

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access)
to Justice Act of --)
)
AST Anlagen-und Sanierungstechnik GmbH) ASBCA Nos. 41305, 55709
)
Under Contract No. DAJA76-87-C-0467)

APPEARANCE FOR THE APPELLANT: Paul D. Reinsdorf, Esq.
Attorney at Law
Frankfurt, Germany

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
CPT Megan E. Stephens, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAUL

By date of 28 January 2009 Analgen-und Sanierungstechnik GmbH (AST) filed an application for attorneys' fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. The government has responded to the application, and AST has replied to the response. Only entitlement is before us (order dated 29 January 2009). The underlying dispute involved AST's appeal, pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from the termination for default of a construction contract with the U.S. Army in Germany. The Board docketed that appeal as ASBCA No. 39576. AST subsequently filed an appeal from a deemed denial of its claims for unpaid invoices under the contract. The Board docketed the appeal as ASBCA No. 41305. AST took a third appeal, docketed as ASBCA No. 50802, against an assessment of excess procurement costs. Finally, AST took an appeal of a deemed denial of its total settlement cost proposal which was docketed as ASBCA No. 55709.

BACKGROUND

On 24 September 1987, the government awarded a construction contract to AST for the renovation of a barracks in Hanau, Germany. Almost two years later, the contracting officer (CO) terminated the contract for default. In a published decision issued on 4 March 2004, the Board overturned the default termination and converted it into a termination for convenience. *AST Anlagen-und Sanierungstechnik GmbH*, ASBCA No. 39576, 50802, 04-1 BCA ¶ 32,558. Familiarity with that decision is presumed. At the time of that decision, AST had already filed an appeal for unclaimed

invoices which was docketed as ASBCA No. 50802. After the decision was promulgated, AST filed an appeal relating to its total settlement cost proposal which was docketed as ASBCA No. 55709. In November 2008, the parties entered into a binding ADR agreement which authorized the Board to conduct a summary trial with binding decision to resolve ASBCA Nos. 41305 and 55709. Accordingly, in December 2008, the undersigned judge conducted the trial in Heidelberg, Germany, and entered a decision awarding AST a total amount of DM 2,250,00 in addition to the sum of €450,000 which the CO had previously paid AST in partial satisfaction of its claim in ASBCA No. 41305.

AST subsequently filed a timely EAJA application with respect to ASBCA Nos. 41305 and 55709. Based upon the parties' briefs, the Board makes the following summary findings regarding AST's EAJA claim: AST is both an eligible and a prevailing party; and the government has failed to meet its burden of proving that its position was substantially justified.

CONCLUSION

The EAJA application is sustained as to ASBCA Nos. 41305 and 55709. The Board remands to the parties for negotiation of quantum. The Board notes for the parties' guidance that AST is only entitled to an hourly rate of \$75 with respect to ASBCA No. 41305 since it was commenced prior to 29 March 1996, the effective date of the statute increasing the hourly rate from \$75 to \$125.

Dated: 30 April 2010

MICHAEL T. PAUL
Administrative Judge
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. 41305, 55709, Appeals of Anlagen-und Sanierungstechnik GmbH, rendered in accordance with 5 U.S.C. § 504.

Dated:

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