



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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GRANTED: August 17, 2022

CBCA 7339-C(6433)

1425-1429 SNYDER REALTY, LLC,

Applicant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Paul Jay Cohen of Cohen Marraccini, LLC, Southampton, PA, counsel for Applicant.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA; and Donald Mobly, Office of General Counsel, Department of Veterans Affairs, Denver, CO, counsel for Respondent.

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

**O'ROURKE**, Board Judge.

Applicant, 1425-1429 Snyder Realty, LLC (Snyder), filed a timely request for attorney fees and costs pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2018), after the Board granted its appeal. *See 1425-1429 Snyder Realty, LLC v. Department of Veterans Affairs*, CBCA 6433, 22-1 BCA ¶ 38,049. Snyder incurred legal costs to litigate the appeal when the contracting officer failed to issue a final decision. The Department of Veterans Affairs (VA) does not contest Snyder's eligibility under EAJA and offers no evidence that its position was substantially justified. Because the Board finds that Snyder's claimed costs are reasonable and properly documented, we grant the request.

### Background

Snyder entered into a contract to lease to the VA a fully built-out space for a residential rehabilitation treatment program for veterans in Philadelphia, Pennsylvania. The VA agreed to pay Snyder rent at the monthly rate of \$36,677.08 for ten years, with two five-year option periods. During construction, on October 25, 2012, the parties executed a bilateral supplemental lease amendment (SLA), SLA0001, which gave the VA unlimited access to the basement for an additional \$5000 per month. For four years, the VA paid Snyder consistent with the lease and the amendment. Then, on October 1, 2016, without any notice or explanation to Snyder, the VA stopped *all* payments, yet it continued to operate the rehabilitation center and enjoy unlimited access to the basement. According to testimony and documentation in the record, a new contracting officer took over the contract and determined that the amendment was redundant on the belief that the lease already provided access to the basement through specified clauses. For this reason, the contracting officer issued a unilateral modification rescinding SLA0001. About five months later, the VA resumed paying the monthly rent of \$36,677.08, but stopped paying the additional \$5000 for the basement access.

On December 20, 2018, Snyder requested a contracting officer's final decision on its claim for \$130,000, which represented back rent of the \$5000 not paid between November 2016 and December 2018. The claim also demanded \$5000 per month, beginning January 1, 2019, for each month of unpaid rent going forward. *1425-1429 Snyder Realty*, 22-1 BCA at 184,761-62. The contracting officer did not issue a final decision, so Snyder appealed to the Board the deemed denial of its claim. The parties unsuccessfully attempted to resolve the dispute through mediation, and the VA filed a motion for summary judgment, which the Board denied.

After a full hearing on the matter, the Board granted Snyder's claim for back rent and interest on February 7, 2022. *1425-1429 Snyder Realty*, 22-1 BCA at 184,764. On February 28, 2022, Snyder submitted its application for attorney fees, paralegal fees, and costs in the amount of \$16,945.50. In response, the VA did not contest Snyder's eligibility for attorney fees and costs under EAJA and deferred to the Board's judgment as to whether the respondent's position was substantially justified. Absent an appeal to the Court of Appeals for the Federal Circuit, the Board's decision became final 120 days later, on June 7, 2022.

### Discussion

An applicant may file an application for fees and other expenses under EAJA. 5 U.S.C. § 504(a).

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.

*Vet4U v. Department of Veterans Affairs*, CBCA 6612-C(5387), 20-1 BCA ¶ 37,504, at 182,187 (citing 5 U.S.C. § 504(a)(1), (2), (b)(1)(B)).

Snyder meets the requirements of EAJA. Snyder is a prevailing party, as the Board entered a judgment granting Snyder's appeal of the VA's deemed denial of its claim for back rent. Snyder submitted documentation showing that its net worth is less than \$7,000,000 and that it has no employees. Snyder timely submitted its application, including the amount sought and an itemized statement of costs and attorney fees. Snyder also alleged that the Government's position was not substantially justified.

“[T]he burden shifts to the government to show that its litigation position was ‘substantially justified.’” *RAMCOR Services Group, Inc. v. United States*, 185 F.3d 1286, 1288 (Fed. Cir. 1999). The Board looks “at the entirety of the government’s conduct and make[s] a judgment call whether the government’s overall position had a reasonable basis in both law and fact.” *Vet4U*, 20-1 BCA at 182,188 (quoting *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991)). Snyder alleges that the Government’s litigation position was not substantially justified because the Government had tried unilaterally to modify its contract, and the Board granted Snyder’s appeal. The VA deferred to the Board as to whether the VA’s position was substantially justified and offered no defense. The Court of Appeals for the Federal Circuit has held that “[a] trial court can consider the government’s failure to submit evidence as an admission that its position was not substantially justified.” *Libas, Ltd. v. United States*, 314 F.3d 1362, 1364 (Fed. Cir. 2003). Nonetheless, we note the following additional information in determining that the Government’s position was not substantially justified in this case. The Government proposed the bilateral amendment, drafted the language it contained, and complied with it for years before unilaterally changing course when a new contracting officer took over. Most unsettling here were the months of inaction and dilatory communication in the face of appellant’s repeated requests for information, including after appellant submitted its claim to the contracting officer—who, despite failing to issue a final decision, claimed that he did during his testimony (a claim that his attorney quickly disavowed). The original contracting officer, who still works for the VA, testified in the hearing. Her testimony bolstered Snyder’s position, not the VA’s, and the VA knew what she would say when Snyder deposed her in April 2021, and when the new contracting officer contacted her to discuss the bilateral amendment before unilaterally rescinding it in 2016. Despite this early understanding, the agency proceeded with litigation.

During all of this time, the agency operated the rehabilitation hospital with the full cooperation of appellant, even when the VA suddenly stopped paying rent for nearly five months. Appellant is a small business that not only was forced to carry the full costs of the agency’s mission during those months but also had to hire an attorney and engage in

protracted litigation to recover its costs under the contract. The Government has many rights when it comes to federal contracts, but those rights are not limitless. As a party to a contract, the agency must deal fairly with its contracting partners. *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). When given an opportunity to justify its position, the agency offered nothing. The agency has not met its burden under EAJA. See e.g., *Systems Management & Research Technologies Co. v. Department of Energy*, CBCA 5437-C(4068), 16-1 BCA ¶ 36,482, at 177,749. Accordingly, Snyder is entitled to recover its attorney fees and costs.

Fees and costs awarded under EAJA are based on the “prevailing market rates for the kind and quality of the services furnished, except . . . (ii) attorney or agency fees shall not be awarded in excess of \$125 per hour.” 5 U.S.C. § 504(b)(1)(A). Snyder claims 129.4 hours of work by its attorney at the statutory rate of \$125 an hour, in the amount of \$16,175; paralegal fees at the prevailing market rate of \$75 an hour, in the amount of \$472.50; and costs for a deposition transcript, in the amount of \$298. We find Snyder’s claimed attorney fees, paralegal fees, and costs to be reasonable and properly documented.

### Decision

We **GRANT** the EAJA application. The VA shall pay Snyder a total of \$16,945.50 in attorney fees and costs.

*Kathleen J. O’Rourke*

KATHLEEN J. O’ROURKE

Board Judge

We concur:

*Beverly M. Russell*

BEVERLY M. RUSSELL

Board Judge

*Jonathan D. Zischkau*

JONATHAN D. ZISCHKAU

Board Judge