Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

DENIED: September 30, 2004

GSBCA 16429-C(15535)

AIRPORT BUILDING ASSOCIATES,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

David R. Nachman of Brown & Nachman, L.L.C., Kansas City, MO, counsel for Applicant.

Catherine Crow, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

NEILL, Board Judge.

On March 10, 2003, the Board granted the appeal of Airport Building Associates (ABA). Airport Building Associates v. General Services Administration, GSBCA 15535, 03-1 BCA ¶ 32,208. That decision, although appealed by the Government, was subsequently affirmed by the Court of Appeals for the Federal Circuit. Perry v. Airport Building Associates, 89 Fed. Appx. 264 (Fed. Cir. 2004). The Board's decision having now become final, ABA, pursuant to Board Rule 135 (48 CFR 6101.35 (2003)), has submitted an application for costs under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000).

ABA's original application was for a total of $58,525.95 in fees and costs. Counsel later reduced the claim to $45,147.72. The General Services Administration (GSA) opposes the application on several grounds. Apart from numerous objections to the reasonableness of various fees and costs, the Government contends that ABA has not adequately demonstrated that it qualifies for an EAJA award. As a partnership, ABA must show that, at the time the adversary adjudication was initiated, it employed no more than 500 persons and its net worth was not in excess of $7,000,000. GSA states that ABA has failed to make

this showing. In addition, GSA contends that, even if ABA qualifies as a party under EAJA, it is not entitled to an award because the Government's position was substantially justified and special circumstances would make an award unjust.

Given the nature of the Government's principal objections to ABA's application, we deem it necessary to review here in some detail facts in the record which bear on the nature of ABA's claim, the processing of that claim, and the eventual resolution of the claim through the Board's decision. The findings referred to in our discussion of the background of the case refer to findings of fact found in our decision on the merits. The exhibits referenced are those found in the appeal file of the underlying case.

Background

ABA, a Missouri partnership, is the owner of a building it leases to the United States Government through GSA. In August 2000, a disagreement arose between ABA and GSA regarding the application of a clause in the lease which provided the lessor with reimbursement for increases in general real estate taxes which occur over the life of the lease. The clause provides that the Government will pay the lessor additional compensation for its share of increases in general real estate taxes over general real estate taxes paid for the calendar year in which the lease commences -- i.e., the base year. However, the clause also provides that if no "full tax assessment" is made during the year in which the lease commences, then the base year will be the first year in which a full assessment is made. The clause defines "full assessment" as "the assessed value of the property ready for full occupancy after completion of all construction, renovation or conversion for the intended use of the Government." See Finding 3.

ABA's lease actually involves three distinct parcels of property. One we referred to as the 9741 Conant Avenue property. The second parcel is immediately adjacent to the first and considerably smaller. It was purchased to accommodate an extension of the building at 9741 Conant Avenue to meet GSA's space requirements. We referred to this second parcel as the "adjacent property." The third parcel is on the other side of Conant Avenue and provides two additional parking lots required under the lease. We referred to this third parcel as the "parking lot property." See Findings 4-6.

GSA took possession of the renovated premises in the fall of 1997. In March 1998, the Platte County Assessor's Office notified ABA that, as of January 1, 1998, the assessed value of the adjacent property and the parking lot property had increased. No notice of an increase in the assessed value of the 9741 Conant Avenue property was received. For the three properties subject to the lease, ABA paid a property tax for 1998 which came to a total of $25,522.30. ABA notified GSA at the close of 1998 that 1998 would be considered the base year for purposes of adjustment to be made under the tax escalation clause of the lease. See Findings 12-14, 17.

In March 1999, ABA was advised that, as of January 1 of that year, the assessed value of all three properties had increased from the prior year. For the three properties subject to the lease, ABA paid a property tax for 1999 which came to a total of $41,594.49. ABA,

thereafter, submitted to GSA a claim for $16,072.19, which represented the increase in taxes for 1999 as compared to those paid for the base year, 1998. See Finding 30.

The contracting officer was uncertain as to whether the improvements made to the leased property in 1997 were reflected in the assessed value of the property as of January 1, 1998. She, therefore, directed one of her staff to contact the Platte County Assessor's Office to verify this fact. Exhibit 5 at 10. On being told that the property was not fully assessed until 1999, the contracting officer rejected ABA's claim and advised that, for purposes of the tax escalation clause, the base year would have to be 1999 rather than 1998. Exhibit 6. Thereafter, a dispute ensued between GSA and ABA as to whether the leased property had been properly appraised and assessed so as to establish 1998 rather than 1999 as the base tax year. Exhibit 7. On October 23, 2000, counsel for ABA submitted to the contracting officer a formal claim for the amount in dispute. Exhibit 10.

Further discussion between GSA and the County Assessor's Office convinced GSA officials that the assessed value of the leased property as of January 1, 1998, did not reflect the cost of improvements made in 1997. Exhibits 8-9. Indeed, a letter dated December 20, 2000, from the Platte County Assessor to GSA expressly stated: "Our valuation for 1998 did not include the addition to the improvements; the additional square footage was picked up for the 1999 tax year." Exhibit 12.

In a final decision dated December 21, 2000, the contracting officer denied ABA's formal claim of October 23. In her decision, the contracting officer stated that a full tax assessment for the 9741 Conant Avenue property did not include the new improvements until 1999 and that the assessed value of that parcel had remained at $869,000 from 1988 to 1998. Exhibit 13.

In February 2001, counsel for ABA obtained from the Platte County Assessor a letter which stated that the assessed value of the 9741 Conant Avenue property as of January 1, 1998, was $869,000, which included all of the improvements made to that parcel during the 1997 calendar year. Exhibit 17. On March 16, counsel for ABA filed a notice of appeal of the contracting officer's decision of December 21. Exhibit 14.

In an effort to clarify the apparently conflicting information the parties had obtained from the office and records of the Platte County Assessor, arrangements were made to depose the assessor, herself, and one of the office's appraisers. A second appraiser, although not deposed, provided an affidavit in which he explained that he had visited the 9741 Conant Avenue property in August 1997 and, using cost data obtained from ABA regarding improvements recently made on the premises, calculated a new appraised value of $1,704,000 for the 9741 Conant Avenue property. For reasons never adequately explained, however, the assessed value of that property, as of January 1, 1998, remained unchanged at $869,000.

Given this apparent error in the determination of the assessed value of the 9741 Conant Avenue property as of January 1, 1998, GSA moved for summary judgment. ABA opposed the motion and argued that, while the assessed value of the 9741 Conant Avenue

property remained unchanged as of January 1, 1998, the values of the other two properties had increased significantly and this reflected the market value of the properties subject to the lease taking into account the improvements made during 1997. ABA's general partner, who was intimately familiar with the site, also stated in an affidavit that the building improvements added in 1997 were not located exclusively on the 9741 Conant Avenue property but were also located on the adjacent property, whose value had increased significantly between 1997 and 1998. This statement was in direct contradiction to a statement in the affidavit of the appraiser who had done the revised appraisal in 1997. This appraiser had stated that the leased premises, with all improvements, rested entirely on the 9741 Conant Avenue property.

The Board denied GSA's motion for summary relief. Airport Building Associates v. General Services Administration, GSBCA 15535, 02-2 BCA ¶ 31,911. Our reason for denying the motion was that, as the record stood at that time, there remained various unanswered questions of material fact. Whether all three properties were subject to the lease was an open question. Apart from the issue of whether the renovated building rested solely on the 9741 Conant Avenue property, there were questions regarding the exclusive use of the parking lot property. Arguably, based on an earlier decision of the Board involving similar facts[1], GSA might have been absolved of any responsibility for an increase in property tax on a separate parcel providing parking space for tenants of a leased building. In addition, we found that the explanations offered thus far for the record by representatives of the Platte County Assessor's Office posed more questions than they answered. In particular, the appraisers had explained that the increases in assessed values for 1998 were arrived at using a "cost," as opposed to an "income," approach. Yet, even with this explanation as to the methodology used, the rationale behind the increases in the assessed values of the adjacent property and the parking lot property still remained obscure at best.

On September 17-18, 2002, the Board held a hearing in Kansas City, Missouri, to resolve these outstanding issues. Both counsel did a highly creditable job at supplementing the record with documentary evidence and testimony from knowledgeable witnesses. It was on the record, thus supplemented, that we relied in rendering our decision on the merits.

Discussion

To be eligible for recovery of costs under EAJA, an applicant must:

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

2. if an individual or an unincorporated business, have had a net worth which did not exceed $2,000,000 or $7,000,000 respectively, at the time the adversary adjudication was initiated;

[1] Prince George Center, Inc. v. General Services Administration, GSBCA 12289, 94-2 BCA ¶ 26,889.

> 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
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> 5. allege that the position of the agency was not substantially justified.

See 5 U.S.C. § 504(a)(1), (2), (b)(1)(B); 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.

ABA has submitted a timely application for fees and costs under EAJA. It has correctly alleged that it was the prevailing party in a proceeding against the United States and has submitted an itemized statement of costs and attorney fees which it seeks to recover. ABA also alleges that the position of the agency in this proceeding was not substantially justified. Finally, the applicant contends that its size and net worth permit it to qualify as a party eligible for an award of costs and fees.

As already noted, GSA contends that ABA has not satisfactorily demonstrated that, at the time the adversary adjudication was initiated, its net worth was not in excess of $7,000,000. In other words, GSA contends that ABA is not a qualifying party as that term is defined in EAJA.

The EAJA defines "party" as:

> (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or
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> (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated . . . .

5 U.S.C. § 504(b)(1)(B). This definition of party then goes on to provide a specific exclusion from these requirements for certain agricultural cooperative associations, tax-exempt organizations, and non-profit entities. Id.

In support of its statement that it is a qualifying party under EAJA, ABA initially submitted a brief affidavit from its individual general partner attesting that, at the time of the adversary adjudication, the partnership had a net worth of less than $7,000,000 and not more than 500 employees. As is permissible, when challenged by Government counsel on a summary assertion such as this, the applicant, ABA, supplemented its initial application with a second affidavit from the same individual. See Bazalo v. West, 150 F.3d 1380 (Fed. Cir. 1998).

In this second affidavit, the general partner explained that ABA maintains its assets and liabilities, income and expenses, as a separate business enterprise, and that its assets, liabilities, income, and expenses are separate and apart from those of its partners or any other business enterprise. The general partner likewise stated that the partnership maintains separate bank accounts for collection of income and payment of expenses and that its assets are not commingled with the assets of its partners or other businesses. The partner further stated that, as part of its federal income tax return form 1065, ABA is required to provide in schedule L a detailed and integrated balance sheet showing the assets, liabilities, and partners' capital accounts of the partnership as of the beginning of each year and as of the end of each year. Because the entry on line 21 of schedule L, "partners' capital accounts," represents the partnership's total assets minus its total liabilities, the affiant stated that this figure constitutes the net worth of the partnership for the year in question. Attached to the affidavit is what is purported to be a true copy of ABA's schedule L balance sheet information from its 2001 tax return. From the entries on the sheet, it is clear that the figure on line 21 of the schedule represents ABA's net worth, i.e., the difference between the partnership's total assets and its total liabilities. The resulting figure shows a negative net worth.

Government counsel contends that this second submission of ABA regarding the partnership's net worth is still unsatisfactory. Counsel gives two reasons for this. First, counsel states that the partnership must produce evidence of not only its individual net worth, but also the aggregate net worth of it and each of its partners. Counsel's second reason for concluding that ABA's supplemental submission regarding its net worth is insufficient is that the schedule L filed with the Internal Revenue Service (IRS) simply is not acceptable evidence of a taxpayer's net worth. We consider each reason in turn.

The Government's argument in favor of aggregation is based primarily on a provision in the model rules for implementing EAJA issued in 1981 by the Administrative Conference of the United States (ACUS) and a decision of the United States Court of Appeals for the Sixth Circuit, National Truck Equipment Ass'n v. National Highway Traffic Safety Administration, 972 F.2d 669 (6th Cir. 1992).

The provision of ACUS' model rule, to which Government counsel refers, states that the net worth of an EAJA applicant and its affiliates "shall be aggregated to determine eligibility."[2] Counsel for GSA believes that this ACUS provision is particularly appropriate in this case because the ABA partnership agreement specifically provides that the partnership does not retain any tax credits, profits, or losses for itself, but rather allocates them directly to the individual partners in accordance with their respective partnership percentage. As such, the ABA partners, according to GSA, are the real parties in interest in this case. In National Truck, the court chose to apply this provision of the ACUS model rule to a trade association because the individual members of the trade association had derived

[2] The provision formally appeared in the Code of Federal Regulations (CFR) at 1 CFR 315.104. With the termination of ACUS by Pub. L. No. 104-52, 104 Stat. 480 (1995), the model rule was removed from the CFR effective February 1, 1996. 61 Fed. Reg. 3539 (Feb. 1, 1996).

significant benefits from the association's successful litigation. Counsel for GSA sees ABA's partners as being in a similar situation in this case.

Although the Board never adopted the ACUS model rule on EAJA, we have, on occasion, looked to it as a guide as to affiliated corporate entities. E.g., Insul-Glass, Inc., GSBCA 9910-C(8223), 89-3 BCA ¶ 22,223. Nevertheless, quite apart from the fact that the rule no longer appears in the CFR, we are not inclined to follow this particular provision in the instant case, notwithstanding the Sixth Circuit's decision in National Truck to apply the provision to a trade association.

Our reluctance to follow National Truck and the ACUS provision it endorses stems from the fact that other United States courts of appeals have chosen not to follow the Sixth Circuit's lead. As counsel for ABA points out, the Court of Appeals for the District of Columbia Circuit expressly rejected this approach and concluded instead that the plain language of EAJA counseled against aggregating the net worth of the plaintiff association's members. The court observed:

> [T]he government's argument . . . conflicts with the plain language of the statute, which expressly lists as eligible for fees any "*association* . . . the net worth *of which* did not exceed $7,000,000 . . . ."

National Ass'n of Manufacturers v. Department of Labor, 159 F.3d 597, 600 (D.C. Cir. 1998). In a similar vein, the Court of Appeals for the Fifth Circuit, in commenting on the definition of "party" in EAJA, observed:

> This language is clear and unambiguous. Nowhere does it limit EAJA's application only to associations whose members individually are eligible for EAJA fees. Instead, it imposes a ceiling only on the net worth and size of the association itself. It was open to Congress to include additional limitations on eligibility, such as the aggregation rule that USDA advocates, but Congress did not do so.
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> We are unpersuaded, moreover, that EAJA's special eligibility rule for agricultural cooperative and non-profit organizations is evidence of an implicit aggregation rule. . . . In sum, we are unable to discern in the unadorned words of § 2142(d)(2)(B)[3] an unwritten aggregation requirement. As we have stressed repeatedly, we must "presume that a legislature says in a statute what it means and means in a statute what it says." U.S. v. Meeks, 69 F.3d 742, 744 (5th Cir. 1995) (citing Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)).

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[3] The reference here is to 28 U.S.C § 2142(d)(2)(B), which contains the EAJA definition of "party" as applicable to judicial tribunals. The language of that provision is, except for a very few minor differences not relevant to our discussion here, virtually the same as that found in 5 U.S.C. § 504(b)(1)(B), which applies to this Board as an administrative tribunal.

Texas Food Industry Ass'n v. United States Department of Agriculture, 81 F.3d 578, 581-82 (5th. Cir. 1996).

GSA counsel would have us read into EAJA an implicit aggregation rule because ABA, pursuant to its partnership agreement, allocates directly to the partners tax credits and profits or losses. This is hardly an extraordinary provision for this type of business association. In the absence of some unique circumstance which might otherwise convince us that, apart from their normal partnership interest, the partners are in fact the real parties in interest in this case, we decline to call for an aggregation of the partnership's net worth with those of the individual partners. EAJA states that a partnership with a net value not in excess of $7,000,000 and with no more than 500 employees may qualify as a party to recover fees and other expenses. Given the facts here, we see no need to concern ourselves with any net worth other than that of the ABA partnership itself.

This brings us to GSA counsel's second reason for concluding that ABA's supplemental submission regarding its net worth is insufficient, namely, that the schedule L filed by ABA with IRS is not acceptable evidence of an applicant's net worth.

Citing a decision of the United States Court of Federal Claims, Lion Raisins, Inc. v. United States, 57 Fed. Cl. 505 (2003), counsel points out that IRS' schedule L has been expressly rejected as acceptable evidence of the net worth of a would-be EAJA applicant. We are unpersuaded by the Government's reliance on Lion Raisins. In that case, the court's rejection of the summary explanations given by the applicant and the data contained in the schedule L stemmed from very specific concerns the court had with the reliability of the applicant's submissions. Lion's vice president had provided a declaration stating that any corroborating evidence regarding Lion's net worth not contained in his declaration could be obtained from his certified public accountant. The certified public accountant, however, had already testified that he had not prepared the balance sheets submitted by Lion and that they did not conform with generally accepted accounting principles. In addition, Lion's controller had also provided testimony that called into question the reliability of the figures used in the same balance sheets. In the instant case, we are aware of no similar circumstances which would lead us to suspect that the entries contained in ABA's schedule L are inherently unreliable.

GSA also points to a second decision of the Court of Federal Claims, Ed Fields v. United States, 29 Fed. Cl. 376 (1993), aff'd, 64 F.3d 676 (Fed. Cir. 1995) (table), in support of its contention that ABA, even with its supplemental submission, has failed to prove satisfactorily its eligibility as a party under EAJA. In Fields, the applicant was expected to demonstrate that his individual net worth did not exceed $2,000,000 and the net worth of his unincorporated business did not exceed $7,000,000. The judge described the supplemental submission as a "hodgepodge of data" which purported to explicate the general range of the applicant's "total net worth." The judge rejected the submission because it contained no affirmation that the reported assets and liabilities were "total, complete, and accurate" and, even "more importantly," because it failed to comply with the requirements of the court's own rule regarding EAJA applications. Id. at 383. In rejecting the applicant's submission, the judge in Fields relied upon an earlier decision, Scherr Construction Co. v. United States, 26 Cl. Ct. 248, 250-51 (1992), in which an unaudited, qualified balance sheet

provided by the applicant was rejected since it did not enable the court to ascertain the plaintiff's net worth.

We do not see either the Fields or the Scheer decision as applicable to the instant case. This Board does not have any set rule regarding documentation an applicant must present in order to establish eligibility as a party under EAJA. Rather, we look at these matters on a case-by-case basis to determine whether there is a preponderance of evidence in support of a determination that the applicant is eligible for an award of fees and other expenses. Where the net worth is not a matter of controversy, we have found that a sworn statement from a knowledgeable individual associated with or representing the applicant is sufficient. E.g., NVT Technologies, Inc v. General Services Administration, GSBCA 16195-C(16047), 03-2 BCA ¶ 32,401. In other cases, where government counsel has with good reason questioned the applicant's alleged net value, we examine the issue in considerably more detail. E.g., Greenville Storage & Investment v. General Services Administration, GSBCA 13547-C(12989), 98-2 BCA ¶ 29,985.

In the instant case, we are satisfied with the second affidavit provided for the record by ABA's individual general partner. He has provided what he refers to as an integrated balance sheet from which the net worth of his partnership can be determined. This same individual testified at length at the hearing convened on the underlying case. We found him to be a highly credible witness and knowledgeable regarding ABA's business affairs. We have no reason to doubt the veracity of his representations regarding ABA's net worth and size or the reliability of the particular documentation he has provided in support of his contention that ABA's net worth falls considerably short of the allowable maximum of $7,000,000.

Having determined that ABA does qualify as a party under EAJA's requirements, we turn next to the applicant's allegation that the position of the agency was not substantially justified.

Although EAJA requires an applicant to allege that the position of the agency was not substantially justified, it is the Government's burden to prove that the agency's position was substantially justified. Gavette v. Office of Personnel Management, 808 F.2d 1456, 1465-66 (Fed. Cir. 1986) (en banc); Griffin Services, Inc., v. General Services Administration, GSBCA 11735-C(11171), 94-3 BCA ¶ 27,075.

The United States Supreme Court has defined "substantially justified" as "'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. Our appellate authority has construed Underwood to require a trial court "to look at the entirety of the Government's conduct and make a judgment call whether the Government's overall position had a reasonable basis in both law and fact." Chiu v. United States, 948 F.2d 711, 715 (Fed. Cir. 1991) (footnote omitted). In Chiu, the Court recognized that this "judgment call" is "quintessentially discretionary in nature" and requires "the trial court to weigh each position taken and conclude which way the scale tips . . . ." Id. at 715 n.4.

In this case, counsel for GSA has convinced us that, from the start of this dispute between ABA and GSA, the Government's position was substantially justified. In Underwood, the Supreme Court wrote: "[A] position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." Underwood, 487 U.S. at 566 n.2. As counsel for GSA points out, the contracting officer and her staff were provided information regarding the nature of the 1998 assessment which led them to believe that this assessment did not reflect the cost of improvements made to the leased property. An affidavit from the county appraiser who visited the site in 1997 stated that the renovated building rested exclusively on the 9741 Conant Avenue property. The assessed value of this parcel in 1998 was unchanged from its assessed value in previous years and the County Assessor's Office confirmed in writing to the contracting officer that the 1998 assessment on the leased property did not reflect the cost of improvements made in 1997 but the assessment for 1999 did.

We cannot fault the Government for relying on the information provided by the County Assessor's Office. Any reasonable person would have done the same. Neither are we surprised that the Government, relying on the information it so diligently garnered at the outset of this dispute and during discovery, brought a motion for summary relief. In a well-reasoned and documented opposition to the motion, counsel for ABA convinced us that the motion should be denied. In a sworn affidavit, ABA's individual general partner insisted that the leased building rested in part on the adjacent parcel of property as well. He likewise argued that the increase in the assessed value of the adjacent parcel and the parking lot parcel for 1998 could have reflected the market value of the property taking into account the improvements made during 1997.

While we drew inferences in ABA's favor in ruling on the Government motion, we still looked to ABA to prove that the highly persuasive information on which the Government was relying was incorrect or, at the very least, misleading. We saw nothing unjustified on the part of GSA in standing firm on its position. Indeed, in addition to what it perceived as a firm factual support for its position, GSA also believed that, on the basis of these facts, its had good legal support for its position as well. In its motion for summary relief as well as in its posthearing brief, GSA remained convinced that the Board's decision in Prince George Center was applicable to these facts. In that event, under the lease's tax adjustment clause, ABA would have been entitled to an increase only in the assessed value of the 9741 Conant Avenue property -- the assessed value of which remained unchanged in 1998. For reasons which we need not repeat here, we ultimately found GSA's reliance on Prince George Center inapposite. Nevertheless, we are persuaded that GSA's conviction that the decision was controlling was a reasonable position under the circumstances, especially in view of GSA's assumption that the leased building rested on one parcel of property only -- a perception that was not proven to be erroneous until our hearing of the case on the merits.

At hearing, the testimony of ABA's various witnesses did much to enhance the credibility of the 1998 assessment of the properties subject to its lease. Similarly, testimony elicited regarding the difference between assessments based upon the cost approach and assessments based upon the income approach did much to clarify the changes in the assessed value of the leased properties in 1999. ABA ultimately proved its case to our satisfaction.

Nevertheless, given the confusion and complexity regarding certain factual issues and related legal issues, we remain convinced that a hearing was necessary and that the position of the Government throughout was "justified in substance or in the main."

Decision

Accordingly, ABA's application for fees and costs is **DENIED**.

EDWIN B. NEILL
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

CATHERINE B. HYATT
Board Judge