# Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

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GRANTED IN PART: December 15, 2004

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GSBCA 16468-C(15997-COM), 16469-C(16057-COM)

DIVECON SERVICES, LP,

Applicant,

v.

DEPARTMENT OF COMMERCE,

Respondent.

Mitchell S. Griffin of Cox, Wootton, Griffin, Hansen & Poulos, LLP, San Francisco, CA, counsel for Applicant.

Terry Hart Lee, Contract Law Division, Office of General Counsel, Department of Commerce, Washington, DC, counsel for Respondent.

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

**DANIELS**, Board Judge.

Divecon Services, LP (Divecon) has submitted an application for reimbursement, under the Equal Access to Justice Act, 5 U.S.C. § 504 (2000) (EAJA), of attorney fees and other expenses it incurred in successfully prosecuting two appeals of contracting officer's decisions. See Divecon Services, LP v. Department of Commerce, GSBCA 15997-COM, et al., 04-2 BCA ¶ 32,656. It seeks an award of $59,438.97 – $52,741 in attorney fees and $6,697.97 in other expenses.

We grant the application in part. We award to Divecon $32,460.47 – $25,762.50 in attorney fees and $6,697.97 in other expenses.

The Department of Commerce, respondent, "does not dispute that Divecon has met all of the requirements for recovery under EAJA." Respondent's Opposition to Appellant's Application at 4. The agency concedes, and we find, that Divecon was the prevailing party in the underlying appeals; had not more than $7,000,000 in net worth and five hundred employees at the time the appeals were initiated; submitted its application within thirty days of a final disposition in the adjudication; in that application, (a) showed that it has met the

requirements as to having prevailed and size, and (b) stated the amount sought and included an itemized statement of attorney fees and costs; and alleged that the position of the agency was not substantially justified.

Commerce makes two objections to our granting the application, however. First, the agency contends that attorney fees and costs should not be awarded because its position in the underlying appeals was substantially justified. Second, Commerce maintains that if the Board finds that its position was not substantially justified, the amount of the award should be reduced from the amount sought. We agree with Commerce as to the second of its arguments, though not quite to the extent the agency desires.

An agency 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). 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.

A & B Limited Partnership v. General Services Administration, GSBCA 16322-C(15208), 04-2 BCA ¶ 32,641, at 161,511; McTeague Construction Co. v. General Services Administration, GSBCA 15479-C(14765), 01-2 BCA ¶ 31,462, at 155,334; DRC Corp. v. Department of Commerce, GSBCA 15172-C(14919-COM), 00-1 BCA ¶ 30,841, at 152,227.

Commerce attempts to show that its position was substantially justified essentially by re-arguing the underlying appeals. In so doing, the agency merely demonstrates that it misunderstands the Board's decision as to one case and that it made an unfortunate choice of litigation tactics as to the other.

In the first case, GSBCA 15997-COM, the Board determined that the Department's National Oceanic and Atmospheric Administration (NOAA) "did not have good grounds or solid evidence justifying the partial termination for default of the contract," and that the termination "was an abuse of the contracting officer's discretion." 04-2 BCA at 161,636. Our determination was based on facts known to both parties from the outset of the case and the application of basic principles of law to those facts. This was not a case like Foremost Mechanical Systems, Inc. v. General Services Administration, GSBCA 14645-C(13584),

99-1 BCA ¶ 30,352, cited by Commerce, in which "[t]he Government's position [was] substantially justified when issues involve[d] close evidentiary questions and the proper application of the governing legal principles [was] not clear until after the record [was] fully developed." Id. at 150,105.

Here, we found that NOAA encouraged Divecon to continue contract performance (by repairing malfunctioning equipment) after it was clear that performance could not be completed by the contractually-required completion date. In so doing, NOAA effectively waived the contract completion date and caused Divecon to perform the repairs in a very expensive context – away from its own facilities and while a vessel and personnel were standing by. Two days into the repair effort, Divecon assured NOAA that it would finish repairs and be ready to resume work two days after that. Though this assurance proved to be accurate, NOAA terminated the contract rather than permit Divecon to honor its pledge. Although NOAA maintained that Divecon abandoned performance, we expressly found that the contractor never did so. Ultimately, NOAA terminated the contract because Divecon would not accept a contract modification which would have placed the contractor at significant financial risk – and even the agency could not find a reported case in which termination for such a reason was thought permissible.

Clearly, Divecon's performance was far from flawless. But NOAA's position, and its contracting officer's ultimate decision, were – quite clearly, in our minds – legally unsupportable and grossly unfair. While we can appreciate the agency's frustration with the predicament the contractor's failures produced, we cannot conclude that the way in which the agency responded to the predicament was substantially justified.

In the second case, GSBCA 16057-COM, the Board determined that Divecon was entitled to most of the termination for convenience costs it sought. Commerce's position as to substantial justification is as follows:

> The agency did not challenge the claim for one primary reason: it believed that it had a solid case with regard to the bases for the partial termination for default, thereby making it unnecessary to challenge the requested termination for convenience costs. The agency also believed that in the unlikely event it lost on the entitlement issue, the parties would thereafter negotiate reasonable termination for convenience costs.

Respondent's Opposition to Appellant's Application at 9.

Commerce's approach to this case was misguided and placed the agency at high risk. The belief that if Divecon prevailed in the other case, the parties would negotiate a settlement to this one was completely unjustified, for all the claimed termination costs were before the Board for decision. The choice not to challenge the claimed costs proved unwise because Divecon did prevail as to entitlement, and the outcome was mitigated for the agency only by the Board's determination to analyze those costs independently, notwithstanding the lack of any advice from the agency.

Although we do not join in Commerce's belief that its position in the underlying appeals was substantially justified, we agree with the agency's suggestion that Divecon is not

entitled to an award of all the attorney fees it has sought. We make reductions in each of the three ways Commerce urges.

First, we are required by controlling law to deny reimbursement of all costs which were incurred prior to the issuance of the first contracting officer's decision that Divecon challenged here – the one that partially terminated the contract for default. 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). We consequently disallow recovery of the $2,000 in attorney fees Divecon incurred prior to October 11, 2002, the date on which the termination decision was issued and received by the contractor.

Second, we decline to reimburse Divecon for attorney fees which, though incurred on October 11, 2002, or later, do not appear to have been in connection with the adversary adjudication before the Board. The attorneys' invoices to the contractor include $354 in charges for the time one lawyer spent in November and December 2002 "re personal injury claim to cook, maintenance and cure, and how to deal with [insurance company]." This matter was not raised in the complaint, hearing, or briefs in the cases before us, so we exclude from our award all costs associated with it.

Third, we restrict to $125 per hour the rate for time devoted by Divecon's attorneys to these cases. The EAJA provides that –

> The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . attorney . . . 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 . . . for the proceedings involved, justifies a higher fee.

5 U.S.C. § 504(b)(1)(A).

Divecon maintains that the Board should award fees in excess of $125 per hour because a "special factor" – "the limited availability of qualified attorneys" – justifies reimbursement of the higher fees charges by its lawyers. In particular, Divecon asserts that it works in the unique field of commercial maritime operations (including well abandonment projects, civil construction in the marine environment, and diving and remotely operated vehicle projects), and that in the company's home state of California, there are no more than fifteen law firms that specialize in maritime matters. None of these firms, Divecon's lawyers believe, charges rates anywhere near as low as $125 per hour.

The Supreme Court has held 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.

The practice of maritime law might be the sort of identifiable practice specialty the Court had in mind when it mentioned patent law. Even if we found that it were, however, we could not award attorney fees in excess of $125 per hour because it was not necessary for an attorney to be a maritime law expert to handle the underlying cases. These cases involved, as Commerce suggests, routine Government contract matters. We appreciate that Divecon wished to be represented by attorneys with whom it was familiar and who understood the intricacies of its business. Having observed the performance of counsel during several telephone conferences, at hearing, and in briefing the cases, and having reviewed counsel's time sheets, we are convinced that the cases were prosecuted efficiently and effectively. Regardless, however, we do not believe that the lawyers' expertise was essential to the excellent way in which they handled these Government contract cases.

The courts have frequently described the purpose of the EAJA in words such as these, from a Congressional committee report on the legislation: "to eliminate the barriers that prohibit small business 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) (quoting H.R. Rep. No. 96-1005, at 9 (1980)); see also, e.g., Commissioner, Immigration & Naturalization Service v. Jean, 496 U.S. 154, 163 (1990); Community Heating & Plumbing, 2 F.3d at 1145; McTeague, 01-2 BCA at 155,334. The limitation of reimbursement of attorney fees to $125 per hour is clearly inconsistent with this objective in this case – as in most cases, for we know of few attorneys, maritime law specialists or others, who charge as little as this amount. As the Supreme Court has explained, however, "we cannot extend the EAJA . . . when the plain language of the statute, coupled with the strict construction of waivers of sovereign immunity, constrain us to do otherwise." Ardestani v. Immigration & Naturalization Service, 502 U.S. 129, 138 (1991); see also American Power, 91-2 BCA at 119,046-47.

Divecon's lawyers devoted 206.1 hours to the underlying appeals and this cost application from October 11, 2002, until the conclusion of our proceedings. Their hourly rates for each of these hours were in excess of $125 per hour. At an hourly rate of $125 per hour, the value of this time is $25,762.50. We award this amount to Divecon.

The total costs incurred by Divecon's attorneys in prosecuting the cases during the same time period were $6,697.97. These costs were incurred for a number of items necessary to the pursuit of the litigation: deposition and hearing transcripts; airfare, lodging, meals, car rental, and parking for depositions and the hearing; on-line legal research; service of process; photocopies; postage; courier service; and long-distance telephone service. We award all of these costs to Divecon.

Decision

The cost application is **GRANTED IN PART**. We award to Divecon, as reimbursement of attorney fees and costs incurred in connection with the underlying appeals and this cost application, the sum of $32,460.47.

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STEPHEN M. DANIELS
Board Judge

We concur:

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ANTHONY S. BORWICK
Board Judge

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ROBERT W. PARKER
Board Judge