

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access)
to Justice Act of --)
)
States Roofing Corporation) ASBCA No. 55505
)
Under Contract No. N62470-97-C-8319)

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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

This is one of eleven appeals associated with Contract No. N62470-97-C-8319 awarded to States Roofing Corporation (SRC) by the Navy for repairs and related work on the roof cells at Building W-143 located at the Naval Operating Base (NOB), Norfolk, VA. At issue is SRC's application for attorneys' fees and costs under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504.

BACKGROUND

There were numerous changes to the contract for which SRC submitted cost proposals. On 18 April 2003, SRC converted 67 of its pending requests for equitable cost adjustments into certified Contract Disputes Act (CDA) claims (R4, tabs 133, 147). The contracting officer issued final decisions on these CDA claims on 1 and 30 September 2004, finding entitlement to \$56,522, including CDA interest, in the first decision and no additional entitlement in the second (R4, tabs 2, 143, 146). Timely appeals from the contracting officer's decisions included some 24 separate claim items and were docketed as ASBCA Nos. 54854 and 54860.

On 24 March 2006, the Navy made a "non-negotiable" settlement offer to SRC in the amount of \$350,000, inclusive of all costs and CDA interest (gov't resp., attach. 2). SRC rejected the offer. A three-week hearing began on 26 June 2006. Shortly thereafter,

the parties settled 12 of the claim items and bilateral Modification No. P00010, effective 24 August 2006, was issued in the amount of \$40,564.07, including an unspecified amount for attorneys' fees and \$5,242.07 in CDA interest (app. reply, tab D).

The remaining 12 claim items were assigned 11 separate appeal docket numbers by the Board on 12 July 2006 (claim items 1 and 61 were combined in ASBCA No. 55506). Both entitlement and quantum were heard in eight of the appeals (ASBCA Nos. 54854, 54860, 55500-55505); quantum only was heard in the remaining three (ASBCA Nos. 55506-55508).

Our initial decision on interpretation of the parapet wall specifications, *States Roofing Corp.*, ASBCA No. 54854, 08-2 BCA ¶ 33,912, was reversed by the Court of Appeals for the Federal Circuit and remanded. *States Roofing Corp. v. Winter*, 587 F.3d 1364 (Fed. Cir. 2009). Following the remand, we awarded SRC \$105,117, plus CDA interest. *States Roofing Corp.*, ASBCA No. 54854, 10-1 BCA ¶ 34,403 at 169,856. On 16 April 2010, SRC submitted a Certificate of Finality executed by SRC's president on 7 April 2010 to the Navy for payment of that amount from the indefinite appropriation established under 31 U.S.C. § 1304, commonly referred to as "The Judgment Fund"¹ (gov't resp., attach. 1).

Our next decision was issued in ASBCA No. 55506. We returned the claim for loss of the use of the elevator and additional costs associated with crane use to the parties for a final computation of the amount due appellant in accordance with our quantum findings and opinion. *States Roofing Corp.*, ASBCA No. 55506, 08-2 BCA ¶ 33,970. By a letter dated 5 November 2008, counsel advised the Board that the total equitable adjustment due SRC was \$317,835, not the \$326,949 previously paid by the Navy, resulting in a credit to the Navy of \$9,114.

We then denied the appeal for safety assurance in ASBCA No. 55500 and awarded SRC \$1,166.22, plus CDA interest, for lobby skylight replacement costs in ASBCA No. 55503. *States Roofing Corp.*, ASBCA Nos. 55500, 55503, 09-1 BCA ¶ 34,036. An appeal from our decision in ASBCA No. 55500 to the Court of Appeals for the Federal Circuit was dismissed. *States Roofing Corp. v. Winter*, 333 Fed. Appx. 526 (Fed. Cir. 2009). In ASBCA No. 55507 we addressed the quantum of a contract change for deletion of the wood blocking and sustained the appeal finding SRC was due a refund of \$13,803.23, plus CDA interest. *States Roofing Corp.*, ASBCA No. 55507, 09-1 BCA ¶ 34,094.

¹ We note that while the Judgment Fund does pay CDA interest, it does not pay EAJA attorneys' fees and costs.

The parties agreed to payment of a total of \$20,000, including unspecified amounts for CDA interest and EAJA attorneys' fees, in bilateral Modification No. P00011, effective 3 June 2009, for the amounts we found due to SRC in ASBCA Nos. 55503 and 55507 and to the Navy in ASBCA No. 55506 (app. reply, tab D).

We also sustained the appeal in ASBCA No. 55508, relating to the quantum of a contract change for deletion of work on Roof Cells D and F, concluding that SRC was due \$20,816, plus CDA interest. *States Roofing Corp.*, ASBCA No. 55508, 09-2 BCA ¶ 34,149. Effective 24 August 2009, the contracting officer unilaterally issued Modification No. P00012 in the total amount of \$27,199.95, including \$6,383.95 in CDA interest (but apparently no attorneys' fees) (app. reply, tab D). The record does not reflect whether this modification was ever paid, however, and on 7 April 2010, SRC executed a Certificate of Finality for payment of the \$20,816 amount we awarded in ASBCA No. 55508 from the Judgment Fund, which was mailed to the Navy on 16 April 2010 (gov't resp., attach. 1).

We decided ASBCA Nos. 54860, 55501, 55502 and 55505 together. We denied the entitlement claims in ASBCA No. 54860, delay associated with a defective submittal register, ASBCA No. 55501, acceleration, and ASBCA No. 55502, additional general conditions delay time extension. We sustained the quantum challenge in ASBCA No. 55502, awarding SRC an additional \$16,172 for extended general conditions, and sustained entitlement to disruption impact in ASBCA No. 55505, awarding SRC \$145,307, both plus CDA interest. *States Roofing Corp.*, ASBCA No. 54860 *et al.*, 10-1 BCA ¶ 34,356. Finally, we sustained ASBCA No. 55504, in part, in the lump sum amount of \$5,000, plus CDA interest, for the reasonable and allowable costs of in-house labor for proposal preparation/contract administration costs. *States Roofing Corp.*, ASBCA No. 55504, 10-1 BCA ¶ 34,361. Certificates of Finality were executed on 7 April 2010 by SRC for all three of these awards for payment from the Judgment Fund and mailed to the Navy on 16 April 2010 (gov't resp., attach. 1).

On 16 June 2010, SRC filed its EAJA application with the Board. The application is nominally restricted to ASBCA No. 55505, disruption impact. SRC seeks \$283,091.96. It explains that this is 95 percent of its total legal and expert fees (\$308,517.85) at not more than the statutory rate of \$125 per hour, and related costs, with a credit of \$10,000 for attorneys' fees associated with the settlements reached on the 12 claim items after the hearing began (Modification No. P00010) and the Board's decisions in ASBCA Nos. 55503, 55506 and 55507 (Modification No. P00011). It adds \$3,972.69 in fees and costs incurred in preparation of its EAJA application, bringing the total amount requested to \$287,064.65 (app. reply at 9).

In the alternative, SRC seeks \$165,427.27, which it explains represents 53.62 percent of its total fees (\$308,517.85), not exceeding the EAJA rates and related costs,

and is based upon the fact that SRC's disruption claim was 53.62 percent of the total costs claimed (\$777,626.33 of a total of \$1,449,785, including mark-ups²) (appl. at 13-14). SRC does not include the \$10,000 credit or the \$3,972.69 associated with preparation of its EAJA fee application in this alternative (app. reply at 10).

DISCUSSION

Eligibility

The Navy does not dispute that SRC meets the EAJA eligibility requirements. SRC's net worth did not exceed \$7,000,000 and it did not have more than 500 employees at the time the appeals were filed (appl., ex. 1, Hugh DeLauney aff. ¶¶ 4, 5, attach. A). SRC therefore is eligible to receive an EAJA award. 5 U.S.C. § 504(b)(1)(B)(ii).

Timeliness

The Navy asserts that SRC's EAJA application was untimely. The Board's decision in ASBCA No. 55505 was issued on 12 January 2010. SRC's EAJA application was filed at the Board on 16 June 2010. The EAJA requires that "[a] party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an [EAJA] application..." 5 U.S.C. § 504(a)(2). This 30-day period is a jurisdictional prerequisite and begins to run when the adjudicative decision may no longer be appealed. *SAWADI Corp.*, ASBCA No. 52973, 01-2 BCA ¶ 31,582 at 156,002.

SRC computes the jurisdictional time period from receipt of the Board's decision on 18 January 2010. The Navy points out that 18 January 2010 was a Federal holiday, seemingly implying that SRC could not have received our decision on that date. According to the certified mail receipt card maintained in the Board's files for ASBCA No. 55505, the Board's 12 January 2010 decision was mailed to counsel for appellant on 13 January 2010 and received on 18 January 2010. Affidavits provided by SRC establish that counsel's law firm mailroom personnel were able to retrieve and process mail from the local post office on 18 January 2010 (app. reply, tabs A and B). We find the decision was received by SRC's counsel on 18 January 2010.

Under the CDA, a party has 120 days from receipt of a Board decision to file an appeal in the United States Court of Appeals for the Federal Circuit. 41 U.S.C. § 607(g)(1)(A) and (B). Final disposition of ASBCA No. 55505 as to SRC, therefore, occurred 120 days after 18 January 2010, on 18 May 2010. SRC then had 30 days within

² \$777,626.33 divided by \$1,449,785 is actually 53.64 percent.

which to submit its EAJA application. 5 U.S.C. § 504(a)(2). Thus, its application was due not later than 17 June 2010. The application was filed at the Board on 16 June 2010.

The Navy contends, however, that on 16 April 2010, SRC provided a Certificate of Finality dated 7 April 2010 to the Navy for payment from the Judgment Fund of the \$145,307 awarded in ASBCA No. 55505 and, as a result, could no longer appeal the Board's decision. In the Certificate of Finality, SRC certified that it "has not initiated and will not initiate any proceedings for review, reconsideration, or appeal of this award" and further that it agreed to accept the amount awarded (gov't resp., attach. 1). According to the Navy, the 30-day jurisdictional period thus began to run on either 7 or 16 April, making SRC's EAJA application due not later than 7 or 16 May 2010 (gov't resp. at 1).

SRC's reply attached copies of emails between its counsel and the Navy which indicate that, as of 17 July 2010, the Navy had not executed the Certificate of Finality SRC had submitted to it and that SRC had not been paid the amount awarded (app. reply at 1-2, tab C). SRC further points out that the Navy has not represented that it has executed its Certificate of Finality, which would certify that the contracting agency "has not initiated and will not initiate any proceedings for the review, reconsideration or appeal of this award" (app. reply br. at 1-2; gov't resp., attach. 1). SRC contends that until it received an executed Certificate of Finality from the Navy or payment of the amount found due by the Board, it could not be sure that the Navy would not appeal. Thus, SRC asserts, and we agree, that neither the date it signed its Certificate nor the date on which it mailed the Certificate to the Navy is of any significance with respect to the EAJA application deadline. *See Foremost Mechanical Systems, Inc.*, GSBCA No. 14645-C (13584), 99-1 BCA ¶ 30,352 at 150,103 (Board decision may be considered final for EAJA purposes by exchange of Certificates of Finality indicating agreement not to seek appeal).

Accordingly, we reject the Navy's timeliness arguments and find that SRC's EAJA application was timely filed on 16 June 2010.

Prevailing Party

We sustained SRC's disruption impact claim in ASBCA No. 55505. As to entitlement, we stated:

[W]e are satisfied from the evidence that SRC's productivity was impacted by the differing site conditions and the changes made to the contract work by the Navy. Indeed, the changes were such that the Navy conceded that it was not reasonable to assert that SRC had not been disrupted and acknowledged that it could not say "in good conscience" that it had not

impacted SRC's productivity. Viewed together, the changes and differing site conditions here materially altered the original contract work, beginning at the start of performance with the unavailability of the freight elevator and the change in the location of the staging area and continuing throughout performance, resulting in cumulative disruption and inefficiency.

States Roofing, 10-1 BCA ¶ 34,356 at 169,667.

As to quantum, we concluded:

We believe the evidentiary record here fully supports the application of a jury verdict and that we would be remiss if we were to deny SRC recovery for disruption damages under circumstance in which its work was so obviously impacted by the differing site conditions it encountered and the contract changes made by the Navy, a conclusion the Navy itself has conceded....

In the nature of a jury verdict, we conclude that SRC is entitled to recover \$145,307 (10% of \$1,453,069) in increased burdened labor costs due to loss of productivity resulting from the disruption caused by the differing site conditions and contract changes we attribute to the Navy.

Id. at 169,669.

Notwithstanding these clear statements in our decision finding in favor of SRC on both entitlement and quantum, the Navy contends that SRC was not a prevailing party. This is so, according to the Navy, because it did not dispute that SRC's work had been disrupted and because the Board used a jury verdict to determine the disruption quantum. SRC characterizes the Navy's position as "nonsensical" (app. reply at 3). We agree with SRC and we conclude that SRC was a prevailing party in ASBCA No. 55505. *See* 5 U.S.C. § 504(a)(1).

While the Navy may not have disputed that SRC was disrupted, it consistently did dispute that the Navy was the responsible party. *States Roofing*, 10-1 BCA ¶ 34,356 at 169,666. Moreover, SRC suggested the use of a jury verdict, among others, as a method for determining the resulting quantum. The fact that the Navy may not have specifically objected to application of a jury verdict has no bearing whatsoever upon whether SRC

succeeded on the merits of its disruption claim and achieved some of the benefit sought in its appeal. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

Substantial Justification

The Navy also asserts that its position was substantially justified, again and without further elaboration, because it did not dispute that disruption occurred and did not challenge use of a jury verdict. The Navy bears the burden of proving that its defense in the underlying agency action and in the adversary adjudication before the Board was substantially justified. *See* 5 U.S.C. § 504(b)(1)(E); *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991). The test is whether the Navy's position was justified to a degree that a "reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988). *See American Service & Supply, Inc.*, ASBCA Nos. 49309, 50606, 04-2 BCA ¶ 32,675 at 161,722.

We find no more merit in the Navy's arguments with respect to the reasonableness of its position than we did with respect to its contention that SRC was not a prevailing party. As we stated in our decision:

We believe the record here is clear that there were differing site conditions and multiple changes that permeated contract performance and impacted SRC's productivity. ... All are attributable to the Navy and are such that the contract SRC actually performed was very different than the contract on which it had bid and had been awarded.

States Roofing, 10-1 BCA ¶ 34,356 at 169,666. We went on to reject the Navy's additional assertions that SRC was responsible for other specific delay-related matters, such as roof leaks, weather, inefficiency and re-work. *Id.* at 169,666-67.

Finally, the Navy points to the \$350,000 settlement offer it made to SRC on 24 March 2006, and which it claims to have made again after the hearing, as evidence that its position was substantially justified. We view the settlement offer as relating to the reasonableness of the attorneys' fees and expenses requested. *See Freedom NY, Inc.*, ASBCA No. 55466, 09-1 BCA ¶ 34,031 at 168,330. We, therefore, address it below.

With respect to the issue of substantial justification, we conclude that the Navy has not demonstrated that a reasonable person would consider its position to have been correct.

Quantum

SRC contends that it should recover \$283,091.96 since it “would have expended substantially the same amount of effort in litigating only its disruption appeal had there been no other appeals before this Board” (appl. at 12). SRC’s application includes \$238,837 claimed for attorneys’ fees and costs (95 percent of \$251,406.94) and \$54,255 claimed for expert fees and costs (95 percent of \$57,110.91). SRC’s application also includes a \$10,000 credit for EAJA attorneys’ fees associated with the settlement of 12 of the claim items after the hearing began and the Board’s decisions in ASBCA Nos. 55503, 55506 and 55507 (appl. at 12-13). ($\$238,837 + \$54,255 = \$293,092 - \$10,000 = \$283,092$) In its reply, SRC adds \$3,972.69 in attorneys’ fees and costs associated with the preparation of the EAJA application, bringing the total EAJA award it seeks to \$287,065 (app. reply at 9, ex. E). In the alternative, SRC seeks \$165,427.27, which it explains represents 53.62 percent of its total fees (\$308,517.85), at EAJA rates, and costs (appl. at 13-14).

The Navy first argues that SRC has not adequately explained and substantiated the fees and costs it seeks. To this SRC replies that it has submitted the “contemporaneous records of exact time spent on the case, by whom, their status and usual billing rates, as well as a breakdown of expenses such as the amounts spent copying documents, telephone bills, mail costs and any other expenditures related to the case” as required by *Naporano Iron and Metal Co. v. United States*, 825 F.2d 403, 404 (Fed. Cir. 1987) (app. reply at 7).

Contrary to the Navy’s view, SRC’s application does include detailed billing and expense statements at exhibits 2 (attorneys’ and paralegals’ fees and costs) and 3 (experts’ fees and costs). However, as the Navy also asserts, most of the invoices for legal fees do not specifically identify charges for work associated with disruption impact. Indeed, according to the Navy, only 10.1 hours are so identified before its 24 March 2006 settlement offer. The Navy considers another 20 entries after 24 March 2006, with a corresponding total of 49.5 hours, to include descriptions of work associated with SRC’s disruption claim. It makes this same argument with respect to the paralegal and expert fees and costs. (Gov’t resp. at 5-7)

SRC responds that separate appeal docket numbers were not immediately assigned to its individual claim items. Instead, they were not assigned to the 12 claim items heard by the Board until 12 July 2006, after the hearing had begun and other claim items had been settled. SRC also asserts that the nature of a disruption claim, which requires analysis of all differing site conditions and contract changes, is such that it would make “segregation of those fees and costs virtually impossible, or at least highly inaccurate” (appl. at 13). It points out that 25 of 91 pages in its post-hearing brief and 78 of 333

pages of the Navy's post-hearing brief were dedicated specifically to SRC's disruption claim (app. reply at 8).

To the extent there is merit to SRC's arguments, it appears to be contradicted by footnote 3 of its application which states that "records of attorneys' fees and costs incurred by SRC associated with the other individual ASBCA appeal decisions and associated payments are *not* included in *Exhibit 2*" (appl. at 11). We speculate that SRC may be referring to the \$10,000 credit for attorneys' fees that were included in the two settlements reflected in Modification Nos. P00010 and P00011. One of these settlements was reached at the beginning of the hearing before individual ASBCA docket numbers were issued; the other relates only to ASBCA Nos. 55503, 55506 and 55507. We have no understanding, however, as to how the statement may relate to the other seven appeals (four of which were sustained in some part and three denied) or to SRC's contention that it should recover 95 percent of *all* of its fees (at the EAJA rates) and costs in ASBCA No. 55505 (appl. at 12).

The Settlement Offer(s)

The Navy contends that the fees and costs sought should be reduced based upon when it made its \$350,000 settlement offers on 24 March 2006 and again after the hearing. SRC notes that the Navy's \$350,000 settlement offer on 24 March 2006 was "non-negotiable" and asserts that it has already recovered more than the Navy offered, not including CDA interest which continues to accrue on unpaid amounts. It denies that any settlement offer was made after the trial, much less in the same amount, which it asserts would have made no sense inasmuch as a number of the claim items had been settled. Citing *Kos Kam, Inc.*, ASBCA No. 34684, 88-3 BCA ¶ 21,049, SRC concedes that the tender and refusal of a settlement award may be probative of the reasonableness of the fees and costs incurred after the settlement offer, but contends that, when the amount recovered substantially exceeds the offer, the rejection is not a reason to disallow EAJA costs and fees (app. reply at 6-7).

In *Kos Kam*, the government made a settlement offer that was rejected. After the Board issued its decision on entitlement, the parties settled the appeal "in an amount considerably in excess of the settlement offer." 88-3 BCA ¶ 21,049 at 106,322. Unlike *Kos Kam*, it is not possible in this case to make a direct comparison of SRC's recovery of \$145,307 for disruption in ASBCA No. 55505 with the Navy's \$350,000 settlement offer because the offer was a lump sum amount covering all of the claim items.

SRC, however, asserts that in order to prove disruption impact, it was required to prepare and present evidence for all of its claim items and, therefore, allocates 95 percent of all of its litigation-related costs to ASBCA No. 55505 (appl. at 12). Thus, we consider an evaluation of SRC's total recovery to be of relevance in determining the

reasonableness of the fees and costs SRC incurred after it rejected the Navy's settlement offer. Contrary to SRC's contention, the amount it ultimately received surely cannot be characterized as "substantially exceed[ing] the rejected settlement offer amount" (app. reply at 6-7).

Here, SRC recovered \$40,564.07, including an unknown amount for attorneys' fees and \$5,242.07 in CDA interest, for the 12 claim items settled shortly after the hearing began (Modification No. P00010) and \$20,000, including unknown amounts for attorneys' fees and CDA interest in settlement of ASBCA Nos. 55503, 55506 and 55507 after receiving our decisions in those appeals (Modification No. P00011). The total is \$60,564.07. We awarded SRC another \$292,412, plus CDA interest, as follows: \$105,117 for ASBCA No. 54854; \$16,172 for ASBCA No. 55502; \$5,000 for ASBCA No. 55504; \$145,307 for ASBCA No. 55505; and \$20,816 for ASBCA No. 55508.

Thus, the total amount of SRC's recovery is \$352,976 (\$60,564 + \$292,412), just \$2,976 more than the Navy's \$350,000 settlement offer on 24 March 2006. We note that SRC's recovery includes \$5,242.07 in CDA interest on \$40,564.07 and that, had SRC accepted the Navy's settlement offer, CDA interest would not have continued to accrue on the balance of its recovery. In any event, on this record, we consider the comparison between the Navy's offer and SRC's recovery after trial to be adequate for the purposes discussed below.

Fees and Costs

The Navy urges us to disallow *all* attorneys' fees after its 24 March 2006 settlement offer and to award only a small percentage of the 10.1 hours billed before the offer making specific reference to work associated with disruption (gov't resp. at 5-6). Exhibit 2 to SRC's EAJA application contains the documentation for its claimed attorneys' fees and costs. SRC statements itemize \$210,359 in attorneys' fees at the \$125 EAJA hourly rate. Our addition of SRC's attorneys' fees reflects that \$44,946 was billed before the settlement offer and \$165,413 after it. We note that \$3,125 of the fees on exhibit 2 incurred after rejection of the settlement offer relate to preparation of the EAJA application.

As to the claimed costs, SRC's statements itemize a total of \$18,288.05: \$5,583.94 before the settlement offer and \$12,704.11 after it (appl., ex. 2) The Navy complains that copying charges at 20 cents per page are unreasonable. SRC's reply is that this is a law firm expense that is billed to its clients at the cost to the firm. The Navy also complains that paralegal costs have not been charged as an expense and at the cost to the law firm. SRC correctly replies that paralegal fees are recoverable at "prevailing market rates" under *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 590 (2008). A total of 304.95 paralegal hours are billed at the total amount of \$22,759.89, an average rate of

\$74.63 per hour. Our addition reflects that \$2,248.51 for paralegals was billed before the settlement offer and \$20,511.38 after it, \$518 of which (6.9 hours x \$75) relates to preparation of the EAJA application. (Appl., ex. 2)

Exhibit 3 to SRC’s EAJA application contains the documentation for its claimed experts’ fees of \$56,970 and costs of \$140.91, a total of \$57,110.91. The Navy asserts that “not even one minute” is identified on this documentation as relating to SRC’s disruption claim (gov’t resp. at 7). \$33,375 of this amount is for SRC’s accountants, 267 hours at \$125 per hour, and \$71.75 in costs. \$25,281.25 of the accountants’ fees representing 202.25 hours was incurred before the settlement offer; the balance of the fees, \$8,093.75, and all of the costs, a total of \$8,165.50, were incurred after the offer. The remaining \$23,595 in fees and \$69.16 in costs are for Doran Consulting. All of the Doran Consulting fees are categorized as expert fees, although some of the billing listings state that some of the charges are for administrative support. It appears that a maximum of \$100 per hour is charged for Mr. Jeffery Brooks. \$15,555 of the Doran fees and the \$69.16 in costs, a total of \$15,624.16, were incurred before the settlement offer; the balance of the fees, \$8,040, was incurred after it. (Appl., ex. 3)

The total fees and costs incurred by SRC at EAJA rates before and after the Navy’s settlement offer are as follows:

Before the Settlement Offer

Attorneys’ fees	\$44,946.00
Attorneys’ costs	5,583.94
Paralegal fees	2,248.51
Accountant fees & costs	25,281.25
Doran Consulting	<u>15,624.16</u>
TOTAL	\$93,683.86 x 95% = \$88,999.67

After the Settlement offer

Attorneys’ fees	\$165,413.00
Attorneys’ costs	12,704.11
Paralegal fees	20,511.38
Accountant fees & costs	8,165.50
Doran Consulting	<u>8,040.00</u>
	\$214,833.99
EAJA Application	<u>- 3,643.00</u>
TOTAL	\$211,190.99 x 95% = \$200,631.44

Thus, SRC incurred \$211,191 in fees and costs to obtain \$352,976 (largely exclusive of CDA interest) just \$2,976 more than the \$350,000 settlement offered by the Navy. We consider this to be grossly disproportionate. *See Fiesta Leasing and Sales, Inc.*, ASBCA No. 29311, 90-2 BCA ¶ 22,729 at 114,086. SRC attributes 95 percent of these fees and costs, a total of \$200,631, to ASBCA No. 55505 on the theory that almost the same amount of work would have been expended on its disruption claim alone. It also allows a \$10,000 credit for attorneys' fees and costs associated with the settlements. We think the total recovery comparison using 95 percent of its litigation costs after the settlement offer and with the credit is still grossly disproportionate.

Further, SRC recovered only \$145,037 of its \$777,626 disruption claim, or 19 percent, and \$352,976 of its total \$1,449,785 claims, just 24 percent. Thus, under SRC's 95 percent theory, SRC spent \$279,449 (\$283,092 – \$3,643) to recover only \$145,037 of its claimed disruption impact. In short, SRC spent almost twice its recovery on litigation costs. Even without the Navy's settlement offer, the disparity between SRC's litigation costs and its recovery is still disproportionate and certainly subject to serious scrutiny under a reasonableness determination. *See Hensley*, 461 U.S. at 430.

Reasonableness

It is readily apparent from the foregoing discussion that SRC's recovery of EAJA fees and costs should be substantially reduced. *See Freedom NY*, 09-1 BCA ¶ 34,031 at 168,331; *Contact International Corp.*, ASBCA No. 44636, 98-1 BCA ¶ 29,338 at 145,883; *Charles G. Williams Construction, Inc.*, ASBCA No. 42592, 93-3 BCA ¶ 25,913 at 128,914; *Sage Construction Co.*, ASBCA No. 34284, 92-1 BCA ¶ 24,493 at 122,240 (rejection of \$46,055 settlement offer to obtain an additional \$2,705 while incurring \$14,000 in legal fees and expenses was a "small victory for Sage at great expense").

Further, the expert fees claimed exceed those allowed under the EAJA, 5 U.S.C. § 504(b)(1)(A). *See Techplan Corp.*, ASBCA No. 41470 *et al.*, 98-2 BCA ¶ 29,954 at 148,226. The applicable rate here is the highest hourly rate fixed for grade GS-15, \$57.00 per hour at the time. *See DFARS 237.104(f)(i)*. We are also of the view that none of the Doran Consulting fees and costs are recoverable. First and foremost, Mr. Brooks did not perform a disruption analysis in ASBCA No. 55505. *States Roofing*, 10-1 BCA ¶ 34,356 at 169,660. Rather, Mr. Brooks testified as an expert in scheduling and critical path methodology in connection with ASBCA Nos. 54860 and 55502, both of which were delay claims. *Id.* at 169,656. We rejected his testimony and concluded SRC had not demonstrated entitlement to 103 days of compensable delay it claimed instead of the 81 days the Navy had awarded to it. *Id.* at 169,664.

In deciding the reasonableness of an EAJA award for ASBCA No. 55505, we take into account the nature and relative complexity of SRC's disruption claim, the

relationship between it and those claims involving contract changes and differing site conditions and, of course, the degree of success SRC obtained. *See Hensley*, 461 U.S. at 430. We also consider the Navy's \$350,000 lump sum settlement offer on 24 March 2006 and its rejection, the disproportionate amount of fees and costs incurred after the offer was rejected when compared to the amount recovered, the lack of information about specific claim items in the time records, in particular after the rejection of the Navy's offer and the assignment of specific ASBCA docket numbers to the 12 claim items remaining following the settlement at the beginning of trial in June 2006, our rejection of the testimony of the delay expert, our application of a jury verdict instead of any of the other theories of recovery advanced by SRC for its disruption claim, and the amount of our jury verdict award relative to the disruption claim and the total amount sought by SRC in all of its claims.

In computing the amount of the EAJA award, we follow SRC's alternative approach, which is based upon the relationship of its disruption claim to its total claim, namely 54 percent of the total. Consistent with our findings, we disregard all fees and costs incurred after the 24 March 2006 settlement offer, except for those legal and paralegal fees associated with preparation of the EAJA application, \$7,616 (\$3,643 included in ex. 2 to SRC's application and \$3,973 included in ex. E to SRC's reply brief). The total of these attorneys' and paralegals' fees and costs is \$60,394 (\$52,778 + 7,616). We also adjust the experts' fees by eliminating the Doran charges and reducing the accountant fees to \$11,528 (202.25 hours x \$57). This produces a total of \$71,922 in eligible EAJA fees and expenses to which we apply a 54 percent recovery, resulting in an award of \$38,838. We conclude that an award of \$38,838 represents a reasonable allocation for the fees and costs incurred relative to SRC's success as the prevailing party on its disruption claim.

CONCLUSION

SRC is awarded \$38,838 in recoverable EAJA fees and costs for its disruption claim, ASBCA No. 55505.

Dated: 20 January 2011

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals on an application for fees and other expenses incurred in connection with ASBCA No. 55505, Appeal of States Roofing Corporation, rendered in accordance with 5 U.S.C. § 504.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals