

ABC HEALTH CARE**CONTRACT NO. V558P-2110****VABCA-3462E****VA MEDICAL CENTER
DURHAM, NORTH CAROLINA**

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James Petersen, Esq., Trial Attorney; *Phillipa L. Anderson, Esq.*, Deputy Assistant General Counsel; and *William E. Thomas, Jr., Esq.*, Assistant General Counsel, Washington, DC, for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE McMICHAEL

ABC Health Care (ABC or Contractor) has filed a timely Application pursuant to the *Equal Access to Justice Act (EAJA)*, 5 U.S.C. § 504, to recover attorney fees and other expenses alleged to have been incurred in connection with its successful prosecution of *ABC Health Care*, VABCA No. 3462, 93-2 BCA ¶ 25,672. Familiarity with that decision is presumed so that recitation of the facts, and grounds for our conclusion therein will not, for the most part, be repeated here.

Following our decision, ABC filed a timely *EAJA* Application seeking \$18,033.75 compensation for 160.3 hours of attorney fees (at \$112.50 per hour), \$64.00 for 1.6 hours paralegal fees (at \$40.00 per hour), and \$2,432.15 in costs, which it alleges arose out of litigation before the Board. ABC subsequently reduced the attorney fees portion of the Application to \$12,022.50, seeking an hourly rate of \$75. Following the Government's filing of its OPPOSITION TO APPLICATION FOR ATTORNEY'S FEES, the Applicant sought additional attorney fees of \$2,467.50 for 32.9 hours (at \$75 per hour), and \$244.93 in costs to prepare and defend the Application. The Applicant now seeks a total of \$17,231.08 for litigating this appeal and defending its *EAJA* Application, consisting of \$14,490 in attorney fees, \$64 in paralegal fees, and \$2,677.08 in costs.

The Applicant has asserted that it meets the eligibility requirements of *EAJA* with respect to its net worth and number of employees, and has provided adequate supporting evidence in that regard. The Government has not contested that assertion. Based on the certified net worth statements submitted by ABC, we find the Applicant eligible to recover attorney fees and expenses in this Application. Also, in order to recover fees and costs incurred in this appeal, ABC must be a "prevailing party" in the litigation. The Government has not questioned that ABC is a prevailing party in VABCA No. 3462.

Although it professes otherwise, much of the Government's OPPOSITION TO APPLICATION FOR ATTORNEY'S FEES is an untimely (and unconvincing) attempt to reargue the merits of appeal. When it turns its attention to the issue at hand, i.e., whether under *EAJA* its position was "substantially justified," the Government correctly acknowledges that the "primary legal question" in the appeal was whether the contract's Continuity of Services Clause was applicable in this dispute and that:

The Board's interpretation of the clause, moreover, disposes of several other important

legal issues, including the requirement for consideration to renegotiate price, quantum of a "reasonable" recovery under a *quantum meruit* theory, and the requirement that "implied-in-fact" contracts be inferred from "conduct."

OPPOSITION TO APPLICATION at 8.

The Government argues that EAJA fees should not be awarded because the "outcome of this appeal depends on the Board's evaluation of an *issue of first impression*, involving application of the 'Continuity of Services Clause.'" (emphasis added) OPPOSITION TO APPLICATION at 9.

DISCUSSION

Substantial Justification

Once an applicant has demonstrated that it is a prevailing party, fees and expenses shall be awarded "unless the adjudicative officer of the agency finds that the position of the agency was substantially justified." 5 U.S.C. § 504(a)(1). The Supreme Court in *Pierce v. Underwood*, 487 U.S. 552, 565 (1988), explained that the Government, in order to successfully defend against an *EAJA* applicant's contention that its position was not substantially justified, need only establish that its position was: "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person." This test is the same as the determination of whether the Government's position had a "reasonable basis both in law and fact." *Id.* See also *Delfour, Inc.*, VABCA Nos. 2049E *et al.*, 90-3 BCA ¶ 23,066; *A.F. Lusi Construction, Inc.*, VABCA No. 2595E, 90-1 BCA ¶ 22,333. The statutory standard applies both to the position maintained by the Government in the adversary adjudication and to the action, or inaction, upon which the adversary adjudication was based. 5 U.S.C. § 504(b)(1)(E); *Delfour*, at 115,813-14. Once an applicant specifies in what respect the Government's position was not substantially justified, in order to avoid the assessment of the applicant's allowable and reasonable fees and expenses, the Government carries the burden of showing that its position was substantially justified. *Penn Environmental Control, Inc.*, VABCA Nos. 3599E and 3600E, 94-1 BCA ¶ 26,326; *Siska Construction Co., Inc.*, VABCA No. 3381E, 92-1 BCA ¶ 24,730; *Delfour, Inc.*, at 115,814.

This appeal essentially centered around how much money the Government owed the Appellant for providing home oxygen services to a number of veterans after the Contract had expired. Following negotiations concerning the pricing of continued home oxygen services and the actual delivery of those services, the Government first ignored and then resisted payment of the Contractor's increased invoices by invoking the Continuity of Services Clause (Clause) contained in the original contract which provided:

(a) The Contractor recognizes that the services under this contract are vital to the Government and must be continued without interruption and that, upon contract expiration, a *successor*, either the Government or another contractor, may continue them. The Contractor agrees to (1) furnish phase-in training and (2) exercise its best efforts and cooperation to effect an orderly and efficient *transition to a successor*.

(b) The Contractor shall, upon the CO's *written notice*, (1) furnish phase-in, phase-out services for up to 60 days after this contract expires . . .

* * * * *

(d) The Contractor shall be reimbursed for all *reasonable phase-in, phase-out costs* (i.e., costs incurred within the agreed period after contract expiration that result from phase-in, phase-out operations) and a fee (profit) not to exceed a pro rata portion of the fee (profit) under this contract.

ABC, at 127,707 (emphasis in original).

The Government avers that its position, that ABC was entitled to no additional compensation other than that already paid for its services (\$6,738.28), was substantially justified because, in this case of first impression, it reasonably believed the Clause applied. Citing the Clause, the Government argued that the oral agreement relied upon by the Contractor in providing services during October 1990 was not enforceable and the Contractor should only receive compensation based on its actual costs related to providing the services, plus a fixed percentage profit.

Contrary to the Government's position, we found that a plain reading of the Clause indicated it could not be used, as it was here, to unilaterally extend a contract where no successor contractor existed, and that the phase-in, phase-out services depicted by the Clause were not present here. There is no language in the Clause which gives the Government the right to unilaterally demand a Contractor's continued performance where there is no successor contractor. Rather, by noting the vital need for the services which must be continued without interruption, the Clause attempts to ensure "an orderly and efficient transition to a successor," and provides that the Contractor "shall be reimbursed for all reasonable phase-in, phase-out costs." The Clause envisions that the Government has properly taken into account the critical nature of the services, the need to have a successor contractor ready to continue services, and finally, the need for continuous services by means of an orderly transition to the successor.

The Board has not had occasion in previous appeals to interpret or consider the application of the Clause. In a situation of first impression, where the Government relies upon what it perceives to be the prevailing state of the common law of contracts, a decision in the Appellant's favor does not necessarily indicate that the Government's position lacked substantial justification. We, and other boards and courts have concluded that "[t]he more novel the newly-minted rule of law set forth as a result of the litigation, the more probable it is that the Government's position will be deemed to have been reasonable, notwithstanding that it failed to prevail on the merits." *Delfour*, at 115,816. See also *Mattson v. Bowen*, 824 F.2d 655, 657 (8th Cir. 1987); *Insul-Glass, Inc.*, GSBCA No. 9910-C(8823), 89-3 BCA ¶ 22,223; *JANA, Inc.*, ASBCA No. 32447, 89-2 BCA ¶ 21,638.

While it is true that the applicability of the Clause was a case of first impression for this Board, it does not follow in this situation that the facts and legal principles under which the matter at issue was necessarily decided were new or novel. As the Armed Services Board noted in *Zinger Construction Company, Inc.* ASBCA No. 31858, 88-2 BCA ¶ 20,661 at 104,416:

The fact that an appeal presents an issue of first impression in the forum does not *ipso*

facto make the Government's position substantially justified. See *Griffon v. Department of Health and Human Services*, 832 F.2d 51 (5th Cir. 1987). An examination of the Government's position and conduct is still necessary.

And, in the recent case of *Sun Eagle Corporation*, ASBCA Nos. 45985 and 45986, 1994 WL 144272 (April 15, 1994) the Board, citing *Zinger*, found that:

[A]lthough the case might have been of first impression for the Board to decide on these facts, the Board did not find the applicable legal principles to be new or novel. It based its decision on a generally accepted or recognized principle . . . Thus we cannot agree with the Government that [its position] was a reasonable action as a matter of law.

We find the same situation here. Although this was a case of first impression, a simple reading of the Clause in question applying traditional rules of contract interpretation revealed that it was not applicable to the situation presented in this dispute. Once that determination was made, everything else flowed from it, as the Government itself has acknowledged.

Thus, given the inapplicability of the Clause, we further determined that the Government had explicitly agreed to pay \$325 per month for concentrators during October 1991, and impliedly agreed to pay the quoted \$.60 per cubic foot refill rate for each "E" cylinder tank by accepting the refill services knowing of, and not disputing, the Appellant's quoted price. The evidence clearly revealed that, while it knew of the Contractor's quoted rates, the Government kept silent and accepted all the services without disputing the rates. Its silent acceptance of the services acknowledged that it acquiesced in the rates quoted by the Contractor.

Where the Government, as here, has no written agreement in effect, yet accepts services under a pricing schedule and fails to dispute the schedule, an implied-in-fact contract at that price will be found. *ABC*, at 127,711-12. The Government's belated attempt to avoid the consequences of its conduct by invoking the clearly inapplicable Continuity of Services Clause does not render its position "substantially justified."

The Government has not disputed the reasonableness of hours expended and the amount of attorney fees and expenses claimed by ABC. Inasmuch as we have reviewed ABC's Application and find the fees and expenses reasonable, we award the Appellant a total of \$17,231.08 for litigating this appeal and defending its *EAJA* Application, consisting of \$14,490 in attorney fees, \$64 in paralegal fees, and \$2,677.08 in costs.

DECISION

For the reasons set forth above, the Application for Attorney Fees in *ABC Health Care*, VABCA No. 3462E, is granted in the amount of \$17,231.08.

DATE: **June 30, 1994**

GUY H. MCMICHAEL III
Chief Administrative Judge
Panel Chairman

We concur:

MORRIS PULLARA, JR.
Administrative Judge

JAMES K. ROBINSON
[3462e.htm](#) Administrative Judge