Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED IN PART: October 24, 2003

GSBCA 16195-C (16047)

NVT TECHNOLOGIES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Jeffrey A. Lovitky, Washington, DC, counsel for Appellant.

John C. Ringhausen, Office of Regional Counsel, General Services Administration, Atlanta, GA, counsel for Respondent.

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

NEILL, Board Judge.

Appellant, NVT Technologies, Inc. (NVT), has filed an application for attorney fees incurred in connection with an appeal filed with this Board In January of this year. The appeal involved a claim by NVT for $13,447.42. This amount was said to represent the cost of extra work NVT was directed to perform under its contract to provide the General Services Administration (GSA) with mechanical maintenance services and other related services for a federal courthouse.

NVT elected to have its case decided using the Board's small claims procedure. On June 16, 2003, after review of the record before us, we concluded that NVT's position was far more persuasive than that of the Government. On June 16, 2003, we rendered a decision in favor of NVT. NVT Technologies, Inc. v. General Services Administration, GSBCA 16047, 03-2 BCA ¶ 32,285.

On July 14, 2003, NVT filed an application for fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000). Counsel for NVT states that he spent a total of 17.1 hours working on NVT's appeal and on preparing the application for fees. The application seeks $3847.50, based upon an hourly rate of $225. NVT claims entitlement to payment at

this rate rather than at the statutory rate of $125 per hour because legal counsel in the metropolitan area of Washington, D.C., generally charge fees in excess of the statutory rate and because the number of attorneys practicing in the specialized area of government contracts is limited.

Discussion

To be eligible for recovery of costs under EAJA, NVT must meet the following requirements:

> 1. have been a prevailing party in a proceeding against the United States;
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> 2. if a corporation, have had not more than $7,000,000 in net worth and five hundred employees at the time the adversary adjudication was initiated;
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> 3. submit its application within thirty days of a final disposition in the adjudication;
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> 4. in that application, (a) show that it has met the requirements as to having prevailed and size (numbers (1) and (2) above) and (b) state the amount sought and include an itemized statement of costs and attorney fees; and
>
> 5. allege that the position of the agency was not substantially justified.

McTeague Construction Co. v. General Services Administration, GSBCA 15479-C (14765), 01-2 BCA ¶ 31,462, at 155,333; see 5 U.S.C. § 504(a)(1), (2), (b)(1)(B); Doty v. United States, 71 F.3d 384, 385 (Fed. Cir. 1995).

Considering these requirements in the order listed above, we find that NVT was decidedly the prevailing party in this litigation. As to the size of NVT at the time its case was filed, the application contains a credible declaration, given under penalty of perjury by the president of NVT, attesting that, at that time, his company employed no more than 130 persons and had a net worth well below $7,000,000. Further, the application was timely filed within thirty days of our decision.

As required, NVT's application specifically addresses the issues of its status as a prevailing party, a qualifying small business, and the timeliness of its submission. Attached to the application is an itemized statement regarding counsel's services and fees.

Finally, the application notes that the position taken by the agency in this case was not substantially justified and explains in some detail why the agency will not be able to meet its burden of demonstrating otherwise. We find applicant's analysis persuasive. Based upon our own independent review of the administrative record before us in NVT's appeal, we too are convinced that the agency's position in this case was not substantially justified.

Indeed, GSA does not oppose the application on the ground that the agency's position was substantially justified. Rather, GSA's concern is with NVT's request to be reimbursed

for attorney fees using an hourly rate of $225. After some discussion, counsel for the parties have entered into the following stipulation:

> 1. Appellant does hereby amend its fee application to a total of $2,992.50 (17.1 hrs x $175.00);
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> 2. Respondent does hereby state that it has no objections to the fee application as amended.

While government counsel in this case may believe that payment at an hourly rate in excess of the statutory rate of $125 is appropriate, this in no way justifies an award by this Board at the agreed-upon hourly rate of $175. The EAJA provision regarding the recovery of fees and other expenses associated with an agency's conduct of an adversary adjudication is clear. It reads:

> [A]ttorney or agent fees shall not be awarded in excess of $125 per hour 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.

5 U.S.C. § 504(b)(1)(A)(ii).

While a judicial tribunal is free to make the determination that a fee in excess of the statutory rate of $125 per hour is justified by an increase in the cost of living or a special factor, an administrative tribunal, such as ours, cannot do so in the absence of an agency regulation addressing that issue. Compare 28 U.S.C. § 2412(d)(2)(A) with 5 U.S.C. § 504(b)(1)(A)(ii); see ABS Baumaschinenvertrieb GmbH, ASBCA 48207, 01-2 BCA ¶ 31,549. Counsel for the Government has referred us to no agency regulation, nor are we aware of any GSA regulation, which determines that an increase in the cost of living or some special factor justifies award of a fee based upon an hourly rate greater than $125. In the absence of such a regulation, we decline to make an award at the enhanced rate notwithstanding the stipulation entered into by counsel. We are satisfied, however, that NVT has met the statutory requirements for award of fees under EAJA at the prescribed rate of $125 per hour.

Decision

NVT's application for attorney fees is **GRANTED IN PART**. We award a total of $2137.50 (17.1 hours at $125 per hour).

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EDWIN B. NEILL
Board Judge

I concur:

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STEPHEN M. DANIELS

Board Judge

HYATT, Board Judge, concurring.

In a dissenting opinion in Giancola & Associates v. General Services Administration, GSBCA 12305-C(12128), 93-3 BCA ¶ 26,146, I expressed reservations about the award of EAJA fees in the context of an appeal in which the contractor has elected to proceed under the small claims procedure provided under the Contract Disputes Act of 1978 (CDA). I continue to have concerns about the application of EAJA to appeals processed under the small claims election.

EAJA is intended to eliminate legal expenses as a barrier to a contractor's challenge to unreasonable Government action. See, e.g., Community Heating & Plumbing Co. v. Garrett, 2 F.3d 1143, 1145 (Fed. Cir. 1993). The statute seems to contemplate that the Government will have the opportunity to appeal when it loses on the merits of a dispute. 5 U.S.C. § 504(a)(2) (2000). Under the small claims election, the Government has no input into the election and no right, in the absence of fraud, to appeal the decision of the single judge ruling on the merits of the claim.[1]

The intent of the election is to encourage both parties to dispense with the sometimes burdensome and costly formalities of due process to obtain an expeditious, economical resolution of a small dollar value dispute. Thus, the process, by definition, is intended to enable the contractor to pursue its claim without the need to incur substantial attorney fees and other expenses -- thus independently achieving the objective of an award of fees under EAJA. In the small claims context, then, an award of attorney fees should be unnecessary.

EAJA and the small claims election are inherently inconsistent in other ways as well. The small claims process requires the Government to relinquish the rigors of litigation in favor of encouraging a speedy, inexpensive resolution of the matter in issue. Having done this, the Government could then be at a serious disadvantage when it comes to proving its position was substantially justified should the contractor pursue an award of attorney fees under EAJA. If an EAJA application is contested, the result could be precisely the type of proceedings the small claims election was intended to obviate. In my view, the potential incompatibilities of the two remedies makes the availability of an award of attorney fees in small claims proceedings problematic.

Nonetheless, having said all of these things, the Board now has established precedent permitting, when appropriate, the award of attorney fees under EAJA in cases where the contractor has elected the small claims procedure. On the facts of this case, the proposed

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[1] This ambiguity inherent in the attempt to reconcile the two provisions is notable because the award of attorney fees under EAJA represents a waiver of sovereign immunity and thus "must be strictly construed in favor of the United States." Ardestani v. INS, 502 U.S. 129, 137 (1991); Bazalo v. West, 150 F.3d 1380, 1382 (Fed.Cir.1998); Levernier Construction, Inc. v. United States, 947 F.2d 497, 503 (Fed. Cir. 1991).

award of fees is not objectionable. The Government has not argued or suggested that its position in the underlying proceedings was substantially justified nor does there appear to be any evidence that an award of attorney fees would otherwise be unjust. Appellant's attorney seeks an award of fees for a relatively modest number of hours devoted to his successful representation of the contractor. The fee award is not unduly disproportionate when compared to the quantum award in the underlying case. The amount of quantum awarded in the underlying appeal, when combined with the fee award, is still substantially less than the $50,000 overall ceiling on small claims. Since I do not disagree with the majority's determination that the standards enunciated under EAJA have been met, I concur in the award.

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CATHERINE B. HYATT
Board Judge