Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED IN PART: April 22, 2005

GSBCA 16536-C(15607)

DATA ENTERPRISES OF THE NORTHWEST,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Marcia G. Madsen, David F. Dowd, and Michael J. Farley of Mayer Brown Rowe & Maw LLP, Washington, DC, counsel for Applicant.

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

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

GOODMAN, Board Judge.

Data Enterprises of the Northwest (Data Enterprises or applicant) has filed an application for fees and expenses incurred in connection with an appeal filed with this Board arising from its contract with the General Services Administration (GSA or respondent).

Background

On June 8, 2001, Data Enterprises filed its appeal of the GSA contracting officer's final decision dated May 18, 2001, denying applicant's certified claim dated December 15, 2000. On November 27, 2001, respondent filed a motion for summary relief seeking denial of the appeal. On February 25, 2002, applicant filed a motion for summary relief on the issue of entitlement. A ruling on the motions for summary relief was deferred pending further discovery and a hearing on the merits. A hearing on the merits was held in Norfolk, Virginia, on July 22-24, 2002, and reconvened in Washington, D.C., on March 19, 2003.

On February 4, 2004, the Board issued a decision granting respondent's motion for summary relief in part, dismissing applicant's appeal to the extent that it asserted a taking under the Fifth Amendment of the United States Constitution and copyright infringement, and granting applicant's appeal in part, finding the Government had breached its contract and awarding damages. *Data Enterprises of the Northwest v. General Services Administration*, GSBCA 15607, 04-1 BCA ¶ 32,539. Respondent filed a motion for reconsideration on March 5, 2004, but withdrew the motion on March 19, 2004, before the Board could issue a decision on the motion. On June 3, 2004, respondent appealed the Board's decision to the United States Court of Appeals for the Federal Circuit. On October 5, 2004, the Court granted respondent's motion to withdraw the appeal.

On November 4, 2004, Data Enterprises filed an application for fees and other expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000). On November 29, 2004, respondent filed a response to Data Enterprises' application, alleging that Data Enterprises had not submitted sufficient information to allow respondent to evaluate applicant's eligibility for EAJA fees. Additionally, respondent maintained that applicant erred in asserting entitlement to fees calculated on the basis of rates in excess of the statutory maximum, and had also included in its application requests for monies not recoverable under EAJA. Applicant filed a reply on December 13, 2005, submitting additional information in support of its eligibility and further arguments in support of the contested costs.

The Government's position as to the substantial justification for its position before and during litigation was presented in two briefs filed by the Department of the Navy on December 13 and 27, 2004, and adopted by respondent as its own position by an unopposed motion filed on January 4, 2005. Applicant responded to the brief filed on December 13, 2004, and stated its intention not to respond to the brief filed on December 27, 2004.

Discussion

Entitlement

To be eligible for recovery of costs under EAJA, Data Enterprises must:

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

(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;

(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.

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).

A party is "a prevailing party" under EAJA if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *DRC Corp. v. Department of Commerce*, GSBCA 15172-C(14919-COM), 00-1 BCA ¶ 30,841, at 152,226. Data Enterprises succeeded on the significant issues in the litigation and achieved some of the benefit sought, as the Board found that the Government had breached its contract with applicant and therefore applicant was entitled to damages as set forth in the Board's decision. Data Enterprises was therefore the prevailing party in this litigation.

Respondent does not dispute that Data Enterprises was the prevailing party in the underlying appeal. However, respondent, relying upon *ABS Baumaschinenvertrieb, GmbH*, ASBCA 48027, 01-2 BCA ¶ 31,549, asserts that applicant has not sufficiently proved that it meets the size requirements, as applicant fails to identify the financial information relied upon to prove its size. *ABS Baumaschinenvertrieb* concerned an applicant's compliance with specific documentation requirements of the Armed Services Board of Contract Appeals (ASBCA) for proving EAJA eligibility, one of which is a "detailed net worth exhibit" which the applicant initially failed to supply. The ASBCA allowed the applicant to supplement its application with the required information to prove its size.

This Board does not have a set rule regarding the documentation an applicant must present to establish eligibility as a party under EAJA. *Airport Building Associates v. General Services Administration*, GSBCA 16429-C(15535), 04-2 BCA ¶ 32,773. Rather, we determine on a case by case basis if there is a preponderance of evidence to support an applicant's eligibility. In the instant case, the application contains a credible declaration,

given under penalty of perjury by the president and chief executive officer of Data Enterprises, attesting that, at the time the appeal was initiated, his company did not employ more than 500 persons and had a net worth below $7,000,000. Application for Costs, Exhibit A. Applicant has also furnished a Schedule L from the company's corporate 2001 tax return that lists the company's assets and liabilities. Applicant's Response to Respondent's Response to Applicant's Motion for Costs, Exhibit A. We have no reason to doubt the veracity of the representations regarding Data Enterprises' net worth and size or the reliability of the documentation provided. We find the evidence submitted by applicant a sufficient basis to establish applicant's size.

The application was timely filed within thirty days of the dismissal of respondent's appeal of the Board's decision. As required, Data Enterprises' 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 are itemized statements in support of the fees and expenses claimed. Finally, the application notes that the position taken by the agency in this case was not substantially justified and explains why the agency will not be able to meet its burden of demonstrating otherwise.

When a party has prevailed in litigation against the Government, the Government bears the burden of establishing that its position was substantially justified. *Doty*, 71 F.3d at 385. Both the Government's pre-litigation, administrative conduct and its litigation conduct must be examined in ascertaining whether its position was substantially justified. *Id.* at 386. The Supreme Court has held that the phrase "substantially justified" means justified in substance or in the main -- that is, to a degree that could satisfy a reasonable person and is equivalent to "having a reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *DRC Corp.*, 00-1 BCA at 152,227.

As set forth in the Board's decision, we found that the Government breached its contract with Data Enterprises by disclosing proprietary information -- various versions of the data dictionary and the ATICTS Workbook -- relating to applicant's software, ATICTS 2000. With regard to the disclosure of the data dictionary, respondent argues the following in order to demonstrate that its pre-litigation position was substantially justified:

> [The applicant's] EAJA application must fail because the Board's decision is not based upon facts in the certified claim presented to the contracting officer. . . . [T]he contracting officer was substantially justified . . . because the contracting officer, in reviewing the underlying claim, focused solely on the issues raised by the Appellant. . . . The Board's decision hinges on the data dictionary, and because the alleged disclosure of the data dictionary was never before the contracting officer prior to the hearing, nor was it included in the certified claim and therefore not the subject of the contracting officer's final decision, the Board in equity should deny this EAJA application.

Navy Response at 5-6.

Respondent argues further with regard to its litigation position as to the data dictionary:

> The insertion of this new "data dictionary" issue at trial was the first time the Government became aware of the issue. The government witnesses were only prepared to address issues presented to the contracting officer for final decision (i.e. alleged workbook disclosure). By raising the data dictionary issue sua sponte during the hearing and using the data dictionary disclosure as the keystone to the Board's decision against the Government, without subjecting it to review by the contracting officer, this was contrary to the fundamental policies underlying the meaningful administrative resolution of contract disputes embodied within the CDA [Contract Disputes Act].

Navy Response at 5.

In order to address these arguments, it is necessary to review how and when the disclosure of the data dictionary was revealed to Data Enterprises and how the parties addressed this issue during the hearing and thereafter. In July 2000, Data Enterprises was notified by the Navy that it had made a decision to develop software that would be used instead of ATICTS 2000. In July 2000, Data Enterprises inquired as to whether its proprietary information had been disclosed to third parties. By letter from the contracting officer dated September 27, 2000, Data Enterprises was notified that the ATICTS Workbook had been disclosed to a third party contractor, but the Government did not reveal that the data dictionary had also been disclosed to the same contractor more than a month previously. Data Enterprises then filed a claim dated December 15, 2000, alleging Government disclosure of proprietary information, based upon the Government's admission that it had disclosed the ATICTS Workbook, and stating further that it did "not yet know the full nature and extent of the Government's disclosure." The contracting officer's final decision, dated May 18, 2001, addressed the ATICTS Workbook, but did not mention the disclosure of the data dictionary, which had already occurred. Accordingly, the Government's pre-litigation position with regard to the data dictionary was simply to refuse to reveal to applicant that the information had been disclosed.

The disclosure of the data dictionary was admitted by the Government during the first hearing in this appeal in July 2002. The Government did not object to questions concerning this subject. Rather, the parties proceeded to address the issue on the merits. During the hearing, both parties offered witness testimony on the nature of the data dictionary and submitted legal positions in their post-hearing briefs as to whether the disclosure of the data dictionary was a breach of contract. Before the hearing in March 2003, respondent was directed to supplement the record with information concerning the data dictionary. The majority of the testimony in the March 2003 hearing dealt with the data dictionary. When the hearing concluded, the Board inquired if the parties wished to file additional briefs, and both parties declined.

After the Board issued its decision in this matter, respondent filed a motion for reconsideration. One of the grounds for reconsideration was essentially the same argument presented here -- that the Board's finding of breach with regard to the disclosure of the data dictionary was "inequitable because of the inequities associated with litigating a new 'data dictionary' issue with [respondent's] witnesses prepared to address only the specific facts . . . presented to the contracting officer for final decision." Motion for Reconsideration

at 5. Respondent withdrew the motion for reconsideration fourteen days later, before the Board could issue a decision on the motion.

Now the Government asserts the same argument, i.e., that the Board's finding of breach of contract with regard to respondent's disclosure of the data dictionary was based upon facts not presented in the certified claim, in an attempt to demonstrate that its position on this issue was substantially justified. To the contrary, this argument only serves to accentuate that respondent's position was not substantially justified on this issue, as one cannot justify the Government's pre-litigation failure to reveal that it had disclosed the data dictionary, both in its initial response to applicant's pre-claim inquiry and in the contracting officer's decision in response to a claim which alleged disclosure of proprietary information.

The Government raised similar arguments in *Solar Turbines, Inc. v. United States*, 26 Cl. Ct. 1249 (1992), in which the United States Claims Court addressed the arguments as a jurisdictional issue. In that case, some of the evidence upon which plaintiff relied to support its claim for breach of contract was in the exclusive possession of the Government at the time the claim was filed. The evidence was revealed during discovery, and the Government alleged that the court did not have jurisdiction to reach the merits of any counts that were supported by evidence unknown to plaintiff at the time of submission of the claim, as no claim based upon this evidence had been submitted to the contracting officer. The court rejected this argument, holding that even though the additional evidenced was discovered by plaintiff after the claim was filed, the essential basis and general theme of the claim presented to the court -- breach of contract by failure to disclose superior knowledge -- remained the same as that described in the claim, and the court had jurisdiction to consider the additional evidence in deciding the merits of the claim.

In the instant case, the essential basis and general theme of applicant's claim was breach of contract for disclosure of proprietary information. The evidence of this additional disclosure of proprietary information to support the claim for breach of contract did not vary the essential basis or general theme of the claim. The information concerning the disclosure of the data dictionary was solely in the possession of the Government and the Government did not reveal the information until the hearing. The Government had ample opportunity to present witness testimony and present legal briefs to the Board. *Solar Turbines* makes clear that the Government cannot rely upon its own failure to timely reveal evidence exclusively in its possession to exclude such evidence from consideration at trial, when the evidence lends support to the essential basis and general theme of the claim. Therefore, the Government's assertion that its position was substantially justified because this issue was not submitted to the contracting officer for a decision lacks merit. Its failure to reveal the disclosure of this proprietary information until the time of the hearing supports our finding that the Government's position was not substantially justified as to this issue.

With regard to the other proprietary information that the Government disclosed, the ATICTS Workbook, the Government merely reargues its position presented in the underlying appeal. Neither the argument concerning the various versions of the data dictionary nor the reargument of the Government's position as to the ATICTS Workbook convinces us that the Government's position was substantially justified. In our decision, we held that:

> Justice Holmes once said that "[m]en must turn square corners when they deal with the Government." *Rock Island, Arkansas & Louisiana Railroad Co. v. United States*, 254 U.S. 141, 143 (1920). This sentiment was reiterated by Justice Jackson's comment that the Government should be held to the same standard, since "there is no reason why the square corners should constitute a one-way street." *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 388 (1947) (Jackson, J., dissenting). Our appellate authority and the boards of contract appeals have applied this principle to the Government's dealings with its contractors. In *Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988), the Court stated:
>
> > The need for mutual fair dealing is no less required in contracts to which the government is a party, than in any other commercial arrangement. It is no less good morals and good law that the government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government. [citations omitted]
>
> In the instant case, the Government did not "turn square corners." The Government did not have the right to use the ATICTS Workbook and the data dictionary to develop competing software, and its uses for this purpose were breaches of contract. The Government's interpretation of the contract lacks merit, as it is contrary to the plain language of the contract and the intent of the parties at the time of contracting.

04-1 BCA at 160,960.

Neither the Government's pre-litigation position in failing to reveal the disclosure of the data dictionary nor its position during litigation in defense of its disclosure of the applicant's proprietary information satisfies the *Pierce* "reasonableness" standard. These positions are not justified in substance or in the main, to a degree that would satisfy a reasonable person. We conclude that the Government's position in the underlying appeal was not substantially justified. Because the Government has not met its burden to demonstrate that its position was substantially justified, Data Enterprises is entitled to recover fees and expenses authorized by EAJA.

Quantum

Attorney Fees

Applicant seeks recovery for 1148.75 hours of attorney fees (1089.5 hours from the date of receipt of the contracting officer's final decision through May 31, 2004, and an additional 59.25 hours for preparation of the application for costs). Applicant requests recovery at its attorneys' actual hourly rates, which exceed the statutory maximum rate of $125. Applicant states:

> While we are not aware of a Board decision finding a special factor justifying a rate above the statutory rate, [applicant] believes a higher rate is warranted

> in this case, especially given the complexity of the litigation and the Government's pre-litigation and litigation conduct in this matter. This appeal involved the interplay of complex contractual provisions governing rights in data for which there was almost no precedent. A detailed and distinct knowledge of and experience with these government contract provisions and data rights generally was essential to successfully prosecute this case.

Application for Costs at 8.

Applicant's perception of the complexity of the litigation, the knowledge required of counsel, and the Government's conduct are not special factors that this Board can consider to justify a rate above the statutory rate. As we explained in *NVT Technologies, Inc. v. General Services Administration*, GSBCA 16195-C(16047), 03-2 BCA ¶ 32,401:

> 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.

03-2 BCA at 160,345.

Counsel for applicant has not referred us to any GSA regulation, nor are we aware of any, 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 cannot consider making an award at a rate greater the statutory rate. We are satisfied, however, that Data Enterprises has met the statutory requirements for award of fees under EAJA at the prescribed rate of $125 per hour.

Respondent does not challenge the reasonableness of the total hours expended. However, respondent maintains that applicant should not recover attorney fees for the hours expended by applicant's attorneys pursuing Freedom of Information Act (FOIA) requests, since "[r]ecovery for attorney fees and expenses is limited to those reasonable, necessary and expended solely exclusively in connection with the case. *American Power, Inc.*, GSBCA 10558-C(8752), 91-2 BCA ¶ 23,766 at 119, 049; *Oliveira v. United States*, 827 F.2d 735, 744 (Fed. Cir. 1987)." Respondent's Response to Application for Costs at 3-4 and Attachment 3.

The cases cited by respondent do not address the issue of attorney fees for work performed with regard to a FOIA request. Applicant maintains that the FOIA requests were made necessary because of respondent's recalcitrance in responding to its discovery requests in this appeal, and that the information obtained was used during the appeal process. The difficulty of obtaining discovery responses from respondent was brought to the attention of the Board prior to the hearing in this matter. When a party incurs attorney fees to pursue FOIA requests which prove more expeditious than traditional discovery, such fees are recoverable pursuant to the EAJA. *See, e.g.*, *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 703 F.2d 700 (3d Cir. 1983). Applicant is entitled to recover its attorney fees expended for FOIA requests.

We have reviewed the detailed invoices submitted by applicant with its application. Application for Costs, Exhibits B, C; Supplement to Application for Costs, Exhibit A. We find the number of hours reasonable in light of the proceedings in the underlying appeal and this cost case. Accordingly, applying the maximum statutory hourly rate of $125 to 1148.75 hours, applicant is entitled to recover attorney fees in the amount of $143,593.75.

Fees for Legal Assistants

Fees for non-attorney legal assistants are recoverable under the EAJA. *Spectrum Leasing Corp. v. General Services Administration*, GSBCA 10902-C(7347) et al., 93-1 BCA ¶ 25,317. Applicant seeks to recover $15,060.67 for legal assistant fees ($14,840.67 from the date of the contracting officer's final decision for the underlying appeal and $220 for preparation of the cost application).

Applicant asserts that it is entitled to recover fees for legal assistants at "market rates," and it is therefore entitled to recover the actual amounts its attorneys billed for the legal assistants, including two legal assistants whose hourly rates exceeded the maximum statutory rates applied to attorney fees. Applicant bases this assertion on its reading of this Board's decision in *Spectrum,* which held that the applicant is not limited to recovering the cost to the attorney (the amount the paralegal was compensated for his or her efforts) but may seek to recover the rate actually billed to the client, i.e, the market rate, providing this is the prevailing practice in the community. Respondent asserts recovery of legal assistants' fees is limited by the statutory maximum hourly rate ($125) that applies to attorney fees.

Data Enterprises misreads our decision in *Spectrum*. In that decision, we applied the reasoning of the Supreme Court when it concluded, for the purposes of the fee-shifting provision of the Civil Rights Act, that "reasonable attorney fees" includes fees for the services of legal assistants billed at market rate and not merely the cost to the attorney. *Spectrum*, 93-1 BCA at 126,153 (citing *Missouri v. Jenkins*, 491 U.S. 274, 288-89 (1989)). We did not allow reimbursement at a market rate in excess of the statutory cap, however. We make clear here that, as respondent suggests, fees for legal assistants are subject to the statutory maximum for attorney fees.[1]

[1] One court has found that it was within the trial court's discretion to determine an hourly rate for non-attorney assistants lower than the market rate billed. *Kopunec v. Nelson*, 801 F.2d 1226, 1228 (10th Cir. 1986). We do not follow that principle.

Respondent also raises the issue that applicant's attorneys used legal assistants to accomplish filings of submission to the Board during the appeal. Respondent's Response to the Application for Costs at 4 and Attachment 5. Applicant responds that the submissions which legal assistants filed were either voluminous or contained sensitive, proprietary information. We have reviewed the legal assistant fees for these instances, and find that applicant's attorneys used a legal assistant at the lowest hourly rate and the total costs did not necessarily exceed the use of a courier service. We find that the justification for the use of legal assistants, as well as the cost of such use, were reasonable.

We have reviewed the supporting documentation submitted by applicant and find that legal assistants expended 151.25 hours (149.25 hours for the appeal and 2 hours for preparation of the application). This number of hours was reasonable given the tasks performed. The amount of $767.50 was billed as the result of individuals charging rates in excess of the maximum hourly rate. Accordingly, when this amount is deducted from the total sought of $15,060.67, applicant is entitled to $14,293.17 in fees for legal assistants.

Consultant Fees

The EAJA allows recovery of "the reasonable expenses of expert witnesses." Consultant fees are recoverable under the EAJA. 5 U.S.C. § 504(b)(1)(A). Applicant seeks recovery for consultant fees for a consultant who reviewed and analyzed documents obtained by applicant during the appeal and submitted a declaration in support of applicant's motion for summary relief. He billed applicant for 118.7 hours, for which applicant seeks $14,837.50. Respondent does not challenge the amount of hours as to reasonableness. We have reviewed the hours in light of the tasks performed and find them reasonable. Applicant is entitled to recover its consultant fees in the amount of $14,837.50.

Litigation Expenses

Data Enterprises seeks reimbursement of expenses that appear to be directly related to the litigation. We agglomerate all expenses, whether paid directly by the attorneys and later repaid by applicant, or paid directly by applicant. *American Power, Inc.*, GSBCA 10558-C(8752), 91-2 BCA ¶ 23,766.

The EAJA lists certain "fees and other expenses" as reimbursable. 5 U.S.C. §504(b)(1)(A). As we noted in *American Power*, our appellate authority has made clear that this listing of examples is not exclusive. The EAJA should be interpreted to permit the award of those reasonable and necessary expenses of an attorney incurred or paid in preparation for trial of the specific case before the court, which expenses are those customarily charged to the client where the case is tried. *Oliveira v. United States*, 827 F.2d 735 (Fed. Cir. 1987); *Jean v. Nelson*, 863 F.2d 759 (11th Cir. 1988), *aff'd sub nom. Commissioner, Immigration & Naturalization Service v. Jean*, 496 U.S. 154 (1990); *Kelly v. Bowen*, 862 F.2d 1333, 1335 (8th Cir. 1988).

Applicant seeks reimbursement of $22,178.76 ($21,021.53 of legal expenses incurred in connection with the appeal and $1157.23 for preparation of the application for costs). These expenses include telephone calls, facsimile transmission, document reproduction,

computer-assisted research, courier services, transportation costs, and travel-related expenses, including meals.

Respondent objects to reimbursement of business meals not related to travel. All meal expenses are detailed in the attorneys' invoices. Respondent's Response to the Application for Costs at 4 and Attachment 5. Applicant states that all meals were related to travel, in that they were incurred while Data Enterprises' employees were either in Washington, D.C., or Norfolk, Virginia, preparing for or attending the hearings in this case.

We have reviewed these expenses, including those for business meals objected to by respondent, and find them reasonable, necessary, and incurred or expended solely or exclusively in connection with the case. We find that applicant is entitled to reimbursement of these expenses in the amount of $22,178.76.

Consultant Expenses

Applicant also seeks recovery of $938.84 for consultant expenses ($917.84 for travel and lodging and $21 for fax and delivery charges). We have recognized these categories of costs as reimbursable as long as they are reasonable, necessary, and "incurred or expended solely or exclusively in connection with the case." *American Power, Inc.*, 91-2 BCA at 119,049. Respondent has not challenged these expenses as to their nature or reasonableness. We find that applicant is entitled to recover $938.84 for consultant expenses.

Other Expenses

Applicant seeks reimbursement of other expenses incurred. These expenses include travel expenses to Washington, D.C., for Data Enterprises' president in June 2002 for a conference with the Board ($334.43) and to Washington, D.C., and Norfolk, Virginia, in July 2002 to prepare for the hearing ($2019.16). Applicant also seeks additional travel expenses for this same individual and another Data Enterprises employee to travel to Washington, D.C., for the hearing in March 2003 ($2898.49).

Respondent challenges the travel expenses incurred for Data Enterprises employees, citing *Shipco General, Inc.*, ASBCA 29206, et al., 87-2 BCA ¶ 19,877. Respondent's Response to the Application for Costs at 4 and Attachment 2. This Board has determined that such expenses are reimbursable under the EAJA if they were incurred in connection with the proceeding and necessary for the preparation of the party's case. *American Power, Inc.*, 91-2 BCA at 119,050. In the instant case, both employees of the applicant testified at the hearings and aided applicant's attorneys in preparation of applicant's case. Accordingly, these costs are reimbursable.

Additional reimbursement is sought for costs pertaining to witness fees for third-party witnesses who testified during the hearing in July 2002 ($1319.05), subpoenas ($960.00), and hearing transcripts ($1971.75 and $709.50). Applicant is also entitled to reimbursement of these charges as incurred in connection with the proceedings and necessary for the preparation of its case.

The total amount recoverable for other expenses is $10,212.38.

Summary

As explained above, the following amounts are recoverable.

Attorney Fees	$143,593.75
Legal Assistant Fees	14,293.17
Consultant Fees	14,837.50
Litigation Expenses	22,178.76
Consultant Expenses	938.84
Other Expenses	10,212.38
Total	$206,054.40

Decision

The application is **GRANTED IN PART**. Applicant is entitled to an award of fees and expenses in the amount of $206,054.40.

ALLAN H. GOODMAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

CATHERINE B. HYATT
Board Judge