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Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

Protests of)
)
Spatial Front, Inc.) Docket No. 18-ODRA-00841 (EAJA)
)
Pursuant to Solicitation DTFAWA-12-R-08591)

**FINDINGS AND RECOMMENDATIONS ON APPLICATION
FOR ATTORNEYS’ FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT**

Spatial Front, Inc. (“Spatial”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) an application (“Application”) for attorneys’ fees and expenses pursuant to the Equal Access to Justice Act (“EAJA”).¹ The Application arises from a protest docketed as 18-ODRA-00841 (“*Spatial Front II*”). Spatial seeks \$7,968.40.² The Product Team principally argues against any EAJA award, but in the alternative, urges the ODRA to limit the award to \$2,478.65.³ The ODRA recommends awarding \$3,143.40 to Spatial.

I. Prior Proceedings

In a protest docketed as 18-ODRA-00803 (“*Spatial Front I*”), the FAA Acting Administrator ordered the Product Team to conduct a limited reevaluation process.⁴ In *Spatial Front II*, Spatial protested three aspects of that reevaluation process: (1) a risk reassessment under evaluation factor two, (2) the source selection decision, and (3) a revised price analysis.⁵ The

¹ The sections of the EAJA applicable to administrative proceedings are codified at 5 U.S.C. § 504 (Westlaw through Pub. L. No. 116–21).

² *Application* at 1.

³ *Agency EAJA Response* at 1.

⁴ See *Protest of Spatial Front, Inc.*, 17-ODRA-00803 (Findings and Recommendations) & FAA Order No. ODRA-18-825.

⁵ *Spatial Front II*, Findings and Recommendations (Public Version) at 2. Familiarity with *Spatial Front II* is assumed.

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Acting Administrator adopted the ODRA's Findings and Recommendations and sustained the protest as to the risk evaluation under factor two.⁶ He denied all other issues in the protest.⁷

II. Discussion

ODRA adjudications are subject to the EAJA.⁸ The FAA's EAJA Regulation establishes the procedures for resolving or adjudicating EAJA applications before the ODRA.⁹ An applicant for an EAJA award must timely: (1) allege that it is an eligible, prevailing party within the meaning of the EAJA; (2) support the allowability and reasonableness of the fees and expenses it is claiming; and (3) allege that the Agency's position was not substantially justified.¹⁰ The burden then shifts to the Government to: (a) challenge the Applicant's timeliness, eligibility, or prevailing party status; (b) demonstrate that the Government's actions were substantially justified in fact and in law; or (c) show "special circumstances" that would render an award unjust.¹¹

A. Spatial is Eligible and Prevailing

Spatial satisfies the eligibility requirements because it had a net worth of less than \$7 million and fewer than 500 employees when it filed its Protest.¹² The Product Team does not challenge Spatial's eligibility. Instead, it challenges Spatial's status as a "prevailing party."¹³

⁶ *Spatial Front II*, FAA Order ODRA-19-848 at 1 (Feb. 21, 2019).

⁷ *Id.*

⁸ 49 U.S.C. § 40110 (d)(4) (Westlaw through Pub.L. No. 115-254).

⁹ 14 C.F.R. §§ 14.02(a), 14.21, 14.27(b), and 14.28(b) (2018).

¹⁰ *Equal Access to Justice Act Application of Diamond Antenna and Microwave Corporation*, 12-ODRA-00605 EAJA and-00617 EAJA.

¹¹ *Id.*

¹² *Application*, Ex. B, *President & CEO Decl.*, at ¶¶ 5 and 9; *Agency EAJA Response* at 2; 14 C.F.R. § 14.03(b)(5) (2018).

¹³ *Agency EAJA Response* at 2-3.

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Although the EAJA itself does not define the term “prevailing party,” the United States Supreme Court explained that “[p]laintiffs may be considered ‘prevailing parties’ for attorney’s fee purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.”¹⁴ Thus, even though the Acting Administrator denied two issues in the Protest, the present question focuses on whether Spatial succeeded on other issues considered “significant,” which resulted in the award of “some of the benefit sought.”¹⁵

As previously explained, the Acting Administrator sustained the protest against the risk that the Product Team assessed under factor two.¹⁶ A protest will only be sustained if an issue is so significant that it caused prejudice, i.e., but for a product team’s error, the protester would “have had a substantial chance of receiving an award.”¹⁷ Spatial’s requested remedy sought “in the alternative” that “a new evaluation be conducted.”¹⁸ Spatial received that remedy.¹⁹ The ODRA, therefore, finds that Spatial succeeded on a significant issue and achieved some of the benefit it sought. By extension, it further finds that Spatial is an eligible, prevailing party for the purposes of the EAJA.

B. No Substantial Justification

The Product Team asserts that the positions taken in the appeal were substantially justified.²⁰ The Product Team rightly observes that it “need not be correct to be substantially justified.”²¹ Equally correct, however, is Spatial’s observation that the determination regarding substantial

¹⁴ *Texas State Teachers Ass’n v. Garland Independent School District*, 489 U.S. 782, 789 (1989) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

¹⁵ See, e.g., *Protest of IBEX Group, Inc.*, 02-ODRA-00254 EAJA (new evaluation remedy sufficient for EAJA status).

¹⁶ See *supra* Part I.

¹⁷ *Protest of Apptis, Inc.*, 10-ODRA-00557.

¹⁸ *Protest* at 19.

¹⁹ *Spatial Front II*, FAA Order ODRA-19-848 at 1 (Feb. 21, 2019).

²⁰ *Agency EAJA Response* at 3.

²¹ *Id.* (citing *Protest of Camber Corp.*, ODRA-98-00079 EAJA).

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justification is made once, for the action as a whole, rather than on a piecemeal basis that focuses on issues or procedural stages.²²

“Substantial justification” means that the Product Team’s position must have had a “reasonable basis both in law and fact.”²³ The ODRA has found substantial justification when, for example, the Acquisition Management System did not provide clear policy statements, or when conflicting evidence required a credibility assessment.²⁴ In *Spatial Front II*, the Product Team defended its risk assessment under factor two by asserting that Spatial “[REDACTED].”²⁵ Such explicit language, however, was not in Spatial’s proposal.²⁶ To the contrary, Spatial represented that it would perform [REDACTED] of the work under the contract, and no evidence suggested that contract administration would account for [REDACTED] the work.²⁷ Finally, in response to the EAJA Application itself, the Product Team did not identify any additional factual evidence to show that its position was substantially justified in fact.²⁸ The ODRA, therefore, finds that the Product Team was not substantially justified.

C. Reasonable and Allowable Fees Incurred

Spatial’s fee exhibit²⁹ summarizes the legal services hours as follows:

²² *Spatial EAJA Reply*, at 3 (citing *Comm’r, Immigration & Naturalization Serv. v. Jean*, 496 U.S. 154, 158 (1990)).

²³ *Pierce v. Underwood*, 487 U.S. 552, 556 (1988); 14 C.F.R. § 14.04(a) (2018).

²⁴ See, e.g., *Equal Access to Justice Application of Camber Corp.*, ODRA-98-00079 EAJA (no AMS guidance); *Equal Access to Justice Application of Ridge Contracting, Inc.*, 04-ODRA-00312 EAJA (diverging testimony).

²⁵ *Spatial Front II, Agency Response* at 22.

²⁶ See *Spatial Front II, Findings and Recommendations* at 14 (Protected Version).

²⁷ *Id.* at 15.

²⁸ *Agency EAJA Response* at 2-3. The Product Team posits only that it was justified in law, and relies on “well-established ODRA precedent that an offeror’s mere disagreement with the judgment of the agency concerning the evaluation of its proposals is not sufficient to satisfy its burden of proof.” *Agency EAJA Response* at 3. The “mere disagreement” line of cases, however, stand on the factual foundation that the agency evaluation had a rational basis. *Protests of Consecutive Weather*, 02-ODRA-00250 to -00254.

²⁹ *Application Ex. A* at 1.

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Description	Hours
Total hours from June 26, 2018 to March 25, 2019	70.0
Less EAJA Application hours	- 6.9
Less time associated with <i>Spatial Front I</i>	- 7.3
TOTAL HOURS RELATING TO THE ADJUDICATION	55.8

Multiplying the claimed hours relating to the adjudication (55.8) by the maximum fee set by statute and regulation (\$125) yields a claimed amount of \$6,975.³⁰ Employing a similar calculation, Spatial seeks reimbursement for its EAJA Application by multiplying 6.9 hours by \$125 to yield \$862.50.³¹ Finally, it asserts that it incurred \$130.90 in photocopying expenses.³² As a result, the total amount sought is:

Description	Amount
Attorneys' Fees for the Adjudication (55.8 hours)	\$ 6,975.00
Expenses	130.90
EAJA Application (6.9 hours)	862.50
TOTAL CLAIMED	\$ 7,968.40

Entitlement to this amount depends on whether the figures are both reasonable and allowable.³³

1. Reasonableness

In this matter, the reasonableness of the fees or expenses is not an issue. The ODRA is satisfied that the reliance on the statutory and regulatory cap of \$125 per hour is appropriate in light of the higher fees actually charged.³⁴ Moreover, the Product Team does not question the \$130.90 in expenses, and the ODRA finds that the amount is *de minimis* and reasonable for this adjudication.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ 14 C.F.R. § 14.05 (2018).

³⁴ 5 U.S.C. § 504 (Westlaw through Pub. L. No. 116–21); 14 C.F.R. § 14.05(b) (2018); *see also Application*, Ex. A.

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2. Disallowing Certain Hours

The parties have differing views regarding the allowability of 4.2 hours. Specifically, the Product Team questions 2.3 hours that pertain to producing a public version of the EAJA decisional documents issued in the *Spatial Front I* protest.³⁵ The Product Team also questions 1.9 hours incurred after the issuance of the Public Version of the Findings and Recommendations in *Spatial Front II*.³⁶ Both sets of hours, according to the Product Team, do not directly relate to the adjudication of the *Spatial Front II* protest.

The ODRA agrees. The EAJA is a waiver of sovereign immunity that “must be construed strictly in favor of the sovereign, and not enlarge[d] ... beyond what the language requires.”³⁷ The EAJA allows the award of fees and other expenses incurred “in connection with that proceeding.”³⁸ The 2.3 hours for matters relating to *Spatial Front I*—an entirely different case that resulted in a different final order—are not fees incurred for the adjudication of *Spatial Front II*.

The second set of claimed time, spanning 1.9 hours, occurred between March 11 and 13, 2019, well after the Acting Administrator’s Order of February 21, 2019. That Order required, among other actions, that t[REDACTED]. The billing descriptions, in turn, refer to consultations with Spatial “[REDACTED].”³⁹ Based on the descriptions and the timing, the ODRA finds that these charges relate to ordinary business activities in support of Spatial’s proposal and are not connected with the adjudication.

The ODRA, therefore, finds that 4.2 hours of the total hours claimed are not recoverable under EAJA. This leaves 51.6 hours of attorney services under consideration.

³⁵ Agency EAJA Response at 3.

³⁶ *Id.* at 5.

³⁷ *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685–86 (1983); *Eno v. Jewell*, 798 F.3d 1245, 1252 (9th Cir. 2015).

³⁸ 5 U.S.C. § 504(a)(1) (Westlaw through Pub. L. No. 116–21).

³⁹ *Application*, Ex. C. at 7.

3. Apportionment

The most significant disagreement between the parties relates to the apportionment of the remaining 51.6 attorney hours. “[W]here an applicant does not prevail on all issues pursued as part of the adjudication, the fees and expenses claimed must be apportioned equitably.”⁴⁰ Initially, Spatial did not provide any apportionment.⁴¹ The Product Team argued that Spatial prevailed on only one out of three issues, and therefore, any EAJA award should be limited to one-third of the hours sought.⁴² In reply, Spatial does not believe apportionment is mandatory, but it “agrees with the FAA that it is entitled to at least 33.3% of the hours it incurred.”⁴³

The ODRA finds that apportionment is appropriate in this matter and agrees that one-third of the claimed hours are allowable. One-third of 51.6 hours equals 17.2 hours. This apportionment fairly accounts for the difficulty, complexity, and success of the issues adjudicated in the Protests. As a result, the ODRA recommends the following award:

Description	Amount
Attorneys’ Fees for the Adjudication (\$125/hr. x 17.2 hrs.)	\$ 2,150.00
Expenses	130.90
EAJA Application (\$125/hr. x 6.9hrs.)	862.50
TOTAL RECOMMENDED AWARD	\$ 3,143.40

III. Conclusion

For the reasons stated above, I recommend that Spatial Front, Inc., as an eligible, prevailing party in the *Protest of Spatial Front, Inc.*, 18-ODRA-00841, be awarded \$3,143.40.

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John A. Dietrich
Dispute Resolution Officer and Administrative Judge
FAA Office of Dispute Resolution for Acquisition

⁴⁰ *EAJA Application of IBEX Group, Inc.*, 02-ODRA-00254EAJA (citing *EAJA Application of Martin Resnik Constr. Co.*, 99-ODRA-00111EAJA).

⁴¹ *Application*, Ex. A.

⁴² *Agency EAJA Response* at 6.

⁴³ *Reply* at 3.