

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

Protests of)	
)	Docket Nos. 13-ODRA-
Diversified Management Solutions, Inc.)	-00633 (EAJA),
)	-00634 (EAJA) and
Pursuant to Solicitation DTFAWA-12-R-08591)	-00635 (EAJA)

**FINDINGS AND RECOMMENDATION ON APPLICATION
FOR ATTORNEYS' FEES
UNDER THE EQUAL ACCESS TO JUSTICE ACT**

I. INTRODUCTION

This matter currently is before the Office of Dispute Resolution for Acquisition (“ODRA”) on an application (“Application”) by Diversified Management Solutions, Inc. (“DMSI”) for an award of attorneys’ fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (“EAJA”). The Application arises from three DMSI bid protests, i.e., Case Numbers 13-ODRA-00633, -00634 and -00635 (collectively referred to herein as “Protests”), which challenged decisions of the Federal Aviation Administration (“FAA”) Contract Weather Observation (“CWO”) Program Office (“Program Office”) to award CWO contracts to three companies.

Two of the Protests, i.e., Case Numbers -00634 and -00635, were resolved and dismissed based on voluntary corrective action taken by the Program Office without commencement of the ODRA adjudication process prescribed by the ODRA Procedural Regulations at 14 C.F.R. Part 17. The ODRA adjudicated the remaining Protest, i.e., Case Number -00633 and ultimately recommended that it be sustained based on evidence of affiliation between DMSI and its ostensible subcontractor. *See ODRA Findings and Recommendation (“F&R”) in Bid Protests of Diversified Management Solutions, Inc., 13-ODRA-00633 at 60.* In FAA Order Number

ODRA-13-686, issued on September 13, 2013, (“Final Order”), the FAA Administrator adopted and incorporated the F&R as the final decision of the Agency in Case Number -00633. The Final Order was not appealed.¹

For the reasons discussed herein, the ODRA recommends that the DMSI Application be denied as to all fees related to Case Numbers -00634 and -00635. The ODRA further recommends that the DMSI Application be granted in part and denied in part as to fees related to Case Number -00633, and that the Program Office be ordered to compensate DMSI under the EAJA in the amount of \$5,683.75.

II. Factual Background

The Protests brought by DMSI challenged the proposed awards of contracts for CWO services to three companies. The Protests alleged that the three companies involved should have been disqualified because of their affiliation with and reliance on an ostensible subcontractor. *DMSI Protests* at 3-8. The Protests were placed on the ODRA Inactive Docket, with the agreement of the parties, to enable the Program Office to review the eligibility of the putative contract awardees in light of the allegations of the Protests. *See ODRA Letter* dated January 16, 2013. Following its review, the Program Office informed the ODRA that it was taking voluntary action to disqualify the putative awardees in Case Numbers -00634 and -00635. The Program Office also informed the ODRA that it had found the putative awardee involved in Case Number -00633 to be eligible for award. *See Program Office Letter* dated March 29, 2013.

Case Number -00633 was adjudicated pursuant to the ODRA Procedural Regulation at 14 C.F.R. Part 17. The ODRA ultimately concluded that the Program Office’s decision to make award to the contractor involved in Case Number -00633 lacked a rational basis. Based on that conclusion, the ODRA recommended that the Protest in Case Number -00633 be sustained and that “the Product Team be directed that: (1) award to [the proposed contractor] not be made under the Solicitation; and (2) if an award already has been made and a contract executed, that

¹ Familiarity with the F&R in Protest number -00633 and the Final Orders in all of the DMSI Protests is assumed for purposes of this Decision.

the Product Team terminate the Contract; and (3) make a new source selection decision in accordance with the continuing needs of the Agency, the Solicitation, and these Findings and Recommendations from the remaining eligible offerors.” *F&R* at 60.

DMSI filed the instant EAJA Application on October 10, 2013. The Application originally sought reimbursement under EAJA in the amount of \$11,636.25 and included documents in support of its eligibility under the EAJA and the fees it had incurred. The Program Office filed its response to the DMSI Application on or about November 12, 2013 (“Program Office Response”). The Program Office Response does not dispute that DMSI timely filed its EAJA Application with respect to the Protests. *See Program Office Response*. Nor does the Program Office contend that: (1) its positions in the adjudications were substantially justified; (2) DMSI does not qualify under the EAJA; or (3) special circumstances exist that would render an award unjust. The Program Office Response does contend, however, that DMSI is not entitled to an award in Case Numbers -00634 and -00635 because it was not a “prevailing party” for EAJA purposes since the matters were resolved by voluntary corrective action taken by the Program Office prior to any adjudication or decision. *Id.* at 1, 2. The Program Office further contends that a portion of the fees claimed by DMSI in Case Number -00633 are not recoverable under the EAJA. *Id.* at 3, 4. In that regard, the Program Office’s Response to the EAJA Application disputes the recoverability of fees that were not incurred in the adjudication phase of Case Number -00633. *Id.* Thus, while conceding that DMSI is entitled to an EAJA award, the Program Office contends that based on the objections it has raised, DMSI should be awarded no more than \$5,416.25 (43.33 hrs. x \$125/hr.). *Id.* at 4.

On November 14, 2013, DMSI filed a Reply (“DMSI Reply”) to the Program Office Response. The DMSI Reply provided additional arguments in support of the Application, including that Alternative Dispute Resolution (“ADR”) “was discussed but never invoked (*see DMSI Reply* at 2),” and that “the adjudicatory process began at the ODRA on January 2, 2013 and continued... until September 13, 2013....” *Id.* DMSI further contends that the costs it incurred in bringing all three cases should be reimbursed under the EAJA because DMSI’s actions benefitted the Agency by protecting the integrity of its acquisition system. *Id.* at 2, 3. DMSI also concedes, however,

based on the Program Office Response, that the amount of its Application should be reduced to \$9,190.77. *See DMSI Reply* at 4; *DMSI Supplemental Reply* at 1.²

III. Discussion

The ODRA jurisdictional statute, 49 U.S.C. 40110 (d)(4) expressly makes ODRA adjudications subject to Section 504 of Title IV, i.e., the EAJA. The FAA's EAJA Regulation establishes the procedures for resolving or adjudicating EAJA applications at the ODRA. *See* 14 C.F.R. §§ 14.02(a), 14.21, 14.27(b), 14.28 b. *See Findings regarding Equal Access to Justice Act Application of IBEX Group, Inc.*, 02-ODRA-00254 EAJA; *Findings regarding Equal Access to Justice Act Application of Ridge Contracting, Inc.*, 04-ODRA-00312 EAJA; *Findings regarding Equal Access to Justice Act Application of Diamond Antenna and Microwave Corporation*, 12-ODRA-00605 EAJA and-00617 EAJA. The FAA Administrator has delegated final decision authority in all EAJA adjudications to the ODRA Director. *See Delegation of Authority* dated October 12, 2011.

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. *Equal Access to Justice Act Application of Diamond Antenna and Microwave Corporation, supra*. The burden then shifts to the Government to: challenge the Applicant's timeliness, eligibility or prevailing party status; demonstrate that the Government's actions were substantially justified in fact and in law; or show "special circumstances" that would render an award unjust. *Id.*

The uncontroverted evidence in this record supports the conclusion that DMSI is an eligible party within the meaning of the EAJA; that its Application was timely filed; and that the

² DMSI filed its Supplemental Reply as part of another EAJA Application related to Case Number 13-ODRA-00636. The Application in that case will be resolved or adjudicated separately.

positions taken in the adjudication of Case Number -00633 lacked substantial justification.³ The issues of whether DMSI was a prevailing party for EAJA purposes and whether the fees claimed are reasonable and allowable under the EAJA are discussed in the following sections.

A. DMSI is a Prevailing Party in Case Number -00633 but not in Case Numbers -00634 and -00635

As noted above, the Program Office does not contend that its position was substantially justified; but it does contest whether DMSI is a “prevailing party” within the meaning of the EAJA in Case Numbers -00634 and -00635. The EAJA does not define the term “prevailing party.” The United States Supreme Court, however, held in *Texas State Teachers Ass'n v. Garland Independent School District*, 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.” 489 U.S. 782, 789 (1989), *quoting Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In Case Number -00633, DMSI succeeded, through litigation, in obtaining an FAA Administrator’s Order that sustained its Protest and directed that the Program Office: “(1) award [to the proposed contractor in Case Number-00633] not be made under the Solicitation; and (2) if an award already has been made and a contract executed, that the Product Team terminate the Contract; and (3) make a new source selection decision in accordance with the continuing needs of the Agency, the Solicitation, and these Findings and Recommendations from the remaining eligible offerors.” *F&R* at 61. Thus, DMSI must be considered a “prevailing party” for purposes of the EAJA since it achieved a significant benefit sought in the -00633 litigation. *Equal Access to Justice Act Application of Diamond Antenna and Microwave Corporation, supra*.

³ For EAJA purposes, the ODRA considers the entirety of the Government’s conduct, as reflected by the administrative record, and “the actions and positions taken by FAA contracting officials must be judged not by twenty/twenty hindsight but, rather by the policy guidance available to them at the *relevant time*.” See *Recommendations of the ODRA on Application of Camber Corporation under the Equal Access to Justice Act*, ODRA Docket No. 98-ODRA-00102, *quoting from Camber Corporation*, 98-ODRA-00079 EAJA at 4 (emphasis added). In Case Number -00633, the Program Office failed to act in accordance with that AMS Guidance and the ODRA concludes that the Region’s actions were not justified “in the main” and thus were not substantially justified in law or in fact for EAJA purposes. *Pierce v. Underwood*, 487 U.S. 552 (1988).

By contrast, in Cases -00634 and -00635, the Program Office voluntarily took early corrective action and disqualified the two putative contractors without attempting to defend its original decision to award contracts to those companies. Thus, it cannot be said that the Program Office took a position in litigation that was without substantial justification in fact or law for EAJA purposes or that DMSI prevailed in an adjudication on the merits of its case. The issue of whether the corrective action was taken as a result of a formal ADR process, or unilaterally by the Program Office, ultimately is immaterial to the analysis.⁴

The undeniable fact that the DMSI Protests had a beneficial, catalytic effect by bringing issues to the attention of the Agency does not entitle it to recovery under the EAJA as a prevailing party in Case Numbers -00634 and -00635. The “catalyst theory” of recovery under fee-shifting statutes long has been rejected by the United States Supreme Court in the absence of a judgment on the merits or a settlement that entailed entry of a consent judgment. *See Buckhannon Board and Care Home, Inc., et al v. West Virginia Dept. of Health et al*, 532 U.S. 598 (2001). Moreover, the theory also specifically has been rejected in the EAJA context. *Application Under the Equal Access to Justice Act of Poly Design, Inc.* ASBCA Nos. 48591, 50862 and 49823, 01-2 BCA ¶31,644, October 26, 2001.⁵ Thus, it is not sufficient to allege, as DMSI does here, that it should receive an EAJA award in Cases -00634 and -00635 as a prevailing party even though the Program Office did not take a position in the litigation and DMSI did not obtain a final order in its favor on the merits of its case through litigation. Accordingly, DMSI does not qualify as a prevailing party under the EAJA in Case Numbers -00634 and -00635 and therefore cannot recover the fees incurred in connection with those cases.

B. A Portion of the Fees Claimed in Case Number -00633 are Allowable Under EAJA and Reasonable

⁴ In that regard, it is well established in ODRA case law that ADR-related fees generally are not recoverable under the EAJA. *See Findings regarding Equal Access to Justice Act Application of IBEX, Group, Inc., supra*. This is true even where ADR does not resolve the matter and the protester ultimately prevails in litigation.

⁵ Decisions of the Boards of Contract Appeals are not binding on the FAA ODRA; but may be considered as persuasive authority where such decisions are not inconsistent with the AMS and the ODRA Procedural Regulation.

The Program Office contends, citing to 14 C.F.R. §14.05 (e), that DMSI cannot recover costs that it incurred prior to the adjudication of the Protests. *See Program Office Response* at 4. As the ODRA noted recently, costs incurred in preparing to file an ODRA case are viewed by the ODRA as a necessary part of “the Adjudicative Process for a protest or contract dispute under part 17 of this chapter and the AMS,” and therefore are recoverable under 14 C.F.R. § 14.05 (e). *Equal Access to Justice Act Application of Diamond Antenna and Microwave Corporation, supra*. Recoverability of such fees can only occur, however, if the other requirements for an EAJA award are satisfied. Thus, an eligible party, who prevails in litigation and establishes that the Agency’s position was not substantially justified, can recover the allowable fees incurred, including fees incurred in preparing initial pleadings and related work necessary to commence the adjudication.

The ODRA adopts the DMSI original Application figure of \$11,636.25 as the starting point for calculating the amount recoverable by DMSI under the EAJA for the three Protests. The ODRA concludes that the amount recoverable must be adjusted by eliminating all of the amounts claimed for Case Nos. -00634 and -00635 and a portion of the amount claimed for Case No. -00633, as follows:

Original Application Amount at \$125/Hr. EAJA Cap	\$11,636.25
Less Unrecoverable Fees:	
All Fees incurred in -00634, -00635	\$5,765.00 ⁶
Unrecoverable Fees incurred in -00633	\$187.50 ⁷
Total Deduction	(\$5,952.50)
Net Amount of EAJA Award	<u>\$5,683.75</u>

⁶ This figure reflects all fees originally claimed by DMSI for these 2 matters, i.e., 46.12 hours at \$125/hr.

⁷ This figure represents disallowed fees for 1/11/13, 1/14/13 and 1/17/13 totaling 1.50 hours at \$125/hr. DMSI’s Reply agrees to the exclusion of fees for all of the above dates. *See DMSI Reply* at 3. The ODRA finds that the disputed entry for 2/20/13 represents reasonable fees incurred in connection with the adjudication process.

The ODRA concludes that the net amount of \$5,683.75 represents reasonable, allowable fees recoverable under the EAJA in connection with the adjudication of Protest Number 13-ODRA-00633 and there are no special circumstances that would render an award unjust.

IV. Conclusion

The ODRA finds, with respect to the portions of the Application related to Case Nos. -00634 and -00635, that DMSI is not a prevailing party within the meaning of the EAJA and thus cannot recover any of the fees incurred in connection with those cases. The ODRA further finds, with respect to Case Number -00633, that: (1) DMSI is an eligible, prevailing party within the meaning of the EAJA; (2) the Program Office's positions were without substantial justification in law and fact; (3) a portion of the fees claimed are reasonable and recoverable under the EAJA; and (4) no special circumstances exist that would render an award unjust. The ODRA therefore recommends that the Program Office be ordered to reimburse DMSI pursuant to the Equal Access to Justice Act in the amount of \$5,683.75 in accordance with 14 C.F.R § 14.30.

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Anthony N. Palladino
Director and Administrative Judge,
FAA Office of Dispute Resolution
for Acquisition