we only have entitlement before us, we will remand the matter to the parties for negotiation of the actual amount of recovery. To guide the parties in their negotiations, we provide the following.

This amount of $5,195.50 is identified as attorneys' fees and law clerk expenses. The billing rate for the law clerks is shown as $95 per hour. It has long been our position that paralegal fees are recoverable only in the amount of the actual cost of these clerks to the law firm. *H.E. Johnson Company, Inc.*, ASBCA No. 48248, 99-1 BCA ¶ 30,264; *see also, Walsky Construction Co*., ASBCA No. 36940, 92-1 BCA ¶ 24,694; *M. Bianchi of California,* ASBCA Nos. 26362 *et al*., 91-1 BCA ¶ 23,445; *F&F Laboratories, Inc.,* ASBCA No. 33007, 89-2 BCA ¶ 21,846.

The application includes an invoice for appellant's expert, a professional mechanical engineer, for $1,250. That amount is identified only as "CONTRACT AMOUNT." (App. application, Reyes decl. at ex. A.) EAJA 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). 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. From the record before us, we can neither determine the rate paid appellant's expert, nor the rate authorized by NASA during the relevant time period.

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: 20 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

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. 50019, Appeal of Valenzuela Engineering, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

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