



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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GRANTED IN PART: May 21, 2014

CBCA 3781-C(2235)

RUSSELL SAND & GRAVEL COMPANY, INC.,

Applicant,

v.

INTERNATIONAL BOUNDARY AND WATER COMMISSION,

Respondent.

Mickey Beisman of Law Offices of Mickey Beisman, Albuquerque, NM, counsel for Applicant.

Rebecca Ann Rizzuti, Office of the Legal Advisor, United States Section, International Boundary and Water Commission, El Paso, TX, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **GOODMAN**, and **DRUMMOND**.

**DANIELS**, Board Judge.

Russell Sand & Gravel Company, Inc. (RS&G) has made an application for fees and other expenses incurred in prosecuting a case which was decided by this Board, *Russell Sand & Gravel Co. v. International Boundary & Water Commission*, CBCA 2235, 13 BCA ¶ 35,455. The total amount sought is \$222,575.49. We grant the application in part.

The application was filed pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2012). The EAJA 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, 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). The purpose of the law is “to eliminate the 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 v. Principi*, 541 U.S. 401, 406 (2004) (citing H.R. Rep. No. 96-1005, at 9 (1980)).

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 partnership, have had 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.

5 U.S.C. § 504(a)(1), (2), (b)(1)(B); see *Doty v. United States*, 71 F.3d 384, 385 (Fed. Cir. 1995); *A&B Limited Partnership v. General Services Administration*, GSBCA 16322-C(15208), 04-2 BCA ¶ 32,641, at 161,511; *McTeague Construction Co. v. General Services Administration*, GSBCA 15479-C(14765), 01-2 BCA ¶ 31,462, at 155,333; *DRC Corp. v. Department of Commerce*, GSBCA 15172-C(14919-COM), 00-1 BCA ¶ 30,841, at 152,226.

RS&G has met all of these requirements. It was the prevailing party in the underlying case, for it “succeed[ed] on any significant issue in litigation which achieves some of the benefit [it] sought in bringing suit.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The contractor was awarded \$544,328.40, nearly 72% of the amount claimed, in the face of the position taken by the International Boundary and Water Commission (IBWC), which was the

respondent in the case, that the contractor was entitled to nothing. RS&G had not more than \$7,000,000 in net worth and five hundred employees at the time the adversary adjudication was initiated. It submitted its application within thirty days of a final disposition of the case (when the time for filing an appeal to the Court of Appeals for the Federal Circuit had run). RS&G has, in its application, shown that it met the requirements as to having prevailed and size,<sup>1</sup> and stated the amount sought with an itemized statement of costs and attorney fees. The contractor has also alleged that the IBWC's position was not substantially justified – that the position was not “justified to a degree that could satisfy a reasonable person,” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

The IBWC has not alleged that its position was substantially justified. This is clearly a prudent posture. The agency's contracting officer denied the claim before it was even made and later, after another contracting officer suggested that the claim might be worth something, the agency ultimately refused to pay anything. The Board found that RS&G was clearly entitled to and awarded the great majority of the money the contractor sought. We expressly find that the agency's position was not substantially justified. RS&G is eligible for an award under the EAJA.

The contractor seeks an award of the following costs:

Attorney fees: 623.3 hours at \$250 per hour, for a total of \$155,825

Paralegal fees: 19.2 hours at \$100 per hour, for a total of \$1920

Attorney costs: \$5628.86

Fees charged by consultant Gene H. Beisman of Beisman Associates, at \$147 per hour: \$39,234.30

Fees charged by accountants Dean Willingham, Henry South, and Diana Sandoval of Atkinson Co., at hourly rates of \$85 (Sandoval), \$200 (Willingham and South), and \$250 (Willingham at hearing): \$6133.50

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<sup>1</sup> In its opposition to the application, the IBWC points out that exhibits to the application show that RS&G that met the requirements as of November 6, 2013, rather than at the time adjudication was initiated. In response, RS&G provided evidence that it met the requirements at the requisite time.

Gross receipts tax on attorney fees (\$10,697.25), paralegal fees (\$134.40), consultant's fees (\$2378.58), and accountants' fees (\$429.35)

The IBWC challenges some of these costs. We discuss the agency's objections below.

As to **attorney fees**, the agency makes three objections: (a) 6.7 hours of the attorney's time is not reimbursable because it was incurred before the underlying appeal was filed at the Board; (b) the number of hours the contractor's attorney spent on the case appears "unreasonable and excessive in our experience"; and (c) none of the time should be reimbursed at a rate greater than \$125 per hour.

The first two points are not well taken. (a) The EAJA allows reimbursement of costs which were incurred in connection with an "adversary adjudication," 5 U.S.C. § 504(a)(1), and our decisions hold that an adversary action begins when the contractor receives the contracting officer's decision. *TST Tallahassee, LLC v. Department of Veterans Affairs*, CBCA 2472-C(1576), 12-1 BCA ¶ 35,037 (2011); *ROI Investments v. General Services Administration*, GSBICA 15488-C(15037-C)-REIN, 01-1 BCA ¶ 31,352, at 154,827 (citing cases). All 6.7 hours to which the agency directs our attention occurred after RS&G received the contracting officer's decision, so those hours are reimbursable.

(b) The IBWC has no experience with similar cases, and thus no standard against which it might measure the reasonableness of the number of hours devoted to the case. In any event, as RS&G notes, the time the attorney devoted to the case was prolonged by the need to defend against various unnecessary actions taken by the agency, including initiation of an inspector general investigation of the claim which resulted in a finding that the agency's allegations were unfounded, assertions by agency employee Christopher Parker which the Board held to be thoroughly misplaced, and untrue representations that various witnesses would be presented at hearing.

(c) The agency's third point regarding attorney fees is correct, however. The EAJA provides 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). As the IBWC notes, the agency has not promulgated a regulation justifying a fee higher than \$125 per hour. This in itself precludes an award at a higher rate. *TST Tallahassee; Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 982-C(50), 08-2 BCA ¶ 33,908, at 167,790. Even if the agency had promulgated such a regulation, the Supreme Court has held that the phrase "limited availability of qualified attorneys . . . for the proceedings involved" must be interpreted restrictively. It "must refer to attorneys 'qualified for the proceedings' in some specialized

sense,” such as an identifiable practice speciality like patent law or knowledge of foreign law or language. *Pierce v. Underwood*, 487 U.S. at 571-72. We do not accept RS&G’s contention that the limited availability of New Mexico lawyers experienced in public procurement and construction law meets this requirement. We therefore reduce the amount claimed for attorney fees by half, from \$250 to \$125 per hour. The amount allowed is \$77,912.50.

The IBWC maintains that compensation for **paralegal services** should be based on the reasonable cost of those services to the law firm which employs the paralegal, not the cost of those services to the client. That was the rule in the Federal Circuit under *Richlin Security Service Co. v. Chertoff*, 472 F.3d 1370 (Fed. Cir. 2006). That decision was reversed by the Supreme Court, however, in *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571 (2008). It is now clear that “paralegal fees are recoverable as attorney’s fees at their ‘prevailing market rates.’” *Id.* at 590. RS&G is entitled to the entire amount claimed for paralegal fees, \$1920.

The agency does not challenge any of the various **costs incurred by RS&G’s attorney** for items including court reporting services, document copying, office supplies, and courier services. We award the entire amount sought, \$5628.86.

With one small exception, the IBWC does not object to our awarding to RS&G the **expert fees** charged by its construction cost consultant and accountants. This is prudent, for the EAJA permits recovery of “the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found . . . to be necessary for the preparation of the party’s case,” 5 U.S.C. § 504(b)(1)(A), and the costs in question fall into this category. The agency maintains, however, that because the EAJA provides that “no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved,” 5 U.S.C. § 504(b)(1)(A)(i), the hourly rate for these individuals should be limited to the rate of pay of agency witness Parker, \$45.74. As RS&G points out, Mr. Parker’s pay rate is of no relevance to this case because he was not an expert witness. The IBWC did not attempt to qualify him as an expert at hearing, and the Board expressly held that “whatever expertise he may have is not applicable to analyzing RS&G’s . . . claim.” 13 BCA at 173,868. We find that the fees charged by the contractor’s consultant and accountants were at reasonable rates and for reasonable amounts of time.

The one minor challenge to the expert fees raised by the IBWC is that sixteen hours of construction cost consultant Beisman’s time for November 2012 were not substantiated and were double-billed. In responding to the agency’s objection, RS&G has provided evidence that neither of these allegations is correct; the issue was prompted by an incomplete

and inaccurate presentation of invoices and has now been corrected. We award all that is sought for the fees of Mr. Beisman and the accountants.

The agency's final objection is to reimbursing RS&G for the **gross receipts tax** it paid on the fees charged for attorney, paralegal, consultant, and accountant services. This tax is not called out in the EAJA, the agency notes, and is not a "reasonable attorney or agent fee." While the agency's assertions are true, they are also irrelevant. The EAJA does not limit recovery to attorney and agent fees; it provides also for an award of "other expenses incurred by [a prevailing] party in connection with [a] proceeding." 5 U.S.C. § 504(a)(1). The Act's examples of recoverable expenses are "not an exclusive listing." A tribunal "in its discretion, may award . . . those reasonable and necessary expenses of an attorney incurred or paid in preparation for trial of the specific case before the [tribunal], which expenses are those customarily charged to the client where the case is tried." *Oliveira v. United States*, 827 F.2d 735, 744 (Fed. Cir. 1987). The gross receipt tax paid by RS&G was reasonably and necessarily paid by the contractor, since it was required by the State of New Mexico to be paid on the fees charged by the various professionals for their services. *See* N.M. Stat. Ann. §§ 7-9-3.5(A)(1); 7-9-4.

### Decision

The application is **GRANTED IN PART**. We direct the IBWC to pay to RS&G, pursuant to the EAJA, all those sums which are sought by the contractor, other than half of the attorney fees and the gross receipts tax associated with those fees. These sums are: \$77,912.50 in attorney fees, \$1920 in paralegal fees, \$5348.63 in gross receipts tax on attorney fees, \$134.40 in gross receipts tax on paralegal fees, \$5628.86 in miscellaneous costs incurred by the attorney, \$41,612.88 in consultant fees (including gross receipts tax), and \$6562.85 in accountant fees (including gross receipts tax). The total is \$139,120.12.

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STEPHEN M. DANIELS  
Board Judge

We concur:

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ALLAN H. GOODMAN  
Board Judge

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JEROME M. DRUMMOND  
Board Judge