



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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GRANTED IN PART: May 13, 2019

CBCA 6255-C(5540)

MARE SOLUTIONS, INC.,

Applicant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

James R. Mall of Meyer, Unkovic & Scott LLP, Pittsburgh, PA, counsel for Applicant.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA, counsel for Respondent.

Before Board Judges **ZISCHKAU**, **RUSSELL**, and **O'ROURKE**.

**O'ROURKE**, Board Judge.

Applicant, Mare Solutions, filed a timely request for attorneys fees and costs under the Equal Access to Justice Act. Mare's application seeks fees in excess of the statutory rate. Because our authority is limited to the statutory rate, we grant the application in part.

Background Facts

The Project, The Appeal, and the Board's Decision

The Department of Veterans Affairs (VA) awarded Mare a firm fixed-price construction contract to build a two-story parking garage adjacent to the VA hospital in Erie,

Pennsylvania. When the project was nearly complete, a dispute arose over electrical conduit that had buckled in several places. The VA determined that the buckling was due to a lack of expansion couplings which, it asserted, the contract required Mare to install. Mare disputed the VA's interpretation of the contract and sought declaratory relief at the Board. On May 16, 2018, the Board agreed with Mare and granted its appeal. *Mare Solutions, Inc. v. Department of Veterans Affairs*, CBCA 5540, 18-1 BCA ¶ 37,048. The VA did not appeal the Board's decision.

#### Mare's First EAJA Application

On June 14, 2018, Mare filed an application for costs, fees, and interest pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2012), for reasonable time and expenses incurred related to CBCA 5540. *Mare Solutions, Inc. v. Department of Veterans Affairs*, CBCA 5540, 18-1 BCA ¶ 37,048, at 180,352. We dismissed that application as premature since the time for filing an appeal had not yet elapsed, and therefore, the decision was not considered final. 48 CFR 6101.30(b)(2018). *Mare Solutions, Inc. v. Department of Veterans Affairs*, CBCA 6165-C, 18-1 BCA ¶ 37,097.

#### Mare's Second EAJA Application

On September 19, 2018, Mare timely re-filed its application for costs in the amount of \$56,431.56. In its application, Mare requested an enhanced hourly rate for attorneys fees based upon its counsel's construction law expertise. In the alternative, Mare requested a cost of living adjustment to the standard rate. The VA responded and asked that we deny the request in full because its legal posture was substantially justified. It further asserted that the Board lacked the authority to grant an enhanced hourly rate for attorneys fees or a cost of living adjustment to the standard rate. Mare amended its application on November 26, 2018, seeking additional fees for work performed during the EAJA application process. The revised total amount of Mare's application was \$58,436.51.

#### Discussion

Mare's application for costs, fees and interest 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.” *Systems Integration and Management, Inc. v. General Services Administration*, CBCA 3815-C(1512), et al., 15-1 BCA ¶ 35,866, at 175,441, citing *Scarborough v. Principi*, 541 U.S. 401, 406 (2004) (quoting H.R. Rep. No. 96-1005, at 9 (1980)).

To recover fees and other expenses under EAJA, an applicant must meet the following requirements. It must:

- (1) have been a prevailing party in a proceeding against the United States;
- (2) if a corporation, 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); *Paradise Pillow v. General Services Administration*, CBCA 5237-C(3562), 17-1 BCA ¶ 36,628, at 178,366; see also *Doty v. United States*, 71 F.3d 384, 385 (Fed. Cir. 1995); *Russell Sand & Gravel Co. v. International Boundary & Water Commission*, CBCA 3781-C(2235), 14-1 BCA ¶ 35,615, at 174,443.

#### Mare Meets the Requirements of the EAJA

Mare prevailed in one of its two consolidated appeals before the Board, CBCA 5540, which dealt with determining which party was responsible for the cost of installing expansion couplings in the parking garage. The application contains a sworn affidavit from the President of Mare, attesting to the fact that at the time Mare filed its appeal, and at all times before and thereafter, Mare employed less than 500 people and had a net worth below EAJA’s statutory threshold of \$7,000,000. Mare’s second EAJA application was filed consistent with the Act’s time requirements. Along with its application in the amount of \$56,431.56, Mare filed an itemized statement of attorneys fees and other costs and expenses, to include the fees of its two expert witnesses who testified in support of this issue. Mare’s EAJA application also asserted that the VA was not substantially justified in its legal

position. For these reasons, we find that Mare’s application meets the first four requirements of the Act. We turn now to the fifth and final EAJA requirement of whether the VA was substantially justified in its legal position.

#### The VA’s Position Was Not Substantially Justified

Once an applicant establishes it is a prevailing party under the EAJA, “the burden shifts to the Government to show that its litigating position was substantially justified.” *Ramcor Services Grp., Inc. v. United States*, 185 F.3d 1286, 1288 (Fed. Cir. 1999). “The test for whether the Government’s position during the dispute was substantially justified is whether that position was reasonable.” *Metric Construction Co. v. United States*, 83 Fed. Cl. 446, 449 (2008) (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)).

The VA cannot meet its burden of establishing that its conduct both before and during the litigation was substantially justified. This issue was a matter of contract interpretation. In making its decision, the Board relied heavily on the contract specifications and drawings, as well as the testimony of expert witnesses. The contract specification regarding expansion couplings was straightforward. It required expansion couplings if any *one* of the following three circumstances applied: 1) where the electrical conduit crossed an expansion joint in the concrete, 2) where the contract drawings showed they were required, or 3) where the National Electric Code (NEC) required their installation. After a cursory review of the drawings, we easily dispensed with the first two circumstances. Expansion couplings were not shown on the drawings, nor did the drawings show any conduit crossing an expansion joint.

With regard to the third circumstance, the parties’ respective electricians came to different conclusions about whether the NEC required expansion couplings under these conditions. In addition to this lay testimony, Mare also presented expert testimony from an electrical engineer, who testified that since the conduit was located on the underside of the garage ceiling, and not exposed to direct sunlight, the NEC did not require the installation of expansion couplings because the conduit would expand at roughly the same rate as the construction materials to which they were affixed. Mare also presented expert testimony from a structural engineer who effectively refuted the VA’s position that a lack of expansion couplings caused the buckling. He pointed out that buckling had only occurred in a few places—the vast majority of conduit experienced no buckling despite the lack of expansion couplings. He even recommended an easy fix—to loosen the conduit anchors on either side of the buckling, which occurred due to the concrete settling, and the failure of the designers to take that into account in their calculations.

The VA did not present any expert testimony in response to Mare’s experts, despite the fact that the VA’s design agent employed engineers who drafted the specifications and

drawings for the project. Instead, the design agent produced an additional drawing as a proposed solution to the buckling. The new drawing showed the recommended location of *fifty-two* different expansion couplings on the conduit. The VA's primary technical witness, an experienced electrician, explained that this new drawing was not necessary at the bidding stage because electricians did not need expansion couplings shown on drawings in order to install them. Rather, it was something they were trained to determine in the field. He stated that he would have installed the expansion couplings based on his training, but admitted that the new drawing "was overkill" because fifty-two couplings seemed excessive. Given that the conduit had only buckled in a few places, installing fifty-two expansion couplings not only seemed excessive, but also expensive. Nevertheless, Mare was willing to install the expansion couplings in accordance with the design agent's new drawing if the VA was willing to modify the contract and add the additional work, which it was not willing to do.

Based on the plain language of the contract documents and hearing testimony from expert and lay witnesses, the Board found that the terms of the contract did *not* require Mare to install expansion couplings on the electrical conduit. Nonetheless, in its response to Mare's EAJA application, the VA argued that because expert testimony was required to decide the issue of expansion couplings, the VA was substantially justified in denying the claim and litigating its position. We disagree. First, in failing to call its design agent to testify, the VA undermined its legal position. The design agent wrote the specification, and therefore, was in the best position to answer questions about it. Second, the design agent's proposed solution (a new drawing showing fifty-two expansion couplings) was unreasonable given the fact that the original drawings showed zero expansion couplings and that the conduit buckled in just a few places. Third, one of Mare's experts testified that the conduit buckled due to the concrete settling, and that the designers failed to take that into account in their calculations. The VA did not offer any expert testimony of its own to rebut this statement. Its only witness who addressed this issue admitted he was not an expert on the issue. For these reasons, we do not find the VA's position to be substantially justified, and the VA has not offered any evidence of special circumstances that would preclude an EAJA award in this case.

#### The Amount of Costs and Fees Claimed in Mare's Application

Under the EAJA, an applicant may recover fees and other expenses, including "the reasonable expense of expert witnesses, the reasonable cost of any study, analysis, or engineering report, test or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney's fees." 5 U.S.C. § 504(b)(1)(A). Mare's application requests fees for three attorneys and two experts, and related litigation expenses. Mare requested an enhanced hourly rate for attorneys fees for Attorney Mall due to his expertise in the area of construction law. For 106 hours of work at the enhanced hourly rate, Mare requested \$45,360.35 for Attorney Mall. As an alternative to the enhanced rate,

Mare requested \$22,151.29. This amount represents the statutory rate of \$125 per hour plus a cost of living adjustment for the same number of hours. Mare did not seek an enhanced rate for the other two attorneys. Rather, Mare requested that they receive the statutory rate with a cost of living adjustment. For Attorney Wilkinson, who performed 8.7 hours of work, Mare requested \$1689.67. For Attorney Leonelli, who initially performed 17.8 hours of work, Mare requested \$3568.37. Mare requested an additional 10.1 hours of work, or \$2024.77, for Attorney Leonelli at the adjusted rate, to draft Mare's EAJA reply, bringing the total requested for Attorney Leonelli to \$5593.14.

The total hours worked by all three attorneys is 142.60, which we find reasonable and supported by Exhibit C of Mare's application.<sup>1</sup> However, the VA's contention that the Board does not have the authority to grant either an enhanced rate or a rate reflecting a cost of living adjustment is correct. The Board's authority to grant attorneys fees under EAJA is derived from 5 U.S.C. § 504, *not* 28 U.S.C. § 2412. The latter authority applies to *courts* and authorizes the court to award fees in excess of the statutory hourly rate of \$125 if "the court determines that an increase in the cost of living or a special factor . . . justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A). The Board's authority to award attorney fees, on the other hand, is limited to the statutory hourly rate of \$125. "[A]ttorney 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 . . . justifies a higher fee." 5 U.S.C. § 504(b)(1)(A) (emphasis added). *See NVT Technologies, Inc. v. General Services Administration*, GSBCA 16195-C(16047), 03-2 BCA ¶ 32,401, at 160,345 ("While a judicial tribunal is free to make the determination that a fee in excess of the statutory rate of \$125 per hour is justified by an increase in the cost of living or a special factor, an administrative tribunal, such as ours, cannot do so in the absence of an agency regulation addressing that issue."). We are aware of no such regulation promulgated by the VA. We are bound by the statutory rate. Based on 142.60 hours at the statutory rate of \$125 per hour, we award Mare \$17,825 for attorneys fees.

Both of Mare's experts fees are reasonable. Mare paid its electrical engineering expert, Mr. Edward Wunderly, a total of \$4013.17, which represented 33.5 hours of work at the rate of \$120 per hour. Mr. Wunderly visited the site, produced a report, and testified at the hearing. We found his testimony to be persuasive and critical to the Board's decision. Mare's structural engineering expert, Mr. Charles Churches, testified about the cause of the buckling and why the design agent's proposed fix was unsuitable. Mr. Churches also visited the site, provided Mare with a report on his findings, and testified at the hearing. Mare paid

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<sup>1</sup> We note that pages 108-113 of Exhibit C refer to a different case that is currently pending before the Board. Although these pages were included with Mare's application for the parking garage project, we are satisfied that the 132.5 hours billed for work on the original case here do not include time spent on other cases.

Mr. Churches \$100 per hour for 18 hours of work, for a total of \$1800. Mr. Churches' testimony was persuasive and provided the Board with important technical information that helped shape our decision. We award Mare the full amount of the experts fees: \$5813.17, and costs in the amount of \$1330.85 for expenses incurred during litigation. In conjunction with the attorneys fees of \$17,825, the total award for all fees and expenses is \$24,969.02.

Decision

For the foregoing reasons, we GRANT the EAJA application in part. The VA shall pay \$24,969.02 to Mare for attorneys fees and costs.

Kathleen J. O'Rourke  
KATHLEEN J. O'ROURKE  
Board Judge

We concur:

Jonathan D. Zischkau  
JONATHAN D. ZISCHKAU  
Board Judge

Beverly M. Russell  
BEVERLY M. RUSSELL  
Board Judge