ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access to Justice Act --	)	
Rex Systems, Inc.	)	ASBCA No. 52247
Under Contract No. F09603-92-C-0709	)	

APPEARANCE FOR THE APPELLANT: James S. Phillips, Esq.
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APPEARANCES FOR THE GOVERNMENT: Thomas B. Pender, Esq.
Chief Trial Attorney
Steven Gruenwald, Esq.
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Defense Contract Management Command, Chicago

OPINION BY ADMINISTRATIVE JUDGE LIPMAN

This is an application under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, for payment of fees and other expenses incurred in connection with an appeal in which we held appellant entitled to receive interest on amounts paid in settlement of a convenience termination, under the Contract Disputes Act (CDA), §§ 601-613, as amended. *Rex Systems, Inc.*, ASBCA No. 52247, 00-1 BCA ¶ 30,671.

In its application, Rex Systems, Inc. (appellant or applicant) sought $7,100.00 in attorneys' fees, and $20.87 in expenses. In its reply to the Government's opposition to the application, appellant increased the total amount sought to $9,145.87.

The Government opposes the application, primarily on the grounds that its position was substantially justified.

BACKGROUND

Following a convenience termination, appellant submitted a termination settlement proposal. The contracting officer unilaterally determined that appellant was due only $22,518.00 out of the $89,613.00 in its settlement proposal, appellant appealed from the unilateral determination and the appeal was docketed as ASBCA No. 50394. The parties notified the Board that the dispute had been settled and the Board dismissed the appeal. Under the terms of the settlement, appellant reserved the right to recover interest under the CDA on the amount of the termination settlement, subject to the parties' ongoing dispute as to whether interest on a termination settlement is legally payable. Appellant submitted a claim for CDA interest on the sum paid pursuant to the settlement of ASBCA No. 50394. Appellant then appealed to the Board from the failure of the contracting officer to issue a decision on the claim and the appeal was docketed as ASBCA No. 52247. We sustained the appeal and concluded that appellant was entitled to recover interest on the amount it was paid in settlement of the convenience termination.

DECISION

Upon timely application, 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. *See Scarborough v. Principi*, 273 F.3d 1087, 1090 (Fed. Cir. 2001) (delineating the requirements under 28 U.S.C. § 2412(d)(1)(B) (1994)). We examine the statutory requirements below.

Timely Application

The Government received our decision in ASBCA No. 52247 on 30 November 1999. Appellant timely filed its application on 12 April 2000. It was thus filed within the period prescribed at 5 U.S.C. §504(a)(2).

Eligibility

In order to demonstrate eligibility for reimbursement under EAJA, appellant presented an affidavit of its Director, Manufacturing, stating that appellant meets the net worth and employee size criteria for an EAJA applicant set forth at 5 U.S.C. § 504(b)(1)(B). *See* ASBCA Equal Access to Justice Act Interim Procedures, ¶ 7(a). After the Government's opposition pointed out that appellant had not included a net worth statement with its application, appellant submitted copies of net worth exhibits for the relevant time periods. The "fleshing out of the details of [appellant's] net worth" subsequent to the filing of its application is permitted. *See Scarborough*, *supra*, 273 F.3d at 1092. We find that appellant met the eligibility requirements at the 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 criterion 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 appeal, appellant sought to recover interest, in accordance with the CDA, on amounts it received in settlement of a convenience termination. It achieved that objective. The Government has not advanced any argument that appellant was not a prevailing party. We find that applicant qualifies as a prevailing party. However, merely prevailing on the merits does not equate to entitlement of attorney's fees and expenses. The "EAJA was not intended as an automatic fee-shifting device . . . ." *Gavette v. Office of Personnel Management*, 785 F.2d 1568, 1579 (Fed. Cir. 1986).

Substantial Justification

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., Inc. 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 Government's actions or inactions upon which the adversary adjudication was based. 5 U.S.C. § 504(b)(1)(C); *Oneida Constr., Inc./Donald Boland, Inc., Joint Venture*, ASBCA Nos. 44194 *et al*., 95-2 BCA ¶ 27,893.

In meeting its burden, the Government is not required "to establish that its decision to litigate was based upon a substantial probability of prevailing." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11, 1980 U.S.C.C.A.N. 4953, 4989-90. 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).

"There is adequate support in decisional law for the proposition that the Government's position may be substantially justified when there is a novel issue, there is no clear contrary precedent on point, or an issue of first impression was presented to the tribunal." *Sun Eagle Corp*., ASBCA Nos. 45985, 45986, 94-2 BCA ¶ 26,870, at 133,698; *see also, Zinger Constr. Co., Inc.*, ASBCA No. 31858, 88-2 BCA ¶ 20,661, at 104,416, *aff'd on reconsid*., 88-3 BCA ¶ 20,978 ("no legal precedent mitigated against the validity of the Government's interpretation and implementation" of a statute); *Pat's Janitorial Service, Inc.*, ASBCA No. 29129, 86-2 BCA ¶ 18,995, at 95,923 ("legal uncertainty at that time as to the application of" statute lead to conclusion of substantial justification).

The question presented on the merits here was novel and one of first impression. Indeed, the parties specifically labored to select and present the ideal "test" case. *Rex Systems, supra*, 00-1 BCA at 151,488.

Another important consideration in determining whether the Government's position was substantially justified is the clarity of the governing law. *JANA, Inc.*, ASBCA No. 32447, 89-2 BCA ¶ 21,638 (citing *Mattson v. Bowen*, 824 F.2d 655, 657 (8th Cir. 1987). The 10th Circuit, in *Martinez v. Secretary of Health and Human Services*, 815 F.2d 1381 (10th Cir. 1987) (quoting *Spencer v. NLRB*, 712 F.2d 539, 559 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984)), discussed the relationship between the clarity of the applicable law and the determination of substantial justification, as follows:

> For purposes of the EAJA, the more clearly established are the governing norms, and the more clearly they dictate a result in favor of the private litigant, the less "justified" it is for the government to pursue or persist in litigation. Conversely, if the governing law is unclear or in flux, it is more likely that the government's position will be substantially justified.

Martinez, 815 F.2d at 1383.

Appellant emphasizes that the Government's position relied in great part on Federal Acquisition Regulation (FAR) § 49.112-2(d), and that our decision in the underlying appeal held that provision did not preclude the payment of CDA interest on settlement amounts (app. application at 4-5; app. reply at 5-6). FAR § 49.112-2(d) provides:

> (d) *Interest*. The Government shall not pay interest on the amount due under settlement agreement or a settlement by determination. The Government may, however, pay interest on a successful contractor appeal from a contracting officer's determination under the Disputes clause at 52.233-1.

Appellant urges that "the fundamental problem with the Government's litigation position was that it disregarded the second sentence of FAR 49.112-2(d), which unambiguously supported [appellant's] entitlement to interest" (app. reply at 5). Appellant further argues that the Government's "position clearly conflicted with two other precedents," namely *Ellett Constr. Co., Inc. v. United States*, 93 F.3d 1537 (Fed. Cir. 1996), and the provisions of the CDA. The CDA provides that "interest on amounts found due contractors on claims shall be paid . . . ." 41 U.S.C. § 611.

In *Ellett*, the court held that "a termination settlement proposal can be a CDA claim, albeit one the regulation writers treat disparately for interest purposes." 93 F.3d at 1545.

The court did not elaborate on the meaning of its statement, nor did it need to. As we noted in the underlying appeal, "[t]he issue facing the court in *Ellett* was whether, and under what circumstances, a termination settlement proposal is a claim; the court was not, as we are, faced with the issue of interest recoverability." *Rex Systems*, 00-1 BCA at 151,490.

As noted above, appellant argues that "the fundamental problem with the Government's litigation position was that it disregarded the second sentence of FAR 49.112-2(d) . . . ." The fundamental problem with appellant's argument is that it ignores the first sentence which prohibits payment of "interest on the amount due under a settlement agreement . . . ." While appellant may have mounted "a successful contractor appeal," the parties reached a "settlement agreement" to resolve the dispute. Thus, it fell to this Board to resolve the resulting tension between the two sentences of the regulation. That we sustained appellant's interpretation does not mean that the Government's position was unjustified.

Given the Federal Circuit's language concerning FAR § 49.112-2(d) and our own musings regarding that provision's meaning in light of what the Federal Circuit had said, the outcome of the underlying "test" appeal "was not obvious or foreordained." *Lombardo's Lakeview Resort, Inc.*, ENG BCA No. 5873-F, 94-2 BCA ¶ 26,650. We conclude that issue was novel and one of first impression, and that the governing law was not clear. Therefore, we find that a reasonable person would think the Government's position to be substantially justified.[*]

CONCLUSION

We conclude that the Government's position that interest was not payable on amounts received in convenience termination settlements was substantially justified under 5 U.S.C. 504 (a)(1). The application is denied.

Dated: 12 February 2002

RONALD JAY LIPMAN
Administrative Judge
Armed Services Board
of Contract Appeals

[*] In light of our conclusion that the Government's position was substantially justified, we need not address any other issues and arguments raised by the parties.

I concur

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

I concur

CARROLL C. DICUS, JR.
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. 52247, Appeal of Rex Systems, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

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