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

GRANTED IN PART: May 9, 2001

GSBCA 15479-C(14765)

McTEAGUE CONSTRUCTION CO., INC.,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

L. Wesley Nichols, P.A., Palm Beach Gardens, FL, counsel for Appellant.

Kevin J. Rice, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **DeGRAFF**.

DANIELS, Board Judge.

McTeague Construction Company, Inc. (McTeague) has applied for an award of attorney fees and other costs it incurred in prosecuting an appeal of a decision by a General Services Administration (GSA) contracting officer. The decision granted in part claims made by McTeague under an indefinite quantity contract for building repairs in three Florida counties.

We grant the application in part.

Background

In the underlying case, McTeague asked the Board to grant it $141,496.09 in compensation for work allegedly performed but not paid for in conjunction with thirteen delivery orders which were issued under the contract, as well as two additional invoices. McTeague Construction Co. v. General Services Administration, GSBCA 14765, 01-1 BCA ¶ 31,203 (2000).

McTeague submitted all but one of its claims to the contracting officer on April 3, 1998. McTeague, 01-1 BCA at 154,051. By July 27, 1998, the contracting officer had not yet issued a decision on the claims, and McTeague petitioned the Board to direct her to make one. Appellant's Exhibit 7 (GSBCA 14765). During August and September 1998, the parties discussed settlement of the claims filed by McTeague and came to a resolution which narrowed the outstanding issues. Neither party honored the agreement, however. Id. at 154,055. McTeague submitted an additional claim on October 2, 1998. Id. at 154,051. On November 3, 1998, the contracting officer issued a decision on all of the claims which had been submitted to her. Id. McTeague appealed this decision to the Board on November 18, 1998. Notice of Appeal (GSBCA 14765).

Settlement negotiations began again in November 1999 and continued through February 2000. These negotiations were fruitless, however. Respondent's Memorandum in Opposition to Appellant's Application for Fees and Costs (Respondent's Opposition) at 2. A hearing was held in the case on April 25 and 26, 2000. Transcript (GSBCA 14765).

Following the hearing, the parties again discussed settlement. On May 31, 2000, GSA offered McTeague $60,000 to settle the appeal. McTeague rejected that offer; it held out for $80,000, interest on that sum, and reimbursement of attorney fees and costs. Respondent's Opposition at 2, Exhibits A, B. Posthearing briefs were filed on July 28, 2000, and reply briefs on September 1, 2000.

The Board's decision was issued on December 6, 2000. In it, we found that the contractor was entitled to some additional compensation on all but one of the delivery orders in question. Due in large part to a lack of documentation as to the amount of damages, however, we awarded only $39,678.41 -- about twenty-eight percent of the total sought.

Discussion

McTeague asks the Board to grant it attorney fees and costs pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1994 & Supp. V 1999). The Act establishes several requirements for eligibility for recovery. The applicant must:

(1) have been a prevailing party in a proceeding against the United States;

(2) if a corporation, have had not more than $7,000,000 in net worth and five hundred employees at the time the adversary adjudication was initiated;

(3) submit its application within thirty days of a final disposition in the adjudication;

(4) in that application, (a) show that it has met the requirements as to having prevailed and size (numbers (1) and (2) above) and (b) state the amount sought and include an itemized statement of costs and attorney fees; and

(5) allege that the position of the agency was not substantially justified.

Id. § 504(a)(1), (2), (b)(1)(B); see Doty v. United States, 71 F.3d 384, 385 (Fed. Cir. 1995); DRC Corp. v. Department of Commerce, GSBCA 15172-C(14919-COM), 00-1 BCA ¶ 30,841, at 152,226. GSA does not dispute, and we find, that McTeague meets all of these requirements and is consequently eligible for an award of fees under the EAJA.

Eligibility for award is not enough to secure the amount sought, however. The agency which defended the contractor's appeal may defeat an application by persuading the adjudicative officer that the position of the agency was substantially justified or that special circumstances make an award unjust. 5 U.S.C. § 504(a)(1). GSA has attempted to defeat McTeague's application by persuading us that the agency's position was substantially justified.

As to a contention of substantial justification, we explained in DRC Corp.:

> The Supreme Court has held that the adjudicator should ask, when confronted with this defense, whether the agency's position was "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988). Under this standard, the trier of the case must determine whether the Government's position had a reasonable basis in both law and fact. Chiu v. United States, 948 F.2d 711, 715 (Fed. Cir. 1991); see also Ramcor Services Group[, Inc. v. United States], 185 F.3d [1286,] 1290 [(Fed. Cir. 1999)]; Ace Services, Inc. v. General Services Administration, GSBCA 12067-C(11331), 93-2 BCA ¶ 25,727, at 128,012. The burden is on the Government to show that its position was substantially justified. Doty v. United States, 71 F.3d 384, 385 (Fed. Cir. 1995); Community Heating & Plumbing Co. v. Garrett, 2 F.3d 1143, 1145 (Fed. Cir. 1993); Hospital Healthcare Systems, Inc. v. Department of the Treasury, GSBCA 14719-C(14442-TD), 99-1 BCA ¶ 30,282, at 149,785.

00-1 BCA at 152,227.

GSA contends that its resistance to paying McTeague the sums claimed was substantially justified because "McTeague never presented any credible evidence that it was entitled to the bulk of the money which it sought. In sum, as the Board twice noted, it was McTeague's burden to present such evidence and for the most part, it failed to do so." Respondent's Opposition at 4.

We agree with McTeague that these facts do not establish that GSA's position throughout its consideration of the claims and during the litigation was substantially justified. Although a contractor's failure to secure through litigation the bulk of the money it seeks is a factor to be considered in determining whether an agency's position was substantially justified, see DRC Corp., 00-1 BCA at 152,228, it is not by itself dispositive of the issue. We believe, based on the record as a whole, that GSA's denial of virtually all payment on McTeague's claims was not substantially justified. The contractor demonstrated entitlement to some recovery on almost every claim, and although its proof of damages was not as strong as might have resulted in a greater award, it was sufficient to justify the award which was made. There is no evidence that this proof, or something like it, was unavailable to GSA at

any time.[1] The purpose of the EAJA is "to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." ROI Investments v. General Services Administration, GSBCA 15488-C(15037-C)-REIN, slip op. at 3 (Mar. 14, 2001) (quoting Commissioner, Immigration & Naturalization Service v. Jean, 496 U.S. 154, 163 (1990)). In our judgment, GSA's near-wholesale denial of the claims was not substantially justified.

There remain two issues raised by GSA for us to resolve: First, should the agency's settlement offers have any impact on the amount of attorney fees and costs we grant to McTeague? Second, should the contractor's partial success on the merits of the underlying case have any impact on that amount?

As related in the Background section of this opinion, settlement discussions occurred at three separate times. The first two -- in August and September of 1998 and from November 1999 through February 2000 -- came to naught. We therefore cannot imagine why the settlement discussions at either of these times should have any impact on the award of attorney fees and costs.

The third installment of settlement discussions, on the other hand, has a material impact. On May 31, 2000 -- after the hearing in this case, but before posthearing briefs and reply briefs were drafted -- GSA offered McTeague $60,000 to settle the case. This amount evidently included recovery on the claims, interest on that amount, and attorney fees and costs. The contractor rejected the offer; the Board consequently had to resolve the disputes. We ultimately awarded McTeague about $40,000. At the time of the offer, interest which had accrued on that $40,000 was about $5,000. See 64 Fed. Reg. 71,851 (Dec. 22, 1999); 64 Fed. Reg. 36,068 (July 2, 1999); 63 Fed. Reg. 72,346 (Dec. 31, 1998); 63 Fed. Reg. 35,645 (June 30, 1998); 62 Fed. Reg. 68,356 (Dec. 31, 1997) (setting forth interest rates applicable to Contract Disputes Act claims during relevant periods of time). Thus, the offer turned out to include about $15,000 for attorney fees and costs. The actual amount of such fees and costs which had accrued by the date of the offer was $20,836.57.[2]

---

[1]GSA suggests that evidence as to some of the claims, in the form of testimony of subcontractor employee Michael Terango, was presented for the first time at hearing. Respondent's Opposition at 7. As McTeague points out, however, Mr. Terango participated in the September 1, 1998, settlement conference, where he joined in a lengthy discussion of issues in which he was involved, and he was at all times available to GSA for questioning. Appellant's Response to GSA's Memorandum in Opposition at 2, 5.

[2]We have calculated this amount from the documentation McTeague supplied with its cost application. The amount is based on a valuation of attorney time at $125 per hour, although McTeague's counsel actually charged more than that. The contractor recognizes, however, that under the EAJA, "attorney . . . fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys . . . for the proceedings involved, justifies a higher fee." 5 U.S.C. § 504(b)(1)(A) (Supp. V 1999). McTeague used the $125 figure in its application and prudently did not suggest that a higher figure was justified.

In Marek v. Chesny, 473 U.S. 1 (1985), the Supreme Court limited recovery of costs under a fee-shifting statute. The Court explained, "In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff -- although technically the prevailing party -- has not received any monetary benefits from the postoffer services of his attorney." Recovery for the costs resulting from those services was therefore denied. Id. at 11. We have followed the common-sense principle of Marek by holding, in EAJA cases, that "if, after a certain point in time, the Government's position on the issues involved in a case becomes substantially justified, reimbursement of costs incurred by the contractor in prosecuting the case further is not appropriate." ROI Investments, slip op. at 11 (citing Universal Development Corp. v. General Services Administration, GSBCA 12174-C(11251), 93-2 BCA ¶ 25,836). Our fellow boards of contract appeals have adhered to this principle as well. Marino Construction Co., VABCA 2752E, 92-2 BCA ¶ 25,015, at 124,688 (1991); Kos Kam, Inc., ASBCA 34684, 88-3 BCA ¶ 21,049, at 106,322. Although Marek involved application of the offer of judgment rule contained in Federal Rule of Civil Procedure 68 and the boards do not have similar rules, the rationale for the Court's decision is the same as our motivation for limiting cost recovery: to induce settlement and avoid protracted litigation, parties should not be rewarded for spending money needlessly. See Northern Virginia Service Corp. v. Department of the Treasury, GSBCA 12872-C(11760-TD), 95-2 BCA ¶ 27,781, at 138,545 n.1.

In the instant case, we could find reasonable that McTeague received monetary benefit by rejecting GSA's final settlement offer of $60,000, and proceeding with the litigation, only if we thought that the contractor merited an award of more than $15,000 of the nearly $21,000 in costs potentially recoverable under EAJA at the time the offer was made. Whether such an award is appropriate is the subject we take up next, in analyzing the second issue GSA asks us to resolve: Should the contractor's partial success on the merits of the underlying case have any impact on the amount to be granted?

The answer to this question is in the affirmative. The "results obtained" factor is important in fashioning an award, and is "particularly crucial where a plaintiff is deemed 'prevailing' even though he succeeded on only some of his claims for relief." Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). Generally, where claims involve a common core of facts or are based on related legal theories, it is appropriate to focus on the significance of the overall relief obtained, and where claims are unrelated, costs expended in pursuit of the unsuccessful claim may be excluded from recovery. Id. at 434-35. Where these guideposts cannot be followed, a tribunal may exercise its discretion simply to reduce the award to account for limited success. Id. at 436-37.

The last option is the only one that is feasible here. The case involved fifteen different claims, most of which had numerous elements. Although McTeague secured through litigation some recovery on almost every claim, it prevailed on only a fraction of the elements. Some issues were common to more than one claim (or element), but most were not. In short, the case caused the parties and the Board to focus on a myriad of diverse, small issues which generally had in common little more than the parties who quarreled about them. In this situation, to arrive at an appropriate award amount, we simply multiply the documented costs incurred by the contractor's percentage of success.

To determine whether McTeague received any monetary benefit by rejecting GSA's final settlement offer, we consider now the documented costs incurred up to the date of that offer: attorney fees of $16,000 (at $125 per hour); paralegal fees of $3,543; and costs of $1,293.57 for items such as the hearing transcript, courier service, and copies of documents. These figures sum to $20,836.57. The contractor's percentage of success was twenty-eight percent of the claimed amount. Multiplying $20,836.57 by twenty-eight percent yields $5,834.24. If we round this figure to $6,000, and add it to the roughly $40,000 to which the Board found the contractor entitled and the $5,000 or so in interest accrued by the date of the offer, we see that an accurate estimate of McTeague's total recovery as of that date was $51,000. We conclude that by rejecting GSA's offer of $60,000, McTeague acted to its detriment. The costs it incurred in pursuing litigation after the date of the offer did not secure any benefit; to the contrary, the money was unwisely spent. We therefore deny recovery of attorney fees and costs incurred after that date.

Decision

McTeague's application for costs is **GRANTED IN PART**. We award to the contractor the sum of $6,000.

_____
STEPHEN M. DANIELS
Board Judge

We concur:

_____
ANTHONY S. BORWICK
Board Judge

_____
MARTHA H. DeGRAFF
Board Judge