ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access to Justice Act --	)	
Carousel Development, Inc.	)	ASBCA No. 50719
Under Contract No. F08651-94-C-0104	)	

APPEARANCE FOR THE APPELLANT: Jeffrey A. Lovitky, Esq.
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Diana S. Dickinson, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE GRUGGEL
ON
APPELLANT'S APPLICATION FOR ATTORNEY'S FEES
AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT

Appellant seeks attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, as amended, in connection with this appeal. Said appeal was partially sustained only with respect to appellant's claim for remission of liquidated damages in the amount of $4,857.44 (together with CDA interest thereon) due to the Government's unjustified delay in releasing units 13-24 to appellant and unusually severe weather. *Carousel Development, Inc.*, ASBCA No. 50719, 01-1 BCA ¶ 31,262. The remainder ($302,153.67) of appellant's 30 December 1996 claim ($307,011.11), certified on 7 March 1997, was denied and included extended field overhead, Eichleay damages, acceleration costs, labor inefficiency costs, alleged delay costs stemming from the Government's failure to timely turn over units 1-8, alleged Government delay in approving appellant's door samples, alleged Government delays associated with the presence of lead-based paint and weather delays (*id*.). The Government did not issue a contracting officer's decision. During the latter stages of the hearing and in its brief filed thereafter, the Government conceded, without explanation, that its assessment of liquidated damages was improper. In this regard, the record herein does not reflect that the Government remitted the withheld amount of liquidated damages to appellant.

Appellant's appeal to this Board was docketed on 2 May 1997. Our decision was issued on 23 January 2001 and received by appellant on 25 January 2001. Appellant's timely Application for Attorney's Fees and Expenses under the EAJA, dated 12 June 2001, was received by the Board on 18 June 2001.

Appellant's application seeks $53,493 including: (a) Jeffrey A. Lovitky's claimed legal fees of $25,125 for 335 hours at an hourly rate of $75/hour in connection with litigating appellant's appeal; and (b) legal expenses in the amount of $28,368 representing Mr. Lovitky's billed and paid legal fees during the May-December 1997 time period ($20,750) and Mr. Lovitky's expenses (copying, mailing, court reporter, Lexis, travel, telephone, etc.) incurred during the May 1997 - October 1999 time period ($7,618) in connection with litigating appellant's appeal (application at 2, ex. 1). The application does not explain the basis for appellant's apparent double counting of legal fees (first under (a), then (b)) or why 335 attorney hours are claimed when the supporting documentation only accounts for 255 attorney hours.

DECISION

An eligible prevailing party is entitled to recover reasonable attorney's fees and expenses from the Government under the EAJA, unless the position of the Government is determined to be substantially justified.

Eligibility

The Government does not challenge appellant's eligibility and we find, based upon the application that appellant meets the net worth and employee size criteria for an EAJA applicant set forth in 5 U.S.C. § 504(b)(1)(B). *See* ASBCA Equal Access To Justice Act Interim Procedures, ¶ 7(a).

Prevailing Party

Although appellant obtained entitlement to only $4,857.44 (plus applicable CDA interest thereon) of the amount claimed, it is not disputed that appellant was a prevailing party under the EAJA since it achieved some of the benefit sought in the litigation. *TRS Research*, ASBCA No. 50086, 98-2 BCA ¶ 29,780 at 147,563 and cases cited therein.

Substantial Justification

The EAJA provides that an award of fees and expenses to a prevailing party will not be made if the Government's position was substantially justified. 5 U.S.C. § 504(a)(1). It is well-established that:

> The burden is on the Government to show its position was substantially justified. *Community Heating & Plumbing Co., Inc. v. Garrett*, 2 F.3d 1143 (Fed. Cir. 1993*); Oneida Constr., Inc./David Boland, Inc., Joint Venture*, ASBCA Nos. 44194, 47914, 47915, 47916, 95-2 BCA ¶ 27,893. The Government's

> burden applies to the position it 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*, supra. Substantial justification is determined on the basis of the administrative record made in the adversary adjudication for which fees and other expenses are sought. *AST Anlagen-Und Sanierungstechnik GmbH*, ASBCA No. 42118, 93-3 BCA ¶ 25,979.

TRS Research, *supra* at 147,563

The Government has failed to meet this burden. The Government continues to assert that it:

> believes strongly that ample testimonial and documentary evidence in the record supported the Contracting Officer's business decision that [not] turning over even more housing units to Appellant when it was already many months behind its schedule for completion of housing units already in its possession (thereby further reducing available housing for Government use) was appropriate and therefore substantially justified. See Government Post-Hearing Brief, pp. at 95-97. The Government's assertion of this same position in this appeal was likewise substantially justified.

(Gov't resp. at 5) However, we addressed the lack of propriety of this argument directly and unambiguously in our decision herein:

> Nothing in the contract justified the Government's refusal to turn over units 13-24 to appellant on the contractually specified dates. The Government's contractual obligation to turn over said units to appellant as scheduled is not obviated because of its concerns stemming from appellant's failure to timely complete the first 12 units. The Government could have easily taken into account its concern about the potential for a contractor to "t[ear] up the entire housing unit and [leave] the job" (finding 4) when it drafted the contract herein. Instead, the Government adopted an unwritten policy of not turning over the units as scheduled "unless the contractor was performing satisfactory [sic]" (*id*.; findings 4, 8, 13(c)-(g)). The Government thus wrongfully denied appellant access to its work sites for units 13-24 for unreasonable and indefinite lengths of time (units 13-16, 146 days; units 17-20, 136 days;

> units 21-24, 133 days) thereby triggering the operation of the Suspension of Work clause of the contract (findings 2-4, 13(e)-(g)).

Carousel Development, Inc., *supra* at 154,409 Thus, the evidentiary record clearly establishes that the contracting officer's ill-conceived "business decision" stems from a unilateral, secret "policy" that pre-dated the award of appellant's contract and that was not a part of an arms-length bargain (*id*. at 154,398). The Government's professed concern about "further reducing available housing for Government use" is not apparent from the evidentiary record in the appeal that underlies these proceedings since, *inter alia*, all 24 units were vacant by 30 December 1994 and were to be vacant during performance of contract work pursuant to paragraph H-807 b. of the contract. *See id*. at 154,398 (finding 4), 154,400 (finding 12). Moreover, the evidentiary record does not establish that housing units 13-24 were ever occupied during the 30 December 1994-7 August 1995 time period. The Government erred when it refused to turn over units 13-24 to appellant on the contractually specified dates and such actions were not substantially justified. Hence, we conclude that appellant is entitled to an award under the EAJA for a portion of its fees and expenses.

Since we only have entitlement before us, this EAJA matter will be remanded to the parties for negotiation of the actual amount of recovery. Our ensuing remarks are provided to the parties to be used as guidance in their negotiations.

Since the underlying appeal herein was filed after the 29 March 1996 effective date of the Contract With America Advancement Act, Pub. L. 104-121, amending 5 U.S.C. § 504(b)(1)(A), the maximum reimbursable rate of $125/hour is applicable (110 Stat. 862-864 (1996)). Nothing in the underlying evidentiary record before us, however, justifies compensation for legal fees rendered herein in excess of the amount actually paid and payable. Because appellant prevailed on only one of the many issues it raised before the Board in the underlying appeal, it may recover only those fees and expenses which it can reasonably allocate to that issue. *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983).

Pursuant to paragraph 4(b) of our Interim Procedures, the Government urges us to reduce the EAJA award to appellant because appellant allegedly failed to accept a reasonable amount in settlement of the underlying appeal and thereby "unreasonably protracted the resolution of this entire appeal" (Gov't resp. at 9). This argument goes to "reasonableness" and is properly addressed by the parties during their negotiations on quantum. *See Fiesta Leasing and Sales, Inc.*, ASBCA No. 29311, 90-2 BCA ¶ 22,729.

CONCLUSION

The EAJA application is sustained on entitlement and is remanded to the parties for negotiation of quantum in accordance with our discussion hereinabove.

Dated: 11 September 2001

J. STUART GRUGGEL, 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 concur

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. 50719, Appeal of Carousel Development, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

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