

U.S. Department of Labor

Board of Contract Appeals
1111 20th Street, N.W.
Washington, D.C. 20036



In the Matter of

FACE ASSOCIATES, INC.,
Appellant

Case No. 86-BCA-12

Contract No. 99-1-4047-14-61

V.

DEPARTMENT OF LABOR,
Respondent

Ralph Kissick, Esq.
Attorney for Appellant

Robert J. Lesnick, Esq.
Attorney for Respondent

DECISION AND ORDER DISMISSING APPEAL AND DENYING MOTION FOR
SUMMARY JUDGMENT

Respondent moves to dismiss for failure to state a claim upon which relief can be granted and appellant, moves for summary judgment.

The appellant (FACE) from June 15, 1981 to September 30, 1983 performed a \$2.39 million cost reimbursement contract with the Department of Labor/Employment and Training Administration (DOL). The contract involved erection of job corps centers. By a contracting officers (CO) decision dated March 15, 1983, it was determined that the contract compensation clause was illegal. DOL demanded an "auditable claim" to decide allowable direct costs and markup. Ultimately \$440,000 of the \$441,000 direct costs, \$30,686 of the markup plus \$1,600 in interest was allowed by the CO. The CO reversed himself finding that the clause was legal.

Claimant contends that the \$19,800 legal and accounting costs of putting together the auditable claim at the CO level is compensable under the Equal Access to Justice Act, 5 U.S.C. 504 et seq (the "EAJA"), DOL argues that EAJA, as amended in 1985, does not allow fees in BCA cases except in "adversary proceedings" and the fees incurred here to prepare a claim before the CO were not adversarial as contemplated by EAJA. The Board agrees.

EAJA provides:

Costs and fees of Parties

An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States fees and other expenses incurred by the party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought. 5 U.S.C. 504 (a) (1) et seq. (Emphasis supplied)

By the 1985 ammendment, Contract Dispute Act matters are also included in the coverage of "adversary adjudication":

"adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, and (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607);

5 U.S.C 504 (c)
(Emphasis Supplied)

DOL argues that the words mean what they say: That is assuming that the other requirements are met, the recoverable costs start at the level of the appeal before the Board of Contract Appeals and not before. Otherwise every act of the Government that might impact the contractor and require counsel or technical aid might be held to be under the EAJA mantel and recoverable. It would open a pandora's box of potential government liability which was not in the legislative comtemplation of EAJA. A seminal recent case dealing with Social Security makes it clear by analogy that administrative expenses of a non-adjudicatory type such as the contractor claims here are not allowed:

"First, at the agency level, the EAJA covers only an "adversary adjudication." 5 U.S.C. §504(a)(1). An "adversary adjudication" is defined as one which is "determined on the record after an opportunity for an agency hearing," 5 U.S.C. 5554, where "the position of the United States is represented by counsel." 5 U.S.C. §504b)(1)(C) . In the remand proceedings at the agency level, the United States was not represented by counsel and therefore an adversary adjudication was not conducted within the language of the statute.

The legislative history of the EAJA supports this conclusion. In assessing the cost of the EAJA, Congress clearly indicated its intent to eliminate administrative proceedings where the United States is not represented by counsel. "[T]he Committee has eliminated non-adversary adjudications (including administrative proceedings under the Social Security Act) from the coverage of . . . this bill, and believes that this is a significant factor in reducing the cost." H.R. Rep., supra, at 20, reprinted in 1980 U.S. Code Cong. & Ad. News 4999. "Social Security Administration (SSA) cases account for more than 91 percent of all administrative adjudication cases. SSA cases are not adversarial, as defined by the bill. . . ." Id. at 22, reprinted in 1980 U.S. Code Cong. & Ad. News 5001.

The Seventh and Fourth Circuits have recognized this limitation.

The legislative history of the EAJA clearly indicates that [the claimant] is precluded from obtaining attorney's fees for work done during the administrative stage of the case. This reflects Congress' deliberate attempt to tailor eligibility for attorney's fees so as to minimize the cost of the EAJA.

Berman, 713 F.2d at 1296: "legislative history makes explicit Congress's intent that . . . the EAJA does not apply to administrative proceedings under the Social Security Act'). We therefore conclude that Cornelia may not recover attorney's fees for work performed at the administrative level following the district court's remand order.

Cornelia v. Schweiker, 728 F.2d 978 (8th Cir. 1984)

EAJA read with Cornelia supra as well as Lear Siegler case enjoining fee reimbursement absent statutory or contract authority (20040, 79-1 BCA §13,687 (1979) further supports the respondents position.

Appellant argues that the House Report shows that proceedings below are to be considered in an EAJA application. However, all the cited House Report at 16 appears to be saying is that in meeting the "substantial justification requirement" of the Act consideration must be given to what went on below. This is not the same, as appellant argues, as setting a threshold for the accumulation of costs below at the administrative level. It only sensibly addresses tracking the origin of the dispute and not abrogating the plain language of the statute restricting cost incurrance to "adversary adjudication." Appellant also relies on the Model Rules for Implementation of the Equal Access to Justice Act 51 Fed. Reg. 16,659, 16,665 - 66. (1986) (to be codified at 1 C.F.R. §315.103 (a)(ii) as supporting its position. However that document, though it talks about CO decisions, also does not suggest that the threshold be lowered for the incurrance of costs. Rather it suggests the opposite:

Alt. 315.103(a): [for use by contract appeals boards] The Act applies to appeals of decisions of contracting officers made pursuant to section 6 of the Contract Disputes Act of 1978 941 U.S.C. before this board as provided in section 8 of that Act (41 U.S.C. 607).

(b) This agency's failure to identify a type of proceeding as an adversary adjudication shall not preclude the filing of application by a party who believes the proceeding is covered by the Act; whether the proceedings is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

(Emphasis supplied)

Nor does the reference to contracting officers decisions alter the basic concept that the costs start at the "adversary adjudication level" at not before.

As the costs incurred here do not appear to have been expended at the "adversary adjudication" level but below, there is no dispute for this Board to consider. Accordingly, respondents motion to dismiss is granted and appellant's motion for summary judgment is denied.

GLENN ROBERT LAWRENCE
Board of Contract Appeals

I concur:

E. EARL THOMAS, Vice Chairman
Board of Contract Appeals

I Concur:

SAMUEL GRONER
Board of Contract Appeals

Dated: Mar 12, 1987
Washington, D.C
GRL:crg