



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: February 18, 2015

CBCA 3815-C(1512), 3816-C(1537)

SYSTEMS INTEGRATION AND MANAGEMENT, INC.,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Robert C. MacKichan, Jr. and Marques O. Peterson of Vedder Price P.C.,
Washington, DC, counsel for Applicant.

Nathan C. Guerrero, Office of General Counsel, General Services Administration,
Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **STERN**, and **GOODMAN**.

SOMERS, Board Judge.

The General Services Administration (GSA or respondent) and Systems Integration and Management, Inc. (SIM or applicant) entered into a basic ordering agreement. Under this agreement, GSA issued task orders to SIM, and SIM provided specified services. SIM submitted invoices to GSA in order to receive payment for services rendered. GSA initially paid all invoices submitted. At some point, however, GSA failed to pay several of SIM's invoices. SIM submitted a certified claim for payment of the amounts owed. On December 18, 2008, GSA's contracting officer issued a decision denying SIM's claim. The contracting officer determined that SIM did not submit invoices on a timely basis or had failed to submit adequate supporting data with the invoices.

On February 10, 2009, SIM appealed this decision to the Board; the appeal was docketed as CBCA 1512. Later, SIM submitted a separate claim to a different GSA contracting officer for payment of some of the invoices. When the second contracting officer failed to act, SIM appealed. The Board consolidated the second appeal (CBCA 1537) with the original appeal.

Starting in May 2009, the parties engaged in settlement discussions.¹ The Board conducted a mediation session over several days in July 2009. Although the Board-assisted mediation did not immediately lead to settlement, by March 2010, the parties agreed that they could resolve the case. The settlement terms specified that GSA would pay SIM \$960,000, inclusive of all interest and fees. Of that amount, a provision in the settlement agreement would reflect an offset in the settlement amount of \$525,000 to satisfy the judgment against SIM that had been obtained by the United States in a civil false claims action in the United States District Court for the Eastern District of Pennsylvania. The parties agreed to the entrance of a stipulation of settlement by the Board, enabling payment to be made from the permanent indefinite judgment fund, 31 U.S.C. § 1304 (2012).

GSA memorialized the settlement terms in a letter to SIM dated March 23, 2010. The parties submitted a joint notice of settlement to the Board and requested that proceedings be suspended. GSA provided a draft settlement agreement to SIM's attorney, Mr. P.H. Harrington. On April 9, 2010, Mr. Harrington sent GSA's attorney a revised settlement agreement, stating on the transmittal sheet: "revised settlement agreement. As you can see, I really tried not to make too many changes and left your language in." The revised settlement agreement stated, in pertinent part:

Whereas, on March 22, 2010, the parties agreed to settle on mutually satisfactory terms all matters relating to the invoice claims under the BOA [basic ordering agreement] and appeals number 1512 and 1537 before the CBCA for the sum of \$960,000, which sum includes costs, interest and attorney's fees. At this time, SIM also agreed to an offset of \$525,000 as the total sum payable to GSA in full and final settlement of GSA's allegations under Civil Action No. 06-4930.

The agreement specified that: "[t]he date of this Agreement shall be March 22, 2010, but this Agreement shall become effective as of the latest date of execution by any signatory hereof."

¹ The parties provided extensive records detailing the substance of their settlement discussions to support their positions in the Equal Access to Justice Act litigation. The detailed facts related to the settlement discussions come from these records.

After the parties reached this agreement, SIM attempted to change various terms. First, SIM asserted that the parties need not enter into a settlement agreement. Rather, SIM suggested that the parties could accomplish the settlement through the submission of a certificate of finality to the Board. GSA's attorney responded that any settlement between the parties must be memorialized by a written and executed settlement agreement.

When SIM refused to finalize the settlement agreement, the parties returned to the Board for assistance. On March 9, 2011, after another mediation session with the Board, the parties agreed that GSA would provide SIM with a new draft of the settlement agreement containing language to which the parties had tentatively agreed. GSA provided the draft settlement agreement to SIM on March 11, 2011. The March 2011 settlement agreement parroted the March 2010 agreement. After evaluating the agreement over the course of several weeks, SIM proposed to amend the settlement agreement by adding a demand for additional interest. When GSA refused the amendment, SIM withdrew the proposed change.

Finally, in August 2011, counsel for SIM indicated that he had presented the settlement agreement (again with terms identical to the March 2010 agreement) to SIM's chief executive officer (CEO) for approval and signature. The CEO refused to sign the agreement. In October 2011, SIM hired new counsel and rejected the settlement agreement.

After trial and post-hearing briefing, the Board granted SIM's appeals, finding GSA owed SIM \$1,058,722.23, plus interest. *See Systems Integration & Management, Inc. v. General Services Administration*, CBCA 1512, et al., 13 BCA ¶ 35,417, *motion for reconsideration denied*, 14-1 BCA ¶ 35,543.

After the Board denied GSA's request for reconsideration, SIM submitted an application for reimbursement of fees and costs under the Equal Access to Justice Act (EAJA or the Act), 5 U.S.C. § 504 (2012). SIM sought \$1,410,261.94 in attorney fees and \$43,313.23 in costs.

GSA opposed the application, first noting that the request for fees included fees for services arising from actions unrelated to the matter before the Board. GSA examined the fees claimed for each attorney identified in the application, while noting that only three of the attorneys had entered a notice of appearance before the Board. The majority of the attorneys listed in the application represented SIM in various other civil and criminal actions unrelated to the matter at hand. In addition, GSA established that the application sought over \$600,000 in fees that occurred before December 18, 2008, the date of the contracting officer's final decision.

SIM, with the assistance of new counsel, replied with a significantly revised EAJA application. The revised application seeks 331.4 hours for work performed by P.H. Harrington (with fees totaling \$57,666), 938 hours for work performed by various attorneys with the law firm of Arnold & Porter (with fees totaling \$172,769), and twenty-six hours for work performed by attorneys from the law firm of Vedder Price (totaling \$4966). In total, the application seeks \$235,401 in attorney fees for 1295.4 hours.

SIM calculates the hourly rate for these attorneys by presenting a cost of living adjusted (COLA) formula to increase the standard EAJA statutory cap of \$125 per hour. SIM explained:

SIM calculated its COLA request by comparing the March 1996 Consumer Price Index for Urban Consumers (“CPI-U”) to the CPI-U for each month and year an attorney billed time. [citations omitted]. SIM then adjusted the \$125 per hour EAJA statutory cap for each month by the percent differences between the March 1996-CPI-U and the relevant month’s CPI-U and then multiplied the hours by the number of hours billed. The formula used to obtain each monthly adjusted rate was: $\$125 \times \text{Month/Year CPI-U (March 1996 CPI-U)} = \text{adjusted rate}$. The adjusted rate was then multiplied by the number of hours worked in the month. SIM performed the calculation for each month from February 2009 until September 2012, which covers the representation by Mr. Harrington and the attorneys at Arnold & Porter, and for October 2014 for the Vedder Price attorneys who assisted in this EAJA Reply.

Applicant’s Reply to Respondent’s Opposition to Applicant’s Application for Costs and Fees Under the Equal Access to Justice Act at 13.

In addition to attorney fees, SIM seeks recovery for 24.75 hours for one legal case specialist and seventy hours for two legal assistants. Using the *Laffey* matrix², SIM calculates these fees at \$16,107.50, using \$170 per hour as the prevailing market rate for paralegals in the District of Columbia.

² The *Laffey* matrix initially arose from the determination of prevailing market rates for paralegals in the District of Columbia as allowed by the United States District Court in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff’d in part, rev’d in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984). The Court of Federal Claims used the *Laffey* matrix to determine the appropriate rates to be paid for paralegals in *United Partition Systems, Inc. v. United States*, 95 Fed. Cl. 42, 60 (2010).

Finally, SIM seeks costs for such expenses as air delivery service, color copies, couriers, depositions and transcripts, duplicating, travel, lodging, and meals. These costs first appear in Arnold & Porter's January 2012 invoice. The total amount sought for expenses is \$26,830.68.

With permission of the Board, GSA filed a sur-reply. GSA argued that the Board should consider the fact that SIM abandoned 80% of its original application when evaluating the reasonableness of SIM's conduct and its entitlement to fees. GSA also asserted that SIM inaccurately described the settlement negotiations, pointing to entries in Mr. Harrington's records that supported GSA's version of the events. Finally, GSA contends that SIM failed to justify the billing rates and hours claimed for its attorneys.

Discussion

EAJA departs from the general American rule requiring each party to a lawsuit to pay its own legal fees. *Scarborough v. Principi*, 541 U.S. 401, 404 (2004) (citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975)). Under EAJA, "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that 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." 5 U.S.C. § 504(a)(1); *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 574 (2008). The purpose of the law is "to eliminate barriers that prohibit small businesses and individuals from securing vindication of their rights in civil actions and administrative proceedings brought by or against the Federal Government." *Scarborough*, 541 U.S. at 406 (quoting H.R. Rep. No. 96-1005, at 9 (1980)); see also *A&B Limited Partnership v. General Services Administration*, GSBGA 16322-C(15208), 04-2 BCA ¶ 32,641, at 161,511.

To be eligible under this Act for recovery of fees and other expenses incurred in connection with a proceeding, an applicant must meet several requirements. It must:

- (1) have been a prevailing party in a proceeding against the United States;
- (2) if a corporation, have not more than \$7,000,000 in net worth and five hundred employees at the time the adversary adjudication was initiated;
- (3) submit its application within thirty days of a final disposition in the adjudication;
- (4) in that application (a) show that it has met the requirements as to having prevailed and size (numbers (1) and (2) above) and (b) state the amount sought and include an itemized statement of costs and attorney fees; and
- (5) allege that the position of the agency was not substantially justified.

Russell Sand & Gravel Co. v. International Boundary and Water Commission, CBCA 3781-C(2235), 14-1 BCA ¶ 35,615, at 174,443 (citing 5 U.S.C. 504(a)(1), (2), (b)(1)(B)) (additional citations omitted).

GSA does not dispute that SIM timely filed its application, that SIM had not more than \$7,000,000 in net worth and had fewer than five hundred employees at the time it initiated its appeal, or that SIM prevailed in the appeal. GSA argues that its position was substantially justified, and, therefore, SIM is not entitled to recover fees and expenses under EAJA. In addition, GSA opposes the application on the grounds that (1) SIM is not entitled to a substantial portion of fees incurred after it rejected GSA's settlement offer; (2) SIM improperly requests fees for a number of attorneys who provided legal service to SIM for matters other than the appeals before the Board; (3) SIM fails to explain, justify, or document the time for attorneys and other staff for fees and expenses incurred prior to the initiation of the appeals; and (4) SIM seeks to recover fees in excess of the statutory cap set by EAJA.

Substantial Justification

Because SIM is a prevailing party, it is entitled to a reasonable EAJA award unless respondent can show that its position was substantially justified. To establish that its position was "substantially justified," as a predecessor board, the General Services Board of Contract Appeals, explained:

The Supreme Court has held that the adjudicator should ask, when confronted with this defense, whether the agency's position was "'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Under this standard, the trier of the case must determine whether the Government's position had a reasonable basis in both law and fact. *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991); *see also Ramcor Services Group [Inc. v. United States]*, 185 F.3d [1286,] 1290 (Fed. Cir. 1999); *Ace Services, Inc. v. General Services Administration*, GSBCA 12067-C(11331), 93-2 BCA ¶ 25,727, at 128,012. The burden is on the Government to show that its position was substantially justified. *Doty v. United States*, 71 F.3d 384, 385 (Fed. Cir. 1995); *Community Heating & Plumbing Co. v. Garrett*, 2 F.3d 1143, 1145 (Fed. Cir. 1993); *Hospital Healthcare Systems, Inc. v. Department of the Treasury*, GSBCA 14719-C (14442-TD), 99-1 BCA ¶ 30,282, at 149,785.

Divecon Services, LP v. Department of Commerce, GSBCA 16468-C (15597-COM), *et al.*, 05-1 BCA ¶ 32,834, at 162,451 (2004) (quoting *A&B Limited Partnership*, 04-2 BCA at 161,511).

a. Was GSA's position substantially justified?

GSA argues that its position was substantially justified, as evidenced by the witness testimony presented at the hearing and as argued in its post-hearing submissions. GSA suggests that due to the passage of time between when SIM performed the work covered by the invoices at issue and when it submitted its claims, "principles of fiscal law" limited GSA's ability to simply pay SIM the amounts it sought. In general, as to the merits of the action, GSA argues that our rejection of its arguments at trial does not necessarily mean its position was not substantially justified.

We explained in our decision why we rejected GSA's argument:

GSA's assertions that SIM failed to provide adequate supporting documents for the invoices do not explain GSA's inconsistent actions. GSA never explained why it paid some invoices and did not pay others, even though the unpaid invoices had the same supporting documentation.

Systems Integration & Management, 13 BCA at 173,766. In sum, SIM established that it had performed the work and presented invoices, and that GSA had failed to pay for the work. GSA's inability to explain why it paid for some invoices, and not others, mandated rejection of its defense. We find that the failure of GSA to provide adequate evidence explaining why GSA paid some invoices and not others requires a finding that the Government's position was not substantially justified.

b. Did GSA's position become substantially justified when SIM rejected GSA's settlement offer?

EAJA provides that the adjudicative officer "may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy." 5 U.S.C. § 504(a)(3). As explained by one of our predecessor boards:

[I]f, after a certain point in time, the Government's position on the issues involved in a case becomes substantially justified, reimbursement of costs incurred by the contractor in prosecuting the case further is not appropriate under the EAJA.

ROI Investments v. General Services Administration, GSBCA 15488-C(15037-C)-REIN, 01-1 BCA ¶ 31,352, at 154,828 (citing *Universal Development Corp. v. General Services Administration*, GSBCA 12174-C(11251), 93-2 BCA ¶ 25,836). In other words, costs associated with actions unduly prolonging the litigation are not appropriate for award under EAJA. *Michael C. Lam v. General Services Administration*, CBCA 1472-C(1213), 09-2 BCA ¶ 34,227, at 169,117 (citing *Universal*).

GSA argues that GSA's position became substantially justified after SIM unreasonably rejected GSA's settlement offer of \$960,000 (inclusive of all interest and fees). GSA notes that our decision resulted in an award of \$1,058,722.23, plus interest. GSA asserts that the judgment amount is less than \$100,000 more than the proposed settlement amount. GSA notes that SIM expended more than \$500,000 in additional fees and costs after finally rejecting the proposed settlement.

SIM disagrees, arguing that GSA never presented a reasonable settlement offer. SIM says that although GSA agreed to pay SIM a portion of the amount owed for the unpaid invoices (\$960,000 all inclusive), SIM would only receive the amount remaining after offsetting \$525,000 due as the result of a judgment against SIM arising from a False Claims Act case brought in the United States District Court for the Eastern District of Pennsylvania. In addition, SIM contends that GSA refused to provide a date for payment. SIM maintains that the fact that the final award required GSA to pay interest resulted in a much better recovery for SIM, asserting that "SIM achieved a net gain of over \$500,000, even recognizing that SIM will have to satisfy the judgment for the unrelated matter."

In *Universal*, GSA's position became substantially justified when the agency made a settlement offer which was in an amount no less than the Board awarded after the case was fully litigated. The Board consequently denied recovery of all costs incurred by the contractor after the offer was made and rejected. We find that here, although the amount awarded by the Board was a bit more than the amount offered in settlement, the same consequence should follow.

Specifically, in this appeal, the parties reached a settlement in principle, and so informed the Board by filing a notice of settlement on March 23, 2010. GSA outlined the terms of the settlement in a letter to counsel for SIM on that same date. At that time, the parties agreed to a settlement amount of \$960,000 in favor of SIM, to include all interest and fees, a provision in the settlement agreement that would reflect an offset in the settlement amount of \$525,000 to satisfy the judgment against SIM that was obtained by the United States in the civil False Claims Act action in the Eastern District of Pennsylvania, and the entrance of a stipulation of settlement by the Board so that the remaining payment to SIM could be paid by the Judgment Fund.

Based upon a review of the correspondence exchanged by the parties, the billing records of Mr. Harrington, and the papers filed with the Board, we find that the key terms of the settlement did not vary from terms contained in the settlement agreement presented to SIM's counsel on April 9, 2010. We conclude that GSA's position became substantially justified on that date.

On April 9, 2010, SIM had the chance to resolve the dispute by signing the settlement agreement. Instead, SIM insisted on prolonging settlement negotiations by making unreasonable demands (i.e., suggesting that the parties could finalize settlement without a written settlement agreement), proposing changes to the terms of the settlement after the parties had informed the Board of the settlement, and withdrawing from the settlement completely in October 2010. SIM then insisted on a hearing and a decision, and achieved no better result than what respondent had offered after deducting litigation costs incurred after the offer. We find that SIM's actions after April 9, 2010, "unduly and unreasonably protracted the final resolution of the matter in controversy." Consequently, applicant is entitled to only those litigation expenses incurred from December 18, 2008, until April 9, 2010, the date GSA presented the draft written settlement agreement to SIM, reflecting the agreement reached by the parties on March 23, 2010.

c. EAJA Award

For the period between the date of the contracting officer's initial final decision (December 18, 2008) and the date the settlement agreement was presented to SIM's counsel (April 9, 2010), SIM presents billing records reflecting a total of 261.9 hours. Upon examination, we note that these billing records include 4.7 hours for time spent on matters unrelated to the appeals before the Board. SIM is not entitled to be reimbursed for fees incurred for outside matters. *See, e.g., Divecon Services*, 05-1 BCA at 162,452. Therefore, we find that SIM should be reimbursed for attorney fees reflecting 257.2 hours, the hours remaining after deducting 4.7 hours for unrelated work.

As noted previously, SIM asserts an upward adjustment to the statutory hourly rate cap established in EAJA. CBCA Rule 30(c)(7) (48 CFR 6101.30(c)(7) (2014)) states:

If the application requests reimbursement of attorney fees that exceed the statutory rate, explain why an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies such fees.

SIM states that “the market rates in Washington, D.C., for attorneys similar to those who represented SIM are substantially higher than the \$125 EAJA statutory cap.” Mr. Harrington apparently charged SIM \$350 per hour for his services.

In *TST Tallahassee, LLC v. Department of Veterans Affairs*, we rejected a request for a fee exceeding the statutory cap of \$125 per hour:

While a judicial tribunal is free to make the determination that a fee in excess of the statutory rate of \$125 per hour is justified by an increase in the cost of living or a special factor, an administrative tribunal, such as ours, cannot do so in the absence of an agency regulation addressing that issue. *NVT Technologies, Inc. v. General Services Administration*, GSBCA 16195-C(16047), 03-2 BCA ¶ 32,401. TST [Tallahassee, LLC] has referred us to no agency regulation, nor are we aware of any VA [Department of Veterans Affairs] regulation, which determines that an increase in the cost of living or some special factor justifies award of a fee based upon an hourly rate greater than \$125. In the absence of such a regulation, we decline to make an award at a rate greater than the statutory rate.

CBCA 2472-C(1576), 12-1 BCA ¶ 35,037, at 172,152 (2011); *see also Russell Sand & Gravel; Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 982-C(50), 08-2 BCA ¶ 33,908; *Data Enterprises of the Northwest v. General Services Administration*, GSBCA 16536-C(15607), 05-1 BCA ¶ 32,968. Even where an agency has promulgated a regulation, the Supreme Court has held that the phrase “limited availability of qualified attorneys . . . for the proceedings involved” must be interpreted restrictively, referring to attorneys with an identifiable practice specialty like patent law or knowledge of foreign law or language. *Russell Sand & Gravel*, 14-1 BCA at 174,444 (citing *Pierce*, 487 U.S. at 571-72). SIM has not referred us to any GSA regulation that “determines that an increase in the cost of living or some special factor justifies award of a fee based upon an hourly rate greater than \$125.” *TST Tallahassee, LLC*, 12-1 BCA at 172,152.

Accordingly, we reduce the amount claimed for attorney fees to \$125 per hour. Based upon a total of 257.2 hours, we award SIM a total of \$32,150 in attorney fees for Mr. Harrington’s time.

The fees for other professionals and the costs claimed by SIM all occurred after SIM failed to act on the settlement offer. Therefore, we find that SIM is not entitled to any of those fees or costs.

Finally, SIM seeks twenty-six hours for attorney fees from the law firm of Vedder Price (totaling \$4966) to prepare and file the reply submission. CBCA Rule 30(c)(3) requires that the application for fees and other expenses:

Be accompanied by an exhibit fully documenting any fees or expenses being sought The date and a description of all services rendered or costs incurred shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the particular services performed by specific date, the rate at which fee has been computed, any expenses for which reimbursement is sought, and the total amount paid or payable by the applicant.

SIM did not provide any exhibit documenting the fees sought for the hours spent by Vedder Price to prepare the reply submission. There is nothing evidencing the date and description of the services rendered, hours spent by each individual, or a description of the services performed by specific date. Therefore, we reject SIM's application for twenty-six hours of attorney fees for preparation of its EAJA reply submission because no exhibits have been provided to document the fees sought.

Decision

We **GRANT IN PART** the application and award applicant \$32,150 without interest pursuant to the EAJA.

JERI KAYLENE SOMERS
Board Judge

We concur:

JAMES L. STERN
Board Judge

ALLAN H. GOODMAN
Board Judge