

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access)
to Justice Act of --)
)
M.E.S., Inc.) ASBCA Nos. 56149, 56348
)
Under Contract No. DACA51-01-C-0039)

APPEARANCES FOR THE APPELLANT: Michael H. Payne, Esq.
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APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

As the prevailing party in the captioned appeals, M.E.S., Inc. (MES) applies for an award of fees and other expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, asserting that the government's position was substantially unjustified. The captioned appeals were consolidated for hearing on the merits with three other appeals of MES under the same contract. In our decision of 22 February 2012 we sustained in part the captioned appeals and denied entirely the other three.¹ See *M.E.S., Inc.*, ASBCA Nos. 56149, 56348, 56349, 56350, 57074, 12-1 BCA ¶ 34,958.² On the MES EAJA application, we grant the application in part as to ASBCA No. 56149 and deny the application entirely as to ASBCA No. 56348.

The claim for price adjustment in ASBCA No. 56149 was submitted by MES in the amount of \$7,524.88 and was sustained in the amount of \$7,377.33. *M.E.S.*, 12-1 BCA ¶ 34,958 at 171,849, 171,854. The claimed EAJA award for this appeal is \$716.88. The government does not dispute MES' entitlement to an EAJA award, but does dispute the amount. MES recorded its fees and other expenses in a single pool for the consolidated

¹ Appellant was not the prevailing party in ASBCA Nos. 56349, 56350 and 57074 and makes no EAJA claim for those appeals.

² Judge Thomas, who participated in our decision, has since retired.

proceeding (\$119,480.83)³ and allocates .6 percent of those costs (\$716.88) to ASBCA No. 56149 on basis of the ratio (.6 percent) of the claimed amount in that appeal (\$7,524.88) to the total claimed amount in all five appeals (\$1,250,867)⁴ in the consolidated proceeding. (Application at 5-6)

The government contends that the allocation ratio should be the ratio of the amount recovered in the appeal (\$7,377.33) to the total amount claimed in all five appeals, or .59 percent.⁵ However, there is no precise formula for allocating fees and other expenses between successful and unsuccessful claims. *See Hoyer Construction Co.*, ASBCA No. 32178, 88-3 BCA ¶ 21,036 at 106,266. The Board considers the record as a whole and exercises its discretion in determining a fair and reasonable allocation. *See C.H. Hyperbarics, Inc. ex rel. Miller*, ASBCA No. 49375 *et al.*, 05-2 BCA ¶ 32,989 at 163,494. With respect to ASBCA No. 56149, the parties' own estimates of a fair and reasonable allocation differ by only one tenth of one percent. In these circumstances we exercise our discretion and in the nature of a jury verdict find that the average of the parties' estimates (.595 percent) is a fair and reasonable allocation of the fees and other expenses to ASBCA No. 56149.

The government also contends that 54.4 hours should be deducted from the consolidated fee pool of 903.4 hours because they were for work performed before ASBCA No. 56149 was filed (21.5 hours) or otherwise clearly identified in the submitted fee and other expense schedules as not being related to ASBCA No. 56149 (32.9) (answer at 4-6). We agree with the government as to the consolidated fee pool of 903.4 hours, and reduce that pool to 849 hours for purposes of the allocation to ASBCA No. 56149. Accordingly, the fees and other expenses allocable to ASBCA No. 56149 are \$670.45.⁶

The claim for price adjustment in ASBCA No. 56348 was submitted by MES in the amount of \$217,043.77 for the costs of 209 days of delay in the work allegedly caused by the government. In its post-hearing brief, MES increased the claim to \$303,331 of field office expense for 210 days of alleged government-responsible delay. We sustained the appeal in the amount of \$97,908.70 for underpayments by the government of the field office delay costs in five modifications that extended the contract performance time by 155 days.⁷ We denied the appeal in all other respects. *M.E.S.*, 12-1 BCA ¶ 34,958 at 171,849-50, 171,855. The claimed EAJA award for this appeal is \$20,789.66 (application at 6).

³ \$112,925.00 + \$6,555.83=\$119,480.83

⁴ \$7,524.88/\$1,250,867.00=.006

⁵ \$7,377.33/\$1,250,867.00=.0059

⁶ [(849 x \$125) + \$6,555.83] x .00595=\$670.45

⁷ One of the modifications was a unilateral modification and the other four were bilateral modifications with reservations of rights by MES to claim additional amounts.

The government disputes entitlement to the claimed award in any amount on the ground that its position in the appeal was substantially justified. The government position was that it had already compensated MES for field office costs of 155 days of government-responsible delays and that MES had failed to show that it was entitled to anything more. MES states in its application that: "the Board provided compensation for field overhead on time extensions granted by the government unilaterally without such compensation" (application at 4). That statement is incorrect. We found that the actual field office daily rate was \$1,320.77 which exceeded the field office daily rates allowed for compensable delay in the modifications at issue. We accordingly increased the field office delay costs in those modifications by a total amount of \$97,908.70. We found no compensable days of delay beyond the 155 days agreed to by the government in the modifications, and the additional compensation we found due was less than one-third of the additional compensation (\$303,331) claimed by MES. The government's opposition to the claim was substantially justified, and we find no entitlement to an EAJA award for ASBCA No. 56348. See 5 U.S.C. § 504(a)(1); *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988).

The application is allowed in the amount of \$670.45 for ASBCA No. 56149 and denied in all other respects.

Dated: 21 May 2013


MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur


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

I concur


ROBERT T. PEACOCK
Administrative Judge
Acting 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 Nos. 56149, 56348, Appeals of M.E.S., Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals