Federal Aviation Administration

Office of Dispute Resolution for Acquisition

Matter: Recommendation of the Office of Dispute Resolution for Acquisition

Regarding the Equal Access to Justice Act Application of IBEX GROUP, INC. Pursuant to FAA Order ODRA 97-31

ODRA Docket: 96-ODRA-0037 EAJA

The Office of Dispute Resolution for Acquisition ("ODRA") recommends that the Administrator grant the Equal Access to Justice Act application of the IBEX Group, Inc., and award attorney's fees and costs to the applicant.

In ODRA Docket No. 96-ODRA-0037, the IBEX Group, Inc. ("IBEX") protested the solicitation and award of a weather observation services contract by the Great Lakes Region of the FAA ("FAA"). The Administrator sustained the protest after considering the recommendation of the Dispute Resolution Officer ("DRO"). Subsequently, IBEX submitted an application for recovery of attorney's fees and related costs.

In its application, IBEX argues, in the alternative: (1) it is entitled to an award under the Equal Access to Justice Act (5 U.S.C. § 504) ("EAJA") for disputes resolved in favor of a complainant under the FAA Acquisition Management System ("AMS"); and (2) the FAA is not bound by the limitations of EAJA and should apply a fee recovery system similar to that used by the General Accounting Office ("GAO"), pursuant to of the Federal Acquisition Streamlining Act, Pub. L. 103-355 (October 13, 1994) 198 Stat. 3243 ("FASA").

I.

The Resolution of the Underlying Protest

The facts pertinent to the underlying Protest are the following. The FAA's Great Lakes Regional Office issued a Screening Information Request ("SIR") for offers to provide weather observation services at twenty sites. Because the services were subject to the Service Contract Act, 29 U.S.C. § 541 ("SCA"), the Contracting Officer ("CO") attached Department of Labor wage determinations to the SIR for each of the twenty sites. The procurement was conducted under the AMS. Section "M" of the SIR stated that the contract would be awarded to the responsible offeror with the lowest price.

Schedule B of the SIR specified the use of a "cost proposal" matrix format, under which the offerors were to break down the component parts of their overall price. The "cost proposal" matrix provided spaces for the insertion of an offeror's proposed quantities of hours and proposed hourly rates in various categories (Day/Night/Sunday/Holiday/Vacation) for both Supervisors and Technicians, plus spaces for extended cost totals for each. The matrix also contained lines for the insertion of applicable state and federal taxes, as well as overhead and profit, and spaces for the total proposed monthly costs for each of the twenty sites.

On March 19, 1997, offers were timely received from 15 firms. IBEX submitted the lowest offers for four of the twenty sites. Nevertheless, those offers were rejected by the CO, because the CO determined that IBEX had incorporated within the "cost proposal" matrices insufficient Supervisor vacation hours to satisfy the SCA. The CO had previously estimated that, in order to adhere to the SCA, an offer would have had to have included a minimum of 80 hours of vacation time for an offeror's Supervisors. This 80-hour estimate was not noted on the "cost proposal" matrix format, nor was it disclosed to IBEX and other prospective offerors in any other manner. The low offers submitted by IBEX for the four weather observation sites indicated slightly less than 80 hours of vacation time for the employees at each of the locations. On that basis alone, and without any further discussions or requests for clarification, the CO rejected the IBEX proposal as "non-responsive" and found IBEX to be "non-responsible."

The ensuing IBEX protest was sustained by the Administrator on the following grounds:

(1) AMS Section 3.2.2.3.1.2.3 provides that evaluations and award will be based solely on the stated evaluation criteria. The 80 hour minimum for vacation time was not among the enumerated evaluation criteria. IBEX and the other proposers were never told that failure to propose 80 hours or more of vacation time would result in their offers being rejected as "non-responsive."

(2) The GAO and the federal courts have held that offers on fixed-price contracts priced below Service Contract Act rates are still eligible for award, so long as the firm is deemed responsible and its proposal does not otherwise evidence an intent to violate the Act. *Allen-Norris-Vance Enterprises,* 91-2 CPD 23; *Solid Waste Services, Inc.*, 92-2 CPD 327. The rationale offered for such holdings has been that under fixed-price contracts, the offeror bears the risk of increased costs, and so long as its proposal unequivocally promises to perform the work in accordance with the wage determinations, there is no risk of increased costs to the Government. *Halifax Technical Services, Inc*., 848 F. Supp. 240 (D.D.C. 1994)

The FAA is not strictly bound by the above-referenced case law. However, the rationale of the cases is compelling under the facts of this case. Although IBEX proposed numbers of vacation hours which were below the number that the CO had privately estimated as the minimum that would be required to comply with the SCA, even if the CO's minimum were to be accepted as absolutely "correct," there was nothing in the record to suggest that IBEX intended to violate the SCA. To the contrary, the IBEX cost breakdowns showed strict adherence to the Wage Determinations in all other respects. In any event, the SIR here was for a fixed-price contract. Thus, the offerors assumed the risk of underestimating contract costs.

(3) Nothing in the SIR prohibited below-cost bids. IBEX had recently been admitted to the Qualified Vendors List in two other FAA Regions, and had successfully completed weather observation contracts at numerous locations, including the Great Lakes Region. Given all the other information available on IBEX and its past performance, even if it had cost IBEX more to comply with the SCA than the amount allowed in its proposal, it was not reasonable to summarily reject IBEX as a "non-responsible" contractor, solely upon the submission of what was perceived of as a "below-cost bid." **[1]**

(4) If there were concerns arising from IBEX's below-cost pricing, the FAA had the ability to confirm IBEX's intent to bear any resulting liability. By summarily rejecting IBEX's offer and every other offer failing to include 80 or more vacation hours within the "cost proposal" matrices, the FAA deprived itself of the opportunity to obtain the services at the lowest price.

(5) Paying a higher price to avoid performance problems during administration of a contract that might arise from a below-cost bid is a "best value" consideration. Section

"M" of the SIR stated that award would be based on low price, not on "best value." *See, generally,* AMS Section 3.2.2.3.1.2.4, dealing with changes in requirements during the evaluation process.

(6) Absent discussions or any other form of communication with the protester on this point, there was no rational basis for summarily rejecting the IBEX proposal as "non-responsive," or to find the protester "non-responsible."

The contracting office was ordered to review all the offers received to determine where low offers were rejected for "non-responsiveness" based upon estimates of hours under the SCA lower than those calculated, but not revealed, by the CO, or for similar reasons. For any site where an award was made to other than the low offeror, the contracting office was ordered to determine whether, as a whole, the low offer was an unequivocal promise to perform by a responsible firm. Absent any evidence that the low offeror did not intend to comply with the wage determinations, or that it is not responsible, the Administrator ordered the contracting office to award to the low, responsible offeror in accordance with the terms of the SIR. At the sites where performance had not yet commenced, the existing contract was to be terminated for convenience. Where performance had begun, the Administrator directed that the option year beginning October 1, 1997 was not to be exercised.

II.

EAJA Analysis

A. The FAA's Dispute Resolution System Is Subject to the EAJA.

It was previously decided that, because the FAA's dispute resolution system under the AMS is effectuated by the Administrator's power to hold hearings under 49 U.S.C. § 46102, the system is subject to the Administrative Procedure Act, 5 U.S.C. § 551, et seq. ("APA"), and under the APA, to the EAJA as set forth in 5 U.S.C. § 504. *See Weather Experts,* FAA Order ODRA-97-25 EAJA.

Under 5 U.S.C. § 504(a)(1), the threshold requirements for an award of fees under the EAJA are: (1) whether the party "prevailed" over the Government; (2) whether the Government's position was substantially justified; (3) whether "special circumstances" exist that would make an EAJA award unjust; and (4) whether, pursuant to 28 U.S.C. § 2412(d)(1)(B) **[2]**, the fee application was submitted within 30 days of final judgment and

was supported by an itemized statement. *I.N.S. v. Jean*, 496 U.S. 154, 158 (1990). The term "party" is defined in 5 U.S.C. § 504(b)(1)(B) as "an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or any . . . . corporation with a net worth not exceeding $7,000,000, and which had no more than 500 employees at the time the adversary adjudication was initiated."

The instant EAJA application was timely submitted and accompanied by an itemized statement of the claimed attorney's fees. IBEX submitted information showing that it is an eligible party as defined by section 504(b)(1)(B). The FAA has not challenged IBEX's eligibility for an award under the EAJA. Thus, the only questions to be decided are: (1) whether IBEX "prevailed" over the Government; (2) whether the Government's position in the underlying dispute was "substantially justified" in fact and in law; and (3) whether "special circumstances" exist that would make an EAJA award unjust.

B. IBEX Is A "Prevailing Party."

Although the EAJA does not define the term "prevailing party," the Supreme Court held in *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782 (1989) 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." *Id.*, 489 U.S. at 789, quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). As explained in Part I of this Order, IBEX protested the award of weather observation contracts at four sites. The protest was sustained, and the FAA was ordered to recompete the contracts. The remedy returned IBEX to its position prior to the solicitation. Because the competition would not have been reopened, absent the filing of the protest, IBEX is clearly a "prevailing party" under the EAJA. *Public Citizen Health Research Group v. Young*, 909 F.2d 550 (D.C. Cir. 1990). The FAA has not contested this point.

C. The FAA Position Was Not "Substantially Justified".

In exploring the EAJA "substantial justification" standard, the Supreme Court in *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) held that the EAJA requires that there be a "reasonable basis both in law and fact" for the Government's action, and that the "reasonable basis" standard is no different from "justified in substance or in the main - that is, justified to a degree that could satisfy a reasonable person." *Id.*, 487 U.S. at 565-566. The legislative history of the EAJA demonstrates that Congress did not intend an automatic award of attorney's fees and expenses, simply because the Government loses its case.

> The standard, however, should not be read to raise a presumption that the Government's position was not substantially justified, *simply because it lost its case*. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on *a substantial probability of prevailing*. [H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 11 (1980); S. Rep. No. 96-253, 96th Cong., 1st Sess. 7 (1979)] [Emphasis added.]

Therefore, even though a protest is sustained, and even though the Government may be found to have been wrong and not to have had a "rational basis" for its action, the action may still have been "substantially justified" at the time it was taken:

> [A] position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable position in law and fact.

Pierce, 487 U.S. at 566 n.1.

As to whether an agency's position is reasonable "in law," the Supreme Court has emphasized that it is "not what the law is, but what the Government was substantially justified in believing it to have been." *Pierce*, 487 U.S. at 561. Thus, we must look to what the CO reasonably should have perceived the applicable law to have been at the time the CO rejected IBEX's proposal. In the present case, the AMS governed the activities of the FAA at the time of the solicitation, competition and award of the instant weather observation services contracts. In FAA Order ODRA-97-25, based upon the standard enunciated by the Third Circuit in *Hanover Potato Products, Inc. v. Shalala*, 989 F.2d 123 (3rd Cir. 1993) and the NTSB in *McCrary v. Engen*, 5 NTSB 1235 (1986), the following three-part test was established to determine whether FAA acquisition actions under the AMS can be considered to have been "substantially justified":

> 1. whether, at the time of the solicitation and award of the contract, the FAA's application of the policy guidance set forth in the AMS and adherence to the terms set forth in the SIR was reasonable;
>
> 2. whether, at the time the FAA reviewed the responses to the solicitation, the FAA's assessment of the facts underlying the award of the contract was reasonable; and

3. whether the FAA acted reasonably when conducting the acquisition, considering the facts and policy guidance available to the participants when the acquisition was conducted.

At the time that the SIR was issued, Section 3.2.2.3.1.2.3 of the AMS provided that, "award on initial offers to other than the low cost or price offer is allowed." However, in Section M of the SIR for this contract, the FAA foreclosed that option by stating:

M.01 AWARD CRITERIA

1. Award will be based on the lowest overall cost to the Government for each location, initial period and option periods cost combined, submitted by a qualified and responsible offeror.

There was no other criterion specified for the award of the contract. Thus, an offeror presenting the lowest offer could be rejected *only* if the offeror was found to be unqualified or was found not to be responsible, or both.

Under §348 (a) of the Fiscal Year 1996 Department of Transportation Appropriations Act, Pub. L. 104-50, 109 Stat. 436 (November 15, 1995) (the "Act"), Congress mandated the creation of a new acquisition system for the FAA that would satisfy this Agency's unique needs. Under §348(b) of the Act, in developing this new system (which later became known as the "Acquisition Management System" – the "AMS"), the FAA was specifically directed not to refer to a host of existing procurement-related statutes and regulations. The SIR in this case made the Service Contract Act, 29 U.S.C. § 541 ("SCA") applicable to the procurement. The SCA is a labor statute that is not addressed in § 348(a) of the Act, nor is the FAA precluded from following it by the language of § 348(b).

The CO here attempted to define a likely outcome from application of the SCA when she calculated a figure of 80 hours for Supervisors' vacation hours. With its proposal, IBEX submitted figures for Supervisors' vacation hours lower than the estimate derived by the CO. The truth is that neither the CO's figure nor IBEX's figures were "correct" on an absolute scale. The date when work was to start, the portion of a contract year that was estimated, the length of employment, and other factors would necessarily cause a variance in such estimates. There was no reasonable or "substantial" justification either in fact or in law for the CO (1) to have utilized her own figure as an unstated minimum, (2) to have rejected IBEX's low offers as "non-responsive," simply because they reflected slightly lower vacation hour estimates, and (3) to have rejected IBEX as a "non-responsible" contractor, simply because those estimates deviated slightly from the CO's

assessment of the minimum number of hours necessary to satisfy the requirements of the SCA.

One of the fundamental policies underlying the AMS is that the FAA evaluate and award contracts based solely on the stated evaluation criteria. *See* AMS Section 3.2.2.3.1.2.3. AMS Section 3.2.2.3.1.2.4 states that where there are changes in requirements during an evaluation, the FAA should notify all offerors of the changes. The use of an estimate derived by the CO as an absolute, but unstated, evaluation criterion resulted in a procurement that was contrary to both Section M of the SIR and to clearly-stated AMS policy. Consequently, the Agency unreasonably applied both the policy in the AMS and the plain terms of the SIR. **[3]**

The SIR contained no statement that award might be made without communication with the offerors. Section 3.2.2.3.1.2 of the AMS, specifically authorizing discussions with offerors, was therefore applicable to this procurement. Yet, IBEX's low offers were rejected as "non-responsive,"without communicating with IBEX to query the basis for its estimates of Supervisors' vacation hours. This was patently unreasonable.

At the time, IBEX had recently been admitted to the Qualified Vendors List in two other FAA Regions, and had successfully completed weather observation contracts at numerous locations, including sites within the Great Lakes Region. Given all the other information available on IBEX and its past performance, it was likewise unreasonable to summarily reject IBEX as a "nonresponsible" contractor, without any sort of communication, solely because the Supervisors' vacation hour estimates from IBEX differed from the "minimum" estimate calculated by the CO. The Agency acted unreasonably, by failing to exercise the discretion allowed by the AMS to ascertain the facts underlying the lowest bid.

In summary, in this case, the actions in question were not in accord with existing guidance under the AMS and failed to satisfy the above-stated three- part test for demonstrating "substantial justification." The Agency actions here likewise cannot be said to have been either reasonable or "substantially justified," when viewed in light of case law pertaining to the SCA, which indicated that a proposal ought not be rejected, merely because it seems to be offering a price below SCA rates, so long as the proposal does not indicate that the offeror intends to violate the SCA. **[4]** Although such case law is not strictly binding with respect to FAA procurement under the AMS, nonetheless, it is persuasive and should be adopted in this case, and others like it.

A. There Were No "Special Circumstances"
That Would Render An EAJA Award Unjust.

The Agency cites to no "special circumstances" or other factors that would make an award of attorney's fees under the EAJA unjust in the instant case, and no such circumstances are present. Thus, the FAA should be liable for the payment of attorney's fees and expenses under the EAJA.

III.

The Amount Due

The award of attorney's fees and other expenses here is governed by the provisions of 5 U.S.C. § 504(b)(1)(A), which limit recovery of attorney's fees to an hourly rate maximum of $125.00 per hour. **[5]** In its EAJA application, IBEX submitted two alternative fee schedules. In the first, IBEX seeks attorney's fees and expenses totaling $19,304.41, based upon the actual hourly rates which it paid for legal services. In the second, IBEX seeks attorney's fees, based on the EAJA's $125.00 maximum hourly rate. Under the second schedule, IBEX seeks attorney's fees and expenses totaling $16,194.01.

In connection with the first schedule, IBEX urges that the FAA ignore the fee limitations of the EAJA and that it adopt a system similar to that utilized by the GAO for awarding attorneys fees in bid protests. The difficulty with IBEX's argument is that those awards are made by the GAO, pursuant to its authority under the FASA. The FAA has no such authority. Indeed, the Congress, in mandating the creation of FAA's new acquisition system, in Section 348(b)(3) of the Fiscal Year 1996 Department of Transportation Appropriations Act, specifically directed that the system to be adopted by the FAA not use, or be subject to, FASA. The sole authority the FAA has for granting relief in terms of attorney's fees and expenses would be the EAJA; and IBEX therefore cannot be awarded attorney's fees beyond the limitations set forth in the EAJA.

Under 5 U.S.C. § 504(b)(1)(A), an award of attorney's fees in excess of the $125.00 per hour maximum rate would be allowable, only if, *by regulation,* the Agency determined that a "special factor," such as the "limited availability of qualified attorneys" would justify a higher fee. First of all, the FAA has not issued such a regulation. Second and perhaps more importantly, the case precedent on this issue would not support the award of a higher fee in this case. Addressing the notion of such "special factors" under the EAJA, the Supreme Court observed: "[T]he Congress thought that $ 75 an hour **[6]** was generally quite enough public reimbursement for attorney's fees, whatever the local or national market might be." *Pierce*, 487 U.S. 552, 572. With respect to the term "qualified

attorneys," the Court stated: "[The] exception for 'limited availability of qualified attorneys for the proceeding involved' must refer to attorneys 'qualified for the proceedings' in some specialized sense, rather than in their general legal competence. We think it refers to attorneys having some distinctive knowledge or specialized skill useful for the litigation in question -- as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation." *Id*. *At* 472-73.

Specialization within a legal practice area, such as Government contracts, will not ordinarily be construed as "distinctive knowledge or specialized skill" for purposes of exceeding the EAJA fee maximum. In this regard, the Supreme Court in *Pierce* distinguished between a patent attorney and an attorney who is needed because of his/her special skill in a foreign language that might be required for a particular proceeding. *Id at* 472. In the instant case, I see no legal basis for the FAA to pay any more than the statutory maximum rate of $125.00 per hour.

Under its second fee schedule, IBEX seeks hourly fees of $125.00 per hour for one attorney whose actual billing rate is $210.00 per hour, and $120.00 per hour for the other attorney, which is that attorney's actual billing rate. The schedule also includes $709.01 paid by IBEX to its attorneys for incidental costs of long-distance telephone, telecopying, photocopying, air courier services, secretarial overtime, and computerized legal research. These expenses are all allowable under EAJA as "fees and other expenses." *Aston v. Secretary, HHS*, 808 F.2d 9, 11 (D.C. Cir. 1986), *see also Hirshey v. FERC*, 777 F.2d 1, 6 (D.C. Cir. 1985). I find the fees and expenses claimed by IBEX under its second fee schedule to have been reasonable, and I accept them with one minor adjustment, namely, the elimination of one hour's worth of attorney time claimed for October 14, 1997. The time sheet entry for the hour in question reads as follows:

> "Discussed cost claim with J. Jones; discussed Colorado Springs solicitation with R. Sweeny; discussed cancellation of solicitation with K. Huber, agency attorney."

The fee for this hour cannot be attributed solely to the instant protest, and IBEX has provided no apportionment of the amount of time that had been spent on FAA matters other than the instant Protest. (The Colorado Springs solicitation had nothing to do with the procurement at issue and was being handled by another FAA Region). Making this one deduction of $125.00 from the schedule total, $16,194.01, the total fees and costs due to IBEX under their EAJA application is reduced to $16,069.01.

For the reasons stated above, it is recommended that IBEX's application for attorney's fees and expenses pursuant to the EAJA be granted, and that the sum of $16,069.01 should be awarded.

Respectfully submitted,

_____

Wilton J. Smith

Dispute Resolution Officer

Office of Dispute Resolution for Acquisition

Dated: March 31, 1998

_____

Footnotes:

[1] Indeed, IBEX's offer was "below cost" only with respect to the Supervisors' vacation times, and only as *estimated* by the CO.

[2] Reference to § 28 U.S.C § 2412(d)(1)(B) addresses the same language in 5 U.S.C. § 504(B)(1) for administrative actions. *See I.N.S. v. Jean* 496 U.S. at 156 n.1.

[3] In contrast to the instant case, the situation in *Weather Experts,* FAA Order ODR-97-25 EAJA, was one where the SIR clearly stated the procurement decision would be based upon "best value," and that the FAA might not communicate with the offerors in the SIR. In that case, although the protest was sustained, relief under the EAJA was denied because the policy guidance available to the FAA at the time the SIR was issued and when the selection of the awardee was made did not require the FAA to note its strong aversion to use the Sole Charge Exemption. An agency's position is substantially justified if it relied upon a credible interpretation of the law. *S&H Riggers & Erectors v. Occupational Safety and Health Review Commission,* 672 F.2d 426, 431 (5th Cir. 1982).

[4] *See Allen-Norris-Vance Enterprises,* 91-2 CPD 23; *Solid Waste Services, Inc.,* 92-2 CPD 327.

[5] Under 5 U.S.C. 504(b)(1)(A), "fees and other expenses" are defined as follows:

> (b)(1) For the purposes of this section -
>
> (A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis,

> engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.)

[6] Paragraph 504(b)(1)(A) of the EAJA statute, with a $75.00 per hour fee cap available at the time of *Pierce v. Underwood*, was subsequently altered by, *inter alia*, raising the cap to $125.00 per hour under Pub. L. 104-121, Title II, § 231, Mar. 29,1996, 110 Stat. 862.