UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

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DENIED: November 28, 2017

CBCA 5739-C(5517)

DREAM MANAGEMENT, INC.,

Applicant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Timothy Sullivan and Jayna Marie Rust of Thompson Coburn LLP, Washington, DC, counsel for Applicant.

Kasey Podzius and Gabriel E. Kennon, Office of the Principal Legal Advisor, Immigration and Customs Enforcement, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **GOODMAN**, and **RUSSELL**.

BEARDSLEY, Board Judge.

On October 17, 2016, Dream Management, Inc. (DMI) appealed the denial of its claim for costs in performing a language interpretation services contract for the Department of Homeland Security, Immigration and Customs Enforcement (ICE). The Board granted the appeal, in part, in the amount of $17,079. *Dream Management, Inc. v. Department of Homeland Security*, CBCA 5517, 17-1 BCA¶ 36,716. In connection with the appeal, DMI filed an application seeking an award of fees and other expenses in the amount of $29,315.09, under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2012). DMI

stated that the application amount covers fees for three attorneys and one paralegal totaling $24,900, as well as $4415.09 in costs related to printing, meals, transcription services, and courier services. DMI incurred the fees and costs claimed on or after October 5, 2016, the date of the contracting officer's final decision.

ICE opposes DMI's application, arguing that the agency's position was substantially justified because the agency prevailed on most of DMI's claim and DMI prolonged the resolution of the dispute by rejecting the agency's settlement offer, an offer that was higher than the Board's award. The agency points to the fact that DMI's primary argument before the appeal was filed was that the agency breached the contract when it failed to order a guaranteed minimum from an indefinite delivery, indefinite quantity (IDIQ) task order. In its claim, DMI only mentioned in passing that the agency's actions could also be considered a constructive termination for the convenience of the Government. ICE also argues that DMI's recovery only equaled 15% of the highest amount claimed. DMI ultimately sought damages for breach of contract in the amount of $114,169.56, or termination for convenience damages in the amount of $62,001.04.

The Board, however, rejected the theory that the contract was an IDIQ task order with a guaranteed minimum that the agency breached, finding instead that the contract was a time and materials task order with no guaranteed minimum that had been terminated for the convenience of the Government.

Prior to the issuance of the contracting officer's final decision, the parties engaged in settlement discussions. ICE offered to "offset a portion of the costs [DMI] incurred preparing for service" in the amount of $31,189.51. DMI made a counteroffer to the agency in the amount of $54,000. Without further settlement discussion, the contracting officer issued his final decision denying DMI's claim on the basis that the contract was a time and materials contract, and DMI did not provide any services to the government. ICE did offer, however, to pay DMI $100, the guaranteed minimum in the federal supply schedule (FSS) contract pursuant to which the task order was issued.

DMI argues that (1) the agency's position was not substantially justified because it only awarded $100 in its final decision; (2) ICE asserted that the modification canceling DMI's contract was not a termination for the convenience of the Government; and (3) ICE was, in essence, punishing DMI for not accepting the agency's settlement agreement. Moreover, DMI argues that the fact that the agency misled DMI as to its actual needs for translation services rendered the agency's position unjustified.

While the Board found that the agency erroneously estimated the number of base hours expected, the Board also found that there was no negligent estimate or breach of

contract of the time and materials task order. The Board also did not decide whether the $100 minimum in the FSS contract applied to the task order. Ultimately, the Board awarded a prorated amount of the costs incurred by DMI as a result of the agency's termination of the contract for its convenience. The Board did not award DMI general and administrative (G&A) costs and profit. It also did not award DMI costs incurred in setting up the translation line or costs incurred in seeking resolution of the dispute, finding that those costs were not substantiated.

Discussion

The parties do not dispute that DMI meets EAJA's eligibility requirements for businesses. Specifically, at the time of filing its application, DMI did not exceed $7,000,000 in net worth or employ over 500 employees. Additionally, the underlying case reached a final, unreviewable decision. Therefore, we find that DMI meets the statutory criteria for eligibility under EAJA.

After meeting the prerequisites to an application, the Board may award reasonable fees and other expenses after determining: (1) the applicant is the prevailing party; (2) the agency's position was not substantially justified; (3) the applicant did not unduly and unreasonably protract a final resolution; and (4) no special circumstances make the award unjust. 5 U.S.C. § 504.

Prevailing Party

The Board may only award reasonable fees and other expenses if the applicant is a prevailing party. An applicant is a prevailing party if it received an enforceable judgment on the merits that created "a material alteration of the parties' legal relationship." *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 605–06 (2001); *see also Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (Fed. Cir. 2002) (applying *Buckhannon* to government contracts). To prevail, a party must be "successful on any significant issue in the litigation that achieves some of the benefit sought." *Allen Ballew General Contractor, Inc. v. Department of Veterans Affairs*, CBCA 3-C(VABCA 6987E), et al., 07-2 BCA ¶ 33,653, at 166,635 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

The Board granted DMI's appeal, in part, and awarded DMI $17,079 in damages. Despite the fact that DMI prevailed on only one of the two claims before the Board, and the amount recovered was 15% of the highest amount sought, "[a] judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would

not pay." *Farrar v. Hobby*, 506 U.S. 103, 113 (1992); *see Neal & Co. v. United States*, 121 F.3d 683, 685 (Fed. Cir. 1997) (party prevailed though it recovered only 11.5% of claim); *N&P Construction Co.*, VABCA 3283E, et al., 93-3 BCA ¶ 26,257, at 130,593 (party prevailed though it recovered only 2% of relief sought). DMI successfully recovered a portion of the benefit it sought, making it a prevailing party for purposes of EAJA.

Substantially Justified

As a prevailing party, DMI may recover reasonable fees, unless the position of the agency was substantially justified. 5 U.S.C. §504(a)(1). The agency can avoid the imposition of an applicant's reasonable attorney fees by demonstrating that its position had "a reasonable basis in law and fact to a degree that could satisfy a reasonable person." *Allen Ballew General Contractor, Inc.*, 07-2 BCA at 166,636 (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)).

The agency has the burden to prove the reasonableness of its position. 5 U.S.C. § 504(b)(1)(E)*; Allen Ballew General Contractor, Inc.*, 07-2 BCA at 166,636 (citing *Helfer v. West*, 174 F.3d 1332, 1336 (Fed. Cir. 1999)). The Board must 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). A favorable case outcome for the agency may be indicative, but not definitive, of whether the position of the agency was substantially justified. *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988) ("[A] position can be justified even though it is not correct, and we believe 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."). Further, the Board may consider the extent to which a party prevailed on its claim. *See DRC Corp. v. Department of Commerce*, GSBCA 15172-C(14919-COM), 00-1 BCA ¶ 30,841, at 152,228 (finding that the fact that the appellant recovered only 21% of the amount sought was an indicator that the agency's position was substantially justified (citing *Atlas Construction Co. v. General Services Administration,* GSBCA 11088-C(8653) et al., 92-2 BCA ¶ 24,944, at 124,329)).

The agency's decision to contest DMI's claims was substantially justified. Both in its claim and during the litigation before the Board, DMI primarily asserted its entitlement to damages based on a theory of breach of contract of an IDIQ task order with a guaranteed minimum. The agency, however, contested this legal theory, and the Board agreed. DMI only secondarily asserted that it was entitled to termination for convenience damages, the basis for the Board's ultimate award. Thus, ICE's decision to challenge DMI's primary legal theory was reasonable.

The damages claimed by DMI were excessive, lacked support, and included dollar amounts for items not awarded by the Board (G&A, profit, performance costs, and costs incurred in seeking a dispute resolution). Given the damages claimed, ICE was substantially justified in its decision to litigate the claim. *See Omni Development Corp. v Department of Agriculture*, CBCA 609-C (AGBCA 97-203-1), et al., 07-2 BCA ¶ 33,699 (finding that the agency's position was substantially justified because, among other reasons, the damages sought lacked support and were excessive); *ROI Investments v. General Services Administration*, GSBCA 15488-C(15037-C)-REIN, 01-1 BCA ¶ 31,352, at 154,826 (finding that a failure of proof creates an adequate basis for the contracting officer to reduce or deny amounts claimed, and an agency's defense of the contracting officer's determination is substantially justified (citing *Foremost Mechanical Systems, Inc. v. General Services Administration*, GSBCA 14645-C(13584), 99-1 BCA ¶ 30,352, at 150,105)). Moreover, DMI recovered only a small portion of the damages sought. The amount ultimately awarded, $17,079, was 15% of the amount claimed for breach of contract or 27.5% of the amount claimed for termination for convenience damages. Such an award disproportionate to the amount claimed indicates that the agency's position was substantially justified. *Atlas Construction Co. v. General Services Administration*, GSBCA 11088-C(8653), et al., 92-2 BCA ¶ 24,944., at 124,329.

A third basis that justified the agency's decision to litigate was DMI's refusal to accept a settlement offer that was higher than the amount awarded by the Board. *Systems Integration & Management, Inc. v. General Services Administration*, CBCA 3815-C(1512), et al., 15-1 BCA ¶ 35,886, at 175,442 (denying recovery of all costs incurred by the contractor after a settlement offer was made and rejected, even though the amount awarded was "a bit more than" the amount offered in settlement); *McTeague Construction Co. v. General Services Administration*, GSBCA 15479-C(14765), 01-2 BCA ¶ 31,462, at 155,335, *motion for reconsideration denied*, 01-2 BCA ¶ 31,526 (denying recovery of attorney fees and costs incurred after appellant rejected a settlement offer); *see also Freedom NY, Inc.*, ASBCA 55466, 09-1 BCA ¶ 34,031, at 168,331 (2008) (denying EAJA fees and expenses incurred after applicant rejected two favorable settlement offers and continued to litigate); *AST Anlagen-und Sanierungstechnik GmbH*, ASBCA 42118, 93-3 BCA ¶ 25,979, at 129,182 (reducing EAJA fees after considering the amount awarded, claims on which applicant did not prevail, and the applicant's unreasonable rejection of agency's prehearing settlement offer). "Costs associated with actions unduly prolonging the litigation are not appropriate for an award under EAJA." *Michael C. Lam v. General Services Administration*, CBCA 1472-C(1213), 09-2 BCA ¶ 34,227, at 169,117 (citing *Universal Development Corp. v. General Services Administration*, GSBCA No. 12174-C(11251), 93-2 BCA ¶ 25,836, at 128,584). ICE's attempt to settle the case for more than awarded and DMI's rejection of the settlement offer prolonged the final resolution of the matter and further justified ICE's position going forward.

Given the conclusion that the agency's position in defending against DMI's claims was substantially justified, we deny the request to recover under EAJA any fees or costs claimed.

Decision

The EAJA application is **DENIED**.

ERICA S. BEARDSLEY
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

BEVERLY M. RUSSELL
Board Judge