UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: August 15, 2007

CBCA 3-C(VABCA 6987E), 24-C(VABCA 7042E), 25-C(VABCA 7043E)

ALLEN BALLEW GENERAL CONTRACTOR, INC.,

Applicant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Allen Ballew, President of Allen Ballew General Contractor, Inc., Chillicothe, OH, appearing for Applicant.

Kenneth B. MacKenzie, Office of the General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **DRUMMOND**, **SHERIDAN**, and **WALTERS**.

**SHERIDAN**, Board Judge.

Allen Ballew General Contractor, Inc. (ABGC) seeks $25,200.68 for legal fees, consultant fees, payroll expenses, and travel-related expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000), following the decision of the Department of Veterans Affairs Board of Contract Appeals (VA Board) in *Allen Ballew General Contractors, Inc.*, VABCA 6987, et al., 07-1 BCA ¶ 33,465 (2006).

## Background

In these matters, ABGC had appealed a January 30, 2003 Department of Veterans Affairs (VA) contracting officer's final decision that denied claims for 120 days of government-caused delay (VABCA 6987), $23,353.20 for extended field office overhead costs (VABCA 7042), and $33,962.40 for extended home office overhead costs and $1432.48 in additional bond costs (VABCA 7043). The claims arose out of a contract between the VA and ABGC for the renovation and construction of a building addition at the VA Medical Center, Kansas City, Missouri. The three appeals were consolidated for purposes of hearing and decision.

Regarding the 120 days of government-caused delay ABGC sought in VABCA 6987, the VA Board found the contractor entitled to a forty-seven day government-caused suspension and four days of non-compensable weather delay. As to the extended field office overhead costs at $283.02 per day that ABGC sought in VABCA 7042, the VA Board, applying a daily rate of $243.82, awarded $11,459.54 of the $23,353.20 sought. The VA Board denied in its entirety VABCA 7043, in which ABGC claimed $33,962.40 for extended home office overhead costs and $1432.48 for additional bond costs.

After the decision was issued in VABCA 6987, 7042, and 7043, the VA Board was, pursuant to statute, consolidated into the Civilian Board of Contract Appeals (CBCA) on January 6, 2007. Pub. L. No. 109-163, § 847, 119 Stat. 3136 (2006). When ABGC's EAJA application was submitted on January 16, 2007, the application in VABCA 6987 was docketed as CBCA 3-C(VABCA 6987), in VABCA 7042 as CBCA 24-C(VABCA 7042), and in VABCA 7043 as CBCA 25-C(VABCA 7043).

## Entitlement

In its timely application, ABGC asserts that it meets the eligibility requirements of EAJA with respect to size (net worth and number of employees); that it was a prevailing party; and that the Government's position was not substantially justified.

## Size and Net Worth

To be eligible for an award of fees and expenses under the EAJA, an applicant that is an unincorporated business, a partnership, or a corporation may not have a net worth in excess of $7,000,000 or more than 500 employees at the time of the initiation of the adversary adjudication. 5 U.S.C. § 504(b)(l)(B). ABGC avers that "our net worth was, and remains less than $328,000 and the number of employees was 13 when the [appeals] were docketed." The VA does not dispute that ABGC meets the limitations regarding net worth

and number of employees set forth in the statute, and we find that applicant meets the statutory criteria for eligibility under the EAJA.

Prevailing Party

The EAJA requires that fees and other expenses incurred in connection with a board of contract appeals proceeding be awarded if that party is a prevailing party in the litigation and if the position of the United States was not substantially justified. A party is a prevailing party if it is successful on any significant issue in the litigation that achieves some of the benefit sought. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Integrated Clinical Systems, Inc.*, VABCA 3745E, et al., 96-2 BCA ¶ 28,425. The VA indicates that it does not dispute that ABGC was a prevailing party. As previously mentioned, of the 120 days delay alleged by the applicant in VABCA 6987, the VA Board found ABGC entitled to an extension of forty-seven days for government-caused suspension and four days for weather delays. Regarding the $23,353.20 in field office overhead costs sought by ABGC in 7042, the VA Board awarded $11,459. The applicant was successful in achieving a portion of what it sought in VABCA 6987 and 7042 and was therefore a prevailing party in those appeals. As for VABCA 7043, however, ABGC's claim of $33,962.40 for extended home office overhead costs and $1432.48 for additional bond costs was denied in its entirety. The applicant was not a prevailing party pursuant to the EAJA in VABCA 7043, and is not eligible to recover fees and expenses in CBCA 25-C(VABCA 7043).

Neither party addressed the possibility of allocating the fees and expenses on the basis that ABGC did not prevail on all of its appeals. It is well established that in arriving at a reasonable EAJA award and in allocating or apportioning EAJA fees and costs, boards of contract appeals have broad discretion and have used various approaches and formulas to determine what constitutes a fair EAJA recovery. *Overflo Public Warehouse, Inc.*, PSBCA 4531, et al., 06-1 BCA ¶ 33,160 (2005); *C.H. Hyperbarics, Inc.*, ASBCA 49375, et al., 05-2 BCA ¶ 32,989; *W. L. Holbrook*, AGBCA 2003-139-10, et al., 04-1 BCA ¶ 32,442 (2003); *Donahue Electric, Inc.*, VABCA 6618E, 03-2 BCA ¶ 32,370; *Staff, Inc.*, AGBCA 98-152-10, 99-1 BCA ¶ 30,260; *Teems, Inc. v. General Services Administration*, GSBCA 14409-C (14490), 98-1 BCA ¶ 29,646; Fanning, Phillips & Molnar, VABCA 3856E, 97-2 BCA ¶ 29,008; *Integrated Clinical Systems, Inc.*; *Northern Virginia Service Corp. v. Department of the Treasury*, GSBCA 12872-C(11760-TD), 95-2 BCA ¶ 27,781; *Eagle Contracting, Inc.*, AGBCA 93-114-10, 93-3 BCA ¶ 26,049; *see also* Hensley, 461 U.S. at 440; *Community Heating & Plumbing Co. v. Garrett*, 2 F.3d 1143, 1146 (Fed. Cir. 1993). We also believe that the CBCA has the discretion to eliminate or discount hours or other expenses that we find would not have been incurred but for an unsuccessful claim. *Hensley*, 461 U.S. at 436-37.

Substantial Justification

As a prevailing party in VABCA 6987 and 7042, ABGC may recover on its application in CBCA 3-C(VABCA 6987) and 24-C(VABCA 7042), unless we find that the position of the agency was substantially justified. 5 U.S.C. § 504(a)(l). "'[P]osition of the agency' means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based." 5 U.S.C. § 504(b)(l)(E); *see Doty v. United States*, 71 F.3d 384, 386 (Fed. Cir. 1995). The Government's position is substantially justified if it had a reasonable basis in law and fact to a degree that could satisfy a reasonable person. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

The Government bears the burden of proving the reasonableness of its position. *Helfer v. West*, 174 F.3d 1332, 1336 (Fed. Cir. 1999). In making our determination, we look at the administrative record as a whole and at the "entirety of the government's conduct and make a judgment call whether the government's overall position had a reasonable basis in both law and fact." *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991).

The VA's litigation position was that ABGC failed to prove that the Government caused a suspension of work along the contract's critical path. The respondent argues against an award of fees and expenses by providing a reiteration of the position which it took in the case in chief. The Government has been cautioned about the folly of simply rearguing the merits of its case as a defense to an EAJA application. *Data Enterprises of the Northwest v. General Services Administration*, GSBCA 16536-C(15607), 05-1 BCA ¶ 32,968; *David Boland, Inc.*, VABCA 5858E, et al., 03-1 BCA ¶ 32,170. Nonetheless, while not fully accepted by the VA Board, the VA's argument that ABGC failed to meet its burden of proof was found to be more correct than not – a conclusion which weighs heavily in this decision.

The VA also avers:

> The VA Board, in its decision, relied on the fact that the contracting officer attempted to negotiate a settlement with appellant.
>
> According to the Federal Rules of Evidence, offers of settlement or statements pursuant thereto are inadmissible. Fed. R. Evid. 408(a).
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> Respondent did not raise this issue in its brief because it did not think that the VA Board would rely on settlement discussions in arriving at its decision. However, given the fact that it did, respondent respectfully requests that the

> Board find that the offer made in Modification #6 (R4F, tab 126) [Appeal File, Exhibit 126] is part of the administrative record for EAJA purposes.

The documents contained in Exhibit 126 were part of the appeal file that was entered into the record at the outset of the hearing in these appeals. While not discussed extensively in the VA Board decision, these documents show attempts on the part of the parties to negotiate delay matters associated with Modification 6.[1] The documents show that well before ABGC's claims were filed, the VA proposed to ABGC that it accept forty-five days of delay time, seventy-seven days of weather-related delay, and $9450 in field office overhead costs associated with the modification. These documents remain a part of the record upon which we base our decision concerning the reasonableness of the respondent's position that gave rise to this adjudication.

ABGC refused VA's offer and continued developing its claim leading to this litigation. The Government correctly points out that ABGC's recovery was far less than the

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[1] On February 27, 2001, well before ABGC's October 5, 2001 claim was submitted to the VA, the contracting officer transmitted to ABGC two proposals for resolution of modification 6. Modification 6 addressed seven items which were changes to the contract. These changes increased the contract by $27,000. It appears from the record that the parties had reached agreement on the monetary amount of the increase for the seven items, since both proposals offered by the Government provided that the contract amount be increased by $27,000. The first proposal, which the VA offered as "Modification 6, Change Order 4," provided for an equitable adjustment of $27,000 for the seven listed items, but did not address the issue of a time extension. Instead, the language of the change order proposal instructed ABGC: "You have thirty (30) days after receipt of this change order to provide the contracting officer with actual costs and time on all work pertaining to this change order." The alternate proposal, referred to by the VA as "Modification 6, Supplemental Agreement 3," was an offer by the VA to enter into a supplemental agreement agreeing to an additional seventy-seven days of non-compensable time for weather delays and forty-five days of compensable time at $210 per day for "direct field office overhead," for a total amount of $9450. The VA made this offer contingent on ABGC agreeing to include language in the supplemental agreement stating that, with regard to modification 6, the agreement would constitute "a complete equitable adjustment for all cost, direct and indirect, associated with the work and time agreed to herein, including but not limited to, all costs incurred for extended overhead, supervision, disruption or suspension of work, labor inefficiencies and this change's impact on unchanged work." On March 6, 2001, ABGC elected to execute the second option, leaving the delay issue open for what ultimately became a part of this litigation.

amount claimed and very close to the amount the contracting officer proposed in February 2001. In claiming 120 days of delay the applicant cited five government-caused events as leading to those delays. Of the five events, it only proved delay and recovered on one, modification 6.

We are confounded as to how the respondent possibly could object to our consideration of the VA's proposals during the case-in-chief. The respondent appears to mistake what seems to us to be the routine exchange of proposals regarding a contract modification -- which regularly occurs during any contract -- to be the type of conduct or statement "made in compromise negotiations regarding the claim" that may be prohibited as use as evidence under rule 408(a) of the Federal Rules of Evidence. The negotiations regarding modification 6, which the VA characterizes as "settlement discussions," were actually exchanges between the contracting officer and the contractor relating to a change order made during the administration of the contract. While we wholly agree that settlement offers made on claims should not be relied upon as proof of a claim, an exchange the like of which occurred here may certainly be considered. Furthermore, the Government itself put into evidence the information about the early proposals that it made to resolve the delay issue when it included documentation regarding the proposals in its appeal file submission. Also, and ironically, while the Government objects to the VA Board's consideration of the proposals associated with the modification, it is those very proposals that first point to the reasonableness of the VA's approach in dealing with the matters that gave rise to this litigation.

In assessing the appropriateness of awarding EAJA fees and costs here, we consider the VA's offer on the modification to be one of the linchpins to our conclusion that the Government acted reasonably from the outset of this dispute. Even though the contracting officer indicated at the hearing he had reconsidered his earlier offer and now believed that ABGC had failed to prove delay, the VA's initial approach regarding the dispute and the position it took was reasonable and, therefore, also an indication that, at least initially, the respondent's position was substantially justified. We also note that the applicant's refusal to accept respondent's reasonable offer appears to be what ultimately set the parties on the litigation path. That course appears to us to have been largely the applicant's own fault and contributed to, if not caused, its incurrence of the costs it now seeks to recover through this application.

The VA Board's decision to grant time in these appeals was difficult for a variety of other reasons as well. Relying essentially on the argument that ABGC had failed to meet its burden of proof, the VA elected to not provide a time analysis of its own to help explain why ABGC finished this contract late. While this was certainly a position the Government was entitled to take, it was a dangerous course, and of no help to the VA Board in considering

why the contract finished so late. ABGC's delay analyses were sorely lacking, and for the most part, failed to distinguish between alleged suspension and change order time.[2] The VA Board also noted several deficiencies in the evidence ABGC provided, determining that ABGC's "multiple disjunctive analyses," "isolated snapshots of selected information," and "conclusory statements" only served to increasingly confuse this litigation as it progressed. Ultimately, the VA Board determined that ABGC had, via update 1, provided sufficient proof of forty-seven days of suspension and four days of weather-related delays. However, ABGC's poor analyses coupled with the confusing record it developed served to severely limit its recovery and is an indicator that the Government's position was reasonable in this litigation.

Another indicator that the agency was substantially justified in contesting the claim relates to the position it took on ABGC's claimed costs. ABGC sought a daily field office overhead rate of $283.02 per day. In February 2001, the VA offered the applicant a daily field office overhead rate of $210 per day. During litigation, the VA took the position that ABGC was entitled to $195.73 per day for its job site supervisor, but argued that ABGC had failed to provide proof of any other costs, or that it had actually incurred those costs. The VA Board observed in its decision that ABGC "failed to provide anything other than cursory support for the field office overhead costs it claims." Notwithstanding this failure, relying on its familiarity with the field office overhead daily rates of several of the claimed categories, the VA Board calculated a daily field office overhead rate of $243.82 per day using a jury verdict methodology. Given the dearth of cost evidence, the VA Board could equally have denied outright for failure of proof ABGC's claimed costs for field overhead other than job site supervisor costs.

The CBCA has had occasion to decide a similar failure on the part of an EAJA applicant in *Silver Enterprises v. Department of Transportation*, CBCA 63-C (DOT BCA 4459, et al.), 07-1 BCA ¶ 33,496. In the original decision on entitlement, the Department of Transportation Board of Contract Appeals (DOT Board) found that the contractor had failed to keep adequate records of its costs. Using testimony received at the hearing, the DOT Board applied a jury verdict approach to make an award. In considering the subsequent

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[2] The VA's Changes clause limits the amount of overhead and profit a contractor can receive for changed work to no more than ten percent overhead and ten percent profit. Case law has developed that allows additional recovery under the Suspension of Work clause for delays not directly related to change order performance. To recover, contractors seeking additional time and costs must distinguish between alleged suspension and change order time, including discrete periods of delay to the critical path preceding the change order work, the time required to do change order work, and the impact that the change had on unchanged work. *Allen Ballew General Contractors, Inc.*, 07-1 BCA ¶ 33,465.

EAJA application, we noted, however, that the DOT Board had to estimate costs due to the inadequate supporting documentation and through testimonial evidence heard for the first time at hearing. The Government had taken the position that it would only pay those costs that were supported by appropriate documentation. In denying the EAJA application, we concluded that the Government had carried its burden of proving its position was substantially justified and reasonable in light of the applicant's failure to keep adequate records of its costs. In the present case, the VA took the position that it would not pay costs that were not adequately supported by the record. With the record before us, this was not an unreasonable position for the Government to take.

In VABCA 6987 and 7042, ABGC's recovery was, for the most part, equal to the offer made by the VA well before the applicant submitted its claim. Having found that the VA reasonably attempted to negotiate a resolution to this dispute early in its tenure, and viewing the entirety of the VA's conduct both at the agency level and during the adversary adjudication, we conclude that the Government's overall position had a reasonable basis in both law and fact and was substantially justified.

Decision

The EAJA application is **DENIED**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

RICHARD C. WALTERS
Board Judge