ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access to Justice Act of --	)	
American Service & Supply, Inc.	)	ASBCA Nos. 49309, 50606
Under Contract No. F34650-94-C-0177	)	

APPEARANCE FOR THE APPELLANT: Garreth E. Shaw, Esq.
Garreth E. Shaw, PC
San Antonio, TX

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
Brady L. Jones, III, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE THOMAS

On 9 March 2004, appellant filed its timely application for Equal Access to Justice Act (EAJA) fees and other expenses in the amount of $511,559. The government has answered the application, arguing that its position was substantially justified and that many of the asserted fees and expenses were not reasonable. Appellant has replied to the government's answer, reducing the amount sought to $435,742. Only entitlement is before us.[1]

ASBCA No. 49309 was an appeal from a termination for default. The Board sustained the appeal. ASBCA No. 50606 was an appeal from the deemed denial of a claim for payment of an invoice. The Board sustained the appeal as to entitlement and remanded it for determination of quantum. *American Service & Supply, Inc.*, ASBCA Nos. 49309, 50606, 03-1 BCA ¶ 32,253, *aff'd on recon.*, 03-2 BCA ¶ 32,411.

EAJA requires that an applicant submit a timely application "which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness . . . ." The applicant "shall also allege that the position of the agency was not substantially justified." 5 U.S.C. § 504(a)(2).

Here, appellant qualifies as a prevailing party. In the case of ASBCA No. 49309, the Board awarded appellant the complete relief sought: conversion of the termination

[1] Judge Schepers who heard these appeals has retired.

for default to one for convenience. In the case of ASBCA No. 50606, the Board awarded it some of the benefits sought: a determination of entitlement. *Aqua-Fab, Inc.*, ASBCA Nos. 34283, 36258, 91-1 BCA ¶ 23,655 at 118,473-74.

Appellant is also eligible for an award. It has submitted notarized statements establishing that it meets the requirements as to net worth and number of employees.

The government argues, however, that appellant may not recover because the government's position as to ASBCA No. 49309 was substantially justified. It is settled that "a position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) 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). The government's position must be substantially justified both with respect to the underlying action by the agency and the adversary adjudication. 5 U.S.C. § 504(b)(1)(E).

In ASBCA No. 49309, the agency's underlying action was the termination for default on 14 November 1995. At that time, the contract completion date was 11 December 1995. It is undisputed that appellant could not meet that completion date. On 7 November 1995, appellant requested an extension of the contract completion date from 11 December 1995 to 29 March 1996. Appellant stated that the extension was necessary because the government's request for skid testing had delayed performance by five months. The TCO denied appellant's request for an extension stating that the skid testing was a contract requirement. (03-1 BCA ¶ 32,253 at findings 60, 62, 66)

At the hearing, the TCO could not point to any contract requirement for skid testing other than a requirement for testing of "the unit." The specifications had provided that "the compressor and engine shall be rated for continuous duty . . . . All components shall be mounted on a structural base [the skid]. The unit shall be factory assembled and test run prior to shipping . . . ." (*Id.* at findings 5, 67) In June and July 1995, the government required static and dynamic testing of the skid before the first skid could be approved and then assembled with the first engine and compressor. There was no contract requirement, however, to test the skid individually, or for static or dynamic stress loading tests on the skid. (*Id.* at findings 29, 33, 37, 39) We conclude that the government has not established that a reasonable person could think that the requirement for separate testing of the skid was correct. The government also has not established that a reasonable person could think that any separate testing should have been accomplished by June 1995.

The government argues that even if appellant was entitled to an extension of the contract completion date to 29 March 1996, the TCO could reasonably think it correct, based upon appellant's approved progress schedule dated 4 January 1995, that appellant required a minimum of 195 days from 14 November 1995 to complete the contract work (gov't answer at 37). We concluded in our decision that, based on appellant's actual

performance, it was reasonable to assume that appellant could have completed the work in five, or even three, months (the extension for the skid tests) plus the one month left in the contract (03-1 BCA at 159,495). The government has not established that a reasonable person could think it correct that it would have taken a minimum of 195 days to complete the contract based on a schedule dated 4 January 1995, without consideration of the contractor's actual performance as impacted by government delays.

We have considered the government's other arguments relating to substantial justification but do not find them persuasive. The government has not argued separately that its position was substantially justified as to ASBCA No. 50606. Accordingly, the government has not established that its position was substantially justified as to either appeal.

The government's arguments as to the reasonableness of the claimed fees and expenses relate to quantum rather than entitlement.

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: 15 July 2004

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

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 Nos. 49309, 50606, Appeals of American Service & Supply Company, rendered in conformance with 5 U.S.C. § 504.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals