

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access )  
to Justice Act -- )  
 )  
Jay-Brant General Contractors ) ASBCA No. 51891  
 )  
Under Contract No. F65503-97-C-0013 )

APPEARANCES FOR THE APPELLANT: Bradley G. Taylor, Esq.  
Terry R. Marston II, Esq.  
Marston & Heffernan  
Bellevue, WA

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF  
Chief Trial Attorney  
MAJ David L. Frishberg, USAF  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE SCHEPERS

Jay-Brant General Contractors (appellant or applicant) filed a timely application, pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, as amended (EAJA), for attorneys' fees and other expenses incurred in connection with its appeal to this Board under the Contract Disputes Act and the subsequent settlement of that appeal. The Government takes issue only with the amounts and supporting documents regarding appellant's requests for fees and expenses. Thus we address only quantum and find appellant entitled to recover \$36,190.36 (\$34,387.50 in attorneys' fees plus \$1,802.86 for other expenses) as reimbursement under the EAJA.

SUMMARY FINDINGS OF FACT  
FOR THE PURPOSES OF THE APPLICATION

Since the Board did not rule on the merits of the dispute underlying the appeal, we summarize the relevant facts of that appeal as follows:

On 22 June 1997, the United States Department of the Air Force (Government) awarded appellant Contract No. F65503-97-C-0013 in the original amount of \$994,200, to perform structural repairs to Building 1300 at Eielson AFB, Alaska (the contract). On 14 August 1998 appellant submitted a \$48,716 claim. On 15 October 1998 the contracting officer denied appellant's claim in its entirety; that decision was timely appealed to this Board on 24 November 1998.

On 27 April 1999 this Board set a hearing in the underlying appeal for 10 May 1999 in Anchorage, Alaska. On 7 May 1999 the parties signed a Settlement - Memorandum of Understanding under which appellant was to receive \$36,500 including all interest “in compensation for a change order to be prepared and executed by the parties compensating Jay Brant [sic] for work and expenses reflected in the claim stated under ASBCA No. 51891.” The hearing scheduled for 10 May was canceled.

On 11 May 1999 pursuant to the stipulation of the parties, this Board dismissed the appeal, subject to reinstatement only in the event the settlement was not consummated.

Under the terms of the Settlement - Memorandum of Understanding the Government prepared a more formal settlement agreement which, on 27 May 1999, was sent to appellant for review and signature. On 11 June 1999 appellant notified the Government that it would not sign the Government’s agreement and instead had prepared its own agreement which included “some additional components” such as a paragraph entitled “Evaluation of Contractor’s Performance.” The paragraph was an attempt by appellant to rescind what it considered was an adverse evaluation from Eielson AFB. On 14 June 1999 the Government notified appellant that its attempt to incorporate an issue beyond the scope of the 7 May Settlement - Memorandum of Understanding, was unacceptable. On 21 July 1999 appellant FAXED the Government a signed settlement agreement which did not contain the objectionable paragraph, but rather was essentially the same as the agreement the Government sent to appellant on 27 May 1999.

On 23 July 1999 the Government executed the settlement agreement, under which the Government agreed to pay appellant \$36,500, due within 90 days after 7 May 1999. The agreement excepted from appellant’s release of claims, appellant’s right “to submit a request for legal fees and expenses relating to ASBCA No. 51891 under the Equal Access to Justice Act.”

On 11 June 1999 appellant filed its EAJA application to which it submitted several supplements. In its final supplement dated 3 September 1999, appellant seeks \$46,486 or alternatively \$39,454.56, for 289.2 hours in attorneys’ fees and \$1,881.13 in costs.

## DECISION

### **Attorneys’ Fees**

The Government challenges applicant’s claim for attorneys’ time of 289.2 hours, billed by two attorneys, Mr. Terry Marston and Mr. Bradley Taylor. The amount of \$46,486 was based on “usual billing rates” which are not specified, but appear to be \$175 per hour for Mr. Marston and \$130 - \$140 per hour for Mr. Taylor. In the alternative, applicant seeks \$39,454.56 in attorneys’ fees, based on \$136 - \$139 per hour for Mr. Marston and \$130 - \$139 per hour for Mr. Taylor. Applicant calculated the alternative attorneys’ fees at the statutory \$125 per hour with a cost of living adjustment based on the Seattle area

consumer price index and for support, cites our decision in *PetroElec Construction Co., Inc.*, ASBCA Nos. 32999 et al., 87-3 BCA ¶ 20,111.

Applicant's reliance on *PetroElec Construction Co., Inc.* is misplaced. The EAJA allows a maximum \$125 per hour rate. This Board has long held, and restated in *PetroElec* at 101,844, that the EAJA allows us no discretion to award adjustments for cost of living and other factors "unless the agency determines by regulation that an increase in the cost of living . . . . justifies a higher fee." 5 U.S.C. § 504(b)(1)(A)(ii). No such regulation has been issued. Accordingly pursuant to the statute, we grant an award of fees based on a \$125 hour rate. See also *Arapaho Communications Inc./Steele & Sons, Inc., Joint Venture*, ASBCA No. 48235, 98-1 BCA ¶ 29,563; *Coleman Newland Construction*, ASBCA No. 32241, 89-1 BCA ¶ 21,434.

Applicant requests reimbursement for the following billed attorney hours:

<u>Dates</u>	<u>Attorney Hours Worked</u>
19 October - 29 October 1998	10.60 hours
17 November - 30 November 1998	2.90 hours
2 December - 30 December 1998	3.30 hours
4 January - 27 January 1999	12.70 hours
1 February - 26 February 1999	13.60 hours
1 March - 29 March 1999	16.40 hours
2 April - 30 April 1999	93.30 hours
3 May - 28 May 1999	82.10 hours
1 June - 30 June 1999	28.30 hours
7 July - 30 July 1999	6.50 hours
5 August - 27 August 1999	8.50 hours
1 September - 3 September 1999	<u>11.00 hours</u>
Total Attorney Hours	289.20 hours

The Government argues that applicant submitted inadequate documentation to establish it is entitled to the attorneys' fees it claims and also objects that the work of two attorneys was unnecessary duplication. In addition the Government contends that applicant requests an inordinate amount of time for certain tasks, especially "EAJA research." Finally the Government argues that applicant is not entitled to payment for time spent in its unsuccessful effort to add language which was beyond the scope of the original Settlement - Memorandum of Understanding to the final written settlement agreement because it was not time spent on a matter involved in this appeal.

The applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and the hourly rates. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Adequate documentation includes: (1) dates and time segments

of work performed; (2) the name of each attorney performing the work with a brief statement of the work; and (3) other details. *Building Services Unlimited*, ASBCA No. 33283, 88-2 BCA ¶ 20,611 at 104,150. Applicant submitted copies of invoices or other documents which include dates of services, description of services, hours expended on each task, and the name of the attorney who performed the work. Therefore, we conclude that applicant has adequately documented its time spent on this appeal.

The Government objects that: “The [attorneys’ hours] also seem excessive since many of the causes are billed redundantly by two attorneys who seem to be doing the same thing and bill for briefing each other.” (Gov’t ans. at 4) We reviewed those billing record to delete any hours which appeared to be unnecessary duplication. *See Midwest Holding Corporation*, ASBCA Nos. 44589, 45222, 94-3 ¶ 27,138. In doing so, we were mindful that the two attorneys billed at different rates, a practice often employed to provide lower costs to the client. We are satisfied there were no unnecessary charges, and thus delete no time for the sole reason that two attorneys were doing applicant’s work.

Further we note applicant’s 15 January 1999 entry for .40 hours was shown “no charge” to the client on the attorneys’ bill to applicant. Accordingly we reduce the hours claimed by .40. We also question applicant’s 8 June 1999 entry which was recorded as follows:

[date]	[attorney]	[task]	[hours]	[rate]
6/8/99	BGT	Complete EAJA Application	1.20	\$168.00
	BGT	Complete EAJA Application	1.20	\$168.00

This is seemingly a duplicate entry. Accordingly, we reduce the claimed hours by an additional 1.20.

The Government contends that applicant’s invoices reflect what seems to be an inordinate amount of EAJA research and EAJA application preparation. Up to and including 8 June 1999, applicant spent approximately 14 hours on research and 13 hours on application preparation. Also from 9 June through August 1999, applicant billed 9 hours reviewing the Government’s responses to its EAJA application and preparing its supplemental application. We do not find this time excessive, and thus allow it.

The Government asserts that applicant should not be entitled to fees for time spent attempting to add language to the Settlement - Memorandum of Understanding signed by the parties on 7 May 1999. The attorneys’ billing records from 11 June through July 1999 indicate that 12.50 hours, a large majority of the time, were spent redrafting the Settlement Memorandum, a redraft which was ultimately rejected. The Government argues that the redraft and added language were related to matters not pertinent to this appeal and applicant’s attempts to include such language “unduly and unreasonably protracted the final resolution of the matter in controversy” for which the agency can deny or reduce the

amount of the award under 5 U.S.C. § 504(a)(3). We agree. We determine that 12.50 hours should be eliminated from the 11 June - 30 July 1999 entries because they were not incurred in connection with the subject adversary adjudication.

Thus we reduce the 289.20 hours claimed by 14.1 hours for a total of 275.10 hours at \$125 per hour, which results in a total \$34,387.50 in attorneys' fees.

### **Other Expenses**

Applicant claims \$1,881.13 (the proper total is \$1,882.03) for other expenses incurred in connection with the adversary adjudication of its appeal and submitted the following itemization of these expenses:

<u>Other Expenses</u>		
Express delivery	1/18/99	\$ 20.34
Travel Expenses (meals, lodging, mileage, etc.)		
	13 March 1999 - 26 April 1999	1,516.70
Deposition (invoice dated 3 May 1999)		<u>344.99</u>
	Total Related Expenses	\$1,882.03

The Government objects to the \$1,882.03 in expenses on the basis that there is insufficient documentation.

Regarding applicant's claim of \$20.34 for an express delivery of documents to the Board on 1/18/99, applicant filed a copy of the USA Airbill dated 18 January 1999, transferring documents to the Board. Applicant's 18 January 1999 Election for Hearing in the Board's files bears the Board's file stamp of 19 January 1999. The amount of the charge is not stated on the airbill, but it is stated in a copy of the 5 March 1999 attorneys' invoice where this charge was billed to applicant. The charge is reasonable. Accordingly we grant this amount.

Applicant claims \$1,516.70 for travel expenses including meals, travel, and lodging between 3 March 1999 and 26 April 1999. The attorneys' May 1999 invoice to applicant reflects these charges. Applicant has submitted copies of charge card receipts for all of these expenses except for a 13 March 1999 "Travel Agency Booking Expense" of \$36.05. Accordingly we deny this charge for lack of documentation, and reduce the travel expenses by this amount.

As for the remaining \$1,480.65 in claimed travel expenses, applicant's May 1999 invoice included an unexplained approximate 2.9% mark-up on each expense. Applicant is

not entitled to this reimbursement. *Cf. Preston-Brady, Inc.*, VABCA No. 1992E, 88-1 BCA ¶ 20,446 (VABCA denied request for a mark-up for overhead and profit on prosecution of claim expenses). Accordingly, we reduce the remaining \$1,480.65 claimed for travel expenses by \$43.12 to \$1,437.53.

Finally, applicant seeks \$344.99 for deposition expenses, for which it submits a copy of the invoice from the court reporting firm and the bill to applicant. The documentation is adequate, and we allow this expense.

In light of the foregoing, we reduce the total amount of expenses sought, \$1,882.03 by \$79.17, leaving \$1,802.86 allowed.

### CONCLUSION

In summary, applicant is entitled to recover \$36,190.36 (\$34,387.50 for attorneys' fees plus \$1,802.86 for other expenses) as reimbursement under the EAJA.

Dated: 13 February 2001

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JEAN SCHEPERS  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

I concur

I concur

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

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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. 51891, Appeal of Jay-Brant General Contractors, rendered in accordance with 5 U.S.C. § 504.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals