Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED IN PART: March 24, 2003

GSBCA 15848-C(13298-REM), 15849-C(13507-REM),
15850-C(13508-REM), 15851-C(13509-REM),
15852-C(13510-REM), 15853-C(13511-REM)

ACE-FEDERAL REPORTERS, INC.,

ANN RILEY & ASSOCIATES, LTD.,

ARTI RECORDING, INC.,

CALIFORNIA SHORTHAND REPORTING,

EXECUTIVE COURT REPORTERS,

and

MILLER REPORTING CO., INC.,

Applicants,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Ronald K. Henry of Kaye Scholer LLP, Washington, DC, counsel for Applicants.

Michael D. Tully and Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **WILLIAMS**.

WILLIAMS, Board Judge.

This is an application for costs under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. Applicants, Ace-Federal Reporters, Inc.; Ann Riley and Associates, Ltd.; ARTI Recording, Inc.; California Shorthand Reporting; Executive Court Reporters; and Miller Reporting, Inc., collectively seek attorney fees and expenses incurred in the prosecution of their appeals claiming that the General Services Administration (GSA) breached their requirements contracts. In the underlying appeals, Ace-Federal Reporters, Inc. v. General Services Administration, GSBCA 13298, et al., 99-1 BCA ¶ 30,139, the Board concluded that the terms of appellants' multiple award schedule contracts precluded recovery of lost profits because the contracts were not requirements contracts, and no individual contractor was given the exclusive right to provide all the mandatory user agencies with court reporting services or was guaranteed that any quantities would be ordered. While the Board recognized that user agencies were not free to order services off schedule and should have ordered from one of the multiple awardees, it concluded that the fact that agencies did so did not give rise to the remedy of lost profits under the terms of the contracts. The United States Court of Appeals for the Federal Circuit reversed, concluding that the Government's promise that it would purchase only from contractors on the schedule (with few exceptions) had substantial business value and the Government's breach of that promise could be remedied. Therefore, the Court of Appeals remanded the matter to the Board for determination of the appropriate damages due appellants. Ace-Federal Reporters, Inc. v. Barram, 226 F.3d 1329 (Fed. Cir. 2000).

On remand, GSA agreed that appellants were entitled to some damages, but argued that these damages should be reduced because grand jury proceedings were outside the scope of the contracts and off-schedule purchases made at lower prices were exceptions to the mandatory use provisions. The Board concluded that court reporting for grand jury proceedings was outside the scope of appellants' contracts and reduced appellants' recoveries accordingly. The Board denied GSA's defense that off-schedule purchases made at lower prices than schedule pricing were exceptions to the mandatory use requirements. The Board awarded appellants damages totaling $4,172,903.74 and apportioned this amount among the six appellants based upon their stipulation.

In their fee petition, applicants initially asserted that the total amount of their attorney fees incurred in these appeals was $1,203,120.40 and the total amount of expenses was $26,058.07. However, applicants made an adjustment for the issue on which they did not prevail, i.e., their argument that grand jury proceedings were included within the scope of the contract. Therefore, they reduced their request by more than 50%, seeking $465,911.90 in fees and $25,146.43 in expenses. GSA opposed this reduced fee petition on the grounds that: (1) the fee petition contained insufficient information upon which to award attorney fees, noting that forty-six individuals at appellants' counsel's law firm, whose jobs were not disclosed, had provided 4502.34 hours of work on these appeals; (2) applicants were not entitled to recovery for twenty-one hours that predated issuance of a contracting officer's final decision; (3) applicants were not entitled to reimbursement for 776.09 hours of attorney and paralegal work and expenses incurred during the United States Court of Appeals for the Federal Circuit's review; (4) applicants had included fees for work unrelated to these appeals and unreasonable meal and transportation costs; (5) applicants failed to apportion any time to issues on which they did not prevail prior to the remand phase of the case even though the

grand jury issue had been litigated earlier; and (6) applicants sought $125 per hour, but EAJA only allowed a maximum hourly rate of $75 per hour for actions commenced, as this one was, prior to March 29, 1996.

In reply to these concerns raised by GSA to their fee petition, applicants again amended their fee petition and reduced the amounts they were seeking. Specifically, applicants accepted all of the adjustments and reductions requested by GSA. Based upon this, the parties have agreed on the total amount of an appropriate EAJA award, stating in a joint statement:

> The parties recognize that the final determination of the amount of attorney fees and expenses is left to the sound discretion of the Board. Nonetheless, if the Board were to conclude that Appellants are prevailing parties and that GSA's opposition to the appeal was not substantially justified, the parties are in agreement that an award of $205,239.95 in fees and $9,064.59 in expenses fully addresses GSA's previously articulated concerns and would constitute an appropriate award under EAJA.

Parties' Joint Statement Regarding Appellants' Revised Fee Petition at 2.

Discussion

The EAJA provides for payment of fees and expenses incurred by a private party in litigation with the Government where the private party prevails and the position of the Government is not substantially justified. 5 U.S.C. § 504. The Act provides that:

> [a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1).

The Government does not dispute that applicants are prevailing parties and otherwise would qualify for an EAJA award based on their size and income.

The Government has not provided any significant argument that its position was substantially justified. Instead, it has simply commented on the legal standard as follows:

> Assuming a party has prevailing party status, the government is not liable for attorney fees and expenses if its position was substantially justified.

> 5 U.S.C. § 504(a)(2). Substantial justification "means justified in substance or in the main -- that is, to a degree that would satisfy a reasonable person and is equivalent to 'having a reasonable basis both in law and fact.'" Granco Industries, Inc. v. General Services Administration, GSBCA Nos. 15572-C[14901,] et al., [ ]01-2 BCA ¶ 31,628 (quoting Pierce v. Underwood, 487 U.S. 552, 565 (1988)); Beta Systems, Inc. v. United States, 866 F.2d 1404, 1406 (Fed. Cir. 1989). In deciding whether the government's position was substantially justified, contract boards of appeals are to conduct an examination of the government's prelitigation, administrative, and litigation conduct. Doty v. United States, 71 F.3d 384, 385 (Fed. Cir. 1995); Granco, supra. In short, contract boards of appeals are "to look at the entirety of the Government's conduct and make a judgment call whether the government's overall position has reasonable basis in both law and fact." Chiu v. United States, 948 F.2d 711, 715 (Fed. Cir. 1991).

Respondent's Opposition to Applicants' Fee Petition at 3-4. The Government's opposition to the fee petition makes no further reference to substantial justification, and the Government does not argue that its position in these underlying appeals was in fact substantially justified.

It is well established that when a party which has prevailed in litigation against the Government applies for an EAJA award, the Government bears the burden to demonstrate that its position was substantially justified. American Sheet Metal Corp. v. General Services Administration, GSBCA 15165-C(14066), 00-2 BCA ¶ 31,126 (citing Doty v. United States, 71 F.3d 384, 385 (Fed. Cir. 1995)). The fact that the Government prevailed before the Board in the initial stage of this litigation does not prove the requisite level of substantial justification. As the United States Supreme Court observed in Pierce v. Underwood, 487 U.S. 552, 569 (1988): "Obviously, the fact one other court agreed or disagreed with the Government does not establish whether its position was substantially justified." Rather, the question is whether the Government's position "has a reasonable basis in law and fact." Pierce, 487 U.S. at 566 n.2. To satisfy its burden, the Government must justify not only its prelitigation conduct but also its position throughout the litigation. E.g., Dantran, Inc. v. Department of Labor, 246 F.3d 36 (1st Cir. 2001). We find that it has failed to do so in this case.

Here, in the prelitigation phase, as our appellate authority determined, there is no question that the Government agencies' conduct in failing to order services from the schedule contractors was a breach of their contracts. The fact that the Board concluded that the terms of the contracts did not warrant the remedy of lost profits in that appellants had already received all business the Board believed was guaranteed to them under the contracts does not change this result. This case involved the question of whether the terms of the contracts would give rise to the remedy requested, notwithstanding that the Government's conduct in procuring off schedule was unjustified and a breach. The Board did not fail to award damages because it found the position of the Government to be legally or factually justified. It failed to award damages because it concluded sua sponte that the terms of the contracts required such a result.

Nor was the Government's litigation position at the Board and the Court of Appeals substantially justified -- other than its assertion that the grand jury proceedings were outside the scope of the contract. With respect to all other arguments, both the Board of Contract Appeals and the United States Court of Appeals for the Federal Circuit found the Government's position to be lacking in legal merit, and factually there remained no justification for the Government's failure to order court reporting services from schedule vendors.

As a threshold matter in the Board litigation, GSA argued that a majority of appellants' claims were barred under the statute of limitations in the Federal Acquisition Streamlining Act of 1994 (FASA), 41 U.S.C. § 605(a) (1994). We disagreed, noting that FASA provides that its statute-of-limitations provision takes effect on the date specified in its final implementing regulations. The regulations promulgated pursuant to that statute unambiguously state that the six-year limitation period shall not apply to contracts awarded prior to October 1, 1995, and renders the statute inapplicable to the instant contracts, which were all awarded in 1988.

Respondent raised several defenses to liability. First, respondent contended that appellants were not entitled to lost profits because, absent bad faith, the termination for convenience clause in the contracts precluded damages for lost profits. Essentially, GSA argued that because the user agencies' off-schedule purchases were not made in bad faith, the Board should impose a "constructive termination for convenience" and deny breach damages. Second, GSA contended that, based upon the equities, appellants were not entitled to recover because they received orders under the contracts exceeding the estimated quantities stated in the request for proposals (RFP). Third, GSA argued that court reporting for grand jury proceedings was outside the scope of appellants' contracts. Fourth, respondent contended that each off-schedule purchase made at a lower price than schedule pricing was an exception to mandatory use pursuant to the Federal Property Management Regulation (FPMR), 41 CFR 101-26.401-4(f)(1). Fifth, respondent contended that appellants' contracts were illusory because there were numerous exceptions to GSA's promise that the court reporting requirements would be satisfied through these contracts and the exceptions taken together vitiated the value of that promise, respondent's sole consideration.

The Board did not address these defenses in its initial decision because it concluded that appellants had not demonstrated that they were entitled to recover lost profits or consequential damages, under the terms of their contracts. The Court of Appeals, in reversing the Board's conclusion that damages were unavailable, found that there was a breach "pure and simple" and summarily rejected the Government's argument that a constructive termination for convenience should be imposed, characterizing that point as a "nonissue" in the context of this case. On remand, the Board agreed with the Government's argument that grand jury proceedings were outside the scope of the contract, but applicants reduced their fee petition to exclude work related to that argument. The Board on remand also rejected the Government's lower-priced exception, and the Government did not raise its other defenses. In sum, based upon our review of the Government's prelitigation and litigation positions here, we conclude that its position was not substantially justified.

In response to GSA's concerns raised in opposition to their revised fee petition, applicants deleted fees and expenses related to the grand jury issue, deleted fees and expenses associated with their appeals to the Federal Circuit, withdrew their claim for fees unrelated to these appeals, identified the positions of legal and support personnel who billed time on these appeals, and agreed that they are not entitled to an hourly rate above $75.[1]

Applicants have also elected not to pursue recovery of additional hours of legal time that they erroneously excluded from their initial fee petition filing. Given these reductions and deletions of fees and expenses claimed, GSA does not oppose the revised fee petition. Specifically, applicants seek and respondent stipulates to an award of $205,239.95 in attorney fees plus $9864.59 in expenses under EAJA. Based upon the Board's independent review of the revised fee petition and the entire record herein, the Board concludes that these fees and expenses were necessary in this litigation and are reasonable.

Decision

Applicants' application for costs under EAJA is **GRANTED IN PART**. Applicants are awarded $205,239.95 in attorney fees plus $9864.59 in expenses.

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MARY ELLEN COSTER WILLIAMS
Board Judge

We concur:

_____
STEPHEN M. DANIELS
Board Judge

_____
EDWIN B. NEILL
Board Judge

[1] The maximum rate was increased from $75 to $125 per hour by Pub. L. No. 104-121, Title II, § 231(b)(1), 110 Stat. 847, 863 (1996).