ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Application Under the Equal Access to Justice Act of -- | ) | |
| Freedom NY, Inc. | ) | ASBCA No. 43965 |
| Under Contract No. DLA13H-85-C-0591 | ) | |

APPEARANCE FOR THE APPELLANT: Gilbert J. Ginsburg, Esq.
Washington, DC

APPEARANCE FOR THE GOVERNMENT: Michael L. McGlinchey, Esq.
Chief Trial Attorney
Defense Supply Center (DLA)
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE JAMES

Freedom NY, Inc. (FNY), seeks to recover attorneys' fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, incurred in the appeal of *Freedom NY, Inc.*, ASBCA No. 43965, 01-2 BCA ¶ 31,585, *recon. denied* on 7 December 2001, 02-1 BCA ¶ 31,676 (*FNY II*), *aff'd in part, rev'd in part and remanded*, *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1326, 1329, *reh'g denied*, 346 F.3d 1359 (Fed. Cir. 2003), *cert. denied*, 541 U.S. 987 (2004), *modified on remand*, 04-2 BCA ¶ 32,775, *recon. denied*, 05-1 BCA ¶ 32,934, *aff'd*, 182 Fed. Appx. 988 (Fed. Cir. 2006).

FNY had previously appealed from the termination for default of the captioned contract, and the Board sustained that appeal, converting the termination for default to a termination for convenience, and determined that FNY was entitled to EAJA fees in connection with the appeal from the default termination. *Freedom NY, Inc.*, ASBCA No. 35671, 96-2 BCA ¶ 28,328 (corrected decision dtd. 7 May 1996) (*FNY I*), *see also* 96-2 BCA ¶ 28,502 (decision dtd. 15 August 1996, ordering correction of decision dtd. 7 May 1996 and restoring ASBCA No. 43965 to the Board's active docket), 98-1 BCA ¶ 29,711 (entitlement to EAJA fees, remanding determination of quantum to the parties).

On 21 December 2001, respondent filed an appeal from our decision in *FNY II* in the Court of Appeals for the Federal Circuit, No. 02-1105. On 9 January 2002, FNY filed an appeal from such decision in the same court, No. 02-1130. On 10 May 2002, FNY submitted an EAJA application at the Board seeking alternatively a total of $946,085 or $725,226, depending upon the maximum hourly rate used, in connection with *FNY II*. Our 16 May 2002 docketing notice stated that no decision on FNY's EAJA application

would be made until the underlying merits had been finally determined. On 2 July 2008, following final disposition of *FNY II*, FNY supplemented its EAJA application. The application as supplemented (appl.) claimed $649,805 in attorneys' fees at $125 per hour and expenses. The government responded to FNY's EAJA application on 1 August 2008, raising various objections. In its reply, FNY reduced the claimed fees for Neil H. Ruttenberg by $14,400 in response to one of the objections (app. reply at 3).

The Board's 20 November 2008 letter sought the parties' views on three questions: (1) why the applicable attorneys' fees should not be limited to $75 per hour, the rate in effect when the appeal was filed; (2) to what extent should attorneys' fees and expenses be apportioned to FNY's Claim Item 12, on which it did not prevail in *FNY II* and (3) explain the discrepancy between various figures stated or derivable for the attorney fee of Mr. Luchansky of Kohlman & Saucier (K&S), *viz*., $193,431, $200,267.50 and $200,642.50. Respondent replied to these questions on 12 January 2009 and FNY replied on 21 January 2009. The parties' views on the first two questions are reflected in the following decision. FNY has clarified that the correct amount for Mr. Luchansky's fees (at $125 per hour) is $200,706 (21 January 2009 ltr. at 15).

In summary, as adjusted to reflect the $14,400 reduction in Mr. Ruttenberg's fees and the amount of $200,706 for Mr. Luchansky's fees, FNY's EAJA application seeks the following:

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| I. Attorneys' fees | |
| • Maupin-Taylor, Ward-Smith, Barnes-Thornburg @ $75/hr. | $ 31,089 |
| • Goldberg & Connolly (G&C), 1,329.85 hrs. @ $125/hr. | 166,231 |
| • K&S, 1,605.64 hrs. @ $125/hr. | 200,706 |
| • Neil H. Ruttenberg (NHR), 687.5 hrs. @ $125 hr. | 85,937 |
| • Gilbert J. Ginsburg (GJG), 214.56 hrs. @ $125 hr. | 26,820 |
| • GJG, EAJA Appl., 38.24 hrs. @ $125/hr. | 4,780 |
| • GJG, Final Subm. & Resp., 20 hrs. @ $125/hr. | 2,500 |
| Subtotal: | 518,063 |
| II. Paralegal fees | |
| • G&C, 65.1 hrs. @ $80/hr. | 5,208 |
| • GJG, EAJA prep., 127.55 hrs. @ $125 | 15,944 |
| • GJG, Final Subm., 40 hrs. @ $125/hr | 5,000 |
| Subtotal: | 26,152 |
| III. Expenses | |
| • G&C | 12,254 |

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| • K&S | 52,911 |
| • GJG | 2,718 |
| • GJG, EAJA prep. | 648 |
| • Fishbane, consulting | 32,246 |
| Subtotal: | 100,777 |
| | |
| TOTAL: | $644,992 |

The government does not dispute that FNY meets the eligibility requirements of the EAJA and is a prevailing party other than as to Claim Item 12. It also does not contest the timeliness of the application. It argues that respondent was substantially justified and, in any event, FNY should not be able to recover various categories of expenses as detailed below. Both entitlement and quantum are to be decided (Bd. corr. ltrs. dtd. 29 January 2009, 4 February 2009, 9 February 2009).

## DECISION

### Entitlement

Prevailing Party. Of FNY's $21,959,311 claim in dispute in *FNY II*, $14.4 million was claimed for lost profits on future Meal, Ready to Eat (MRE) procurements (MRE7-MRE11) not awarded to FNY. 01-2 BCA at 156,058 (findings 117, 119, 121). Since the non-recoverability of such consequential damages was clear from well established legal precedents, FNY did not prevail on Claim Item 12. The U.S. Court of Appeals for the Federal Circuit affirmed our decision on that issue. 329 F.3d 1320, 1333 (Fed. Cir. 2003).

Substantial Justification. Respondent must demonstrate that its position in the underlying agency action and in the adversary adjudication was substantially justified. 5 U.S.C. § 504(b)(1)(E); *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991). FNY asserts that respondent's position was not substantially justified (appl. at 16-17). Respondent contends that the Board's decision in *FNY II* held in favor of FNY on three alleged breaches and in favor of respondent in part on another alleged breach, and awarded $5,907,654 out of FNY's $21,959,311 total claim, which amount was reduced to $2,970,747 on remand, and concludes that much of the government's position, therefore, was found by this Board and the Court of Appeals to have "a reasonable basis in law and fact" (answer at 3).

Under the EAJA substantial justification requirement, "only one threshold determination for the entire civil action is to be made.… The 'substantial justification' requirement…properly focuses on the governmental misconduct giving rise to the litigation." *Commissioner v. Jean*, 496 U.S. 154, 159, 165 (1990). DLA's position with respect to the entirety of its conduct -- maladministration of contract progress payments,

interference with FNY's financers, diversion and delay of GFM, failure to pay invoices for MREs delivered, improper inspection procedures and added testing requirements -- found in our principal decision in *FNY II* (01-2 BCA at 156,061-65) and its adversary position on such conduct weigh heavily in deciding whether a reasonable person could think such position was correct or had a reasonable basis in law and fact. *See Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988) (reasonable person test); *Chiu v. United States, supra* (position encompasses the entirety of government conduct). We hold that respondent's position was not substantially justified.

We conclude that FNY is entitled to recover reasonable EAJA fees and expenses incurred in connection with ASBCA No. 43965, except with respect to Claim Item 12.

Quantum

We first address the first two questions in the Board's letter of 20 November 2008, and then turn to the government's objections to specific costs.

1. Rate of Attorneys' Fees. FNY's application sought attorney fees at $125 per hour (except $75 per hour for fees originally claimed in connection with *FNY I*) (appl. at 24; FNY's 21 January 2009 ltr. at 2). This appeal was filed on 28 December 1991 and docketed on 3 January 2002. FNY argues first that the date governing the applicable EAJA attorneys' fees is not the filing or docketing date, but rather 15 August 1996, when the Board granted FNY's motion to correct its 7 May 1996 decision, vacated that part of the decision denying ASBCA No. 43965 and restored such appeal to the Board's active docket, 96-2 BCA ¶ 28,502 at 142,325. Since that corrected decision resurrected, revived and reinstated ASBCA No. 43965, and the Congress amended the attorneys' fee under 5 U.S.C. § 504(b)(1)(A)(ii) to $125 per hour effective 29 March 1996 (Pub. L. No. 104-121, § 233), FNY concludes that the $125 rate applies to this EAJA application. (FNY's 21 January 2009 ltr. at 2-8) FNY further argues that the ASBCA should apply a cost-of-living increase to the hourly rate provided by 5 U.S.C. § 504(b)(1)(A)(ii), as federal courts do in accordance with 28 U.S.C § 2412(d)(2)(A)(ii), since for 23 years the Defense Department has abused its discretion by failing to issue regulations providing for such increases permitted by 5 U.S.C. § 504(b)(1)(A)(ii) (*id*. at 8-11). Respondent's 12 January 2009 letter argues that the applicable rate for attorneys' fees is $75 per hour.

Public Law No. 104-121, § 233, provided that the increase in EAJA attorneys' fees from $75 to $125 per hour "shall apply…to adversary adjudications commenced on or after the date of the enactment of this subtitle [29 March 1996]." For the purposes of an EAJA application to the ASBCA, an "'adversary adjudication' means…(ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607)." 5 U.S.C. § 504(b)(1)(C). CDA appeals are taken from contracting

officers' decisions. 41 U.S.C. § 606. In *FNY II* there was a claim, a contracting officer's decision and an appeal. FNY does not cite, and our research has not uncovered, any legal authority holding that reinstatement of an appeal or suit after its erroneous denial changes the date of commencement of the adversary adjudication. We conclude that the adversary adjudication in *FNY II* began when FNY filed that appeal. *See Commercial Energies, Inc.*, ASBCA Nos. 47106, 50316, 00-1 BCA ¶ 30,907 at 152,489, 152,491 ($75/hour rate applied to bifurcated proceedings in which the entitlement appeal (ASBCA No. 47106) was docketed on 24 January 1994 and we "reinstated the appeal" on 1 November 1996 for determination of quantum (redesignated ASBCA No. 50316)), *aff'd*, 194 F.3d 1330 (Fed. Cir. 1999) (table), *cert. denied*, 528 U.S. 820 (1999) (Mem.); *see also Coastal Dry Dock & Repair Corp.*, ASBCA Nos. 31894, 36754, 92-1 BCA ¶ 24,494 at 122,243. Since the $75 per hour rate applied to the 1994 date when the entitlement appeal was filed in *Commercial Energies*, before the appeal was "reinstated" on 1 November 1996 for quantum, then *a fortiori* the $75 per hour rate applies to this non-bifurcated appeal in *FNY II*. Therefore, the $75 per hour rate applies to all attorneys' fees requested in FNY's application.

With respect to applicant's fee enhancement issue, the EAJA applicable to Board proceedings, 5 U.S.C. § 504(b)(1)(A)(ii), provides in pertinent part:

> [A]ttorney or agent fees shall not be awarded in excess of $125 per hour [$75 per hour before amendment by Pub. L. No. 104-121 effective 29 March 1996] *unless the agency determines by regulation* that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee. [Emphasis added.]

The EAJA applicable to federal court proceedings, 28 U.S.C § 2412(d)(2)(A)(ii), provides in pertinent part:

> [A]ttorney fees shall not be awarded in excess of $125 per hour *unless the court determines* that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. [Emphasis added.]

Thus, 5 U.S.C. § 504(b)(1)(A)(ii) does not confer on the ASBCA discretion to apply cost of living or special factor increases without an agency determination so prescribing by regulation. *See ABS Baumaschinenvertrieb, GmbH*, ASBCA No. 48207, 01-2 BCA ¶ 31,549 at 155,826-27, where we declined to apply the 28 U.S.C § 2412(d)(2)(A)(ii) fee enhancement provision to an EAJA application for fees before the ASBCA, stating:

> Our authority to grant attorney fees and other expenses is derived from 5 U.S.C. § 504, which limited the attorney fees to $75 per hour at the time of the initiation of the adversary adjudication.… While 5 U.S.C. § 504(b)(1)(A) permitted the enhancement of fees for cost of living or a special factor…that enhancement required an agency determination by regulation to authorize our [ASBCA] granting of such a fee enhancement. [Citations omitted.] [T]he Department of Defense has not issued such a regulation authorizing enhancement of fees based on cost of living or any other special factor. [Citation omitted.]

FNY suggests that it is entitled to a higher fee because of the Department of Defense's "abuse of discretion" (21 Jan. 2009 ltr. at 11). However, it cites no authority for that proposition. We conclude that FNY's fees are limited to $75 per hour.

2. Apportionment. The criteria for apportioning attorneys' fees were set forth in *Hensley v. Eckerhart*, 461 U.S 424, 440 (1983):

> We hold that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees.… Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

In response to the second question in the Board's 20 November 2008 letter, FNY argues that Claim Item 12 was not "distinct in all respects" because respondent's treatment of FNY under the MRE-5 contract (DLA13H-85-C-0591) was the direct cause of subsequent MRE contract losses, and, if that contention is rejected, then 181.09 hours of attorneys' time (Ruttenberg, 25.1 hours, Steiger, 89.253 hours and Luchansky, 66.732 hours), are apportionable to Claim Item 12. Mr. Ruttenberg's records referred specifically to the subject matter of Claim Item 12 (total of 25.1 hours). FNY arrived at the hours for Messrs. Steiger and Luchansky based on percentages of transcript pages (0.48322%) and briefing pages (17.3%) relating to Claim Item 12. (FNY's 21 January 2009 ltr. at 12-14, ex. 2) Respondent argues that 23% of FNY's requested attorneys' fees

and expenses are apportionable to FNY's Claim Item 12, based upon the average of the percentages of claims (8.3%), briefing pages (18.3%), and damages claimed under Claim Item 12 (43.1%) (gov't 12 January 2009 ltr. at 3-5).

In *Hubbard v. United States*, 480 F.3d 1327, 1334 (Fed. Cir. 2007), the Court stated that a tribunal should take a "nuanced approach" to determining a reasonable fee in light of the results achieved. It rejected a "mechanical mathematical analysis." Accordingly, we do not accept such measures as the percentages of transcript or briefing pages and damages sought as controlling, although they may provide useful information.

We hold that FNY's Claim Item 12, involving consequential damages, was distinct from the remainder of the claim items. We consider that it was a relatively simple part of the appeal to try and to decide. Despite the large amount of damages claimed, little of the overall effort on the appeal was concerned with it. Therefore, based on our review of the record of the appeal and of the attorneys' billings for which fees were incurred, we apportion 14% of EAJA fees and expenses to FNY's Claim Item 12 and reduce the recovery by that amount.

3. Reasonable Fees and Expenses. We address seriatim respondent's objections to elements of FNY's fees and expenses.

(1) Respondent objects to the fees included under FNY's petition heading, "VII. The Maupin Taylor and Barnes and Thornburg Fees Related to the Breach/Equitable Adjustment Work Is Included in this Filing" on the grounds that such fees were among FNY's original $120,735.54 sought under the EAJA in *FNY I*, 98-1 BCA ¶ 29,711, were "disallowed" by the Board's decision in such EAJA application, and are barred by accord and satisfaction due to the parties' 5 August 1998 Stipulation of Quantum for EAJA attorney fees and expenses in the amount of $75,050 in *FNY I* (answer at 3-5; ex. A). There are two fatal flaws in respondent's argument. First, our decision in 98-1 BCA ¶ 29,711 did not address or disallow the $31,089.09 in Maupin Taylor and Barnes and Thornburg Fees. Second, the parties' 5 August 1998 Stipulation of Quantum did not include a release or accord and satisfaction provision. We hold that respondent has not established its accord and satisfaction defense against recovery of said $31,089.09.

(2) In addition to the charges of $14,400 referred to above, respondent also objects to fees of Neil H. Ruttenberg, then FNY's general counsel, incurred before 29 December 2000 on the basis that Modification No. A00004 treated such fees as a G&A expense (answer at 7-8). With respect to FNY's convenience termination settlement proposal, Modification No. A00004 stated:

> The contractor's proposed G&A expense included legal costs totaling $338,471 for the firms of Quinn, Racusin, Ruttenberg; Alberi and Alberi; Barnett and Alagia; Neil

> Ruttenberg; and Saul, Ewing, and Remick. The negotiated agreement on the G&A…includes the compensation for all above legal expenses which were negotiated and finalized at $281,973.

(Appl., attach. 2 at 12 of 30) Mr. Henry Thomas, FNY's President, states, without opposition, that:

> 6. The $281,973 [in Modification No. A00004] included an amount for the legal services of Mr. Ruttenberg. That amount was for general legal services and corporate-related matters. None of it was for specific claims or litigation.
>
> 7. Freedom did not pay Neil Ruttenberg a salary or fixed retainer.
>
> 8. The Neil Ruttenberg time expended on the ASBCA matter and the interest claim were [sic] not included in Freedom's General and Administrative expense.

(Thomas aff. of 8 August 2008). There is no duplication of Mr. Ruttenberg's legal charges recovered in Modification No. A00004 with his hours for work in year 2000 on "the ASBCA matter," *i.e.*, *FNY II*, and no contractual basis to exclude the latter hours, if reasonable.

(3) Respondent objects to facsimile and courier expenses for communications between FNY's attorneys and between FNY and its attorneys (answer at 8-10). We have reviewed the facsimile and courier expenses FNY claims between and among its attorneys and itself and determine that they are reasonable. *See FNY I*, 98-1 BCA at 147,249-50 (reasonable facsimile and courier expenses recoverable).

(4) Respondent objects to expenses of business lunches when an attorney was not travelling and extra secretarial services as unreasonable (answer at 10). In its reply, FNY does not explain why the business lunch expenses were reasonable. We sustain respondent's objection to recovery of expenses of business lunches unrelated to a Board hearing. We allow the expenses of secretarial services, which FNY's attorneys billed separately to FNY, *see Union Precision and Engineering*, ASBCA No. 37549, 92-3 BCA ¶ 25,028 at 124,759, *rev'd on recon. in part, aff'd on cited part*, 93-1 BCA ¶ 25,337 (appellant's attorneys charged clients for computer research, travel, overnight mail and word processing separate from hourly attorney fees, thus those expenses were recoverable). Accordingly, we disallow the following: (a) G&C (Mr. Steiger's firm) $47.44 in business lunch expenses on 3 February and 6 March 2000 at its New York office (appl. exs. 1B, 1E). (b) GJG, business lunches in July 1996 ($33.04) and in

January 1997 ($12.35 “TAHS” and $8.75 “Meals & Misc”), totaling $54.14, none of which was associated with any documented travel (appl. exs. 4D, 4E). The total amount disallowed is $101.58.

We determine that the remainder of the claimed fees and expenses are reasonable. Accordingly, we calculate recoverable EAJA fees and expenses as follows:

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| I. Attorneys’ fees requested | $518,063.00 | |
| Fees at $125/hr. | 486,974.00 | |
| Reduction to $75/hr. (75/125=.6) | 292,184.40 | |
| + Maupin-Taylor *et al.* @ $75/hr. | 31,089.00 | |
| Subtotal: | 323,273.40 | |
| | | |
| II. Paralegal fees requested | | 26,152.00 |
| G&C $5,208 @ $80 reduced to $75 | 4,882.50 | |
| GJG $20,944 @ $125 reduced to $75 | 12,566.40 | |
| Subtotal: | 17,448.90 | |
| | | |
| III. Expenses requested: | 100,777.00 | |
| Less: disallowed expenses: | | (101.58) |
| Subtotal: | 100,675.42 | |
| | | |
| Total of I + II + III | 441,397.72 | |
| Less: 14% reduction for Claim Item 12 | (61,795.68) | |
| Total allowed on application: | $379,602.04 | |

The Board grants FNY's application for EAJA attorneys' fees and expenses to the extent of $379,602.04, and denies the balance thereof.

Dated: 5 March 2009

DAVID W. JAMES, 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. 43965, Appeal of Freedom NY, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

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