UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: September 12, 2018

CBCA 6060-C(5449)

RICHTER DEVELOPMENTS, LTD.,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Stephen B. Hurlbut, John M. Neary, and Daniel R. Miktus of Akerman LLP, Washington, DC; and Scott A. Silver of Akerman LLP, Miami, FL, counsel for Applicant.

Jay Bernstein, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SHERIDAN**, **KULLBERG**, and **LESTER**.

SHERIDAN, Board Judge.

Richter Development, LTD (Richter or applicant) has filed an application under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2012), seeking recovery of $167,144.29 in fees and expenses incurred in connection with its appeal made pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. The underlying appeal arose out of a lease between Richter and the General Services Administration (GSA). The parties settled the appeal at the start of the hearing in this matter. Upon joint stipulation for entry of judgment, the Board granted the appeal in part by entering a judgment. The joint stipulation and resultant judgment reserved Richter's right to seek attorney fees and expenses.

Background

On September 9, 2014, GSA and Richter entered into lease GS-04P-LPL62198 for office and warehouse space in Doral, Florida. During the build-out of the space, certain changes and delays occurred for which the parties discussed potential solutions. In some instances, the parties were able to negotiate lease amendments, but for other changes the parties were unable to agree. GSA accepted the space, and the lease commenced on March 7, 2016.

Richter's certified claim totaling $545,076 was submitted on March 29, 2016, seeking an equitable adjustment of the contract lease price for delay costs of $98,536; increased tenant improvement (TI) costs in the amount of $402,978; increased operating expenses totaling $30,025; and a shell rent increase in the amount of $13,537. The claim consisted of a cover letter and twenty attached pages consisting of spreadsheets and summaries listing costs. Virtually no documentation was provided to support the claimed costs.

GSA contracting officer (CO) James Thompson issued a final decision on July 28, 2016, addressing each element of Richter's claim. The contracting officer stated he would be issuing a lease amendment deleting Richter's responsibility to provide various items for which Richer sought extra operating costs, including but not limited to janitorial and cleaning, electrical, plumbing, and air conditioning. GSA asserted that the amendment would render moot Richter's claim for some of the extra operating costs it sought. GSA rejected Richter demand for "miscellaneous" operating costs, concluding that "Richter has not submitted any documents or other materials to substantiate GSA's responsibility for the delay . . . or to substantiate its claimed damages." GSA informed Richter that it was rejecting Richter's claim for an increase of the operating cost base from $39,063 to $69,088, and that the issuance of its proposed amendment "will result in a new operating cost base of $14,174 ($1.83/sf)." For the increased TI costs Richter alleged, the CO determined that "the difference between Richter's costs of $366,941 and the TI improvement allowance of $307,774 is $59,197 [and] of that amount, $15,000 is amortized as part of the lease payments. The remaining balance of $44,197 represents the total amount due to Richter for 'excess tenant improvement costs.'"

Richter also claimed that the change in lease scope entitled it to increases for real estate taxes, insurance, building maintenance reserves, and management. The CO denied the portion of the claim for increased real estate taxes because "the actual ad valorem property taxes of $12,450.71 (GSA's pro-rata share) alleged by Richter is less that the $18,686.26

established in paragraph 1.14 of the lease."[1] The remaining portion was denied "because the claimed amounts are unsupported, and because Richter has not provided any information to explain how these alleged increases are the result of or are attributable to delay for which GSA is exclusively responsible." Addressing the part of the claim seeking delay costs, the CO listed several items, including design and procurement services, interim carry costs, losses due to increase in lending rate, and noted Richter had not provided any information to explain how the costs were the result of GSA-caused delays and that "despite several GSA requests, Richter has failed to submit the information necessary to support the costs claimed."

The CO's final decision concluded:

> Regarding Richter's claim for "equitable adjustments of operating expense rent, excess tenant improvement costs and shell rent increases"; (a) based upon the operating cost increases accepted by GSA, and the operating costs which GSA anticipates deleting, the new operating cost base is $14,174 ($1.83/sf); (b) per the worksheet attached to the notice to proceed, the total amount due to Richter for "excess tenant improvement costs" is $44,197; (c) Richter's claim for shell rent increases is unsupported and therefore denied.
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> Regarding Richter's claim for "delay costs and expenses," while GSA acknowledges that scope changes were made that affected the lease commencement date, the costs claimed by Richter are unsupported and undocumented, and therefore denied.

Richter appealed the CO's final decision, and it was docketed by the Board as CBCA 5449.

A GSA Office of Inspector General (OIG) auditor worked with Richter to obtain additional cost data to support the claim, although it is not clear from the record what or when additional cost data was provided.

On November 16, 2016, the OIG issued a report adjusting Richter's claim of $545,076 downward to $315,226. The OIG auditor concluded, "our examination of Richter's $545,076 claim disclosed that the contractor did not submit accurate and complete information; and did not adequately support some of the claimed costs." The OIG auditor adjusted Richter's claim

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[1] Paragraph 1.14 of the lease provides: "The Real Estate Tax Base, as defined in the 'Real Estate Tax Adjustment' paragraph of the Lease is $18,686.26. Tax adjustments shall not occur until the tax year following lease commencement has passed."

downward from $98,536 to $69,161 for delay costs; $402,978 to $245,956 for increased TI costs; $30,025 to $99 for increased operating expenses; and $13,537 to $0 for the shell rent adjustment. GSA shared the audit report with Richter in March 2017, and correspondence in the record indicates that Richter continued to work directly with the OIG auditor to resolve unsupported costs.

On June 15, 2017, GSA issued unilateral lease amendment 4 implementing the changes associated with the operating expenses and reducing the amount to be paid annually by GSA to Richter from $40,144.52 to $24,955.52.

The record indicates that as the litigation progressed, Richter continued to submit additional cost data to resolve the problems GSA raised regarding Richter's support for individual claim elements. As the hearing date drew close, the Board ordered Richter to submit a schedule of costs. On June 21, 2017, Richter submitted to the Board and GSA an extensive schedule of costs containing documentation much of which was not previously included in the record. Attached to the schedule of costs were ten exhibits and hundreds of unnumbered pages. This was the first time such comprehensive support was submitted. The schedule of costs was made part of the record on September 20, 2017.

GSA responded to Richter's schedule of costs on July 24, 2017, accepting the documentation provided by Richter as verification of costs and seeking additional clarification on other items. GSA informed Richter it was continuing to consider the information provided in the schedule of costs. On September 15, 2017, the agency submitted a supplemental response to the schedule of costs agreeing to pay parts of the claim.

On October 16, 2018, at the start of the hearing in this matter, the parties represented that they had been engaged in "very vigorous settlement discussion over the past several weeks" and that there were "some matters we're still trying to tie down." The parties' request to delay the hearing to resolve certain issues was granted. The hearing was re-convened later that day, and the parties informed the Board on the record that they had settled the appeal.

Richter and GSA submitted a joint stipulation for entry of judgment on January 29, 2018. The joint stipulation, which the Board adopted by granting the appeal in part and entering a judgment on January 30, 2018, provided:

> 1. In full and final resolution of all elements of Richter's certified claim for "reimbursement of delay costs and GSA-directed changes" that is detailed in Exhibit A of Richter's Schedule of Costs, dated June 21, 2017 (the "SOC"), the parties agree that GSA will pay Richter the lump sum amount of $85,680,

plus CDA [Contract Disputes Act] interest at the rate established by the Secretary of the Treasury, commencing on March 29, 2016.

2. In full and final resolution of all elements of Richter's certified claim for "equitable adjustment in operating expense rent" that is detailed in Exhibit B of the SOC, the parties agree that: (a) GSA will pay Richter the lump sum amount of $27,000; (b) commencing on November 1, 2017, the total annual operating expense rent paid by GSA to Richter will be $60,000; and (c) commencing on December 1, 2018, the total annual operating expense rent paid by GSA to Richter will be $66,707. GSA currently compensates Richter in the amount of $7,000 per year for janitorial salaries. However, commencing on November 1, 2017, GSA will compensate Richter $13,000 per year for janitorial salaries, which is included in the revised operating expense rent detailed above. The parties further agree that relative solely to the $6,000 increased portion of the janitorial salaries (from $7,000 to $13,000) going forward, if there is a minimum wage increase which affects said janitorial salaries, GSA will compensate Richter for such amounts.

3. In full and final resolution of all elements of Richter's certified claim for "equitable adjustment in shell rent" that is detailed in Exhibit C of the SOC, the parties agree that: (a) GSA will pay Richter the lump sum amount of $9,300, plus CDA interest at the rate established by the Secretary of the Treasury, commencing on March 29, 2016; and (b) commencing on November 1, 2017, the annual shell rent paid by GSA to Richter will increase by the amount of $5,595.

4. In full and final resolution of all elements of Richter's certified claim for "reimbursement of excess tenant improvement costs" that is detailed in Exhibit D of the SOC, the parties agree that GSA will pay Richter the lump sum amount of $449,726, plus CDA interest at the rate established by the Secretary of the Treasury, commencing on March 29, 2016.

The parties stipulate that, upon entry of the requested final judgment, all disputes, claims, counterclaims and issues related to CBCA No. 5449 will be fully and finally resolved, with the exception of Richter's claim for attorneys' fees and expenses, which is expressly reserved. GSA agrees that, upon entry of the requested final judgment, Richter shall be a prevailing party on all claims brought in this appeal for the purposes of Richter's claim for attorney fees and expenses under the Equal Access to Justice Act, 5 U. S. C. § 504.

> Pursuant to CBCA Rule 31 [48 CFR 6101.31 (2017)], Richter and GSA certify that they shall not seek review or reconsideration of judgment so rendered, provided that upon entry of the consent judgment Richter may file an application for attorney fees and costs pursuant to the Equal Access to Justice Act. With respect to the decision of the Board issued pursuant to this motion, Richter and GSA waive their rights to reconsideration under CBCA Rule 26, rights to relief from judgment under CBCA Rule 27, and rights to appeal the decision.

On March 1, 2018, Richter timely filed an application for award of attorney fees and expenses seeking $167,144.29.

Discussion

The parties do not dispute that Richter meets EAJA's eligibility requirements for businesses. *See* 5 U.S.C. § 504(b)(1)(B)(ii). Specifically, at the time of filing its application, Richter did not exceed $7,000,000 in net worth or employ over 500 employees. Additionally, a final, nonreviewable judgment was entered in the underlying appeal. Therefore, we find that Richter meets the statutory criteria for eligibility under EAJA.

After meeting the prerequisites to an application, the Board may award reasonable fees and other expenses after determining: (1) the applicant is the prevailing party; (2) the agency's position was not substantially justified; (3) the applicant did not unduly and unreasonably protract a final resolution; and (4) no special circumstances make the award unjust. 5 U.S.C. § 504.

Prevailing Party

The Board may only award reasonable fees and other expenses if the applicant is a prevailing party. 5 U.S.C. § 504(a)(1). An applicant is a prevailing party if it received an enforceable judgment on the merits that created a "material alteration of the legal relationship of the parties." *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 602-04 (2001) (quoting *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782, 792-93 (1989); *see also Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (Fed. Cir. 2002) (applying *Buckhannon* to government contracts). To prevail, a party must be "successful on any significant issue in the litigation that achieves some of the benefit sought." *Allen Ballew General Contractor, Inc. v. Department of Veterans Affairs*, CBCA 3-C(VABCA 6987E), et al., 07-2 BCA ¶ 33,653, at 166,635 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

This appeal was settled at the very outset of the hearing, before the start of testimony. The parties informed the Board, after a delay in the start of the hearing, that they had settled the appeal. The parties jointly moved for entry of judgment, and judgment was entered. To be a prevailing party for the purposes of a fee-shifting statute, a party must secure a judgment on the merits or a court-ordered consent decree. *Buckhannon*, 532 U.S. at 603-04. That rule applies to requests for fees and costs under EAJA. *Brickwood Contractors*, 288 F.3d at 1379. "[A] prevailing party does not include a party who obtained relief through 'a defendant's voluntary change in conduct.'" *Dellew Corp. v. United States*, 855 F.3d 1375, 1380 (Fed. Cir. 2017) (quoting *Buckhannon*, 532 U.S. at 605). As the Board entered a judgment in favor of Richter, Richter is a prevailing party.

Substantially Justified

As a prevailing party, Richter may recover reasonable fees, unless the position of the agency was substantially justified. 5 U.S.C. § 504(a)(1). The agency can avoid the imposition of an applicant's reasonable attorney fees by demonstrating that its position had "a reasonable basis in law and fact to a degree that could satisfy a reasonable person." *Allen Ballew General Contractor, Inc.*, 07-2 BCA at 166,636 (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)).

The agency has the burden to prove the reasonableness of its position. 5 U.S.C. § 504(b)(1)(E); *Allen Ballew General Contractor, Inc.*, 07-2 BCA at 166,636 (citing *Helfer v. West*, 174 F.3d 1332, 1336 (Fed. Cir. 1999)). The Board must look 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).

GSA asserts that its position was substantially justified because Richter failed to substantiate its costs. GSA also avers that "[a] significant portion of the documentation requested by GSA was not provided until shortly before or during the hearing on the merits of the quantum case, and upon review of the additional materials, GSA conceded the amounts appropriate for award."

This was a complicated lease claim made even more difficult by the poor job Richter did of providing proof of its claimed costs from the outset. GSA, in addressing this claim and throughout the litigation, did not focus on entitlement, but it did demand that Richter provide proof of the costs it was seeking. The claim content was notably sparse, conclusory, and generally unsupported by compelling cost data. The contracting officer approached the claim fairly and attempted to provide an equitable adjustment that was supported by the lease documents and the sparse cost information provided by Richter. Given the lack of supporting

information contained in the claim, the CO's final decision was fair and reasonable. While it is apparent that there was an ongoing attempt to get additional cost and pricing support from Richter, the administrative record does not reveal when or what documentation was provided until Richer submitted its schedule of costs late in the litigation. Richter continued submitting documentation until the very day the appeal was settled.

Richter's schedule of costs contained extensive documentation not previously part of the record. It is clear from its reference in the joint stipulation that the statement of costs, to a large degree, served as a basis for the settlement of this appeal. Richter's statements that it recovered "all" or "almost all" "of its costs set forth in the schedule of costs" points to the fact that sufficient supporting cost information was not submitted until very late in this litigation. Richter should not expect to collect attorney fees and expenses associated with a claim so inadequately presented to the contracting officer.

Given the paucity of Richter's cost information contained in the claim, the damages claimed, and GSA's actions to work with Richter to substantiate costs, GSA was substantially justified in requiring Richter to prove its costs through this litigation. *See Dream Management, Inc. v. Department of Homeland Security*, CBCA 5739-C(5517), 17-1 BCA ¶ 36,916 (finding that the agency's position was substantially justified because the damages sought were excessive, lacked support, and included dollar amounts for items not awarded by the Board); *Omni Development Corp. v. Department of Agriculture*, CBCA 609-C (AGBCA 97-203-1), et al., 07-2 BCA ¶ 33,699 (finding that the agency's position was substantially justified because, among other reasons, the damages sought lacked support and were excessive); *ROI Investments v. General Services Administration*, GSBCA 15488-C(15037-C)-REIN, 01-1 BCA ¶ 31,352, at 154,826 (finding that a failure of proof creates an adequate basis for the contracting officer to reduce or deny amounts claimed, and an agency's defense of the contracting officer's determination is substantially justified (citing *Foremost Mechanical Systems, Inc. v. General Services Administration*, GSBCA 14645-C(13584), 99-1 BCA ¶ 30,352, at 150,105)).

We conclude that GSA has carried its burden of proving its position was substantially justified and reasonable in light of applicant's failure to timely submit adequate documentation of its costs. This failure was apparent from the claim itself, continued through submission of the schedule of costs, and remained until the day of the hearing. The record shows that GSA reasonably challenged much of Richter's claim because the costs sought were unsubstantiated, and that lack of proof was an ongoing problem significantly impacting and protracting claim resolution. GSA acted reasonably in attempting to resolve portions of the claim in the contracting officer's final decision by agreeing to pay for the costs that it considered substantiated and offering to delete contested extra work. GSA did not take a hard position on entitlement, and engaged in an ongoing effort to work with

Richter to obtain the proof of costs necessary to make payment. The OIG auditor also worked directly with Richter to obtain sufficient proof of costs.

To the extent that GSA makes other arguments as to why its position was substantially justified, we need not address those arguments. Given the conclusion that GSA's position in defending against Richter's claim was substantially justified, we deny applicant's request to recover any fees or costs claimed under EAJA.

Decision

The EAJA application is **DENIED**.

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

We concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge