



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: July 10, 2008

CBCA 982-C(50)

TIDEWATER CONTRACTORS, INC.,

Applicant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Joseph A. Yazbeck, Jr., of Yazbeck, Cloran & Hanson, LLC, Portland, OR, counsel for Applicant.

David Sett, Division Counsel, Federal Highway Administration, Department of Transportation, Lakewood, CO, counsel for Respondent.

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

SOMERS, Board Judge.

Tidewater Contractors, Inc. (Tidewater) has submitted an application for reimbursement of fees and costs under the Equal Access to Justice Act, 5 U.S.C. § 504 (2000) (EAJA), incurred in connection in successfully prosecuting an appeal of a contracting officer's final decision. It seeks an award of \$44,448.94, including attorney fees and expenses.

We grant the application in part. We award to Tidewater \$23,262.50 in attorney fees and \$1847.94 in other expenses, for a total of \$25,110.44.

Background

On August 15, 2005, Tidewater appealed the Federal Highway Administration's contracting officer's final decision dated August 12, 2005, which denied Tidewater's claim for an extension of contract time resulting from the Government's delay in the issuance of the notice to proceed. After denying cross-motions for summary judgment, the Department of Transportation Board of Contract Appeals (DOTBCA) held a hearing in Portland, Oregon. On March 22, 2007, the Civilian Board of Contract Appeals, the successor board to the DOTBCA, issued an opinion granting Tidewater's claim in part. *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50, 07-1 BCA ¶ 33,525. Tidewater filed a motion for reconsideration, seeking the remainder of its claim. On June 29, 2007, the Board granted Tidewater's motion for reconsideration and amended the decision, granting the appeal in its entirety. *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50-R, 07-2 BCA ¶ 33,618. As a result, the contract completion date was extended by eighty-nine days. The Government, which had assessed liquidated damages against Tidewater after the appeal had been filed, issued a unilateral modification as a result of the decision and remitted to Tidewater \$160,200, representing the amount of liquidated damages that had been withheld from Tidewater.

On November 26, 2007, Tidewater filed an application for fees and other expenses under the EAJA. On December 21, 2007, respondent filed a response to Tidewater's application. Subsequently, applicant filed a motion for summary relief, seeking an order to compel the Government to pay interest on the amount held for liquidated damages pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (CDA). The Government filed an opposition and cross-motion for summary relief. We address the EAJA application and the CDA interest issue below.

EAJA Eligibility

In order to be eligible for an award of attorney fees, an applicant must be the prevailing party in the litigation and must meet net worth and employment size requirements. 5 U.S.C. § 504(b)(1)(6). In addition, an applicant must file its EAJA application within thirty days of the final disposition of the appeal. 5 U.S.C. § 504(a)(2). The undisputed record indicates that Tidewater meets these threshold requirements.

Pursuant to EAJA, Tidewater is entitled to an award of attorney fees and other expenses unless the Board finds that the position of the agency was substantially justified or that special circumstances make an award unjust. *Id.* § 504(a)(1). The Government's position is substantially justified if it is justified in substance or in the main, or justified to a degree that would satisfy a reasonable person. *Pierce v. Underwood*, 487 U.S. 552, 565-

66 (1988). The burden of proof in establishing substantial justification falls upon the Government. *Id.* at 575-76.

In the underlying appeal, the Board determined that the Federal Acquisition Regulation (FAR) and the contract specifications called for the Government to issue a notice to proceed within a specified period of time following bid opening, and concluded that the Government failed to do so. In response to the EAJA application, the Government argues that its position was substantially justified because it acted based upon its reasonable belief that Tidewater was not ready to begin construction operations in early 2004. The Government asserts that Tidewater's "factual unreadiness" divested Tidewater of the right to an extension of the completion date. In addition, the Government states that the decision to use an "offsite" notice to proceed was consistent with its practice on other contracts. Respondent's Motion in Opposition of Appellant's Motion for An Award of Fees and Other Expenses at 3.

We reject the Government's argument. As the decisions in the underlying appeal indicate, nothing in the FAR or the contract authorizes the creation of an "offsite" notice to proceed. Likewise, the contract does not give the Government the right to delay the issuance of the notice to proceed until it determined that Tidewater was ready to begin construction operations. To the contrary, the FAR provision in question, FAR 52.211-10, expressly stated that the completion date will be extended by the number of calendar days after the seventieth day following bid opening that the contractor received the notice to proceed, with limited exceptions not relevant here. 48 CFR 52.211-10 (2007). Where explicit, unambiguous regulations directly contradict the Government's position, as is the case here, we cannot find the Government's position to be substantially justified. *See, e.g., Geo-Seis Helicopters, Inc. v. United States*, 79 Fed. Cl. 74, 78 (2007); *Hillensbeck v. United States*, 74 Fed. Cl. 477, 481 (2006) (Government's position conflicted with unambiguous statutory definition and regulations); *Loomis v. United States*, 74 Fed. Cl. 350, 355 (2006) (military failed to comply with its own regulations).

Award Determination

Our authority to award fees and expenses is governed by 5 U.S.C. § 504(a)(1), which provides that:

An 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

Section 504(b)(1)(C) defines an adversary adjudication as, among other things, “any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before any agency board of contract appeals”

Tidewater seeks its attorney fees and costs in the total amount of \$44,448.94. The Government does not dispute Tidewater’s claim for expenses in the amount of \$1847.94, but does object to the claim for attorney fees as unreasonable and/or not incurred in this adversary adjudication. We examine the application to determine whether the amount of fees claimed is warranted.

A party seeking an EAJA award must include with its application “an itemized statement from any attorney, agency, or expert representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.” 5 U.S.C. § 504(a)(2). The award of fees is not automatic; it is a matter for the Board’s discretion. *Commissioner, Immigration and Naturalization Service v. Jean*, 496 U.S. 154, 158 (1990).

Tidewater’s application for \$44,448.94 is composed of the following amounts:

Attorney fees incurred by Yazbeck, Cloran & Hanson, LLC	\$41,061.00
Expenses incurred by Yazbeck, Cloran & Hanson, LLC	1,847.94
Anticipated attorney fees for preparation of this petition	1,540.00
Total	\$44,448.94

In support of its claim, Tidewater submitted a detailed fee and expense transaction list, with each task identified by date performed, services provided, and hours spent. Tidewater seeks reimbursement for 199.9 hours of legal services performed by five attorneys at their market rates.

The Government objects to the application on several grounds. The Government contests payment of some of the attorney fees sought for preparation of the fee petition. Tidewater initially sought eleven hours of “anticipated” attorney fees, 2.5 hours of which the Government contended duplicated actual attorney fees claimed. Tidewater amended its application by removing the eleven hours of “anticipated” attorney fees and substituting actual attorney fees of twelve hours. The parties now agree that the total hours claimed is 199.9 hours and that these hours are not duplicative.

Nonetheless, the Government maintains that Tidewater is not entitled to 6.4 hours, representing fees arising from a separate, parallel appeal under the same contract, which had been dismissed at Tidewater’s request on June 28, 2006. Also, the Government objects to

fees for work on issues arising out of the ongoing road construction project, which is unrelated to the current appeal. These entries represent 7.4 hours of services. We agree that Tidewater is not entitled to fees arising from the separate appeal, nor is it entitled to fees arising from issues not included in the appeal before the Board. Accordingly, we delete the hours represented by those unrelated issues and conclude that Tidewater is entitled to 186.1 hours in attorney fees.

As to attorney fee hourly rate, Tidewater seeks reimbursement at the rate of \$170 per hour. The EAJA provides that -

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 . . . 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.

5 U.S.C. § 504(b)(1)(A). The Department of Transportation has not issued a regulation that provides for an award of increased fees, and no special factor has been established, so there is no basis for the Board to allow a higher hourly fee. Accordingly, we calculate the attorney fees at 186.1 hours at \$125 and find Tidewater is entitled to \$23,262.50 in attorney fees.

Entitlement to CDA Interest

On August 10, 2005, Tidewater filed an uncertified claim for an eighty-nine day extension of time to complete the contract. On August 17, 2005, upon receiving the contracting officer's denial of its claim, Tidewater appealed the contracting officer's final decision. The Government did not begin accessing liquidated damages until August 30, 2005, the original contract completion date. Upon receiving the Board's decision awarding the eighty-nine day extension of the contract period, the Government returned \$160,200 in liquidated damages.

Appellant has filed a motion for summary relief seeking an order requiring the Government to pay interest pursuant to 41 U.S.C. § 611 on the eighty-nine days of liquidated damages withheld by the Government from contract payments. The Government opposes the request, arguing that the Board lacks jurisdiction to consider Tidewater's claim because Tidewater failed to certify the claim prior to filing the appeal.

We agree that the Board does not possess jurisdiction to entertain the claim, but for different reasons from those asserted by the Government. The assessment of liquidated damages is a government, not a contractor, claim. *Technocratica*, ASBCA 48060, et al., 06-2 BCA ¶ 33,316. The interest provisions of the CDA do not apply to amounts wrongfully withheld by the Government. *Id.* However, CDA interest does accrue on a claim submitted by a contractor for the remission of such withholdings. *Hettich & Co., GmbH*, ASBCA 35239, 88-2 BCA ¶ 20,699, at 104,597-98, *aff'd in part and remanded*, 873 F.2d 1451 (Fed. Cir. 1989)(table); *Hunter Manufacturing Co.*, ASBCA 34209, 87-2 BCA ¶ 19,903, at 100,690. Thus, interest on liquidated damages could only accrue if Tidewater had submitted a claim for such damages, and filed an appeal of the denial of such claim.

In this case, Tidewater sought an extension of the contract period and filed an appeal of the denial of that claim. Only subsequent to the filing of this appeal did the Government assess liquidated damages. The record contains a letter dated November 1, 2007, from Tidewater to the contracting officer which indicates that Tidewater had asserted a claim on November 1, 2007, for the payment of interest on the liquidated damages. *See* Respondent's Motion in Opposition to Appellant's Motion for an Award of Fees and Other Expenses, Exhibit 3. In that letter, Tidewater expressly states that "we reserve our right to the claims and are awaiting a Contracting Officer's decision." *Id.* at 2. Nothing indicates that the contracting officer issued a final decision on that claim, or that Tidewater appealed the denial of its claim for interest on the liquidated damages. Accordingly, the Board does not possess jurisdiction in the appeal underlying this application over the claim for the return of liquidated damages. *See, e.g., AEC Corp.*, ASBCA 42920, 03-1 BCA ¶ 32,071 (2002) (rejecting appellant's argument that a previous board decision granting time extensions allowed the remission of assessed liquidated damages in the absence of a claim and contracting officer's final decision on that issue).

Decision

The cost application is **GRANTED IN PART**. We award to Tidewater, as reimbursement of attorney fees and costs incurred in connection with the underlying appeal and this cost application, the sum of \$25,110.44.

JERI KAYLENE SOMERS
Board Judge

We concur:

JAMES L. STERN
Board Judge

EILEEN P. FENNESSY
Board Judge