ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access to Justice Act of --	)	
Maggie's Landscaping, Inc.	)	ASBCA No. 56748
Under Contract No. DAAD05-92-D-7022	)	

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LTC Dana J. Chase, JA
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OPINION BY ADMINISTRATIVE JUDGE JAMES

Appellant's (Maggie's) timely 2 November 2011 application (appl.) requests $252,184.50 in attorneys' fees and costs under the Equal Access to Justice Act, 5 U.S.C. § 504, arising from *Maggie's Landscaping, Inc.*, ASBCA Nos. 52462, 52463, 04-2 BCA ¶ 32,647 (*Maggie's I*) and ASBCA No. 56748, 11-2 BCA ¶ 34,807, *recon. granted,* 11-2 BCA ¶ 34,849 (*Maggie's II*). The Board's 3 November 2011 letter to the parties stated that the Board intended to decide whether the government's position was substantially justified and any other EAJA issues relating to entitlement or quantum that may be raised by the record. Maggie's supplemented its application on 17 November 2011. On 1 December 2011 the government responded to Maggie's application. Maggie's replied thereto on 3 January 2012.

BACKGROUND

Maggie's I. On 5 June 1992 the government awarded the captioned contract to Maggie's for grounds maintenance at Edgewood Area (EA) of Aberdeen Proving Ground, Maryland, in the estimated amount of $583,817 for the base year of 1 July 1992 to 31 March 1993. The contract was a unit price, requirements contract based on estimated frequencies of mowing, clipping, and edging of 93 designated areas at EA. The government exercised the contract options for four additional years of mowing services.

This extended the contract through the mowing season that ended in November of 1996. (*Maggie's I*, finding 1)

Following completion of performance, under date of 15 December 1996, Maggie's submitted six claims, totaling $179,522: I. $29,000 for additional unpaid work performed in four areas; II. $62,384 for 600+ added trees and $9,945 for 5,000 linear feet (l.f.) of added fencing; III. $6,478 for convenience termination of mowing general's quarters, IV. $68,049 due to changed mowing frequencies; V. $1,086 for areas maintained by other agencies; and VI. $2,580 for DOL wage increases (*Maggie's I*, R4, tab 53 at 4-5, 14). The contracting officer (CO) received the claims on 25 March 1997. On 22 April 1997 the CO decided that Maggie's proof of claims I, II and part of V, was insufficient to analyze for lack of EA areas, dates and mowing frequencies, and denied in their entirety claims III, IV, part of V, and VI due to the requirements contract's good faith estimates and releases, but did not notify Maggie's of its appeal rights. (*Maggie's I*, findings 50, 51; R4, tab 55)

On 15 October 1998 Maggie's revised its claims to $618,266, increasing the additional unpaid work claim to $58,939 including interest, and the $559,327 balance, without separate itemization, for 639 added trees, 10,643 l.f. of fencing and reduced mowing frequencies, including changed mowing height (*Maggie's I*, finding 52; R4, tab 56 at 3-16). DCAA questioned the entire $618,266 claim as unsupported, lacking causal effect, and for accounting reasons; adopted the Army's counts of 438 trees planted and 3,341 l.f. of new fencing; and calculated a $54,366 overpayment for areas not mowed and $2,713 for removal of Maggie's abandoned trailer (*Maggie's I*, finding 52; R4, tab 64 at 5-6, 33-35).

The CO's 20 August 1999 decision denied Maggie's claims in their entirety for lack of evidence to support them, and asserted government claims in the net amount of $46,535, composed of a $54,366 overpayment for areas not mowed, plus $2,713 for disposal of Maggie's office trailer, less $10,544 in underpayment for added 438 trees and 3,341 l.f. of added fences (*Maggie's I*, finding 53; R4, tab 66 at 1). In other words, the CO agreed that Maggie's was entitled to payment for 438 added trees and 3,341 l.f. of added fencing, to that extent. The Board docketed Maggie's claims as ASBCA No. 52462 and respondent's claims as ASBCA No. 52463. (*Maggie's I,* finding 53)

The Board held a hearing on entitlement. In our decision we discussed the various claims under the following headings: I. Mowing Performance (changed mowing frequencies, so that the mowing scheduled was less than estimated). II. Change in Mowing Height. III. Contract Administration (arbitrary and improper government conduct). IV. Modifications to Mowing Areas, including A. Trees, B. Fences and C. Mowing Area Acreage Reductions (government claim). V. Areas Allegedly Mowed Without Reimbursement. VI. Office Trailer Disposal (government claim). 04-2 BCA

¶ 32,647 at 161,564-69. Respondent conceded liability for 438 new trees (Claim IV.A) and 3,341 l.f. of new fencing (Claim IV.B) and argued that contract § C.6.4.1.3 allowed changing the mowing height at no cost on Claim II (gov't br. at 15-17, 29-30). We held that § C.6.4.1.3 provided no-cost changes only for varying seasonal conditions, not on a "semi-permanent basis." 04-2 BCA ¶ 32,647 at 161,567. We sustained ASBCA No. 52462 in part for changed mowing height (Claim II), 438 new trees (Claim IV.A) and 3,341 l.f. of new fencing (Claim IV.B), and denied the claims for reduced mowing frequencies (Claim I), arbitrary and capricious conduct (Claim III) and additional unpaid work (Claim V). In ASBCA No. 52463 we determined that the government was entitled to a credit for reduced mowing requirements (Claim IV.C) and dismissed the government's office trailer removal claim (Claim VI) for lack of jurisdiction. *Id.* at 161,568-69. We remanded the appeals to the parties to negotiate quantum consistent with the opinion.

Maggie's II. On 15 May 2007 Maggie's requested an equitable adjustment of $406,780.00 from respondent for changed mowing height, $14,306.50 for trees and $8,724.00 for new fencing (*Maggie's II*, R4, tab 47 at numbered pages 2-4). The parties did not resolve quantum and the appeals were reinstated and redesignated ASBCA No. 56748. Maggie's 4 December 2009 Statement of Costs (SOC) included $405,489 for changed mowing height, $3,640 for trees, $8,724 for fences, and $38,760 for unpaid mowing (denied in *Maggie's I*). The government's 8 January 2010 response included $ 0 for changed mowing height due to Maggie's lack of cost records to support the 4,545 hours in 1994, 7,070 hours in 1995 and in 1996 that it used to calculate $405,489 (*Maggie's II*, R4, tab 48 at 4-7), $3,640 for trees, $6,904 for fencing, and ($54,366) for reduced mowing acreage, and totaled ($43,822). 11-2 BCA ¶ 34,807 at 171,289. Three weeks before the 23 November 2010 hearing in *Maggie's II*, Maggie's revised its quantum to $199,525 for the mowing height change, $11,567 for trees and $8,724 for fencing, totaling $219,816, exclusive of overhead, profit and CDA interest (ex. A-9). Maggie's January 2011 brief re-quantified its claims to $143,307.56 for changed mowing height, $11,567 for trees and $8,724 for fences, exclusive of profit and CDA interest (app. br. at 11).

In summary, Maggie's revised its damages on quantum on the claims we sustained as to entitlement as follows:

Date	Mowing Height	Trees	Fences
5/15/07	$406,780	14,306	8,724
12/4/09	405,489	3,640	8,724
11/1/10	199,525	11,567	8,724
1/8/11	143,307	11,567	8,724

We sustained the quantum appeal and, on reconsideration, allowed $105,014.21 for changed mowing height (claim II), $3,640 for trees (claim IV.A), and $6,949.85 for fencing (claim IV.B), plus 10% profit, totaling $127,164.47 on Maggie's claims, and reduced the government reduced mowing requirements claim (claim IV.C) from $54,366 to $21,164.06 due to failure of proof and cost duplications. 11-2 BCA ¶ 34,807 at 171,291-92; 11-2 BCA ¶ 34,849 at 171,434.

To determine damages for the mowing height change, we disregarded Maggie's earlier annual work hour multipliers (4,545 hours in 1994, 7,070 hours in each of 1995 and 1996), as did Maggie's itself, and its later reliance on Ms. Coryell's unsupported testimony about the typical number of mower operators and laborers used to mow the 16 Jake areas. 11-2 BCA ¶ 34,807 at 171,289-90. Rather, we used respondent's weekly mowing assignment sheets showing the dates on which each such area was mowed for all the years of contract performance. Because of a computation error, pointed out by Maggie's on reconsideration, we initially arrived at an amount of $11,472.74. Our September 2011 decision on reconsideration corrected the mowing height change recovery to $105,014.21, as stated above. 11-2 BCA ¶ 34,849 at 171,434.

DECISION

Eligibility. Ms. Coryell, Maggie's president, stated on 15 November 2011 that its net worth was less than $7 million and it had fewer than 500 employees at the time of its appeal (Coryell aff.). Respondent does not dispute Maggie's eligibility (answer at 3 n.3).

Prevailing Party. A prevailing party must succeed on any significant issue in litigation which achieves some of the benefit the party sought in bringing the suit. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). We hold that Maggie's succeeded on significant issues in claims II, IV.A, IV.B and IV.C and is a prevailing party as to them.

Substantial Justification. Respondent has the burden to prove that its position in the agency actions giving rise to the litigation and in the adversary adjudication was substantially justified. *See Scarborough v. Principi*, 541 U.S. 401, 414-15 (2004) (government has burden of proof of substantial justification). Thus, 5 U.S.C. § 504(b)(1)(E) provides:

> (b)(1) For the purposes of this section—
>
> ....
>
> (E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary

> adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings....

"[A] position can be justified even though it is not correct, and we believe that it can be substantially (i.e., for the most part) justified if 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). In applying this test, we are to consider the government's position on the whole case:

> Any given civil action can have numerous phases. While the parties' postures on individual matters may be more or less justified, the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than atomized line-items....
>
> ....
>
> The 'substantial justification' requirements of the EAJA establishes a clear threshold for determining a prevailing party's eligibility for fees, one that properly focuses on the governmental misconduct giving rise to the litigation.

Commissioner v. Jean, 496 U.S. 154, 161-62, 165 (1990); *see also* 5 U.S.C. § 504(a)(1). "Thus...to determine whether the overall position of the United States is substantially justified, trial courts are instructed to look at the entirety of the government's conduct and make a judgment call whether the government's overall position had a reasonable basis in both law and fact." *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) (footnote omitted).

Where a litigation has separate claims, the government must prove it was substantially justified as to the claims upon which the contractor prevailed. *See Hensley*, 461 U.S. at 434-35. Here, as we determined above, Maggie's prevailed on claims II, IV.A, IV.B and IV.C. Accordingly, we decide whether the government was substantially justified as to them.

Respondent argues that agency actions giving rise to the litigation and its litigation positions were substantially justified because Maggie's was unable to document its claims and on 20 August 1999 the CO denied them for lack of documentation; the Board denied three of Maggie's six claims on entitlement; on the changed mowing height claim, Maggie's

claimed quantum constantly changed and its evidence provided little support for its alleged operator and laborer numbers; and the Board awarded $3,640, the exact amount the CO calculated for the 438 added trees and $6,949.85, only $45.85 more than the $6,904 the CO calculated for the 3,341 l.f. of added fencing, in his final decision (*Maggie's II*, 11-2 BCA ¶ 34,807 at 171,289-90 (finding 10), 171,290-91; answer at 4-10).

Maggie's argues that respondent did not offer to settle the mowing height, new trees and added fences claims, respectively II, IV.A and IV.B, refused to recognize the impact of its actions and required Maggie's to litigate those claims, so its position was not substantially justified on those claims (appl. at 4-5) and that "the entire litigation was essentially one issue: the impact of the inability to use the 'Jake' in the weekly areas," the new trees and fences were "minor issues" and "[t]his is not a case where there were separate, discrete, unrelated claims" because its "reduced work order" claim theory, which the Board rejected, and its "additional work hours" claim theory for changed mowing height, which the Board accepted, in *Maggie's I* "were based on the same operative impact" (app. reply br. at 2, 5).

Maggie's "one issue" mowing height change argument turns on its assertion that its "reduced work order" theory and its "additional work hours" theory for changed mowing height were "were based on the same operative impact" (app. reply br. at 5). "[D]istinctly different claims...are based on different facts and legal theories." *Hensley*, 461 U.S. 424, 434. The facts and issues in the unsuccessful reduced work order claim were the government's alleged reduction of areas to be mowed in the 1992-1996 work orders and assignment sheets, a constructive termination or cardinal change. The fact and theory in the successful mowing height claim was respondent's June 1994 direction to change the mowing height from two to three inches of all areas mowed, a constructive change. *See Maggie's I*, 04-2 BCA ¶ 32,647 at 161,564-67. Those facts and theories were distinctly different, not related. We reject Maggie's "one issue" argument.

Determination of Substantial Justification.

The mowing height change was not among Maggie's 15 December 1996 claims. Maggie's mentioned the mowing height claim under the heading of reduced mowing frequencies, but did not identify any monetary amount for it, in its 15 October 1998 revised claim. In 1999 the CO denied Maggie's entire claim for lack of supporting evidence. In 2004 *Maggie's I* sustained the mowing height change, then designated Claim II, on entitlement.

Maggie's sought $406,780 in May 2007 and $405,489 in its December 2009 Statement of Costs for Claim II, alleging 4,545 added hours in 1994 and 7,070 added hours in each of 1995 and 1996 for tractor operators and laborers. Maggie's later abandoned its 4,545 and 7,070 hours theory, noted that it could not access its payroll

records because its computer was locked, and offered Ms. Coryell's testimony with respect to the number of tractor operators and laborers who cut and trimmed the ex-Jake areas before and after the mowing height change. We found that there was no evidence of government responsibility for the locked computer, Maggie's documentary records of employee hours and wages were incomplete, did not show employee wages, hours and locations of changed work, and provided little support for Ms. Coryell's testimony (*Maggie's II*, finding 10).

Maggie's inability to adduce probative evidence to support a plausible quantum recovery on Claim II led the Board on our "own initiative" (as Maggie's observed, app. mot. for recon. at 1), to search the government's weekly work assignment sheets for a way to derive damages. We calculated and compared the documented number of days to mow and trim the 16 ex-Jake areas before and after the 17 June 1994 mowing height change (*Maggie's II*, findings 11-12). Maggie's ultimately obtained recovery by virtue of the Board's scouring the record for evidence to support a rationale that Maggie's had ignored. *See C.H. Hyperbarics, Inc.*, ASBCA No. 49375 *et al.*, 05-2 BCA ¶ 32,989 at 163,493 (the government was not entitled to recovery on two claims 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); *Henry Angelo & Co.*, ASBCA No. 43669, 95-1 BCA ¶ 27,426 at 126,684 (where the basis of a contractor's relief differs from that considered or argued by either party, and was first advanced by the Board, the government's action in defending against the claim and appeal may be substantially justified); *Seaman Marine Co.*, ASBCA No. 36579, 91-1 BCA ¶ 23,653 at 118,469 (government's position was substantially justified when the contractor advanced no plausible theory of recovery and the Board's independent review of the contract revealed an unusual liability shifting provision in the technical specifications).

The CO's August 1999 decision tacitly conceded liability to Maggie's for Claims IV.A and IV.B, added trees and fencing, *Maggie's I*, 04-2 BCA ¶ 32,647 at 161,564, finding 53. Those two claims were litigated because Maggie's claimed 639 trees and 21,286 l.f. of new fencing, *id.* at 161,561-62, findings 38, 41, which it failed to prove, leaving the government's pre-litigation calculations of 438 new trees and 3,341 l.f. of fencing as the quantities for which we held entitlement. *Id.* at 161,567-68. With respect to Claim IV.C, the government's reduced mowing requirements claim, in *Maggie's II* the Board reduced the government's claimed amount from $54,366 to $21,164.06 due to failure of proof and duplication of time periods. 11-2 BCA ¶ 34,807 at 171,291-92.

Based on our foregoing analysis, we hold that on each of Claims II, IV.A, IV.B, IV.C the government agency's conduct and its litigation position considered as a whole had a "reasonable basis in both law and fact," and was substantially justified. With particular reference to Claim IV.C, the government's $54,366 quantum position, though

not correct, was substantially justified. *See Pierce*, 487 U.S. at 552, 566 n.2 ("a position can be justified even though it is not correct").

Accordingly, we deny Maggie's EAJA application.

Dated: 13 March 2012

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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. 56748, Appeal of Maggie's Landscaping, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

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