ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access to Justice Act of --	)	
CKY, Inc.,	)	ASBCA No. 60451-EAJA
Under Contract No. W912P8-11-D-0007	)	

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OPINION BY ADMINISTRATIVE JUDGE TAYLOR ON APPELLANT'S EQUAL ACCESS TO JUSTICE APPLICATION

Appellant, CKY, Inc. (CKY), submitted an Application for Award of Attorney's Fees and Other Fees & Expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, as amended. The underlying appeal arose from claims for two water-related impacts to CKY's construction site in Baton Rouge, Louisiana. *CKY, Inc.*, ASBCA No. 60451, 20-1 BCA ¶ 37,575. Familiarity with that decision is presumed. We find that CKY is an eligible, prevailing party on one of its claims, and that the government's position on that claim was not substantially justified. Accordingly, we grant CKY's application, but reduce the requested recovery amount to that which is allowed by the EAJA.

BACKGROUND

The underlying appeal involved a July 22, 2010 multiple award task order contract for civil works construction projects in the Greater New Orleans and southern Louisiana area. On October 17, 2012, the U.S. Army Corps of Engineers (government or Corps of Engineers) awarded CKY a task order under the contract for "reinforced concrete culvert installation" alongside "placement of earthen fill, bedding, geotextile

. . . dewatering . . . and other incidental work" *CKY, Inc.,* 20-1-BCA ¶ 37,575 at 182,450-51.

During its performance on the task order, CKY encountered problems resulting from Mississippi River backflow into the construction site due to high water levels and the discharge into the site from two undisclosed culverts that drained water into the work area. *Id.* at 182,452. On June 17, 2015, CKY submitted a certified claim to the contracting officer in the amount of $1,146,226 for what appellant alleged was out of scope work dealing with the Mississippi River's backflow, the undocumented culverts' discharge into the work site and the government's alleged delay in responding to a request for information.[1] *Id.* Appellant's claim did not identify the total claimed amount attributable to impacts from each of the different claims. *Id.* On December 11, 2015, the contracting officer issued a final decision denying appellant's claim in its entirety. CKY filed its appeal on February 19, 2016. *Id.*

Our April 13, 2020 decision on the merits denied appellant's claim for any increased costs resulting from the floodwaters back-flowing into the work site from the Mississippi River. *Id.* at 185,456. The decision, however, sustained appellant's claim for increased costs resulting from the presence of a Type 1 differing site condition due to the two undocumented culverts. *Id.* We returned the appeal to the parties to determine quantum. *Id.*

The parties subsequently engaged in settlement negotiations and signed a settlement modification dated May 2, 2022 (app. EAJA application, at ex. C). In that agreement, the government agreed to pay CKY the principal amount of $185,000 and Contract Disputes Act (CDA) interest in the amount of $28,530.93 to resolve the appeal. (*Id.* at 3). CKY submitted an Application for Award of Attorney's Fees and Other Fees & Expenses to the Board on June 1, 2022.

DISCUSSION

In order to recover under the EAJA, an applicant must timely file its application, establish it is an eligible party as defined by the EAJA, and prove that it was a prevailing party in the underlying action. *Rex Systems, Inc.,* ASBCA No. 52247, 02-1 BCA ¶ 31,760 at 156,854. Even if an applicant is otherwise qualified, an award may be denied if the government's position is determined to have been substantially justified, or when special circumstances make an award unjust. 5 U.S.C. § 504(a)(1). As a partial waiver of sovereign immunity, the EAJA is to be strictly construed in favor of the United States. *Ardestanti v. I.N.S.*, 502 U.S. 129, 137 (1991).

[1] Appellant subsequently abandoned its claim for delay resulting from the government's alleged delay in responding to a request for information.

I. Timely Application

An application under EAJA must be filed within 30 days after the Board's final disposition of an appeal. 5 U .S.C. § 504(a)(2). A final disposition in an adversary adjudication before the Boards of Contract Appeals means a disposition which is no longer appealable. *Taylor v. United States*, 749 F.2d 171, 174 (3rd Cir. 1984*)* ("fee petitions under the EAJA must be filed no later than thirty days after the expiration of the time to appeal, or after the termination of the litigation by the court of last resort, or after a losing party asserts that no further appeal will be taken."). The Board issued its decision in this matter on entitlement on April 13, 2020 and remanded the case back to the parties to determine quantum. The Board retains jurisdiction over an appeal when it resolves a contractor's claim for an equitable adjustment as to entitlement but remands the matter back to the parties to determine quantum. *Nab-Lord Assocs. v. United States*, 682 F.2d 940, 943 (Ct. Cl. 1982). The parties finalized the settlement of the quantum amount on May 2, 2022. Thus, this matter became final upon the date of the parties' quantum settlement. We find appellant timely filed its June 1, 2022 EAJA Application within 30 days of the final disposition.

II. Eligibility

An EAJA Application must show that the applicant is eligible to receive an award. 5 U.S.C. § 504(a)(2). The EAJA defines a corporation as an eligible party if it has a net worth of no more than $7,000,000 and no more than 500 employees at the time it initiated the appeal. *Alderman Building. Co.*, ASBCA No 58082-EAJA, 22-1 BCA ¶ 38,126 at 185,211; *see also* 5 U.S.C. § 504(b)(1)(B). In this case, appellant provided a Declaration from its chief executive officer and supporting documentation showing it had neither a net worth exceeding $7,000,000 nor over five hundred employees at the time it initiated the appeal (app. EAJA application at ex. E). The government did not attempt to refute that evidence (gov't opp'n at 6). Following our review of the documents, we are satisfied CKY is an eligible party.

III. Prevailing Party

A party is a "'prevailing part[y]' for attorney's fees purposes if [it] succeed[ed] on any significant issue in litigation which achieves some of the benefit the part[y] sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433, (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d. 275, 278-79 (1st Cir. 1978); *WECC, Inc.*, ASBCA No. 60949-EAJA, 22-1 BCA ¶ 38,115 at 185,139. Appellant need not obtain all the relief sought to be a prevailing party. *Hart's Food Servs.*, ASBCA No. 30756 *et al.*, 93-1 BCA ¶ 25,524 at 127,174. CKY prevailed on its claim relating to the presence of the two undocumented culverts and recovered some of the benefit it sought in its appeal. Moreover, the government does not dispute that CKY qualifies as a "prevailing party"

on its undisclosed culverts claim (gov't opp'n at 6). We find CKY is a prevailing party as to that claim.

IV. Substantial Justification

An EAJA application may be denied if the government's position was substantially justified or when special circumstances make an award unjust. *Asia Commerce Network*, ASBCA No. 58623, 19-1 BCA ¶ 37,352 at 181,621; 5 U.S.C. § 504(a)(1). The government bears the burden to show its position was substantially justified. *Alderman Building Co.,* 22-1 BCA ¶ 38,126 at 185,212; *K&K Indus., Inc.*, ASBCA No. 61189, 19-1 BCA ¶ 37,353 at 181,628. The government must demonstrate "a reasonable person could think [the government's position is] correct, that is [that] it has a reasonable basis in law and fact." *Pro-Built Constr. Firm.*, ASBCA No. 59278, 18-1 BCA ¶ 36,975 at 180,116 (quoting *Pierce v. Underwood*, 487 U.S. 552, 566 n.2. (1988). The entirety of the government's litigation position is considered in determining whether its position is substantially justified and not just the posture on individual issues. *K&K Indus., Inc.*, 19-1 BCA ¶ 37,353 at 181,628. Moreover, "the government position is more likely to be substantially justified when greater 'legal uncertainty' is presented." *SST (Supply & Serv. Team) GmbH*, ASBCA No. 59630, 18-1 BCA ¶ 36,932 at 179,932 (citing *Rex Sys., Inc.*, ASBCA No. 52247, 02-1 BCA ¶ 31,760 at 156,855).

In its opposition to appellant's application for EAJA fees, the government first contends the application should be denied because the government's position was substantially justified when considering the "entirety" of the litigation (gov't opp'n at 7-9). The government points out that it prevailed on two of appellant's three claims (*id*. at 8-9). The government notes that appellant did not appeal the contracting officer's denial of its delay claim resulting from alleged government delay in responding to Request for Information No. 15 (*id*. at 9). The government further notes the Board denied appellant's "High River" impact claim (*id*.).

While the entirety of the government's litigation position must be considered in determining whether the government's position is substantially justified rather than its posture on individual issues, that entirety relates to the government's position on a particular claim to which the contractor prevailed and not to the litigation as a whole. *Goldhaber v. Foley*, 698 F.2d 193, 196-97 (3d Cir. 1983). In other words, the government must show its litigation position on the claim in which CKY prevailed, the undisclosed culverts, was substantially justified. Even though the government prevailed on other claims within the same litigation, that fact does not negate CKY's prevailing position on the undisclosed culverts claim.

It is well settled that a party is deemed to have prevailed for purposes of attorney fees if it succeeded on any significant issue in the litigation which achieves the benefit

it sought in bringing the suit. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *BH Services, Inc.*, ASBCA No. 39460, 94-1 BCA ¶ 26,468 at 131,725. When a litigation involves separate claims, those claims should be treated as separate lawsuits and hours spent on the unsuccessful claims should be excluded in determining the amount of a reasonable fee award. *M. Bianchi*, ASBCA No. 26362, *et al.*, 90-1 BCA ¶ 22,369 at 112,396. Appellant's lack of success on certain claims, however, does not provide the government with substantial justification on the claims on which appellant prevailed. *Relyant, LLC*., ASBCA No. 59809, 19-1 BCA ¶ 37,318 at 181,513 ("Relyant's lack of success on one particular cause of action . . . does not make the government's defense substantially justified.") The government does not dispute CKY was the prevailing party on its undisclosed drainage culverts claim.

The government next contends its position on the undisclosed drainage culverts claim was substantially justified since appellant's ultimate recovery was significantly reduced from its original claim (gov't opp'n at 9). The government correctly notes appellant claimed an entitlement to $1,146,226 in its original claim. *CKY, Inc.,* 20-1-BCA ¶ 37,575 at 182,452. The government further correctly noted the parties ultimately settled the appeal for a principal amount of $185,000 (gov't opp'n at 5). The Board's precedent is clear that the settlement of a dispute at a substantial reduction from the original claim amount is a consideration in determining the reasonableness of any awarded fee under EAJA but should not be considered in determining whether the government's position was substantially justified. *WECC, Inc.,* ASBCA No. 60949-EAJA, 22-1 BCA ¶ 38,115 at 185,140 (citing *C.H. Hyperbarics, Inc.*, ASBCA No. 49375 *et al*., 05-2 BCA ¶ 32,989 at 163,494). We consider the impact of the ultimate settlement amount later in this opinion in our discussion of the awarded fee amount.

Finally, the government contends its overall actions in litigating CKY's undisclosed culverts were substantially justified since they were reasonable in both law and fact (gov't opp'n at 10-22). Whether the government's position was substantially justified is a determination made on the facts of each case. Mere existence of a colorable legal basis for the government's position is not sufficient. *Gavette v. Office of Personnel Management,* 808 F.2d 1456, 1467 (Fed. Cir. 1986) (quotation omitted). Rather, the government must establish that a reasonable person could think its position was "correct" and that it had a reasonable basis in law and fact. *Pro-Built Constr. Firm.*, ASBCA No. 59278, 18-1 BCA ¶ 36,975 at 180,116 (citations omitted).

The government's primary argument in defending the undocumented culverts claim was that the parties had previously settled all the claims relating to the undisclosed culverts, including, but not limited to, any delay claims (gov't opp'n at 10-17). The government's defense primarily relied upon the closing statement in Modification No. 1M (Mod 1M) (*id*.). The parties entered into Mod 1M following the government's issuance of a notice to proceed with certain changes to address the water overflow from the undisclosed culverts. *CKY, Inc.*, 20-1-BCA ¶ 37,575 at 182,452.

The government argued this modification compensated CKY for all its delays resulting from the undisclosed culverts. *Id*. at 182,455. In our decision, however, we found Mod 1M's plain language did not support the government's argument. *Id.* at 182,456. Mod 1M's closing statement stated in part, "this adjustment constitutes compensation in full . . . for all costs and markups directly or indirectly *attributable to the changes ordered*, for all delays, impacts and extended overhead *related thereto*" (emphasis in original). *Id.* As discussed in our original opinion, the language in the July 2013 RFP, CKY's responsive bid, the prior two modifications (1E and 1L), which discuss the added work, and to which Mod 1M refers, all clearly indicate Mod 1M's closing statement was intended to cover only the new work resulting from the change orders and not pre-change order work. *Id*.

In its opposition to appellant's Application for EAJA fees, the government contends its position in the underlying litigation was reasonable since the Board stated the government's interpretation of Mod 1M's closing statement "would present an ambiguity" (gov't opp'n at 11). We, however, did not find Mod 1M's closing statement language to be ambiguous. Rather, we rejected the government's interpretation and specifically found Mod 1M's plain language did not cover the pre-change order work. *CKY, Inc.*, 20-1-BCA ¶ 37,575 at 182,456. No legal uncertainly exists when there is only one plausible reading of specific language in a contract. *SST (Supply and Service Team) GmbH,* ASBCA No. 59630, 18-1 BCA ¶ 36,932 at 179,932-33. An interpretation of that language contrary to its plain meaning is not a substantially justified position.

The government further contends its reliance upon the language in Mod 1M's closing statement was substantially justified since that position was supported by established legal precedent (gov't opp'n at 13-16). Specifically, the government relies heavily upon the Court of Claims decision in *George H. Craddock d/b/a Southern Heating Company v. U.S.*, 230 Ct. Cl. 991 (1982). The issue before the court in that case was whether certain closing statement language in negotiated change orders precluded the contractor's recovery of increased labor costs and a price adjustment resulting from enactment of Fair Labor Standards Act amendments. *Id.* at 992. The Court of Claims, in affirming the ASBCA's decision, held that the language acted as a bar to the contractor's further recovery of any labor costs. *Id*. at 994. The facts and circumstances in the *Craddock* case, however, are distinguishable from those in this matter.

In *Craddock*, the court affirmed the Board's decision denying the contractor's claim for a contract adjustment to cover its increased wage costs on the delayed but unchanged work. The Board specifically found that the parties had discussed and rejected the increased labor costs prior to signing the release language. *Id.* at 993. The parties then subsequently negotiated substantial contract adjustments and executed the written agreements including the release language to cover all the costs directly or

indirectly related to the changes and delays. *Id.* at 994. In this case, no contemporaneous evidence exists suggesting the parties, during the negotiations, contemplated that Mod 1M included a payment for the pre-change delay costs appellant incurred as a result of the undisclosed culverts. Rather, as noted in our previous decision, the language in the July 2013 RFP, appellant's responsive bid, and the two prior modifications all indicate the subject of the Mod 1M closing statement was the other work resulting from the change orders and not pre-change order work. *CKY, Inc.*, 20-1-BCA ¶ 37,575 at 182,456. The government's reliance on the *Craddock* decision does not support a finding that its position on appellant's undisclosed culverts claim was substantially justified.

V. Special Circumstances

The government does not contend any special circumstances exist that would make an award of fees and costs unjust. 5 U.S.C. § 504(a)(1). We conclude no special circumstances exist to preclude an EAJA award.

VI. Quantum

i. Request for Attorney Fees

Even though we have determined CKY is a prevailing party on its undisclosed culverts claim and the government's position was not substantially justified on that claim, that alone does not entitle appellant to recover all the fees and expenses it seeks. We still must determine what fees and expenses are reasonable. 5 U.S.C. § 504(b)(1)(A).

Appellant seeks attorney fees and expenses in the amount of $213,633.82 and expert witness fees in the amount of $16,400.28 for a total claim of $230,034.10 (app. EAJA application at 19). Appellant provided a breakdown of these expenses in its EAJA Application as an attachment to exhibit D, the Declaration of Islam M. Ahmad in Support of Appellant CKY, Inc.'s Application for Fees and Costs ("Fee Declaration") (and also in an unredacted copy of its fees and expenses as exhibit 6 to its reply to respondent's opposition to application for fees and costs). The billed hourly rates range between $175 to $410. The billed rates of $175 and $180 appear to be for the paralegal's time. Appellant's Fee Declaration concludes with total hours billed of 679.20 with a corresponding fee amount of $185,570 (app. EAJA application at ex. D, fee declaration at p. 49; app. reply at ex. 6, fee declaration at p. 49). It also shows expenses of $33,063.83 (*id.*). Those expenses were apparently reduced by $5,000 in its claim since they included the $5,000 expert retainer fee appellant also included in its claim for expert witness expenses (app. EAJA application at ex. D at 42).

The government initially objected to a number of CKY's 679.20 claimed hours since appellant's redacted "Time and Expense Details" made it difficult to determine the actual provided services (gov't opp'n at 23). Appellant rectified this problem in its reply by providing an unredacted submission setting forth additional details on numerous entries (app. reply at ex. 6).

In addition, the government objected to seven specific claimed charges on the basis they were not related to the subject appeal (gov't opp'n at 32-33). Appellant did not respond to those specific charges in its reply. The government appears correct that these charges do not relate to this matter. The seven claimed charges totaled 4.10 hours. (See app. EAJA application at ex. D at 3 - 1/9/2015 entry for .20 hours; 1/22/2015 entry for .20 hours; 1/29/2015 entries for .20 & .50 hours; *id*. at 5 - 8/23/2016 entry for .50 hours; 8/30/2016 entry for 2 hours; *id*. at 20 – 8/29/2017 entry for .50 hours.) We therefore reduce CKY's claimed 679.20 EAJA hours by these 4.10 hours resulting in 675.10 allowable hours.

The government further objects to any claimed fees incurred before the date of the contracting officer's final decision, December 11, 2015 (gov't opp'n at 28-29). The government correctly notes it is well established that the beginning of the "adversary adjudication" for the purposes of EAJA is the date of the contracting officer's final decision. *Levernier Const. Inc. v. United States*, 947 F.2d 497, 500 (Fed. Cir. 1991). Accordingly, CKY's claimed hours on its EAJA application must be reduced by the hours it incurred prior to December 11, 2015. In its application, CKY claimed 9.70 hours in fees incurred prior to December 11, 2015. (See app. EAJA application at ex. D at 2-3.) Those 9.70 hours include 1.10 hours previously reduced above because they appear to have been incurred on work not related to the subject appeal. (See app. EAJA application at ex. D at 3 entries for 1/9/2015, 1/22/2015 and 1/29/2015.) Hence, we further reduce CKY's claimed hours an additional 8.60 hours for hours incurred prior to the issuance of the contracting officer's final decision resulting in 666.50 allowable hours (675.10 less 8.60).

Both parties appear to agree that an EAJA award should not include any amounts for time spent on the denied high river claim (gov't opp'n. at 25; app. reply at 13-14). The parties are correct that any EAJA award should exclude any fees and expenses associated with an unsuccessful claim. *C.H. Hyperbarics, Inc.*, ASBCA No. 49375 *et. al.*, 05-2 BCA ¶ 32,989 at 163,491 ("Where separate claims are involved they should be treated as separate lawsuits, and no fee should be awarded for services on unsuccessful claims.") *See also Alderman Building. Co.,* 22-1 BCA ¶ 38,126 at 185,213. Unfortunately, it is impossible to differentiate between the fees and costs attributable to the high river and undisclosed culvert claims from appellant's itemization of its fees and expenses. Appellant's EAJA fee application narrative descriptions describing its fees and expenses could apply to either or both claims. Moreover, appellant's original claim did not identify how much of its total claimed

amount was attributable to the high river impacts and how much to the undocumented culverts. *CKY, Inc.,* 20-1 BCA ¶ 37,575 at 182,452. Fortunately, we have discretion in determining the amount of a fee award as long as we account for the relationship between the amount awarded and the results obtained. *See WECC, Inc.*, ASBCA No. 60949-EAJA, 22-1 BCA ¶ 38,115 at 185,141 (citing *Hensley v. Eckerhart*, 461 U.S. 424 at 435-36 (1983)).

In its reply, CKY suggests a reasonable allocation between its high river and undocumented culverts claims would be to deduct 25% of the total fees and costs incurred by appellant to account for the unsuccessful high river claim (app. reply at 13-14). CKY appears to arrive at this deduction by looking at the number of days delay associated with each of the claims. CKY suggests there were a total of 151 days delay and additional dewatering related to the river backflow and 172 days delay and additional work performed beyond the Task Order requirements with respect to the undisclosed culverts claim (app. reply at 14).[2] Appellant does not clearly identify as to how those numbers translate to the proposed 25% deduction.

The government, on the other hand, suggests appellant's allowable EAJA fees and expenses should be no more than 16% of the claimed amount since that percentage is reflective of its overall recovery resulting from the settlement as compared to CKY's original claim ($185,000/$1,146,226) (gov't resp. at 26). The government contends this attorney fee award amount would be most reflective of appellant's ultimate recovery.

In determining the reasonableness of an EAJA award, we consider the nature and complexity of the legal work involved and the degree of success obtained by the applicant. *Hensley v. Eckerhart,* 461 U.S. 424, 436-37 (1983); *Charles G. Williams Constr., Inc.*, ASBCA No. 42592, 93-3 BCA ¶ 25,913 at 128,914. Here, CKY successfully prevailed on its undisclosed culverts claim but not on its high river claim. As such, CKY's attorney fees should be limited. *Avant Assessment*, *LLC*, ASBCA No. 58903, 18-1 BCA ¶ 37,040 at 180,324 (citations omitted) ("Where a party has achieved only limited success, we should award only that amount that is reasonable in relation to the results obtained.").

In *Hubbard v. United States*, the Federal Circuit stated that a tribunal should take a "nuanced approach" to determine a reasonable fee in light of the results achieved. 480 F.3d 1327, 1334 (Fed. Cir. 2007). The court rejected a "mechanical mathematical analysis." *Id*. Accordingly, we do not accept either appellant's proposed 25% deduction or the Government's proposed 16% apportionment based upon the

[2] Appellant, in its reply, cites to the Board's decision at p. 8, but the Board did not determine the number of delay days associated with each claim.

percentage of the settlement amount ($185,000) compared to appellant's original claim ($1,146,226).

Appellant's apportionment approach appears to be based upon the number of delay days attributable to each claim. The number of delay days associated with a particular claim does not, however, determine the reasonable attorney hours spent on that claim. For example, a claim could in theory be very complex requiring the expenditure of significant time but result in little damages. Alternatively, a claim could be relatively simple but involve significant damages.

Moreover, appellant misinterprets the impact from the concurrent delays. The government correctly notes it is not responsible for delay costs when other noncompensable causes cannot be reasonably separated from those delays for which the contractor is entitled to receive compensation. *Beckman Constr. Co.*, ASBCA No. 24725, 83-1 BCA ¶ 16,326 at 81,159. Here, appellant acknowledges 138 of the alleged delay days were concurrently attributable to both the high river levels and the undisclosed culverts (app. reply at 11). Since CKY did not prevail on its high river claim, it would not have been entitled to recover any damages associated with those concurrent delays.

The government's proposed approach, on the other hand, does not necessarily award appellant for its efforts in prevailing on its undisclosed culverts claim and could result in disincentivizing future settlements. Moreover, if we were to adopt such an approach, the proper apportionment measure would be a comparison between the settlement amount and the damages appellant sought in this appeal ($710,807). A comparison between the damages sought and ultimate recovery provides useful information, but it is not controlling. *Freedom NY, Inc.*, ASBCA No. 43965, 09-1 BCA ¶ 34,097 at 168,596.

In this case, it is difficult to distinguish a difference in the legal complexity between the high river and undisclosed culverts claims. Appellant relied upon the same three legal theories in both claims even though the factual bases for the two claims were different. *CKY, Inc.,* 20-1 BCA ¶ 37,575 at 182,455. In our original decision, we found the presence of a patent ambiguity related to the Task Order's performance period prevented CKY from any recovery from its high river level claim. *CKY, Inc.*, 20-1 BCA ¶ 37,575 at 182,456. No such patent ambiguity existed on the undisclosed culverts claim. In its reply, appellant correctly notes a winning claim may require more attorney time than a losing claim regardless of the amount at issue (app. reply at 13). Appellant, however, presents no evidence that the undisclosed culverts claim required more attorney time than its high river claim. Absent any such evidence, we conclude the attorney hours and fees should be split equally between the two claims. In other words, we reduce appellant's allowable attorney hours from 666.50 to 333.25 due to its

unsuccessful high river level claim. Similarly, we reduce appellant's claimed expenses by 50%.

The government further contends appellant should be prohibited from recovering any attorney fees and expenses incurred after the date CKY rejected the government's $150,000 settlement offer and asserted it would accept no settlement below $450,000 (gov't opp'n. at 26-28). That date was April 5, 2018. (Gov't opp'n at ex. A.) The government points out that CKY's claim for $710,807 before the Board was ultimately settled for the principal amount of $185,000 plus CDA interest of $28,530.93 (gov't opp'n at 27.) The government further notes that after its April 5, 2018 settlement offer, appellant's EAJA application indicates it spent an additional $88,972 in fees and costs (*id.)*. The government suggests CKY's expenditure of an additional $88,972 in order to recover an extra $35,000 above the government's original settlement offer was unreasonable (*id.* at 28).

The tender and refusal of a settlement offer may be probative of the reasonableness of attorney fees and expenses incurred after the applicant has declined to accept a settlement. *Freedom NY, Inc.*, ASBCA No. 55466, 09-1 BCA ¶ 34,031 at 168,330 (citations omitted); *States Roofing Corp.*, ASBCA No. 55505, 11-1 BCA ¶ 34,668 at 170,778. The government compares its settlement offer to CKY's ultimate recovery (gov't opp'n at 27-28). In this case, however, it is difficult to make a direct comparison between the government's settlement offer and the final settlement of the undisclosed culverts claim because the government's offer was a lump settlement offer for both claims. *States Roofing Corp.*, 11-1 BCA ¶ 34,668 at 170,779.

Ultimately, appellant prevailed on its undisclosed culverts claim through litigation and recovered $185,000 plus CDA interest on that claim. That amount was $35,000 more than the government's previous settlement offer for both claims. Appellant's continued legal expenses incurred after the government's settlement offer appear to have been justified. *Kos Kam, Inc*., ASBCA No. 34684, 88-3 BCA ¶ 21,049 at 106,322 ("In view of the agreement to settle the dispute at a higher figure than the settlement offer, the applicant's continued legal expenses appear to have been justified"). In *Fiesta Leasing and Sales, Inc*., we found the appellant's recovery of $17,501 in excess of a settlement offer was not so disproportionate to its expenditure of $60,025 in attorney fees and other expenses after the settlement offer to preclude recovery under the EAJA. *Fiesta Leasing and Sales, Inc.*, ASBCA No. 29311, 90-2 BCA ¶ 22,729 at 114,086. This case is similar. Appellant's incurrence of the additional attorney fees after the government's settlement offer was reasonable in light of its ultimate recovery. These fees were necessary for the contractor to vindicate its contractual rights.

In our opinion, the 50% reduction to appellant's claimed legal fees and expenses results in the recovery of appellant's reasonable fees and expenses on its successful undisclosed culverts claim. No further reduction resulting from CKY's rejection of the government's settlement offer is necessary.

In its Application, CKY requests attorney fee rates ranging from $210 to $410 per hour notwithstanding the EAJA's limitation of the attorney fee rate to $125 per hour under 5 U.S.C. § 504(b)(1)(A). CKY contends the enhanced legal fees should be awarded due to the complex nature of this litigation. The EAJA provision applicable to litigation before administrative agencies, such as the Board, permits the assessment of attorney fees greater than $125 per hour only if an agency regulation provides for it. 5 U.S.C. § 504(b)(1)(A); *K&K Industries, Inc.,* ASBCA No. 61189, 19-1 BCA ¶ 37,353 at 181,628-29. As of the date of this decision, the Department of Defense has issued no such regulation. Consequently, we possess no authority to award enhanced fees. CKY's hourly attorney fee rate will be limited to $125 per hour per the statutory limit.

ii. Request for Paralegal Fees

Appellant's EAJA fee application includes certain charges for a paralegal at rates of $170 and $180 an hour.[3] CKY included a Supplemental Declaration from Mr. Islam Ahmad in its Reply declaring the prevailing hourly market rate for paralegals in the Sacramento, California area is $180 (app. reply ex. 6). The government contends paralegal expenses are recoverable at the law firm's cost and not at the paralegal's billing rates (gov't opp'n at 29). Appellant is correct that paralegal expenses under EAJA are recovered at prevailing market rates and not cost. *Richlin Sec. Serv. Co. v. Chertoff,* 553 U.S. 571, 581 (2008); *States Roofing Corp.*, ASBCA No. 55505, 11-1 BCA ¶ 34,668 at 170,780. As discussed above, however, the EAJA limits attorney fee awards before this Board to $125. The term "attorney fees" in the EAJA includes both paralegal services, as well as compensation for attorneys. *Richlin* at 581. As such, CKY's claim for its paralegal fees is also limited to $125 per hour.

iii. Request for Expert Fees and Expenses

The government also challenges the $16,400.28 for expert consulting services appellant included in its fee application (gov't opp'n at 30-31). The government contends appellant's use of an expert was unnecessary in this case because it chose not to use an expert and the Board's decision did not reference the expert's report or

[3] Appellant indicates Ms. Sharon Brazell was the only paralegal and/or legal assistant to work on this appeal, and the only non-attorney that submitted time entries (app. reply at 14). Appellant's EAJA fee application includes numerous entries for Ms. Brazell that are billed at the rate of $170 to $180 per hour (app. EAJA application at ex. D).

testimony in its decision (i*d*. at 30). The government further contends the expert's hourly rate is limited by the applicable law (*id*. at 30-31).

The government's decision not to use an expert in its case and the fact that the Board's opinion on entitlement did not cite to the expert's report or testimony is not dispositive as to whether the expert's fees and expenses should be allowed as part of the EAJA application. Appellant decided it needed an expert witness in order to prevail in its case. We will not second guess that decision. It is difficult, however, to distinguish the expert's time spent on appellant's unsuccessful high river claim versus the successful undisclosed culverts claim. For the reasons discussed above, we therefore apply the same 50% recovery percentage to the expert's billable hours to reflect CKY's achieved overall results (60 hours x 50% = 30 hours).

The government is correct in its contention that the expert's hourly rate should be limited. The EAJA limits the allowable expert witness fees to the highest hourly rate fixed for government GS-15 employees. *See* 5 U.S.C. § 504(b)(1)(A) and DFARS 237.104(f)(i); *States Roofing Corp.*, ASBCA No. 55505, 11-1 BCA ¶ 34,668 at 170,781; *Techplan Corp.,* ASBCA No. 41470 *et al.*, 98-2 BCA ¶ 29,954 at 148,226-27. As the government notes in its opposition, the GS-15 Step 10 hourly base salary in 2018 was $65.48 (gov't opp'n at 31). Thus, the maximum allowable recovery for Mr. Sill's expert witness fees is $1,964.40 ($65.48 times 30 hours of allowable hours). In addition, CKY is entitled to 50% of the expert's billed $400.28 in expenses or $200.14 resulting in a total expert witness award of $2,164.54.

iv. Lay Witness Travel and Lodging Costs

Finally, CKY includes lay witness travel and lodging expenses in the amount of $3,014.58 in its EAJA application (app. EAJA application at ex. D at 42-49). We have consistently held that lay witness fees and expenses are generally not reimbursable. *See K&K Industries, Inc.*, 19-1 BCA ¶ 37,353 at 181,629; *Optimum Servs.*, ASBCA Nos. 58755, 59952, 17-1 BCA ¶ 36,816 at 179,433. Moreover, CKY did not respond to the Government's argument in its reply, apparently abandoning this request. We thus deny the $3,014.58 request for lay witness travel and lodging fees.

SUMMARY

We grant applicant's request for attorney's fees and expenses under the Equal Access to Justice Act to the extent indicated herein and summarized below.

Attorney/Paralegal Fees (333.25 hours at $125 per hour)	$41,656.25
Attorney/Paralegal Expenses ($33,063.82 less $3,014.58 x 50%)	$15,024.62
Expert Fees (30 hours at $65.48)	$ 1,964.40
Expert Expenses ($400.28 x.50%)	$ 200.14
TOTAL AWARD	$58,845.41

CONCLUSION

CKY is awarded $58,845.41 in fees and other expenses under EAJA.

Dated: February 15, 2023

ARTHUR M. TAYLOR
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
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 in ASBCA No. 60451-EAJA, Appeal of CKY Inc., rendered in conformance with the Board's Charter.

Dated: February 15, 2023

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals