



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: October 30, 2023

CBCA 7833-C(7472)

GC WORKS, INC.,

Applicant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Diana Lyn Curtis McGraw and Nicholas T. Solosky of Fox Rothschild LLP, Washington, DC, counsel for Applicant.

Mark R. Simpson, Office of the General Counsel, Department of Agriculture, Atlanta, GA, counsel for Respondent.

Before Board Judges **RUSSELL**, **VERGILIO**, and **ZISCHKAU**.

VERGILIO, Board Judge.

The applicant, GC Works, Inc., timely seeks to recover attorney fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2018), following the Board's decision granting in part its appeal. The Board awarded the applicant \$5000, plus interest, for several days of delay. This was less than the full amount sought, because the applicant's actions unnecessarily extended the period to resolve the differing site/changed condition. *GC Works, Inc. v. Department of Agriculture*, CBCA 7472, 23-1 BCA ¶ 38,379 (a one-judge non-precedential decision; Board Rules require a three-judge panel to resolve an application, Board Rule 1(d) (48 CFR 6101.1(d) (2022)). The Department of Agriculture (agency)

requests that the Board deny the application, asserting that the applicant was not a prevailing party and that the agency's position was substantially justified.

The applicant was a prevailing party. It succeeded on a significant issue of the litigation; it achieved some of the benefit sought. The agency's position was not substantially justified, as the site conditions differed from the Government-provided drawings. The agency offered no relief initially and suggested only limited relief thereafter. The applicant has supported the hours worked (it requests no expenses), seeking \$9362.50. Given the limited success of the results achieved, that figure is adjusted downward to account for the applicant's unsuccessful pursuit, throughout the course of litigation, of greater damages for a longer delay period and its failure to acknowledge its responsibility for a portion of the delay. The escalated requests for relief during the proceedings were not substantially justified and protracted the litigation. The Board awards \$4700, approximately half of the amount sought.

Background

On May 17, 2022, the applicant received the initial decision by a contracting officer, denying what was deemed to be a claim to recover \$5518.43 for a differing site/changed condition and work stoppage due to a notice of non-compliance. Underlying the dispute were the locations of bolts in an existing gate that did not match those depicted in the Government-provided drawings. The applicant sought payment based upon six days of delay to remedy the variance. The contracting officer recognized that the agency had issued a notice of non-compliance but did not view that to be a stop work order that hindered performance. Further, the contracting officer concluded that under the design-build contract, the applicant was required to verify bolt locations, such that the applicant, not the agency, was liable for costs associated with the variation between the drawing and the actual bolt locations. Thereafter, the applicant sought \$9743.02, revised first to \$30,427.66 and then \$26,619.34, in submissions to the agency. In its final brief, the applicant sought \$15,191.26, associated with eighteen days of delay, all arising from the differing site/changed condition. Of that amount, the agency deemed appropriate to pay at most approximately \$1775, but it needed further support. The Board decision awarded the applicant \$5000, plus interest.

Prior to the appeal (during performance and in the decision denying the initial claim) and thereafter (throughout the litigation), the agency failed to recognize its basic obligations to compensate the applicant for the differing site/changed condition that caused the applicant to incur additional time and costs to verify a solution to account for the differing site/changed condition. The applicant achieved only limited success, with the Board granting in part the appeal, for fewer dollars based upon fewer days than the applicant sought. After the initial claim, the applicant pursued positions that were unrealistic, factually and legally.

The applicant qualifies in terms of size (dollar value and number of employees) at the time the appeal was filed. The applicant seeks \$9362.50 under EAJA, which reflects attorney hours capped at \$125 per hour, not the cap of \$150 per hour available under agency regulations. 7 CFR 1.186 (2022). The amount sought also excludes expenses of \$46, identified simply as miscellaneous without further detail. The attorney hours were incurred after the applicant received the contracting officer's decision and relate to the appeal and application.

Discussion

The standards for and analysis required to resolve an application are detailed in *SBC Archway Helena, LLC v. General Services Administration*, CBCA 7858-C(5997, et al.) (Oct. 25, 2023). The agency opposes relief. It maintains that the applicant was not a prevailing party and that the agency's position was substantially justified, that is, had a reasonable basis in fact and law.

The applicant qualifies in terms of size (net worth and number of employees) at the time it filed the underlying appeal. The applicant is a prevailing party; it achieved some of the relief it sought. The agency's position was not substantially justified. Initially, the contracting officer found zero agency liability, despite the government drawings indicating bolt positions at variance with actual locations. To conclude there was no agency liability was not reasonable, factually or legally. The variation caused the applicant to incur additional time and costs to verify a solution. Thereafter, during the appeal, the agency suggested minimal, inadequate relief. The amount put forward by the agency was not substantially justified. The agency's actions are what prompted the filing and pursuit of the appeal to enable the applicant to obtain the relief envisioned under the contract.

The Board, however, must consider that the applicant obtained only limited success, when comparing the relief obtained to the escalated amounts it sought from the initial stages of encountering the differing site/changed condition through to its position in briefing. The applicant ultimately pursued a position that was unrealistic, factually and legally. Had the applicant recognized that its conduct, by attempting to alter bolt size, contributed to the delay, the case may well have been resolved short of submission on the record, or less time would have been spent in developing the record and briefing. Under these circumstances, full payment of fees is not appropriate. The Board reduces the requested award to reflect appropriate relief. The applicant is to recover \$4700 of the \$9362.50 sought, approximately half of the request, given that the initial appeal was required but much effort thereafter was not beneficial to resolution.

Decision

The Board **GRANTS IN PART** the application. The applicant is to recover \$4700.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

We concur:

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge