



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: August 31, 2016

CBCA 4750-C(3552)

IMPACT ASSOCIATES, INC.,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Andrew K. Wible and William F. Savarino of Cohen Mohr LLP, Washington, DC, counsel for Applicant.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **SHERIDAN**,¹ and **ZISCHKAU**.

VERGILIO, Board Judge.

Impact Associates, Inc. (applicant) prevailed in the appeal, *Impact Associates, Inc. v. General Services Administration*, CBCA 3552, 15-1 BCA ¶ 35,910, underlying this timely filed application for recovery pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2012). Maintaining that it satisfies the requirements in terms of net worth and number of employees and that the position of the Government was not substantially justified, the

¹ Because of the retirement of one judge, the panel has changed from the underlying appeal.

applicant seeks to recover \$27,025.20 in attorney fees and costs. The General Services Administration (GSA) recognizes that the applicant was a prevailing party before this Board, does not challenge the net worth or size assertions, and does not allege that its position before the Board was substantially justified. However, GSA seeks to subtract from the relief sought the amount expended in initially pursuing the appeal at the Armed Services Board of Contract Appeals (ASBCA) (which dismissed the matter for lack of jurisdiction) and reduce the remaining amount by ten percent because the applicant did not recover the full amount of its claim (it dropped an item of recovery, reducing the amount sought by \$40,000).

The Board concludes that the applicant shall recover the full amount sought only for the period after receipt of the GSA contracting officer's decision. The activities prior to receiving the denial of the claim underlying this appeal, while reasonable and necessary steps for the applicant to obtain relief, are not compensable. While the applicant dropped an item of relief from its claim, the record does not support the conclusion that the award of relief here should be reduced for that reason. The applicant recovers \$5612.50.

Findings of Fact

By way of background, the applicant held a GSA schedule contract. The applicant entered into a no-cost task order contract with the United States Army Corps of Engineers (Corps) thereunder. The applicant provided technical assistance support to plan and conduct forums. Under the task order, the agreement provided that the applicant could not claim against the Government for any costs or other damages that the applicant might incur by Government-required changes, a reduction in participation, or withdrawal. Under the task order, the applicant retained mandatory registration and exhibition fees and sponsorship monies; these were the applicant's sources of income under the task order. During an option year, the Corps required the applicant to eliminate all forms of corporate sponsorship, otherwise altered the applicant's ability to recover its costs, and required the applicant to expend monies it would not have otherwise. Seeking to recover \$215,183.79, in August 2010, the applicant submitted a certified claim to a Corps contracting officer, who denied the claim. The applicant appealed to the ASBCA on May 11, 2011. After twice concluding that it had jurisdiction, the ASBCA reconsidered the question in light of an opinion by the Federal Circuit issued on February 23, 2013, *Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367, 1374-75 (Fed. Cir. 2013) (the court held that the ordering agency contracting officer has no authority to decide a claim requiring interpretation of the schedule contract), and on April 19, 2013, dismissed the appeal for lack of jurisdiction, concluding that the issue involved interpretation of the schedule contract. *Impact Associates, Inc.*, ASBCA 57617, 13 BCA ¶ 35,289. Thereafter, the applicant referred the claim to a GSA contracting officer, who, in August 2013, affirmed the claim, seemingly in terms of entitlement only, because payment did not occur. Seeking to reduce the contracting officer's decision to a final judgment, in

September 2013 the applicant filed at this Board the appeal underlying this case. GSA asserted that the claim must be denied on the basis that the alleged damages were not foreseeable because the contract shielded the agency from liability. The Board granted the appeal. The applicant recovered \$175,183.79, the full amount sought at the time because it had reduced its claim by \$40,000, as it no longer pursued relief for what it viewed to be income lost from sponsorships.

In this proceeding, the applicant seeks to recover \$27,025.20, its attorney fees and expenses; this amount is less than the amount billed by the law firm because rates here are reduced and the calculations made utilizing the EAJA rate of \$125 per hour. The charges include amounts relating to claim preparation and the pursuit of the claim with the Corps and at the ASBCA. The charges also reflect the costs incurred in formulating the claim for \$215,183.79. The itemized hours do not indicate specific law firm work relating to the calculation of lost sponsorship income or research regarding that theory of relief. For the period prior to receipt of the GSA contracting officer's decision (that is, relating to pursuit of the claim before the ASBCA), the applicant seeks to recover \$20,256.25 in adjusted fees and \$1156.45 in expenses. For the period after receipt of the GSA contracting officer's decision, the applicant seeks to recover \$5612.50 in adjusted fees.

Discussion

GSA challenges neither the applicant's eligibility in terms of net worth or size nor the applicant's status as a prevailing party. Similarly, GSA does not contend that its position was substantially justified. The Board determines that the applicant qualifies as a prevailing party eligible to recover fees and other expenses, and that the position of the agency was not substantially justified.

GSA raises two bases to reduce the recovery sought by the applicant. First, it contends that recovery should not extend to fees and expenses incurred in pursuing relief with the ordering (Corps) contracting officer and at the ASBCA. Second, it contends that relief should be reduced to reflect that the claimant did not prevail on its entire claim, as it obtained relief of \$40,000 less than the original claim amount.

Efforts Before the Ordering Agency and the ASBCA

GSA asks that the Board deny recovery for time and expenses incurred prior to the proceeding before this Board; that is, GSA would disallow the related portion of the relief sought for two separate reasons; because costs (1) were not incurred in this proceeding and (2) the applicant did not prevail before the ASBCA.

In considering the costs and fees provision applicable in civil actions before any court having jurisdiction of such an action, 28 U.S.C. § 2412, the Federal Circuit has concluded that attorney fees and expenses may be awarded only for those incurred or expended solely or exclusively in connection with the case before the court. In the context of a Government contract case, “at its earliest, EAJA coverage may begin after the decision of and in pursuit of an appeal from the decision of a contracting officer.” *Levernier Construction, Inc. v. United States*, 947 F.2d 497, 502 (Fed. Cir. 1991).

With reference to that opinion, Board precedent dictates that the “starting point for an EAJA claim is receipt of the contracting officer’s final decision.” *TST Tallahassee, LLC v. Department of Veterans Affairs*, CBCA 2472-C(1576), 12-1 BCA ¶ 35,037, at 172,152 (2011). The law of this case, as determined by the ASBCA, is that the dispute required interpretation of the schedule contract’s no-cost task order clause such that the Corps contracting officer could not resolve the dispute. *Impact*, 13 BCA, at 173,251. The decision of the ordering contracting officer did not create jurisdiction. The relevant decision is that of the GSA schedule contracting officer, which serves as the starting point for relief. Accordingly, the costs incurred by the applicant related to pursuing relief before the ordering agency contracting officer and ASBCA predate the period for which this Board permits relief under EAJA. For the period after receipt of the GSA contracting officer’s decision, the applicant seeks \$5612.50. This amount is calculated in accordance with statutory limits and represents work incurred on the case.

Success on Less Than the Full Amount of the Underlying Claim

GSA asks that the applicant’s recovery reflect that it dropped an item of its claim and recovered \$175,183.70 out of the \$215,183.79 initially sought. GSA suggests a ten percent reduction of the incurred costs and fees. The applicant opposes a reduction.

While the Board recognizes that, because of a limited or partial success on the merits, a reduction in the sought EAJA recovery may be appropriate, the Board declines to reduce the applicant’s recovery for that reason. The applicant achieved excellent success on its claim; the submissions do not indicate that the applicant incurred particular hours or expenses in terms of the preparation or deletion of the dropped item in the dollar amount of the relief. There was a single claim based on improper actions by the ordering agency, with different elements of the applicant’s losses. In light of the success on the claim, a reduction in the EAJA relief would be improper. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

The applicant is entitled to recover \$5612.50 of its costs incurred in pursuing the matter at this Board.

Decision

The Board **GRANTS IN PART** the application; the applicant is to recover \$5612.50.

JOSEPH A. VERGILIO
Board Judge

We concur:

PATRICIA J. SHERIDAN
Board Judge

JONATHAN D. ZISCHKAU
Board Judge