

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access)
to Justice Act --)
)
Beta Engineering, Inc.) ASBCA Nos. 53570, 53571
)
Under Contract Nos. SPO560-00-C-F017)
SPO560-01-C-F039)

APPEARANCES FOR APPELLANT: John S. Broude, Esq.
S. Aaron Holland, Esq.
Broude, Smith & Jennings, P.C.
Fort Worth, TX

APPEARANCE FOR THE GOVERNMENT: Gale B. Furman, Esq.
Trial Attorney
Defense Supply Center
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE TING

Beta Engineering, Inc. (Beta Engineering) seeks an award of attorney's fees and expenses in the amount of \$31,281.62¹ under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, incurred in connection with two appeals it litigated before the Board. On 3 June 2002, the Board issued a Rule 12.3 decision converting the terminations for default of Contract Nos. SPO560-00-C-F017 (the F017 contract) and SPO560-01-C-F039 (the F039 contract) to terminations for the convenience of the Government. *Beta Engineering, Inc.*, ASBCA Nos. 53570, 53571, 02-2 BCA ¶ 31,879. The Government moved for reconsideration. We denied the motion by decision issued on 3 September 2002. *Beta Engineering, Inc.*, ASBCA Nos. 53570, 53571, 02-2 BCA ¶ 31,970.

Beta Engineering's timely 4 October 2002 EAJA application avers that it was the prevailing party in its appeals before the Board, that it is eligible to receive an award of

¹ Beta Engineering's original application was in the amount of \$29,037.87 (application at 4-5). It forwarded a supplemental application by letter dated 20 November 2002, adding its fees and costs incurred during the months of September, October, and November 2002, for a total of \$31,281.62 (supp. application at 2).

attorney's fees and expenses, and that the itemized amount sought totals \$29,037.87. The application also avers that the Government's position was not substantially justified.

Eligibility

In support of its EAJA application, Beta Engineering has submitted its balance sheet as of 11 October 2001, the date it filed its appeals (application, ex. A-1). In a separate motion filed with the application, Beta Engineering asked that the Board exclude its balance sheet from public disclosure on the grounds that the financial information furnished in the balance sheet is exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552(b)(1)-(9), that it could result in competitive harm to Beta Engineering, and that disclosure is not required in the public interest. In accordance with the Board's EAJA Interim Procedures, Rule 8b., Beta Engineering has placed its balance sheet in a sealed envelope labeled "Confidential Financial Information." The Government has not opposed the motion. Accordingly, the Board will not place the balance sheet in the public record and any request to inspect or copy it shall be disposed of under established procedures under FOIA.

The balance sheet was actually preceded by what was referred to as "ACCOUNTANTS' COMPILATION REPORT" from Namanny & Company, P.C., Beta Engineering's accountant. This report, dated 5 July 2002, states:

We have compiled the accompanying balance sheet of Beta Engineering, Inc. as of October 11, 2001 in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants.

A compilation is limited to presenting in the form of financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other assurance on them.

Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included with the balance sheet, they might influence the user's conclusions about the Company's financial position. Accordingly, this balance sheet is not designed for those who are not informed about such matters.

(Application, ex. A-1)

The affidavit of Thomas R. Namanny (Namanny) states that he is a certified public accountant, is currently the accountant for Beta Engineering, and served as its accountant during 2001. His affidavit made the following declarations:

3. “On October 11, 2001, Beta had eight (8) employees.[”]
4. “On October 11, 2001, the combined net worth of Beta, Bob Austin and Shirley Austin did not exceed \$7,000,000.00.[”]
5. “A true and correct copy of the balance sheet for Beta as of October 11, 2001, is attached hereto as Exhibit ‘ A-1’. This document shows that as of October 11, 2001, Beta had total assets of \$[deleted] and total liabilities of \$[deleted], for a net worth of \$[deleted].”

(Application, ex. A)

Beta Engineering also submitted an affidavit from Bob Austin (Austin). Austin states that he is the president of Beta Engineering, that Beta Engineering is a privately owned Texas corporation and it has “only two shareholders, myself and Shirley Austin, my wife.” The affidavit further states that “[o]n October 11, 2001, the combined net worth of Beta, Shirley Austin and me did not exceed \$7,000,000.00” and that “[o]n October 11, 2001, the date Beta filed its appeals with the Armed Services Board of Contract Appeals, Beta had eight (8) employees.” Austin states, in addition, that he has reviewed the balance sheet and the affidavit of Namanny, and “they accurately reflect Beta’s net worth as of [October 11, 2001].” (Application, ex. A)

In its answer filed on 6 November 2002, the Government challenged the adequacy of Beta Engineering’s net worth exhibit. The Government contends that Beta Engineering’s net worth statement failed to include any financial information of Bob and Shirley Austin who are affiliates of Beta Engineering as defined in the Board’s EAJA Interim Procedures, Rule 3d. The Government also contends that Beta Engineering’s net worth statement did not include any of the disclosures required by Generally Accepted Accounting Principles (GAAP), and provided no assurance of accuracy or completeness. (Answer at 1-2)

Beta Engineering's reply argues that the Government presented no evidence that Beta Engineering's net worth exceeded \$7 million. It maintained that the uncontroverted sworn testimony of Austin and Namanny support its eligibility. (Reply at 1-2)

Even though Rule 3d. of the EAJA Interim Procedures provides that "[t]he aggregate net worth . . . of the applicant and all of its affiliates shall be used to determine eligibility," and "[a]ny individual . . . that . . . owns a majority of the voting shares . . . will be considered an affiliate for purposes of these procedures," 5 U.S.C. § 504(b)(1)(B)(ii) defines the term "party" to mean "any . . . corporation . . . the net worth of which did not exceed \$7,000,000 . . . and which had not more than 500 employees at the time the adversary adjudication was initiated." Thus, following the dictates of the statute, we need only consider the net worth of the corporation as of 11 October 2001.

Even though Namanny's compilation report, standing alone, is somewhat troublesome, the uncertainties associated with that report are alleviated by the affidavits of Namanny and Austin. Namanny's affidavit states unequivocally that on 11 October 2001, the combined net worth of Beta Engineering and its two shareholders was less than \$7 million. That Beta Engineering's net worth was less than \$7 million was also supported by the affidavit of Austin. The Government has provided no evidence to contradict the balance sheet and affidavits of Namanny and Austin. The Government is not without ability to flesh out the details of Beta Engineering's financial condition as of 11 October 2001. It could have sought additional proceedings, including discovery on the issue of eligibility, pursuant to Rule 12 of the Board's EAJA Interim Procedures.

Based on the unchallenged affidavits submitted by Namanny and Austin, we conclude that Beta Engineering has established a *prima facie* case of eligibility. See *Infotec Development Inc.*, ASBCA Nos. 31809, 32235, 92-2 BCA ¶ 24,817 at 123,781 (unchallenged affidavit from vice president of company held sufficient to establish a *prima facie* case of eligibility); *Finesilver Manufacturing Co.*, ASBCA No. 28955, 88-2 BCA ¶ 20,536 (affidavit of company president held inadequate where the Government submitted documentary evidence to refute the affidavit).

Prevailing Party

Under the EAJA, an applicant must be a "prevailing party." 5 U.S.C. § 504(a)(1). The Government has not taken issue with Beta Engineering as the prevailing party in the two appeals which are the subject of this application. We find that Beta Engineering is the prevailing party.

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). 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). This statutory standard applies both to the position asserted by the Government in the adversary adjudication and to the action or inaction upon which the adversary adjudication was based. 5 U.S.C. § 504(b)(1)(E). In other words, 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) The Government has the burden of proof on this issue. *Community Heating & Plumbing Co., Inc. v. Garrett*, 2 F.3d 1143, 1145 (Fed. Cir. 1993).

The appeals which are the subject of this EAJA application involved the default terminations of two machine gun lock-release lever contracts when Beta Engineering allegedly failed to deliver first article test samples (FATS). The F017 contract required Beta Engineering to deliver FATS by 30 September 2000. In response to Beta Engineering's request for a time extension, the Government unilaterally established 30 April 2001 as the production quantity delivery date, but failed to establish a definite delivery date for the FATS. Six months after award of the F017 contract, the Government awarded Beta Engineering a second lock-release lever contract – the F039 contract – with FATS required to be delivered 6 May 2001. Both parties later considered 30 April 2001 to be the F017 FATS delivery date. The parties understood that the F039 FATS would be waived if the F017 FATS were found to be acceptable.

When Beta Engineering failed to deliver the F017 FATS on 30 April 2001, the Government did not establish a new delivery date. The Government issued a modification in May 2001 authorizing Beta Engineering to use an alternate steel. The Government also proceeded with preliminary inspections so that the F017 FATS could be forwarded to the testing laboratory for first article testing. As a result of a dispute between the parties during preliminary inspection, Beta Engineering offered to resubmit the F017 FATS in three weeks. Beta Engineering also submitted a written request in June 2001 to make a second F017 FATS submission. The Procurement Contracting Officer's inaction in both instances left Beta Engineering in limbo. On 15 August 2001, 107 days after the delivery date of the FATS had passed, the Government terminated the F017 contract for default. When no FATS were delivered on 6 May 2001, the Government waited 114 days before it terminated the F039 contract for default.

In our decision issued on 3 June 2002, we held that the Government improperly terminated the F017 contract because it failed to reestablish a new FATS delivery date after having disestablished the 30 April 2001 delivery date. We held that the default termination of the F039 contract was likewise improper because the Government never reestablished a FATS delivery date when the 6 May 2001 delivery date was not met, and when approval of the F017 FATS did not materialize.

Relying on *DeVito v. United States*, 413 F.2d 1147 (Ct. Cl. 1969), the Government moved for reconsideration, contending that Beta Engineering had not met the two-prong test required to find that the Government had waived its right to terminate the contracts for default once the delivery dates had passed. We denied the motion. In the case of the F017 contract, we found that the Government continued to encourage Beta Engineering to perform by approving an alternate steel and by initiating preliminary inspection even after the 30 April 2001 FATS delivery date had passed. These circumstances, coupled with the fact that the Government did not terminate the F017 contract until 15 August 2001, 107 days after the delivery date of the F017 FATS had passed, led us to conclude that the Government failed to terminate within a reasonable time under circumstances indicating forbearance. Moreover, we found that Beta Engineering provided sufficient evidence to establish that it incurred costs and continued to perform in reliance on the Government's forbearance. In the case of the F039 contract, we found that the parties understood that FATS would be waived if the F017 FATS were found to be acceptable. When approval of the F017 FATS faltered, the Government never reestablished a new delivery date after the 6 May 2001 FATS delivery date had passed. The Government's termination of the F039 contract on 28 August 2001, 114 days later, supports a finding that it waived the delivery date under circumstances indicating forbearance.

In arguing that its position was substantially justified, the Government merely rehashed the same arguments that it previously advanced. These appeals boil down to sending confusing signals to the contractor and poor contract administration. We cannot conclude that its position was substantially justified.

CONCLUSION

Based on the foregoing, we hold that Beta Engineering is entitled to an award of attorney's fees and expenses. The determination of the amount is remanded to the parties for negotiation.²

² Inasmuch as the Government's answer focused only on entitlement, it should be given the opportunity to review each item of the amount claimed. We note that 5 U.S.C. § 504(b)(1)(A) authorizes attorney's fee at the rate of \$125 an hour.

Dated: 26 March 2003

PETER D. TING
Administrative Judge
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 Nos. 53570, 53571, Appeals of Beta Engineering, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

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