

APPEALS OF MARSHALL ASSOCIATED CONTRACTORS, INC.
And COLUMBIA EXCAVATING, INC. (J.V.)

IBCA 4397F thru 4400/2002

Decided: June 1, 2006

Bureau of Reclamation
Contract No. 2-07-40-CO809

Final Board Decision on Quantum
and Remand to Parties

APPEARANCE FOR APPELLANT:

Richard A. Franzke, Esq.
Charles F. Adams, Esq.
Stoel Rives, LLP
Portland, Oregon

APPEARANCE FOR GOVERNMENT:

Elaine England, Esq.
Department Counsel
Salt Lake City, Utah

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

Summary

This is an Application for attorney fees and other expenses under the Equal Access to Justice Act, 5 U.S.C. §504 (EAJA). The appeal underlying this application was on the Board's docket for a record 17-plus years, following a Notice to Proceed issued on September 27, 1982; an Appeal filed on December 26, 1984; and the difficulties experienced by the Appellant both before and after the appeal. The case involved a Bureau of Reclamation (BOR) contract for Appellant (Marshall) to supply, for a price of \$6,602,693, about 1,061,400 cubic yards (cy) of sand and coarse aggregate for the construction of the Upper Stillwater Dam, located about 40 miles from Duchesne, Utah, as part of the Central Utah Project. Construction of the dam was to begin in 1983.

Marshall was required to take materials for aggregate production from a specific borrow area, which BOR represented as containing readily crushable sandstone. But BOR's own tests, not given to Marshall, showed that the borrow site primarily contained extremely hard and abrasive materials, principally quartzite, that were clearly incapable of meeting the contract's specifications. BOR provided no alternative site and blamed Marshall entirely for the problem.

Although Marshall strove mightily to meet the contract's demands and deadlines, it was unsuccessful and became bankrupt in attempting to do so. When BOR terminated Marshall for default, Marshall attempted to work out a settlement with the Contracting Officer (CO), but the compromise convenience termination that was achieved was rejected at BOR headquarters on the basis of erroneous information provided by its Denver laboratories. Marshall then appealed to the Board but continued its efforts to persuade BOR headquarters to permit a convenience termination. The effort failed despite Marshall's many-faceted but perhaps ill-advised subsequent attempts to persuade BOR to accept the negotiated settlement.

Specifically, Marshall incurred substantial legal, travel, and other expenses in attempting to overturn BOR's decision, meeting with Senators, Congressmen, the Secretary, BOR officials, and the Solicitor's Office in Washington. Its attorney actively worked to restructure its debt to the Bank of California, and had extensive negotiations with Marshall's surety. It also filed a subsequent complaint with the Court of Federal Claims, rather than actively pursuing its Appeal before the Board. The Court ultimately transferred the case back to the Board. Marshall's surety also brought an action in Federal District court and sought to charge Marshall with its cost.

Marshall now seeks total reimbursement under the Equal Access to Justice Act, 5 U.S.C. §504 (EAJA), for all of the attorney fees and costs involved, comprising \$1,266,422 in attorney fees and \$616,083 in expenses, for a total of \$1,882,506. The Government contends that of this amount, only \$560,911 in allowable fees and \$401,093 in allowable expenses, for a total of \$962,093, were properly expended in

the litigation before the Board. Appellant's remaining fees and expenses, in the Government's view, were spent principally or entirely on Appellant's lobbying efforts.

As we have noted, Marshall's appeal was filed on December 26, 1984, from the CO's December 6, 1984, final decision terminating Marshall's contract for default. No final CO decision was ever issued on Marshall's September 28, 1984, certified claims for differing site conditions, defective specifications, and time extensions. In January 1985 Marshall and its surety negotiated with the CO what they believed was a settlement agreement, that would have converted the default termination into one for convenience and paid Marshall \$3.3 million. Marshall notified the Board on February 6, 1985, that its appeal had been settled, and the Board by order dated March 6, 1985, dismissed the appeal (without prejudice "in the event the terms and conditions of the settlement agreement are not carried out.") However, BOR viewed the settlement as merely "proposed" and revoked its agreement to it in May 1985 on the ground that it exceeded the CO's authority.

On June 11, 1985, Marshall notified the Board of BOR's action and then filed a Complaint focusing on the issue of whether a settlement agreement had actually been achieved. Simultaneously, Marshall began its "lobbying activities" without success, and on June 1, 1987, the Board scheduled a hearing on the issue for September 14 of that year. Before the hearing could take place, however, Judge Packwood notified the parties that his review of the file revealed no valid agreement with BOR, and he cancelled the hearing, refusing further proof as to the terms of the agreement but allowing Marshall to file an offer of proof as to its validity. Apparently Marshall did not do so.

For the next sixteen months, through November 1988, the parties continued to file related materials, but by order dated June 30, 1989, the Board found that the CO did not have authority to convert the default termination to one for convenience, and removed the case from the Board's active docket, urging the parties to explore the possibility of settlement. The order stated that the Appeal would be restored to the

Board's active docket "only when appellant is prepared to schedule an immediate hearing on the merits of its appeal."

The appeal was restored to the Board's docket on February 26, 1990, when Appellant sought to obtain a Board judgment denying the CO's authority to convert the termination for default (T4D) to one for convenience (T4C) in order to appeal the decision to the Federal Circuit Court. The request was denied and the appeal returned to an inactive status until "such time as appellant is prepared to schedule an immediate hearing on the merits of its case." Thereafter, Marshall conferred further with the Department to resolve the settlement issue, judging that the time and expense of litigation before the Board on the merits were not warranted because it believed there had been a valid settlement.

On September 19, 1991, BOR proposed its own administrative hearing (not as a Contract Disputes Act case) on the issue of settlement, but later cancelled and refused to reschedule it. On November 1, 1992, BOR issued its own claim against Marshall and its surety for excess procurement costs of more than \$3.3 million. In January 1993, the surety sought a ruling from the U.S. District Court against Marshall and BOR to confirm that the alleged settlement with BOR was dispositive, thus disputing BOR's procurement cost demand. The District Court ruled that it lacked subject matter jurisdiction, and both Marshall and the surety then appealed to the Ninth Circuit Court from the decision.

On October 29, 1993, Marshall filed another complaint in the Court of Federal Claims again challenging BOR's procurement cost demand. Meanwhile, on October 21, 1993, this Board sua sponte issued its own order dismissing the appeal for failure to prosecute it before the Board. Marshall objected to the dismissal and filed for reconsideration on November 17, 1993. BOR objected, but the Board granted reconsideration and redocketed the appeal.

The Board subsequently issued five additional decisions in this matter: (1) a 68-page entitlement decision dated February 3, 1998, granting summary judgment to

Appellant on the merits but denying its motion for a summary judgment that would have decided that the termination had been changed to one for convenience (98-1 BCA ¶29,565); (2) a May 14, 1998, decision denying Appellant's motion for reconsideration of the Board's February 3 holding on the ground that Appellant's own citations had confirmed that the decision was correct. (98-2 BCA ¶29,756); (3) a June 15, 1998, decision denying Appellant's second motion for reconsideration. The Board noted that the appeals had been pending "for many years," but that Appellant had been resisting preparing for hearing for many years. (98-2 BCA ¶29,819); (4) a 34-page decision dated January 12, 2001, issued after a 6-day hearing on liability, granting Appellant's motion to convert the default termination to one for convenience on the ground that the CO's termination for default was an abuse of discretion in addition to the fact that Marshall had been hampered by defective specifications. The decision remanded the matter to the parties for settlement. (01-1 BCA ¶31,248); and (5) a March 22, 2002, decision finally determining quantum based upon a further 3-day hearing after the parties were unsuccessful in reaching agreement. (02-1 BCA ¶31,797).

EAJA Issues

This has been a difficult and hotly contested case, made substantially more complex by BOR's uncompromising and unconscionable position when the original claim was filed. However, BOR's poor handling of the claim alone cannot justify every action that Appellant took to try to rectify the situation. The good news, on the other hand, is that in the four years that have elapsed since our quantum decision, the two sides have negotiated almost continuously to arrive at the amount of eligible EAJA costs, and they have now achieved considerable agreement on costs except for their unresolved dispute over which costs are reimbursable and which ones are not.

The principal issue in this quantum application is whether the expenses collectively referred to by the Government as "lobbying expenses" are recoverable under EAJA. We think not, since the Act is intended only to mitigate and reimburse legal and related expenses incurred before the forum that had jurisdiction over the

case, in this case IBCA, which ultimately awarded damages to the Appellant/petitioner as a prevailing party in the substantive litigation. In this decision, we have denied all claimed expenses that were not directly related to the underlying appeal.

A major remaining issue is the amount of the hourly attorney fee rate for which the applicant is eligible. On March 29, 1996, the Congress amended the EAJA in the Contract with American Act, Pub. L. 104-121, sec. 231(6)(1), to permit agencies to pay up to \$125 per hour for attorney fees, rather than the previous maximum of \$75 per hour. The Interior Department did not change its maximum allowance beyond the initially \$75 per hour until February 8, 2006, when by regulation it applied the \$125 per hour to “any application *** pending on that date.” 71 Fed. Reg. 6364, 6367. Appellant, which filed its application on May 25, 2002, argues that “by its plain and unambiguous terms” the rule makes the \$125 fee allowance application to this application. The Government disagrees, citing sec. 233 of Pub. L. 104-121, quoted infra. The issue is which authority applies, discussed below.

Except for the remaining issues being considered here, we have been greatly impressed by the Government’s patient, careful, and unrelenting (but reasonably generous) efforts to analyze and comment on each of Appellant’s myriad submissions in order to find common ground. It appears that the Government took the time to review, apparently item by item, Appellant’s 189 pages of single-space entries for their intended purpose and eligibility, and it has succeeded in obtaining various revisions, corrections of mistakes, and greater information wherever errors or omissions were found. Appellant also is to be commended for its continued willingness to make whatever changes were justified, in order not to waste the Board’s time on unnecessary details, in light of the overall size of this Application.

Thus, the remaining issues in this case are essentially what fees and costs are allowable and what are not, and what the resulting maximum attorney fee amounts allowable should be.

Discussion

A) Fees and expenses that are not ordinary, necessary, and customary in prosecuting an appeal before a Board of Contract Appeals are not reimbursable by the Board.

We start with a recognition of the undisputed fact that EAJA is not a blanket cost reimbursement statute, and was not intended to be. It is a deliberate and carefully worded waiver of the Government's sovereign immunity, and therefore must be construed strictly. Courts cannot "do equity." Lavernier Construction v. U.S., 947 F.2 497 (Fed. Cir. 1991). Boards cannot, either. It follows that expenses that are unreasonable or unnecessary cannot be awarded. As the Court said in Oliveira v. U.S., 827 F. 2d 735, at 744 (Fed. Cir. 1987):

The EAJA provides for recovery by a prevailing party in any civil action brought by or against the United States of reasonable attorney fees and legal expenses incurred in the pursuit of the cause of action. * * *

[T]he trial court, in its discretion, may award only those reasonable and necessary expenses of an attorney incurred or paid in preparation for trial of the specific case before the court, which expenses are those customarily charged to the client where the case is tried. The quantum and method of proof of each allowable expense is discretionary with the trial court. In contrast, expenses of an attorney that are not incurred or expended solely or exclusively in connection with the case before the court, or which expenses the court finds to be unreasonable or unnecessary in the pending litigation, cannot be awarded under the EAJA. (Emphasis added.)

The Department's new EAJA regulation at 43 CFR 4.605(a) authorizes recovery of "fees and expenses in connection with a proceeding," as does the EAJA itself. The Board in this case had previously advised the parties that it would consider only fees "relating to litigation before this Board." (02-1 BCA ¶31,797 at 157.062). Appellant contends that this is an unduly restrictive standard derived from our decision in Central Colorado Contractors, Inc., 87-1 BCA ¶19,460, but avers that we rejected this standard eight years later in Hardrives, Inc., 96-1 BCA 27,935 at 139,518, on the basis of Oliviera, above. We disagree, inasmuch as we read Oliviera

as supporting the proposition that only expenses that are incurred before the forum that has jurisdiction over the case are compensable.

Substantively, Appellant argues that its “lobbying” activities were simply part of “an ongoing effort by Appellant to resolve this litigation through settlement negotiations.” The Government disagrees, pointing out that these activities were carried out without the knowledge or participation of Government counsel; that they were not the usual type of settlement discussions contemplated by the parties during litigation; and that the procedures followed by the CO in terminating for default were not an issue in litigation at the time the lobbying took place.

In addition, as the Government has argued in earlier briefs, not only were these activities not ordinary, necessary, or customary actions in connection with the Appeal before the Board, but if anything, they appeared to be attempts to evade the jurisdiction of the Board by seeking resolution of the appeal in alternative forums. If the Board were to suspend or defer its proceedings in every case while appellants pursued such alternative courses of action, its docket would quickly become unmanageable, and it would be virtually impossible to efficiently determine the true status of any given case at any given time. The whole point of a Contract Appeals Board is to “provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes.” (41 U.S.C. §607(e), emphasis added) Appellant’s lobbying efforts were not compatible with that goal, and we therefore decline to pay the costs involved.

We are not overruling Hardrives, which in effect held that it may be possible to use the same research in more than one forum without a reduction in allowable fees. But we are in agreement with the Government, consistent with Oliviera, that not all of the attorney time here was reasonable and necessary to the case before the Board. To be paid, attorney fees and legal expenses must be incurred in the pursuit of the cause of action before the Board, rather than primarily, or even equally, for some other purpose, such as trying to convince BOR to change its mind or to induce the Secretary or a member of Congress to intervene in the matter.

Here, Judge Packwood on at least two occasions, in his June 30, 1989, and April 24, 1990, orders, told the Appellant that the attempt by the CO to change the nature of the termination was a nullity and that it should schedule “an immediate hearing on the merits of the case.” Instead, as Judge Rome noted in her February 3, 1998, opinion, “Appellant elected not to follow that course, but rather to pursue the aborted settlement.” The Court in Oliviera left both the quantum and method of proof to the discretion of the trial court or, here, the Board. We find the Government’s allocation of costs to be fair and reasonable and reject the addition of further costs.

B) EAJA applicants are entitled to attorney fees of no more than \$75 per hour if their applications were not filed on or after March 29, 1996.

Although the Department’s new EAJA regulations are arguably ambiguous and imprecise with respect to pending applications, the underlying statute is not. The EAJA amendments of 1996, above, while containing a typographical error, are not at all ambiguous in stating that “The amendments made by sections 331 and 332 [should be 231 and 232] shall apply to civil actions and adversary adjudications commenced on or after the enactment of this subtitle,” which was March 29, 1996. 5 U.S.C.A. 1999, Pocket Parts, p. 10, emphasis added. Since Appellant’s appeal was filed in 1984, Appellant cannot benefit from the 1996 statutory amendment. Inclusio unius est exclusio alterius (The inclusion of one alternative is the exclusion of another.) Black’s Law Dictionary, Revised 4th ed. To the extent that the Department’s regulation suggests a \$125 hourly rate is permissible for applications filed before 1996, we must reject the regulation as contrary to the statute. Thus Appellant’s reimbursable attorney fees for an “adversary adjudication” (i.e., the appeal) filed in 1984 cannot legally exceed \$75 per hour. We assume the Department’s regulation was intended to apply to the more current applications that were filed after the date of the statutory change but that the effective date was inadvertently omitted.

C) Company principals or employees may be reimbursed for fees and expenses only to the extent that they are participating in the appeal as pro se attorneys or expert witnesses.

With respect to the expenses incurred by company principals during the course of this litigation, the Department's new regulations make clear at 43 CFR 4.606 that "(a) If the criteria in §§4.603 through 4.605 are met, you may receive an award under this subpart only for the fees and expenses of your attorney(s) and expert witness(es)." Appellant characterizes this provision as fatally inconsistent with Oliveira in limiting recovery of expenses solely to those incurred by attorneys or expert witnesses. Our review of case law suggests that this question is still open. However, this Department has decided to foreclose it by regulation, allowing reimbursement for only those expenses incurred by attorneys and experts, or those acting as attorneys and experts.

We also note that some forums have taken an essentially equally restrictive posture in similar matters. See, e.g., Fanning, Phillips, and Molnar v. West, 160 F. 3d 717 (Fed. Cir. 1998); Naekel v. Department of Transportation, 845 F. 2d 976 (Fed. Cir. 1988); Carmichael v. U.S., 70 Fed. Cl. 81; Baldi Bros. Construction v. U.S., 52 Fed. Cl. 78, 87; and Simpson Contracting Corp.(EBCA), 96-2 BCA 28,471 at 142,192.

We therefore deny the expenses of Marshall's principals, who testified only as fact witnesses, on the basis of the Department's regulation.

D) Appellant's "lobbying" activities and other similar activities here should not be considered special circumstances warranting a lesser EAJA award unless they prejudiced actions by the Government or the Board, even if they had the effect of delaying the proceedings. But the resulting fees and costs are not compensable.

The parties blame each other for the very substantial delays that have hampered the resolution of this application. We find that the delays were caused principally by the Appellant's desire to avoid or evade the jurisdiction of the Board and to resolve the case in some other forum.

It is said that a colleague once asked the late Senator Paul Douglas to support a questionable bill by quoting Confucius that a thousand mile journey begins with a

single step. Senator Douglas reportedly observed that if the first step is in the wrong direction, the journey is apt to be a lot longer than a thousand miles. Such is the case here, where Appellant apparently wanted only to keep its Board appeal in reserve but to litigate elsewhere. We think Appellant was entitled to seek such information, guidance, and reassurance as it thought necessary despite the additional time and expense to the Government and to the Board, as long as the Government does not have to pay the costs of such detours. We have therefore elected not to further reduce the applicant's entitlement to the fees that were actually related to this proceeding.

E) A jury verdict does not appear to be necessary or appropriate in this case despite its delays and the large number of unallowable costs.

Because the final record contains many hundreds of pages of detailed fees and expenses over the course of this litigation during the past twenty-some years, all of which have been extensively analyzed by the parties, we think we would be doing both of them a disservice if we were to choose a jury verdict approach to our award. Both of the parties before the Board have carefully and even exhaustively presented their views and their justifications, and we find no fault with either side's exposition of the facts and issues involved. But where the costs have remained in dispute, we have chosen to accept the fee and cost conclusions that seem to us to be most consistent with the law and the facts as we know them. That those are the figures calculated by the Government must already be evident. We have accepted its conclusions as the most accurate and reliable basis for our award, having agreed with it that the lion's share of the fees and expenses that Appellant incurred were for what the Government has termed lobbying expenses, which we find to be are unallowable.

The figures we accept as allowable are the following:

Description	Claimed	Allowable
Fees Stoel Rives - Attorney	\$1,196,102.50	\$505,980.00
Stoel Rives - Non attorney	\$ 66,468.74	\$ 52,912.43
Allen & Yazbeck	<u>3, 851.14</u>	<u>\$ 2,018.44</u>
Subtotal:	\$1,266,422.38	\$560,910.87

Expenses Steel Rives	\$199,431.49	\$ 27,911.39
Other Law Firms	\$ 42,590.05	\$ ---
Experts and Consultants	\$ 419,112.58	\$347,414.20
Marshall Expenses _____	\$ 53,959.24	\$ 25,856.95*
Subtotal:	\$616,083.36	\$401,182.54
Total:	\$1,882,205.74	\$962,093.41

*Appeal related expenses, such as tests, reports, analyses, photocopying; etc. No principals' witness fees or travel expenses are included.

We find no merit in Appellant's arguments that it is entitled to reimbursement at an \$125 dollar per hour rate, rather than a \$75 dollar per hour rate, because of changed economic conditions since the appeal was filed. A regulation change would presumably have been required to justify a higher rate on that basis.

Decision

Accordingly, we conclude that the Appellant is entitled to \$962,093, with interest commencing from the date of this decision. It is so ordered.

_____/s\
Bernard V. Parrette
Administrative Judge

I concur:

_____/s\
Candida S. Steel
Chief Administrative Judge