ARMED SERVICES BOARD OF CONTRACT APPEALS

Application under the Equal Access to Justice Act --	)	
C.H. Hyperbarics, Inc., on behalf of William J. Miller, Jr., Trustee	)	ASBCA Nos. 49375, 49401, 49882, 53077, 53078, 53079, 53080, 53292
Under Contract Nos. N47408-94-C-4025 N47408-94-C-4036	)	

APPEARANCES FOR THE APPELLANT: Joseph A. Camardo, Jr., Esq.
Kevin M. Cox, Esq.
Law Firm of Joseph A. Camardo, Jr.
Auburn, NY

APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
Navy Chief Trial Attorney
David L. Koman, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TODD

C.H. Hyperbarics, Inc., on behalf of William J. Miller, Jr., Trustee (CHHI), has filed a timely application under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, for payment of fees and other expenses incurred in connection with appeals of a default termination, request for an equitable adjustment in the amount of $1,163,199, government claims in the amount of $115,802, and an assessment of $304,150 in liquidated damages. On the merits we held that the default termination was proper, appellant was entitled to an equitable adjustment on some but not all of its claims, the government was entitled to recovery on one of its claims, and the government's assessment of liquidated damages was improper. Appellant was entitled to a total recovery of $111,929, plus interest. *C.H. Hyperbarics, Inc.*, ASBCA No. 49375 *et al.*, 04-1 BCA ¶ 32,568.

CHHI's application was for 70 percent of a total amount of $125,158.71, or $87,611.10. The total amount included $100,915.05, identified as attorney fees; $10,698.77, identified as fees of a cost analyst; $5,793.91 for travel, and $7,750.98 for other direct costs. (App. application (applic.) at 12, 17) CHHI reduced the amount of its application to $77,909.08 in response to the government's objection that CHHI is only entitled to an attorney hourly rate of $75.00 for time spent on the appeals filed prior to 29 March 1996 (app. reply at 10). The new total amount of the application of $87,841.72

also includes fees and expenses incurred in connection with the EAJA application (*id.* at 13).

DECISION

An eligible applicant which prevails against the government is entitled to recover attorney fees, expert fees, and other expenses under EAJA § 504, unless the position of the government was substantially justified or special circumstances make an award unjust. There is no contention of such special circumstances in these appeals.

In order to demonstrate eligibility for reimbursement under EAJA, CHHI presented portions of appellant's financial statements showing its net worth for the time periods of the appeals and stated that the company did not have at any time more than 500 employees (app. applic. at 4, ex. 2). The government does not contest CHHI's eligibility status (answer at 1). Accordingly, the applicant has established eligibility.

Under EAJA, an applicant must be a "prevailing party." 5 U.S.C. § 504(a)(1). An applicant meets this requirement if it achieved some substantive benefit that it sought in the litigation. *Texas State Teachers Assoc. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-93 (1989); *Rex Systems, Inc.*, ASBCA No. 52247, 02-1 BCA ¶ 31,760. A party is deemed to have prevailed for purposes of attorney fees if it succeeded on any significant issue in litigation which achieves the benefit sought in bringing the suit. Where separate claims are involved they should be treated as separate lawsuits, and no fee should be awarded for services on unsuccessful claims. *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983); *BH Services, Inc.*, ASBCA No. 39460, 94-1 BCA ¶ 26,468 at 131,725. In these appeals there were 36 separate claims: ASBCA No. 49401 involved the one matter of the government's default termination, ASBCA No. 49375 included appellant's 15 claims under Contract 4025 and 3 claims under Contract 4036, ASBCA No. 49882 included five government claims, ASBCA No. 53080 included seven parts to appellant's Claim 16[*] and four parts to its Claim 17 (delay and disruption, REA preparation costs, bonding costs, and Prompt Payment Act interest), and ASBCA No. 53078 included the government's claim for liquidated damages. ASBCA Nos. 53077, 53079 and 53292 were dismissed as duplicative. A principal underlying purpose of appellant's appeals was to obtain the significant benefit of remission of the government's assessment of liquidated damages.

The government acknowledges that CHHI was the prevailing party as to entitlement on 17 of its claims. Appellant was the prevailing party in ASBCA No. 49375 on eight claims under Contract 4025 and one claim under Contract 4036, in ASBCA

[*] We found appellant submitted requests for equitable adjustment rather than a single termination claim. 04-1 BCA at 161,149.

No. 49882 on four government claims, in ASBCA No. 53080 on three subparts of Claims 16 and 17 (retainage, REA preparation costs, and bonding costs), and in ASBCA No. 53078 on the government's claim for liquidated damages. We reject the government's calculation that appellant was the prevailing party on 37 percent of the total number of claims in the appeals because it duplicated claims to arrive at an inflated total of 46 claims. Appellant was the prevailing party on 17 of its 36 claims, or 47 percent of the total number of claims in these appeals. The government argues that appellant was not the prevailing party as to quantum on the grounds that appellant's recovery was based on rates that the government did not dispute and the submission of estimates in proof of increased costs by appellant that were not accepted in full by the Board, but in each instance reduced in the Board's decision. Although some of applicant's efforts were unsuccessful and it was awarded less than the amount claimed, applicant was a prevailing party. *Thomas J. Papathomas*, ASBCA Nos. 50895, 51352, 00-1 BCA ¶ 30,834 at 152,186.

EAJA fees and expenses are not recoverable if the government's position was "substantially justified," that is, justified in substance or in the main to a degree that could satisfy a reasonable person, or if a reasonable person could think it correct, that is, if it has a reasonable basis both in law and fact. *See Pierce v. Underwood*, 487 U.S. 552, 566, n.2 (1988). The government has the burden of establishing substantial justification. *See Community Heating & Plumbing Co., Inc. v. Garrett*, 2 F.3d 1143 (Fed. Cir. 1993). While the parties' positions on individual issues may be more or less justified, the EAJA favors "'treating a case as an inclusive whole, rather than as atomized line-items.'" *D.E.W., Inc. and D.E. Wurzbach, A Joint Venture*, ASBCA Nos. 50796 and 51190, 01-2 BCA ¶ 31,551 at 155,835, citing *INS v. Jean, et al.*, 496 U.S. 154, 161-62 (1990). Thus, in making an EAJA award, we look to the "'entirety of the government's conduct and make a judgment call . . .'" citing *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) (*id.*).

The government has presented its arguments that its position was substantially justified with reference to four areas of the claims: the REA claims in ASBCA Nos. 49375 and 49882, the liquidated damages claim in ASBCA No. 53078, the claim for REA preparation costs in ASBCA No. 53080, and the retainage claims under Contracts 4025 and 4036. The government argues that it was reasonable in denying applicant's REA claims because they were not presented on the basis of their true value. Where a contractor's effort to prove quantum is seriously lacking, the government is not obligated to attempt to assemble the appropriate figures, and the government's position requiring proof as to entitlement on specific claimed problems, causation, and reasonableness of amount has been held substantially justified. *Henry Angelo & Co., Inc.*, ASBCA No. 43669, 95-1 BCA ¶ 27,426 at 136,684; *Jackson Engineering Co., Inc.*, ASBCA No. 36220, 91-3 BCA ¶ 24,178 at 120,935.

With respect to entitlement in ASBCA No. 49375, the government did not dispute the underlying facts as to entitlement for two of the claims (the warped FAT flange and the changes to the pipe routing and Haskell pumps), but rejected appellant's statement of resulting increased costs. Appellant presented its costs in that appeal as estimates of direct labor hours expended, material costs for which there was no documentation, per diem costs without reference to how or when they were incurred, overhead, general and administrative costs (G&A), bonding costs, and profit. The government did not accept appellant's estimates or its higher than previously paid profit rate, but agreed to the claimed rates for overhead, G&A, and bonding costs. The issues involving quantum were complex, and the Board adjusted appellant's estimates downward where they were considered less credible and rejected certain costs in their entirety. Appellant's recovery on its affirmative claims in ASBCA No. 49375 was approximately three percent of the total amount claimed. Where there is minimal supporting documentation of actual costs, there may be a lack of credibility on such a large portion of the claims that substantial doubt as to the veracity of the claims as a whole will support denial of a contractor's claims and pursuit of an affirmative recovery by the government. Thus a pervasive lack of documentation may render the position of the government "'justified in substance or in the main.'" *Mediax Interactive Technologies, Inc.*, ASBCA Nos. 43961, 46408, 50054, 01-1 BCA ¶ 31,239 at 154,190; *see Aislamientos y Construcciones Apache S.A.*, ASBCA No. 45437, 98-1 BCA ¶ 29,373 at 146,008.

Although CHHI was the prevailing party on some of appellant's REA claims for some of the costs claimed, the government was reasonably justified in not accepting at face value appellant's data regarding its estimates without sufficient documentation persuasive as to entitlement and quantum. The judgment call of the government on the technical issues was sufficiently close that we cannot label the government's position unreasonable. The Board finds that the government was substantially justified in litigating the claims in ASBCA No. 49375.

With respect to the claims in ASBCA No. 49882, the government has argued that the Board found the government not entitled to recovery on two claims (the government's claim for redesign of the pipe trenches and for the reduction in engineering efforts to design the external tank), on an independent basis not presented by appellant. Where the basis of decision differs from that considered or argued by either party, and first advanced by the Board, the government's action in litigating the claim may be substantially justified. *See Henry Angelo & Co., Inc., supra* at 136,684; *Seaman Marine Co.*, ASBCA No. 36579, 91-1 BCA ¶ 23,653 at 118,469. The Board held appellant entitled to prevail on these two claims on an independent basis not presented by appellant. On a third government claim (for reduction in the thickness of the escape trunk) on which CHHI was the prevailing party, the government withdrew its claim upon receipt of further supporting information from appellant. The Board finds that CHHI was

the prevailing party on four of the government's five claims, but the government was substantially justified in its position in litigating three of those claims.

The government argues that its position on its claim for liquidated damages was well founded in fact and in law. The government continues to present the position taken on the merits that its no-cost field change regarding the recompression chambers was sufficient to allow it to assess liquidated damages and it gave a clear enough indication to appellant that it was not waiving its right to use the original amended delivery date for the assessment of liquidated damages. The government also argues that its reprocurement following the termination for default was pursuant to a similar contract. We held to the contrary as explained in our discussion of the merits of this appeal. *See* 04-1 BCA at 161,152-53. The government has not carried its burden that its position on this claim was substantially justified.

The government argues that its position with respect to appellant's claims in ASBCA No. 53080 for retainage costs, REA preparation costs, and bonding costs was substantially justified because it did not contest these costs. We find the government's position reasonable and conclude that its position was substantially justified.

CHHI presented a summary of fees and expenses in its application that was not segregated as to individual claims because, according to CHHI, they were incurred generally in getting the case through discovery and to a hearing (app. applic. at 11). Without an assignment of services to particular claims, it is necessary to make an apportionment of fees and costs eligible for award that can be made on a jury verdict basis. *M. Bianchi of California,* ASBCA No. 26362 *et al.,* 91-1 BCA ¶ 23,445 at 117,638. There is no precise formula or rule to be followed, but it is based on review of the record as a whole with an allocation on the basis of the division of effort between the successful and unsuccessful claims. *International Foods Retort Co.,* ASBCA No. 34954 *et al.,* 93-3 BCA ¶ 26,249 at 130,574; *see Gaffny Corporation,* ASBCA No. 39740 *et al.,* 96-1 BCA ¶ 28,060 at 140,123, *rev'd on other grounds*, 108 F.3d 1391 (Fed. Cir. 1997) (table). One approach is to apportion based on the percentage of claims in which the government's position was substantially justified. *BH Services, Inc., supra* at 131,725. This approach is not, however, to be applied on a mathematical basis comparing the number of issues, but should take into account the significance of the overall relief obtained. *Hensley v. Eckerhart, supra* at 435. Apportionment is a quantum issue, but both parties have briefed it, and we consider it appropriate to decide here.

CHHI argues that apportionment should be on the basis of what it considers "the fairest allocation method" pursuant to the decision of the Veterans Affairs Board in *Jiminez,* VABCA No. 6353E, 03-2 BCA ¶ 32,343 (app. applic. at 13). CHHI estimated the percentage of trial time spent on matters on which appellant prevailed on the basis of the number of pages in the transcript related to general matters common to all claims

which were too difficult to segregate and to specific claims on which appellant prevailed to claim 70 percent of the fees and expenses incurred. The government objects to this approach because the contractor's recovery in *Jiminez* was comparable to the percentage of appeals that were sustained whereas here appellant recovered only 9.6 percent of the total amount sought (answer at 72).

The Board exercises discretion in apportioning EAJA fees and expenses to adjust for an appellant's failure to obtain the full relief sought in an appeal. We believe an estimate can be made of what work pertained to matters as to which appellant was the prevailing party and the government's position was not substantially justified. *M. Bianchi of California, supra* at 117,638. Here the primary effort appellant made was first, to invalidate the termination for default in ASBCA No. 49401 and second, to obtain recovery on its affirmative claims and defend against the government claims in ASBCA Nos. 49375 and 49882 to which we would assign 85 percent of the litigation effort. Appellant was compelled to defend against the government's claims, but only one of them, representing quite a small part of the effort, was without substantial justification. All of these claims involved complex technical issues and difficulties of proof of quantum whereas a significantly lower amount of effort of approximately 10 percent was spent on appellant's remaining 11 claims in ASBCA No. 53080. Appellant's effort with respect to the liquidated damages claim, while an important part of the relief sought, was relatively little considering the record as the parties presented it and the fact that no issues of quantum were presented.

We note that this approach of evaluating the substantive issues raised by separate claims to estimate the division of effort that should be made between the successful and unsuccessful claims leads to a conclusion within range of other approaches that have been suggested. An apportionment on the basis of the percentage of successful claims would be approximately five percent since the government was either the prevailing party or its position was substantially justified on 34 of 36 claims. With CHHI's proposed method, we would look at the record as a whole for the amount of litigation time spent on successful claims. The documentation concerning liquidated damages was minimal. Little attention was given to the issue in appellant's briefs as the government has noted. CHHI's review of the transcript pages included other claims in 149 pages, or 8.3 percent of the total pages. Our review suggests that approximately five percent of the trial time related only to the claim for liquidated damages. The government has proposed, if it were found not to have had substantial justification, a jury verdict on the basis of the percentage of the appellant's monetary recovery, *i.e.*, 9.6 percent.

CHHI is only entitled to a reasonable award. The rejection of a settlement offer is one circumstance which should be taken into account in determining a reasonable award. *Oneida Construction, Inc./David Boland, Inc., Joint Venture,* ASBCA No. 44194 *et al.,* 95-2 BCA ¶ 27,893 at 139,148; *Charles G. Williams Construction, Inc.,* ASBCA

No. 42592, 93-3 BCA ¶ 25,913 at 128,914. The government submits that its settlement offer of approximately $90,000 to convert the termination for default to a termination for convenience, pay $60,000 on its REA claims, and release the retainage of approximately $30,000 should serve to reduce the EAJA fees and costs sought in this application. Appellant rejected this settlement offer from the government. CHHI now maintains it was not relevant considering a comparison of the amount offered to the maximum recovery it would be entitled to taking into account CDA interest and EAJA fees. We find the settlement offer was significant and thus its rejection is relevant to the reasonableness of the EAJA fees and costs that are to be awarded.

Having considered the record as a whole, the work associated with the issues upon which appellant did not prevail or as to which the government was substantially justified, the reduced recovery that was awarded to appellant, appellant's refusal of the government's settlement offer, and the government's suggestion of a jury verdict, we conclude that the EAJA fees and expenses requested should be reduced. In an exercise of discretion on a jury verdict basis, we hold CHHI entitled to seven percent of the EAJA fees and costs it reasonably incurred and deny the balance of fees and expenses claimed.

The determination of the amount of attorneys' fees and expenses is remanded to the parties for their negotiation in accordance with the foregoing. Should the parties fail to agree within 60 days from the date of this opinion, the Board will determine the allowability and amount of the fees and expenses still in dispute.

Dated: 9 June 2005

LISA ANDERSON TODD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
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 Nos. 49375, 49401, 49882, 53077, 53078, 53079, 53080, 53292, Appeals of C.H. Hyperbarics, Inc., on behalf of William J. Miller, Jr., Trustee, rendered in accordance with 5 U.S.C. § 504.

Dated:

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