

# In the United States Court of Federal Claims

NOT FOR PUBLICATION

No. 02-584C

(Filed May 31, 2007)

\*\*\*\*\*

**TRAVELERS CASUALTY AND  
SURETY OF AMERICA,**

Plaintiff,

v.

**THE UNITED STATES,**

Defendant.

\*\*\*\*\*

## ORDER

The Court has reviewed the “Motion for Attorneys’ Fees and Expenses with Affidavits and Memorandum in Support Thereof” submitted on January 24, 2007 by plaintiff, a surety company. Landscape Pavers, Ltd. (“LPL”), a subcontractor, applies for attorneys’ fees and expenses under 28 U.S.C. § 2412 (the Equal Access to Justice Act or “EAJA”) on a pass-through basis, and seeks to recover \$74,403.95. Defendant opposes plaintiff’s motion and moved without opposition from plaintiff to have the Court stay consideration of all other issues until the Court reviews plaintiff’s eligibility under the EAJA.

After reviewing plaintiff’s application and defendant’s opposition, the Court concludes that plaintiff has not carried its burden for recovering attorneys’ fees and expenses under the EAJA. The Court may award attorneys’ fees and expenses to a “prevailing party” in a civil action against the United States, 28 U.S.C. § 2412(b), but only if the application “shows that the party is a prevailing party and is eligible to receive an award under this subsection.” *Id.* § 2412(d)(1)(B). The EAJA defines a “party” as “(i) an individual whose net worth did not exceed \$2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed.” *Id.* § 2412(d)(2)(B).

This Court and boards of contract appeals, relying on Federal Circuit precedent, have interpreted “party” under the EAJA to mean the named party in the case and not the subcontractor whose pass-through claims were actually litigated. *See R.C. Const. Co., Inc. v. United States*, 42 Fed. Cl. 57 (1998); *Southwest Marine, Inc.*, ASBCA No. 36287, 93-1 BCA P 25225, 1992 WL 173869 (ASBCA July 9, 1992); *Teton Constr. Co.*, ASBCA No. 27700, 87-2 BCA P 19766, 1987 WL 40782 (ASBCA Jan. 5, 1987); *see also Erickson Air Crane Co. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984) (“It is a hornbook rule that, under ordinary government prime contracts, subcontractors do not have standing to sue the government under the Tucker Act, 28 U.S.C. § 1491, in the event of an alleged government breach or to enforce a claim for equitable adjustment under the Contract Disputes Act of 1978. The government consents to be sued only by those with whom it has privity of contract, which it does not have with subcontractors.”) (citations omitted).

Plaintiff’s application for fees makes no claims as to Travelers’ eligibility for an award under the EAJA, and plaintiff has declined the opportunity to respond to defendant’s opposition, which contests Travelers’ eligibility. Moreover, the Court notes that even if LPL were to be considered the potential party for the purposes of the EAJA, plaintiff has submitted no evidence demonstrating that LPL meets the EAJA definition of a party, but instead rests upon a conclusory statement of its counsel. *See* Ex. 1 to Pl.’s Mot., ¶ 1.

As plaintiff has failed to prove its eligibility as a “party” under the EAJA, the Court cannot award it attorneys’ fees and expenses. Accordingly, the Court **DENIES** plaintiff’s motion.

**IT IS SO ORDERED.**

---

**VICTOR J. WOLSKI**  
Judge