Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED IN PART: May 26, 2004

GSBCA 16322-C(15208)

A & B LIMITED PARTNERSHIP,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Allen E. Ertel and Daniel F. Schranghamer of Allen E. Ertel & Associates, Williamsport, PA, counsel for Applicant.

Jeremy Becker-Welts, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

DANIELS, Board Judge.

A&B Limited Partnership (A&B) leased to the General Services Administration (GSA) office space in a building in Wilkes-Barre, Pennsylvania. After the lease expired, A&B claimed entitlement to payment for the cost of repairing damage the Government had caused to the space, and also for the cost of replacing items the Government had removed. The Board held for A&B as to the cost of repair and for GSA as to the cost of replacement. A&B Limited Partnership v. General Services Administration, GSBCA 15208, 04-1 BCA ¶ 32,439 (2003); 01-2 BCA ¶ 31,444, reconsideration denied, 01-2 BCA ¶ 31,522.

After the Board issued its last decision in the case, A&B filed an application pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000), for an award of attorney fees and other costs incurred in its prosecution of the case. A&B seeks a total award of $52,215.01 – $44,940 in attorney fees; $658.71 in postage, facsimile transmission fees, courier fees, and costs of copying of documents and a videotape; $1,936.30 in transcript costs; $5 in parking charges; and $4,675 in witness fees. In this opinion, we address the cost application.

A. EAJA 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 purpose of the law is "to eliminate the barriers that prohibit small businesses and individuals from securing vindication of their rights in civil actions and administrative proceedings brought by or against the Federal Government." Scarborough v. Principi, 124 S. Ct. 1856, 1861 (2004) (citing H.R. Rep. No. 96-1005, at 9 (1980)).

To be eligible under this Act for recovery of fees and other expenses incurred in connection with a proceeding, an applicant must meet several requirements. It must:

(1) have been a prevailing party in a proceeding against the United States;

(2) if a partnership, have had not more than $7,000,000 in net worth and five hundred employees at the time the adversary adjudication was initiated;

(3) submit its application within thirty days of a final disposition in the adjudication;

(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.

5 U.S.C. § 504(a)(1), (2), (b)(1)(B); see Doty v. United States, 71 F.3d 384, 385 (Fed. Cir. 1995); McTeague Construction Co. v. General Services Administration, GSBCA 15479-C(14765), 01-2 BCA ¶ 31,462, at 155,333; DRC Corp. v. Department of Commerce, GSBCA 15172-C(14919-COM), 00-1 BCA ¶ 30,841, at 152,226. There is no question that A&B has met all of these requirements. The only one contested by GSA is the second, and an uncontested affidavit from A&B's controller demonstrates that the partnership meets the size requirement.

B. Eligibility does not guarantee an award, however. The agency which defended the contractor's appeal may defeat an application by persuading the adjudicative officer that the position of the agency was substantially justified or that special circumstances make an award unjust. 5 U.S.C. § 504(a)(1). GSA has attempted to defeat McTeague's application by persuading us that the agency's position was substantially justified.

As to a contention of substantial justification, we have explained:

> The Supreme Court has held that the adjudicator should ask, when confronted with this defense, whether the agency's position was "'justified in substance or

> in the main' -- that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988). Under this standard, the trier of the case must determine whether the Government's position had a reasonable basis in both law and fact. Chiu v. United States, 948 F.2d 711, 715 (Fed. Cir. 1991); see also Ramcor Services Group[, Inc. v. United States], 185 F.3d [1286,] 1290 [(Fed. Cir. 1999)]; Ace Services, Inc. v. General Services Administration, GSBCA 12067-C(11331), 93-2 BCA ¶ 25,727, at 128,012. The burden is on the Government to show that its position was substantially justified. Doty v. United States, 71 F.3d 384, 385 (Fed. Cir. 1995); Community Heating & Plumbing Co. v. Garrett, 2 F.3d 1143, 1145 (Fed. Cir. 1993); Hospital Healthcare Systems, Inc. v. Department of the Treasury, GSBCA 14719-C(14442-TD), 99-1 BCA ¶ 30,282, at 149,785.

McTeague, 01-2 BCA at 155,334; DRC, 00-1 BCA at 152,227.

GSA believes that its determination to oppose A&B's claim was substantially justified because the Board denied the appeal as to one of the two elements of the claim and because A&B did not "adjust its claim to face the reality of the facts" until cross-examination during the hearing on the merits of the other element. Respondent's Response to Appellant's Application for Legal Fees and Costs (Respondent's Response) at 4-6. We do not find this argument convincing. The claim element as to which the Board denied the appeal was relatively minor and dropped from the case at an early stage. While we make an adjustment to the amount of the award to account for resources devoted to this issue (see below), GSA's having prevailed on it does not affect our conclusion that the agency's position on the claim, taken as a whole, was not substantially justified. We found that GSA's position on the principal issue was based on assumptions of agency employees which were without any justification whatsoever. The employees' views as to the agency's liability were predicated on cursory investigation, extravagant ideas of the critical question of what constitutes normal wear and tear, and admittedly erroneous arithmetic. GSA ultimately stipulated to A&B's position as to both entitlement and quantum on this principal issue. The one issue as to which A&B adjusted its claim after evaluating hearing testimony was insignificant.

C. GSA makes another argument which, if accepted, would defeat most of the cost application – the request for reimbursement of attorney fees. The attorney who represented A&B in the underlying appeal, Allen E. Ertel, is a limited partner in A&B. In its opposition to the application, GSA expresses concern that A&B may not have actually paid Mr. Ertel for his services. The agency maintains further:

> If . . . A&B . . . actually retained Mr. Ertel to represent it in this matter and Mr. Ertel submitted contemporaneous itemized bills to the Partnership and the Partnership actually paid those bills, then A&B might be entitled to some payment. Respondent contends, however, that such can only be shown by A&B's actually providing copies of (1) a retainer agreement; (2) the actual contemporaneous bills; and (3) evidence of payment. No such evidence has been provided in Appellant's Application and the Application must therefore be denied.

Respondent's Response at 7.

The agency's concern in this regard is not warranted under the interpretation of EAJA propounded by the Court of Appeals for the Federal Circuit. According to the Court, "It is well-settled that an award of attorney fees is not necessarily contingent upon an obligation to pay counsel. . . . The presence of an attorney-client relationship suffices to entitle prevailing litigants to receive fee awards." Ed A. Wilson, Inc. v. General Services Administration, 126 F.3d 1406, 1409 (Fed. Cir. 1997) (citation and quotation omitted). Under the Court's reasoning, even if counsel had represented himself in the case, or had been a salaried employee of the applicant, reimbursement of attorney fees would have been appropriate. Id. In light of this binding precedent, we need not inquire into the payment arrangement between A&B and Mr. Ertel. The fact that Mr. Ertel acted as the attorney for client A&B during our proceedings suffices to make an award of attorney fees appropriate.

D. We do, however, make some deductions from the amount sought by A&B before making an award of attorney fees and other expenses incurred in prosecuting the appeal.

1. We are required by controlling law to deny reimbursement of all costs which were incurred prior to the issuance of the contracting officer's decision on A&B's principal claim. EAJA allows reimbursement of costs which were incurred in connection with an "adversary adjudication," 5 U.S.C. § 504(a)(1), and an adversary adjudication is deemed not to begin until the contractor receives the contracting officer's decision. ROI Investments v. General Services Administration, GSBCA 15488-C(15037-C)-REIN, 01-1 BCA ¶ 31,352, at 154,827 (citing Levernier Construction, Inc. v. United States, 947 F.2d 497 (Fed. Cir. 1991), and several decisions of the GSBCA). This appeal was filed before a certified claim was made to the contracting officer, and the Board suspended proceedings to permit A&B to make such a claim and the contracting officer to render a decision on it. The contracting officer never did render a decision – or even reply to the claim. We will therefore deem the contracting officer to have denied the claim on the sixtieth day after the claim was made, or on August 18, 2000, and consider the case to have been properly put before the Board on the following day. See 41 U.S.C. § 605(c)(2) (contracting officer to issue decision or notify contractor of time within which decision will be issued within sixty days of receipt of submitted certified claim over $100,000). A&B's application shows $1,916.33 in costs ($1,897.50 in attorney fees and $18.83 in costs for postage, facsimile transmission, and copying) as having been incurred prior to August 18, 2000. We deny reimbursement of this portion of the costs sought.

2. We deny reimbursement of costs which were incurred to prosecute the claim element as to which we found for GSA – the cost of replacing items the Government removed from the premises. When a tribunal is calculating an award based on only limited success, "There is no precise rule or formula for making . . . determinations [as to deductions from the amount sought. The tribunal] may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." Hensley v. Eckerhart, 461 U.S. 424, 436-37 (1983); see also ROI Investments, 01-1 BCA at 154,828 (and cases cited therein); Hospital Healthcare Systems, Inc., 99-1 BCA at 149,786. The element as to which GSA prevailed dropped from the case on June 5, 2001, when the Board issued an interlocutory decision. A&B's application shows $5,799.29 in costs ($5,617.50 in attorney fees and $181.79 in costs for postage, facsimile transmission, and copying) as having been incurred between August 18, 2000 (when the case properly came before the Board), and June 5, 2001. The element in question constituted approximately thirty percent

of the total amount claimed. We cannot identify any specific hours as having been devoted to this element, so we simply reduce the amount sought by thirty percent to account for some hours having been spent on the element. We deny reimbursement of $1,739.79 ($1,685.25 in attorney fees and $54.54 in costs of postage, facsimile transmission, and copying).

3. GSA contends that entries for attorney time spent on several days are inherently unreasonable and "impossible to justify." Respondent's Response at 8. The agency notes in particular October 28, 2002 (40.25 hours, including travel time, for a trip to Philadelphia to review documents and draft a letter); November 6, 2002 (twenty hours, including travel time, for a trip to Wilkes-Barre, Pennsylvania, for depositions of two witnesses); November 7, 2002 (twenty hours, including travel time, for a trip to Philadelphia for depositions of two witnesses); January 17, 2003 (two hours for a telephonic conference with the presiding judge); and March 5, 2003 (ten hours for depositions of two witnesses). For each of these days, according to agency counsel, A&B's attorney engaged in the activities listed in the cost application, but spent far less time than alleged in performing them. In response, A&B states that the entries for each of the days except January 17, 2003, reflect time spent over the course of several days. The review of documents in October 2002 itself consumed several days, A&B maintains, and each deposition required many hours of preparation.

The record contains no basis for making a precise calculation as to this matter. The parties have provided us with no evidence, and we were not present to observe actions for ourselves (except for the telephonic conference, whose length the presiding judge cannot recall). We can only apply, as a guide here, a general impression of how the proceedings unfolded. The agency's position is buttressed by our noting that the attorney's time records are meticulous on most days, showing to the tenth of an hour which specific actions were performed on which specific days, and that the attribution of many hours of work over several days to similar activities appears out of keeping with the attorney's general practice. On the other hand, agency counsel acknowledges that each of the activities he questions consumed several hours. Further, any good attorney – and Mr. Ertel clearly falls within that category – spends time to prepare for depositions and conferences with a judge. In attempting to balance these considerations, we reduce the amount awarded by twenty hours for the October 28, 2002, entry, and by ten hours for each of the November 6 and 7, 2002, entries. These reductions allow appropriate time for the activities at issue, whether they occurred on the dates noted or on several days around those dates. Because the cost application is premised on Mr. Ertel's billing rate of $150 per hour, this reduces the amount of attorney fees for which reimbursement is permitted by $6,000 (forty hours times $150 per hour).

4. As noted immediately above, A&B's attorney billed for his time at the rate of $150 per hour. EAJA provides that "attorney 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). A&B justifies the higher rate on the ground that as "one of the pre-eminent trial attorneys in northcentral Pennsylvania," Mr. Ertel was uniquely qualified to handle the underlying case. Appellant's Reply Brief at 10. The Supreme Court has held, however, that the phrase "limited availability of qualified attorneys . . . for the proceedings involved" must be interpreted restrictively. It "must refer to attorneys 'qualified for the proceedings' in some specialized

sense," such as an identifiable practice specialty like patent law or knowledge of foreign law or language. Pierce v. Underwood, 487 U.S. at 571-72; see also Beta Systems, Inc. v. United States, 866 F.2d 1404, 1407 (Fed. Cir. 1989); Granco Industries, Inc. v. General Services Administration, GSBCA 15572-C(14900, et al.), 01-2 BCA ¶ 31,628, at 156,255; Hospital Healthcare Systems, 99-1 BCA at 149,786-87; American Power, Inc., GSBCA 10558-C(8752), 91-2 BCA ¶ 23,766, at 119,046-48; Kumin Associates, Inc., LBCA 94-BCA-3, 98-2 BCA ¶ 30,008. Mr. Ertel's skills as a trial lawyer notwithstanding, A&B does not even contend that he has some distinct knowledge which would merit a higher fee. Thus, the requisite test is not met here.

After eliminating $9,582.75 in attorney fees ($1,897.50 for activities prior to A&B's receipt of the contracting officer's decision, $1,685.25 for contesting the claim element as to which the agency's position was correct, and $6,000 for time for which justification was insufficient), $35,357.25 in fees remain. At $150 per hour, this means that counsel devoted 235.72 productive, documented hours to the case. Multiplying 235.72 hours times the limiting hourly rate of $125 per hour yields a total of $29,464.38 in attorney fees.

5. A&B asks to be paid $4,675 in witness fees. Of this amount, $250 is listed among the expenses for which Mr. Ertel invoiced A&B. The invoice does not explain which witnesses were paid this amount. GSA thinks the witnesses were William Brown, a limited partner in A&B, and Daniel Kester, the construction manager of the partnership, and A&B has not challenged this assumption. The other $4,425 is listed separately in the cost application as charges at the rate of $150 per hour for the deposition and hearing testimony of Mr. Brown, Mr. Kester, and Michael Litchkowski. The law is clear that reimbursement for the value of the time a non-lawyer or corporate official or employee devotes to the prosecution of his or his company's appeal is not permissible. Granco Industries, 01-2 BCA at 156,256; American Power, 91-2 BCA at 119,048-49. GSA proposes that this rule be applied to partnership members and employees, thereby resulting in a denial of reimbursement sought for the time of Messrs. Brown and Kester. While the agency's suggestion is attractive, we need not decide whether to implement it in this case. The reason is that payment may not be made for the time of any of the three individuals simply because EAJA authorizes an award of "fees and other expenses incurred" by a prevailing party, 5 U.S.C. § 504(a)(1), and A&B has provided no proof that it has actually paid (or is obligated to pay) any amount of money to any of the individuals as a consequence of his participation in this case. Cf. Rumsfeld v. United Technologies Corp., Pratt & Whitney, 315 F.3d 1361, 1370-71 (Fed. Cir.), cert. denied, 124 S. Ct. 532 (2003) ("cost"– a term essentially synonymous with "expense," Webster's Third New International Dictionary 800 (1986) – means an outlay of money in exchange for items).[1] The application is particularly suspect in this regard in that it lists $750 as associated with testimony by Mr. Litchkowski at our hearing in the case, despite the fact that Mr. Litchkowski never testified before us.

Decision

[1]This understanding of "cost" or "expense" is of course at variance from the Court's understanding of incurrence of attorney fees for the purpose of an EAJA award. See Part C of this opinion. We do not believe that the Court intends its view that certain costs may be awarded even if not paid out-of-pocket by the applicant to extend beyond attorney fees.

The application is **GRANTED IN PART**. We award to A&B, under authority of EAJA, $31,991.02 – $29,464.38 in attorney fees; $585.34 in postage, facsimile transmission fees, courier fees, and costs of copying of documents and a videotape; $1,936.30 in transcript costs; and $5 in parking charges.

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STEPHEN M. DANIELS
Board Judge

We concur:

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ANTHONY S. BORWICK
Board Judge

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EDWIN B. NEILL
Board Judge