



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: February 20, 2007

CBCA 63-C (DOT BCA 4459, 4462)

SILVER ENTERPRISES,

Applicant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Robert W. McGuire, Jr., Senior Associate of Silver Enterprises, Cape Coral, FL, appearing for Applicant.

Felicia McBride, Office of General Counsel, Research & Innovative Technology Administration, Department of Transportation, Cambridge, MA, counsel for Respondent.

Before Board Judges **STERN**, **FENNESSY**, and **SOMERS**.

STERN, Board Judge.

We have before us the timely application of Silver Enterprises (Silver or applicant), for fees and other expenses in the amount of \$29,188.32, under the Equal Access to Justice Act (EAJA). This application follows the decision of the Department of Transportation Board of Contract Appeals finding Silver was entitled to be paid \$18,728 under a termination for convenience of its contract issued by a contracting officer for the Department of Transportation Research and Special Programs Administration (RSPA), now called the Research and Innovative Technology Administration (RITA or respondent).¹

¹ *Silver Enterprises v. Department of Transportation*, DOT BCA 4459, 4462, 06-2 BCA ¶ 33,370. There was some initial confusion by RITA regarding the due date for its response to Silver's application. This resulted in RITA's filing of a "Motion for Clarification" and a response by the applicant requesting award to Silver based on RITA's failure to answer its application for fees and expenses within thirty days. We dismiss applicant's request and find that RITA's response was timely.

Summary of Earlier Proceedings

The appeal involved a contract for the periodic maintenance of two GP-9 locomotives. Silver was to provide labor and materials during inspections of the locomotives upon their delivery to the United States Army's Military Ocean Terminal Concord (MOTCO) at Concord, California. Respondent was obligated to provide adequate facilities to appellant for the performance of the contract work. After one locomotive was received at MOTCO, Silver attempted to schedule an inspection. However, respondent was unable to make the inspection facility available. Several other unsuccessful inspection attempts followed. Eventually, RITA terminated the contract for convenience.

The record reflected that Silver incurred costs in attempting contract performance. The evidence indicated that Silver made numerous efforts to inspect the locomotives and it incurred costs in making preliminary arrangements for inspections. In addition, Silver obtained test equipment and sent a technician to the site in preparation for testing. The record also disclosed numerous contacts between Silver and RITA in making and canceling arrangements for locomotive inspections.

After the contract was terminated, Silver was invited to submit a termination settlement proposal. Silver submitted a request for payment of the full contract amount of \$48,582 but stated that it was willing to settle for fifty percent of this amount, or \$24,291. Silver failed to submit any documentation in support of its proposal. RITA rejected the proposal and offered a settlement of \$4027.90, which was later increased to \$5220.23.

Applicant kept no time records. The only items of evidence before the Board were the testimony of Silver's owner, an invoice for the purchase of two airline tickets, and numerous items of correspondence that demonstrated the efforts Silver had made in attempting contract performance.

In addition to its claims for payment under the termination for convenience clause, applicant argued before the board that the termination for convenience itself was not valid. The board rejected this claim.

As to applicant's monetary claim, the board found that Silver had proven that it incurred costs in attempting to perform the contract. However, there was no accurate way of making a definite determination of the damages since Silver did not track its costs. The board found that it could make a reasonable determination of the amount due. Using a jury verdict approach the board estimated the amount of hours, based on the record, that Silver expended in attempting to perform various tasks in arranging for contract performance. The

board concluded that Silver's principals had invested 180 hours of work on the contract. The board applied a reasonable rate, including overhead and profit, of \$100 per hour to these hours. In addition, the board found Silver entitled to \$728 for the cost of two airline tickets. Silver was found entitled to be paid \$18,728.

The Application

Applicant seeks \$29,188.32 for fees and expenses it alleges it incurred subsequent to the termination for convenience. Silver claims that this amount would reimburse it for the time spent by Silver's two principals in the preparation and presentation of the adversary adjudication. Silver alleges it was the prevailing party and that respondent's position was not substantially justified.

To be eligible for an award of fees and expenses under the Equal Access to Justice Act (EAJA), an applicant that is an unincorporated business, a partnership, or a corporation may not have a net worth in excess of \$7,000,000 or more than 500 employees at the time of the initiation of the adversary adjudication. 5 U.S.C. § 504(b)(1)(B) (2000). Along with its application Silver filed a statement that it has never had more than two employees and that its net worth was well below the \$7,000,000 threshold. A personal financial statement was filed in support of this statement. RITA has not disputed these claims and we find that applicant meets the statutory criteria.

The Equal Access to Justice Act requires that fees and other expenses incurred in connection with a proceeding be awarded to a party other than the United States if that party is the prevailing party in the litigation and if the position of the United States was not substantially justified. A party is the prevailing party if it is successful on any significant issue in the litigation that achieves some of the benefit sought. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Digital Services Group, Inc.*, DOT BCA 1817E, 92-2 BCA ¶ 24,786, at 123,648 (1991). The Department of Transportation Board of Contract Appeals found the applicant entitled to be paid \$18,728 on its claim of over \$61,000. RITA's settlement offer, as revised, was in the amount of \$5,220.23. Silver clearly was successful in achieving a portion of what it sought. We find that Silver was the prevailing party in the litigation.

Silver, as the prevailing party, may recover on its application unless we find that respondent's position was substantially justified. 5 U.S.C. § 504(a)(1). The Government's position is substantially justified if it had a reasonable basis in law and fact to a degree that could satisfy a reasonable person. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). "[P]osition of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary

adjudication is based.” 5 U.S.C. § 504(b)(1)(E); *Doty v. United States*, 71 F.3d 384, 386 (Fed. Cir. 1995). The Government bears the burden of proving the reasonableness of its position. *Helper v. West*, 174 F.3d 1332, 1336 (Fed. Cir. 1999); *Trundle v. Bowen*, 830 F.2d 807, 809 (8th Cir. 1987). In making our determination we must 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).

Here, RITA made several requests to Silver for documentation in support of its termination claim. Silver provided no records of the time it spent on contract performance. RITA rejected Silver’s various settlement proposals based upon its failure to support its claimed costs. The Department of Transportation Board of Contract Appeals found that applicant failed to keep adequate records, so the exact amount of time spent by appellant on contract work could not be determined. The board made an award based on the jury verdict approach. The board had to estimate Silver’s costs due to the inadequate supporting documentation. The record before the board included the sworn testimony of Silver’s owner. RITA did not have this evidence before it. RITA stated that it would only pay those costs that were supported by appropriate documentation. RITA made a settlement determination of \$5220.23 (as revised). We cannot find that this position was unreasonable in light of applicant’s failure to keep adequate records of its costs. RITA has carried its burden. We find its position was substantially justified.

Decision

The application is **DENIED**.

JAMES L. STERN
Board Judge

We concur:

EILEEN P. FENNESSY
Board Judge

JERI K. SOMERS
Board Judge