Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

DENIED: September 15, 2000

GSBCA 15165-C(14066, et al.)

AMERICAN SHEET METAL CORPORATION,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Guilford D. Ware and Donald C. Schultz of Crenshaw, Ware & Martin, P.L.C., Norfolk, VA, counsel for Applicant.

Robert C. Smith, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **NEILL**, **WILLIAMS**, and **GOODMAN**.

WILLIAMS, Board Judge.

This is an application for costs under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1994 & Supp. IV 1998). Applicant, American Sheet Metal Corporation (ASMC), seeks attorney fees, expert fees, and costs incurred in the prosecution of its appeals challenging its termination for default, assessment of excess reprocurement costs, and liquidated damages imposed by the General Services Administration (GSA). In the underlying appeal, the Board converted the termination for default to a termination for convenience, denied excess reprocurement costs and liquidated damages, and dismissed without prejudice appellant's claims for monies due for labor and materials furnished prior to termination. The appeal was granted because respondent did not meet its evidentiary burden of proving the propriety of the termination. American Sheet Metal Corp. v. General Services Administration, GSBCA 14066, et al., 99-1 BCA ¶ 30,329, at 149,975, 149,992. In particular, the Board concluded that GSA did not meet its burden of proving that the contracting officer reasonably determined that ASMC would not complete the work prior to the extended completion date. We deny the application for costs, finding that the Government's position was substantially justified.

Background

ASMC had a contract to replace the roof on the Norfolk, Virginia, Federal Building. The original schedule called for commencement of work on June 15, 1996, completion of the eighth floor roof by July 22, and the entire job by September 27. The work did not go smoothly. In July 1996 the Government inspector discovered that ASMC had mistakenly installed sixty-four squares of composite board insulation upside down on the eighth floor roof. 99-1 BCA at 149,978. This was eventually remedied by a corrective solution which entailed placing an additional layer of membrane on the roof. The Government was willing to accept this solution so long as the manufacturer of the roofing system provided a warranty. Id. at 149,978-79. On August 7, ASMC left the job to complete another job and did not return until September 5. Id. at 149,979. Although the Government was aware at the outset that ASMC would be off the job for approximately two weeks, bad weather caused ASMC to remain off the job for approximately a month. In addition, there was unusually adverse weather that summer.

On August 5, ASMC requested a twenty-nine day extension for bad weather, and GSA gave it an eighteen day extension, moving the contract completion date to October 15. On September 20, 1996, the Government sent ASMC a cure notice notifying ASMC that the contract would be in default for failure to comply with ASMC's progress schedule, inability to finish the contract by the September 27 completion date, and the incorrect installation of a large portion of the roof. GSA stated that unless these conditions were cured within seven days, the Government "may terminate for default." This cure notice was not received by appellant until September 27. In response to the cure notice, ASMC accelerated its efforts. 99-1 BCA at 149,983.

By modification dated September 30, 1996, the completion date was extended to October 15, 1996. Meanwhile, ASMC had advised GSA that it would complete the eighth floor by October 15, begin the second floor roof by October 16, and take approximately two weeks on this portion of the project. 99-1 BCA at 149,984. Weather delays between September 28 and October 2 required yet another revised schedule, which called for completion of the eighth floor by October 17 and the remaining work by October 31.

On October 10, ASMC again submitted a revised schedule showing a completion date of October 20 for the eighth floor but keeping October 31 as the overall completion date. 99-1 BCA at 149,982. On October 10, the contracting officer sent ASMC a letter granting it an additional five days to complete the eighth floor but not expressly addressing a deadline for overall completion. Id. A modification extended completion until October 21 for the eighth floor only. Id..

Meanwhile on October 10, the contracting officer made preliminary plans with a reprocurement contractor to take over the work. The contracting officer had contacted a manufacturer with a different roofing system from the one ASMC had been installing, a system by Soprema which called for a three-ply roof instead of the two-ply Siplast roof.

By letter dated October 18, 1996, GSA terminated ASMC's contract for default effective immediately, for insufficient progress, finding the project to be only about 61% complete. Appellant's Exhibit 70; Appeal File, Exhibit 30.

However, the Government measured appellant's progress by counting the number of squares of roof installed. 99-1 BCA at 149,986. The COTR admitted that counting squares was a "clumsy way to mark the progress of the contract," because it assumed a uniform amount of labor, material, and effort to install a single square over the entire job, when in reality it took longer to install squares around the cooling tower and flashing work was far more labor intensive. Id. In ASMC's project manager's view the entire job was 70% complete at the time of termination. Id. at 24.

GSA did not conduct a new procurement for the roof completion, but modified an indefinite quantity term contract for roofing repairs in Baltimore, Maryland, to include this roof. 99-1 BCA at 149,988. Subsequently, GSA decided to remove and replace the eighth floor roof which ASMC had installed because water was detected as a result of a test cut, the parapet height was low, and there was ponding water on the corridor roof, tearing at the drains, and too severe a slope. Another reason for the tearoff was the raised insulation due to the corrective solution on the sixty-four squares which caused the flashing height to be reduced. We found, however, that these problems had not been proven to be of ASMC's making.

Discussion

The Equal Access to Justice Act provides for payment of fees and expenses incurred by a private party in litigation with the Government where the private party prevails and the position of the Government is not substantially justified. 5 U.S.C. § 504. The Act provides that:

> [a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1).

The Government does not dispute that ASMC is a prevailing party and otherwise would qualify for an EAJA award based on its size and income. The issue in this case is whether the Government's position was substantially justified. The Supreme Court has held that the phrase "substantially justified" means justified to a degree that could satisfy a reasonable person and is equivalent to "having a reasonable basis in law and fact." Pierce v. Underwood, 487 U.S. 552 (1988). When a party has prevailed in litigation against the Government, the Government bears the burden of establishing that its position was substantially justified. Doty v. United States, 71 F.3d 384, 385 (Fed. Cir. 1995). Further, both the Government's prelitigation, administrative conduct, as well as its litigation conduct, must be examined in ascertaining whether its position was substantially justified. Doty, 71 F.3d at 386.

Our appellate authority, the United States Court of Appeals for the Federal Circuit, has explained the substantial justification standard as follows:

> Notwithstanding that in this court substantial justification under the EAJA requires that the government's position be "clearly reasonable," a conclusion on the underlying merits that its actions were unreasonable because unsupported by substantial evidence or not in accordance with law . . . is not the end of the inquiry. "[T]he EAJA was not intended to be an automatic fee-shifting device in cases where the petitioner prevails. . . . [S]ubstantial justification is to be decided case-by-case on the basis of the record." Gavette [v. Office of Personnel Management], 808 F.2d [1456,] at 1467 [Fed.Cir. 1986) (in banc)]. "The mere fact that the United States lost the case does not show that its position in defending the case was not substantially justified." Broad Ave. Laundry & Tailoring v. United States, 693 F.2d 1387, 1391 (Fed. Cir. 1982). The decision on an award of attorney fees is a judgment independent of the result on the merits, and is reached by examination of the government's position and conduct through the EAJA "prism," Federal Election Comm'n v. Rose, 806 F.2d 1081, 1090 (D.C. Cir. 1986), not by redundantly applying whatever substantive rules governed the underlying case.

Luciano Pisoni Fabbrica Accessori v. United States, 837 F.2d 465, 467 (Fed. Cir.), cert. denied, 488 U.S. 819 (1988); see Foremost Mechanical Systems, Inc. v. General Services Administration, GSBCA 14645-C(13584), 99-1 BCA ¶ 30,352, at 150,103-04 ("The Government's position is substantially justified when issues involve close evidentiary questions, and the proper application of the governing legal principles is not clear until after the record is fully developed.").

In reviewing GSA's termination for default here, the Board focused primarily on the fact that the termination was for ASMC's failure to make progress with diligence that would ensure completion within the time specified in the contract extension. The Board relied on Lisbon Contractors v. United States, 828 F.2d 759, 765 (Fed. Cir. 1987), where the United States Court of Appeals for the Federal Circuit held that the Government must establish that the contracting officer "reasonably determined that there was no reasonable likelihood that the contractor could perform the entire contract effort within the time remaining." We noted that when a determination of the extent of a contractor's diligence in performing turns in part on the percentage of progress achieved, "the method of calculation of that percentage takes on obvious importance." The Board concluded that GSA's methodology for calculating appellant's progress here was "incomplete and inadequate because it was based solely upon counting the number of squares of roofing membrane installed." The Board pointed out that GSA's estimate of completion did not include labor-intensive flashing work, asbestos abatement, or the recognition that not all areas were equally difficult or time consuming to reroof. The Board concluded that "the weight of the evidence" suggested that there was a reasonable likelihood that appellant could have completed the eighth floor by October 21.

The default termination in this case was based upon a prediction of whether a contractor could complete the work within the allotted time or not. Such a judgment call is necessarily subjective and not a precise determination. Although the Board concluded that

completion of the eighth floor roof by October 21 "was within reach" for ASMC, this is not to say that the Government's conclusion to the contrary and its termination for default were without justification. Although we disagree with the Government's methodology used to measure performance as overly simplistic, there is nonetheless not insignificant evidence supporting the decision to terminate, which renders the Government's conclusion substantially justified. For example, there is evidence that the contracting officer reasonably lacked confidence in the ability of this contractor to complete the job on time. There had been numerous time extensions, performance problems, and in the contracting officer's view, insufficient progress during a time which should have been a time of considerable acceleration.

In sum, we view the propriety of the termination for default as a close evidentiary case. In the Board's decision, the Board referred to "the weight of the evidence" and respondent's failure to meet its burden of proof. The Board was cognizant that there was evidence which supported the Government's decision but found there was more evidence, including evidence garnered after the fact, which rendered the Government's conclusion that appellant could not have finished the eighth floor by October 21 and the job by October 31 less than "solid." This case is similar to Shipco General, Inc., ASBCA 29942, et al., 87-2 BCA ¶ 19,877, where the Armed Services Board of Contract Appeals found the Government's position substantially justified, reasoning that "the Government's doubts that appellant would be able to complete the contract in a timely manner were understandable, albeit insufficient to sustain its burden for terminating the contract for failure to make progress." Id. at 30,172; accord Harry and Keith Mertz Construction, Inc., AGBCA 97-183-10, 98-1 BCA ¶ 29,380 ("In resolving a close evidentiary question, the Board will find the Government substantially justified.").

The Government has also established that it was substantially justified in hiring a reprocurement contractor and replacing the eighth floor roof. There is evidence not only that it was reasonable for the Government to doubt ASMC's ability to complete the work on time, but also that it was reasonable to hire a replacement contractor as soon as possible. The record supports a conclusion that the Government was concerned with completing the roof as quickly as possible, and the reprocurement contractor estimated that it could complete the job in twelve days. Further, GSA had an ongoing indefinite quantity contract for roof repairs with that contractor, thus streamlining the reprocurement process.

Appellant further argues that GSA's subsequent decision to remove the eighth floor roof was not substantially justified. Appellant's Supplemental Memorandum of Law in Support of Application for Fees and Costs at 4-5. Appellant contends that this decision was contrary to an infrared survey and the opinions of a Government inspector and GSA's own expert. However, the decision to tear off the eighth floor roof was made during the reprocurement contract, well after the survey and receipt of these opinions. Further, this decision was based on the conclusion of respondent's independent expert that that roof was faulty based upon subsequent information, i.e., water was detected as the result of a test cut, the parapet height was low, and there was ponding water on the corridor roof, tearing at the drains, too severe a slope, and a reduced flashing height. We conclude that respondent's reliance on its independent expert was supported by evidence and was reasonable.

Decision

Although the Government failed to sustain its burden of proving the termination for default was warranted for failure to make progress, it nonetheless was substantially justified in taking that action based upon the complete evidence of record. The Government's position in this case, both administratively and in this litigation, was substantially justified. The cost application is **DENIED**.

MARY ELLEN COSTER WILLIAMS
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

ALLAN H. GOODMAN
Board Judge