



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: January 29, 2020

CBCA 6612-C(5387)

VET4U, LLC,

Applicant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Michael T. Stanczyk of Lynn D'Elia Temes & Stanczyk LLC, Syracuse, NY, counsel for Applicant.

Harold W. Askins III, Office of Regional Counsel, Department of Veterans Affairs, Charleston, SC, counsel for Respondent.

Before Board Judges **DRUMMOND**, **LESTER**, and **O'ROURKE**.

O'ROURKE, Board Judge.

Applicant filed a timely request for attorney fees and costs under the Equal Access to Justice Act (EAJA) after the Board partially granted its appeal. *See Vet4U, LLC v. Department of veterans Affairs*, CBCA 5387, 19-1 BCA ¶ 37,336. During the appeal process, applicant incurred costly legal bills, which it now seeks to recover in this action. Respondent opposes any award of legal fees under EAJA, contending that it was substantially justified in denying applicant's claims. We disagree and grant the request in part.

Background Facts

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

Respondent, the Department of Veterans Affairs (VA or agency) awarded applicant, Vet4U, a firm, fixed-price contract to transform the crawl space under a sixty-year-old, multi-level VA hospital into a fully functional hospital floor. This required Vet4U to perform a wide variety of construction services, including asbestos abatement, dirt and rock excavation, engineering services, and electrical, plumbing, and concrete work. The VA paid Vet4U approximately \$4.1 million for the project, which Vet4U completed one year prior to the required deadline, but eighteen months after the construction time line in its contract bid.

During performance, Vet4U incurred additional costs over and above the contract award amount and sought to recover those costs (\$296,853) through the claims process. Vet4U's claim to the agency consisted of twenty-three individual claims, which the VA denied in their entirety. Vet4U appealed to the Board and requested a decision on the record. On May 14, 2019, we granted Vet4U's claim in the amount of \$46,052. We dismissed the portion of the appeal related to legal fees (\$6300) as premature. *Vet4U LLC*, 19-1 BCA at 181,584. With no appeal to the Court of Appeals for the Federal Circuit, the Board's decision became final 120 days later, on September 12, 2019.

Vet4U's EAJA Application and the VA's Response

On September 25, 2019, Vet4U filed its application for attorney fees (at market rates) in the amount of \$47,212.50 and expenses totaling \$930.11. Alternatively, if market rates could not be recovered, Vet4U requested \$32,642.38 in attorney fees, plus expenses of \$930.11. In support of its EAJA application, Vet4U stated that "[it] experienced continuous difficulties throughout the life of the project," and, as a result, incurred unforeseeable costs that could not be addressed informally by the parties due to personnel changes within the VA and strained relationships between the parties. Vet4U also stated that because it completed work that was outside the scope of the contract—work that was duly approved or mandated by the VA—the VA's position on the same was not justified. Vet4U noted that it had extremely limited resources to contest the decision of the contracting officer, but had no other choice than to seek relief from the CBCA due to the agency's unreasonable position during and after performance.

In response, the VA did not dispute Vet4U's status as a prevailing party in the underlying litigation, nor as a qualifying corporation for purposes of EAJA, but argued against the award of any attorney fees. It maintained that it was substantially justified in denying Vet4U's claims, as evidenced by the fact that the Board denied nineteen of the twenty-three claims on appeal. The VA clarified, however, that in the event the Board finds

merit in Vet4U's EAJA application, it suggested that a reasonable award for attorney fees and costs in this case would be \$1847.

Discussion

Vet4U'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 purpose of which is "to eliminate 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 & Management, Inc. v. General Services Administration*, CBCA 3815-C(1512), et al., 15-1 BCA ¶ 35,886, 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 under EAJA, an applicant 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) 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, Inc. 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.

We find that Vet4U meets the requirements of EAJA. First, it is a prevailing party within the meaning of the statute since we entered a judgment partially granting Vet4U's appeal. Second, the VA did not challenge Vet4U's assertion that it met the Act's corporate size and net worth requirements, and we find no evidence to the contrary. Third and fourth, Vet4U timely filed its EAJA application with the Board and included the amount sought, along with an itemized statement of its costs and attorney fees. Finally and fifth, Vet4U alleged that the agency's position was not substantially justified.

It is well settled that once an applicant establishes it is a prevailing party, "the burden shifts to the Government to show that its litigating position was 'substantially justified.'" *Ramcor Services Group, 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)). Contrary to the VA's assertion, it is not axiomatic that the agency's position was reasonable simply because it prevailed on the majority of the claims or on a particular issue or argument. "While the parties' postures on individual matters may be more or less justified, the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than as atomized

line-items.” *Commissioner v. Jean*, 496 U.S. 154, 161–62 (1990). Indeed, the Federal Circuit has instructed tribunals “to 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.” *Chui v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991). Thus, we look not only to the agency’s legal stance during the litigation, but also to the agency’s conduct during performance of the contract. *SUFINetwork Services, Inc. v. United States*, 128 Fed. Cl. 683, 696 (2016).

To be sure, Vet4U brought claims that were inconsistent with the plain language of the contract, such as the provision of engineering services, the relocation of utilities, and cleaning up the substantial debris in the crawl space. On the other hand, the VA’s failure to recognize its own hand in increasing the costs of performance prevented the parties from resolving disputes in a more cost efficient manner. Here, the record brims with evidence of such conduct, some of which we alluded to in our decision on the merits: forcing Vet4U to bear the costs of renting a crane to move a chemical shed and dumpster—work that was beyond the contract scope—because the owner, a VA organization, had no money in its budget to move it; failing to promptly address a gushing water pipe in the crawl space that burst because it was rotted and then refusing to reimburse Vet4U for the emergency repair; ignoring appellant’s urgent requests for assistance in securing cooperation from an adjacent contractor who was impeding Vet4U’s excavation work; and leaving appellant in limbo for fourteen weeks on a costly excavation change order due to an understaffed design agent, personnel changes, and budgeting issues.

Consequently, our assessment of the agency’s conduct as unreasonable in these instances stems from its failure to act when the circumstances required it. Appellant faced mounting costs while the contracting officer, without proposing solutions to the problems Vet4U was facing on issues that we have found were the Government’s responsibility, sent stern emails—sometimes bordering on verbally abusive—from offsite, before abruptly retiring. He did not visit the project site despite its proximity to his office; he did not attend project meetings. At the same time, the VA kept some of these issues on the weekly meeting agendas, describing them as “pending approval” by the contracting officer. Notably, these items were never approved or paid by the VA. Since the record is thin on contemporaneous analysis of the VA’s position on many of the claims, it fell to the new contracting officer—the one who issued the final decision on the claims—to explain and attempt to justify the agency’s conduct after the fact.

Based upon our review of the agency’s overall conduct, we find that the VA has failed to establish that its overall position was substantially justified. Accordingly, Vet4U is entitled to recover costs and fees under EAJA. The only remaining question is the amount of the award.

The starting point for calculating recoverable costs in an EAJA claim is the date of the contractor's 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 contracting officer issued the final decision on Vet4U's claim on March 30, 2016. The statement of costs accompanying the EAJA claim includes costs that pre-date the contracting officer's final decision. Those costs cannot be reimbursed. The remaining costs are reimbursable, but not at the market rate that Vet4U seeks. In the absence of a specific regulation authorizing payment of such fees at market rates, the award is limited to the statutory rate of \$125 per hour. *Mare Solutions LLC, Inc. v. Department of Veterans Affairs*, CBCA 6255-C(5540), 19-1 BCA ¶ 37,334, at 181,567 ("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." (citing *NVT Technologies, Inc. v. General Services Administration*, GSBCA 16195-C(16047), 03-2 BCA ¶ 32,401, at 160,345)). We are aware of no such regulation. Consequently, Vet4U's recovery is limited to the statutory rate.

After subtracting ineligible hours from the total billable hours, the remaining hours of 137.7 (associate and principal hours) are eligible for reimbursement at the reduced rate under EAJA of \$125 per hour. That total of \$17,212.50, plus costs in the amount of \$930, results in a total EAJA award of \$18,142.

Decision

We **GRANT** the EAJA application **IN PART**. The VA shall pay \$18,142.50 to Vet4U for attorney fees and costs.

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

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

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