Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED IN PART: July 19, 2005

GSBCA 16611-C(16115-CFTC)

WEIDEMANN ASSOCIATES, INC.,

Applicant,

v.

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

Anthony H. Anikeeff of Bracewell & Giuliani LLP, Washington, DC, counsel for Applicant.

Martin B. White, Office of General Counsel, Commodity Futures Trading Commission, Washington, DC, counsel for Respondent.

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

GOODMAN, Board Judge.

Weidemann Associates, Inc. (Weidemann 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 Commodity Futures Trading Commission (CFTC or respondent).

Background

On April 16, 2003, Weidemann filed its appeal of the CFTC contracting officer's final decision dated February 14, 2003, denying applicant's certified claim dated December 19,

2002, for breach of contract. Both parties filed motions for summary relief. On October 18, 2004, the Board issued a decision denying respondent's motion, granting the applicant's motion, and granting the appeal. *Weidemann Associates, Inc. v. Commodity Futures Trading Commission*, GSBCA 16115-CFTC, 04-2 BCA ¶ 32,782. On March 11, 2005, Weidemann filed an application for fees and other expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000). On April 26, 2005, respondent filed a response to Weidemann's application. Applicant filed a reply to the respondent's response on June 16, 2005, and respondent filed a surreply on July 15, 2005.

Discussion

Entitlement

To be eligible for recovery of costs under EAJA, Weidemann 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 the 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. Weidemann succeeded on the significant issues in the litigation and achieved the benefit sought, as the Board found that the applicant was entitled to payment under the contract. Weidemann was therefore the prevailing party in this litigation. Respondent does not dispute that Weidemann was the

prevailing party in the underlying appeal or that Weidemann meets the size requirements of the EAJA.

The application was timely filed within thirty days of the dismissal of respondent's appeal of the Board's decision. As required, Weidemann's application specifically addresses the issues of its status as a prevailing party, a qualifying small business, and the timeliness of its submission. Attached to the application are itemized statements in support of the fees and expenses claimed. Finally, the application states 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. The Government's administrative conduct before litigation as well as 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 Weidemann fulfilled the requirements of its contract with the CFTC and was entitled to payment. In its response to the application for costs, respondent reargues the merits of the issues, similarly to its submissions during the appeal, and asserts that its denial of payment under the contract was substantially justified, stating:

> The CFTC's decision to deny Weidemann's claim was reasonable in fact and law because the facts of this case were not simple and the law in effect at the time changed during the period of contract performance. Specifically, the CFTC ultimately hired a candidate who had interviewed for the job, but turned it down, before Weidemann began work. In addition, a statutory change occurred in the personnel law governing the Director position during the contract term. These events resulted in the parties having to strain to fit actual events into the terms of the contract that was not written to address them.

Response at 1-2.

Contrary to respondent's assertion, the undisputed material facts of this case were easily discernable from the parties' submissions. In early 2002, the CFTC issued a request for proposals seeking an executive search firm to find potential candidates for the position

of Director of Marketing Oversight (the director position). In March 2002, while receiving and evaluating proposals, agency personnel identified Dr. Michael Gorham as a potential candidate for the director position, contacted him, and asked him to travel to Washington, D.C., for an interview. On March 22, 2002, Weidemann was selected for award of the contract, but the agency postponed award because Dr. Gorham was under consideration. Dr. Gorham was interviewed on March 26, 2002, and shortly thereafter the CFTC offered him the director position. Dr. Gorham wrote a letter to the CFTC, declining the offer of employment and stating that he did not want the CFTC to renew the offer even if its future search for a candidate was unsuccessful.

The CFTC then decided to enter into a contract with Weidemann. On April 9, 2002, agency personnel met with Weidemann's representatives. Before entering into the contract with applicant, CFTC personnel informed Weidemann's representatives that the agency had offered the director position to an individual who had declined to accept it and the CFTC did not have any candidates under consideration at that time. Dr. Gorham was not identified by name.

During contract performance, a Weidemann recruiter independently identified Dr. Gorham as a potential candidate, contacted him, informed him the position was available, and submitted his name to the CFTC as a potential candidate. Dr. Gorham contacted the CFTC, submitted an application for the position, and was hired. When Weidemann invoiced the CFTC for its fee pursuant to the contract, the CFTC refused to pay. We found that Weidemann had fulfilled all requirements of its contract and was entitled to payment.

We conclude the Government's position was not substantially justified as it lacked a reasonable basis both in fact and in law. As respondent notes in its response to Weidemann's application, its justification for denial of payment to Weidemann, both before and during this litigation, was based upon its attempt to "strain to fit actual events into the terms of the contract that was not written to address them." Respondent's factual position lacked a reasonable basis. Its assertion that Dr. Gorham's candidacy predated its contract with Weidemann was contrary to the undisputed facts that Dr. Gorham had explicitly rejected the offer of employment prior to execution of the contract and CFTC's representation to Weidemann that no candidates were under consideration.

Respondent's legal position similarly lacked a reasonable basis. The CFTC states that "Dr. Gorham's unexpected reemergence as a candidate for the Director position" was an "unanticipated development during the contract term." Response at 9. As the CFTC did not anticipate Dr. Gorham's "reemergence" while Weidemann sought potential candidates, the contract contained no provision to deny payment if Dr. Gorham was referred to the CFTC by Weidemann. The CFTC's legal position that the applicant was not entitled to payment

lacked a reasonable basis, as applicant fulfilled all contractual requirements necessary for payment and we found that the contract contained no provision precluding payment under the circumstances which occurred. The statutory change in personnel law referred to by respondent had no effect on the CFTC's obligation to pay applicant under the contract.

The Government has not met its burden to demonstrate that its position was substantially justified. Weidemann is entitled to recover fees and expenses authorized by the EAJA.

Quantum

Attorney Fees

Applicant seeks recovery for 233.25 hours of attorney fees from the date of receipt of the contracting officer's final decision through June 16, 2005, including effort expended 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:

> Contrary to the practice of the United States Court of Federal Claims which recognizes that the cost of living has increased . . . and warrants an increased attorney fee rate over and above the $125 amount in legislation, *e.g., Keeton Corrections, Inc. v. United States*, 62 Fed. Cl. 134, 139 (2004) . . . neither the CFTC nor the Board appears to have authorized a similar increase in fees.

Application at 11.

The applicant is correct that this Board has not previously authorized an increase in fees in excess of 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 CFTC 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 than the statutory rate.

Respondent does not challenge the reasonableness of the total hours expended by applicant's attorneys. We have reviewed the supporting documentation to the applicant's application for costs and reply, which contain monthly invoices detailing the tasks performed by Weidemann's counsel. Application, Exhibit D; Reply, Exhibit D. We find the total number of hours reasonable in view of the tasks performed. We are satisfied that applicant has met the statutory requirements for award of fees under EAJA at the prescribed rate of $125 per hour. Applicant is therefore entitled to an award of attorney fees in the amount of $29,156.25.

Paralegal and Summer Associate Fees

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, at 126,153. Applicant seeks to recover for 42.25 hours expended by summer associates and paralegals through March 2005, including time expended for preparing the application.

Respondent does not challenge the reasonableness of the total hours expended by applicant's paralegals and summer associates. We have reviewed the supporting documentation to the application for costs which contain monthly invoices detailing the tasks performed by these individuals. Application, Exhibit D. We find the total number of hours reasonable in view of the tasks performed. Applicant requests reimbursement for the efforts of four individuals. The actual billing rates of three individuals are less than the statutory hourly rate of $125. Applicant is entitled to an award of fees for non-attorney legal assistants for three individuals at their actual billing rates and for the fourth individual at the statutory hourly rate of $125, for a total amount of $5026.25.

Litigation Expenses

Applicant 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, at 119,049. 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 presentation 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, 743 (Fed. Cir. 1987); *see also Jean v. Nelson*, 863 F.2d 759, 778 (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 $2265.18 through June 16, 2005, including costs incurred for preparation of the application. These expenses include the costs of photocopies of discovery documents, client documents, and pleadings; delivery of pleadings to opposing counsel, the client, and the Board by messenger, courier, and mail; and computer-assisted legal research. Application, Exhibits B, D; Reply, Exhibit C. We have reviewed the documentation in support of these costs and find that they were necessary expenses incurred for presentation of the case and reasonable in amount.

Applicant is entitled to reimbursement of litigation expenses in the amount of $2265.18.

Summary of Quantum

Applicant is entitled to an award of the following:

Attorney Fees	$29,156.25
Non-attorney Legal Assistant Fees	5026.25
Litigation Expenses	2265.18
Total	$36,447.68

Decision

The application is **GRANTED IN PART**. Applicant is entitled to an award of fees and expenses in the amount of $36,447.68.

ALLAN H. GOODMAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

EDWIN B. NEILL
Board Judge