UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: November 9, 2023

CBCA 7187-C(5089, 5619)

MICHAEL JOHNSON LOGGING,

Applicant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Joseph Scuderi of Scuderi Law Offices, P.S., Olympia, WA, counsel for Applicant.

Benjamin R. Hartman, Office of the General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent.

Before Board Judges **SHERIDAN**, **ZISCHKAU**, and **O'ROURKE**.

O'ROURKE, Board Judge.

Applicant, Michael Johnson Logging (MJL), filed an application under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2018), seeking attorney fees and costs in the amount of $203,575.16. We grant the application in the amount of $10,632.48, having determined that only a portion of the United States Department of Agriculture's (USDA or agency) position was not substantially justified.

Background

The Board presumes familiarity with the facts of *Michael Johnson Logging v. Department of Agriculture*, CBCA 5089, et al., 21-1 BCA ¶ 37,904, *aff'd sub nom. Michael Johnson Logging v. Secretary of Agriculture*, No. 2022-1210, 2022 WL 17494846 (Fed. Cir.

Dec. 8, 2022). The Board found "that Johnson failed to establish that USDA breached the implied duty of good faith and fair dealing in its administration of the contract, precluding any recovery for lost productivity, performance suspensions, use of inadequate skid trails, and equipment damage." *Id.* at 184,080. But the Board also found "that USDA did breach certain express terms of the contract and, therefore, grant[ed] in part Johnson's claim in CBCA 5089 and award[ed] damages in the amount of $89,425." *Id.*

On August 13, 2021, MJL filed a premature request for attorney fees and costs under EAJA after the Board partially granted its appeal. On August 16, 2021, the matter was docketed as CBCA 7187-C(5089, 5619). On August 25, 2021, the Board issued an order deferring action on the application until the time to seek appellate review of the Board's decision in the underlying appeals had expired. MJL subsequently appealed the Board's decision to the Court of Appeals for the Federal Circuit, and on December 8, 2022, the Court affirmed the Board's decision. MJL's request for attorney fees and costs is now ripe for consideration.

In addition to its application, MJL attached Exhibit A, titled "Detail Transaction File List." Exhibit A is a detailed report showing fees and costs in the total amount of $203,575.16. The report categorized expenses according to transaction date, initials of the person doing the task, rate, hours to bill, amount, and a brief description of the task.

On April 7, 2023, USDA filed an objection to applicant's fee and cost application. USDA argued that (1) MJL's application is facially inadequate; (2) the agency's position was substantially justified; (3) even if the agency's position was not substantially justified, the Board should disallow expenses that (a) were incurred outside the appropriate time frame, (b) exceed the statutory cap on hourly rates, (c) were incurred performing work not relevant to the sole issue on which MJL prevailed, or (d) lack adequate documentation to support an award; and (4) any award should be reduced proportionate to MJL's limited success.

On May 5, 2023, the Board issued an order asking MJL to submit additional briefing detailing the requested fees, such as which charges relate to each claim and element of the case. On June 5, 2023, MJL submitted a supplemental application for attorney fees and costs in a total amount of $9780.69, arguing that an 8% prorate should be applied to total billable hours and costs because MJL's recovery was 8% of the dollar value of its claims.

On June 7, 2023, USDA submitted a reply in which it argued that (1) MJL still failed to refute USDA's argument that it was substantially justified to contest the company's $1,112,417 claim and (2) even if the agency was not substantially justified, MJL had failed to cure deficiencies relating to disallowed costs in its application.

Discussion

The purpose of EAJA is "to eliminate legal expense as a barrier to challenges of unreasonable governmental action." *Ellis v. United States*, 711 F.2d 1571, 1576 (Fed. Cir. 1983). To recover under EAJA, an 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) 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. 5 U.S.C. § 504(a)(1), (2), (b)(1)(B); *Paradise Pillow, Inc. v. General Services Administration*, CBCA 5237-C(3562), 17-1 BCA ¶ 36,628, at 178,366; *see also Doty v. United States*, 71 F.3d 384, 385 (Fed. Cir. 1995); *Russell Sand & Gravel Co. v. International Boundary & Water Commission*, CBCA 3781-C(2235), 14-1 BCA ¶ 35,615, at 174,443.

Even if the applicant meets all of these eligibility requirements, the agency may defeat the 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)(l). "EAJA is not a mandatory fee-shifting device." *RAMCOR Services Group, Inc. v. United States*, 185 F.3d 1286, 1290 (Fed. Cir. 1999). We analyze MJL's EAJA claim in light of the foregoing requirements.

First, MJL was a prevailing party in a suit against the United States. A party is considered to have "prevailed" for EAJA purposes if it "succeed[s] on any significant issue in litigation which achieves some of the benefit [it] sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). "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). Our award of $89,425 to MJL made it a prevailing party. *See, e.g.*, *Neal & Co. v. United States*, 121 F.3d 683, 685 (Fed. Cir. 1997) (party "prevailed" even 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 the relief sought).

Second, MJL met the size limitations for eligibility for recovery. While MJL failed to show that it met the size limitations in its initial application, MJL supplemented its application with a declaration of Mr. Michael Johnson showing its compliance with the size limitations. The Court of Appeals for the Federal Circuit has held that while the statute's time limitation for filing "should be strictly met, the content of the EAJA application should be accorded some flexibility." *Bazalo v. West*, 150 F.3d 1380, 1383 (Fed. Cir. 1998); *see also DRC Corp. v. Department of Commerce*, 00-1 BCA ¶ 30,841, at 152,227 ("Consistent

with these decisions, we hold that when an EAJA application is timely filed, eligibility requirements may be shown through amendment within a reasonable period of time—as long as the amendment does not prejudice the Government."). Affording MJL some flexibility, we find that Mr. Johnson's declaration is sufficient to establish that MJL met the size limitations for eligibility.

Third, MJL submitted its cost application in a timely, albeit premature, manner. As we stated in our August 25, 2021, order, MJL submitted its application before the time to seek appellate review had expired, thus making the application premature under our rules. We deferred further action on the application until after this time had expired, and the application is now timely.

Fourth, MJL included a statement that it is seeking $203,575.16 in fees and costs which were identified in an itemized accounting.

Fifth, MJL asserted that the agency was not substantially justified in its decision to challenge the claims. The agency argues that MJL has failed to allege that the position of the agency was not substantially justified, and, therefore, the EAJA application is facially inadequate. However, in his declaration, Mr. Johnson asserted that "Ms. Carlson [the contracting officer] made [MJL's] ability to perform this job timely and profitably impossible." Declaration of Michael Johnson (June 5, 2023). In light of this statement and the contracting officer's miscalculation of the cost of the time extension during performance, which was only remedied after MJL's claim submission, we find that Mr. Johnson's declaration sufficiently asserts MJL's position that the agency was not substantially justified in challenging MJL's claims. *DRC Corp.*, 00-1 BCA at 152,227.

It is well settled that once an applicant establishes it is a prevailing party, "the burden shifts to the Government to show that its litigating position was 'substantially justified.'" *Ramcor*, 185 F.3d at 1288. "The test for whether the government's position during the dispute was substantially justified is whether that position was reasonable." *Metric Construction Co. v. United States*, 83 Fed. Cl. 446, 449 (2008) (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)).

We look to several factors to determine whether the agency was substantially justified in contesting MJL's claim. In past cases we have looked to whether the contractor enunciated the theory on the basis of which the Board granted relief, which party's positions on the issues presented were successful, whether the Government has forced the applicant to litigate to obtain some relief, whether the Government's overall conduct was unjustified when administering the contract, and what percentage of the amount claimed was actually recovered by the applicant. *See, e.g.*, *DRC Corp.*, 00-1 BCA at 152,227–28; *Dream Management*, *Inc. v. Department of Homeland Security*, CBCA 5739-C(5517), 17-1 BCA

¶ 36,916, at 179,861; *Vet4U, LLC v. Department of Veterans Affairs*, CBCA 6612-C(5387), 20-1 BCA ¶ 37,504, at 182,187–88.

USDA argues that we should consider its position on the appeal as a whole, citing to *Crockett Facilities Services, Inc. v. General Services Administration*, CBCA 4470-C(3772), 15-1 BCA ¶ 36,080, at 176,177 (citing *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991)). In *Chiu*, the Federal Circuit instructed tribunals "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*, 948 F.2d at 715. This holding does not limit a tribunal's ability to look at each issue contained within a claim to see whether the Government's overall conduct on that issue was substantially justified. *See, e.g.*, *Staff, Inc.*, AGBCA 98-152-10, 99-1 BCA ¶ 30,260, at 149,643. In fact, the Supreme Court has held that once a litigant has met all of the eligibility conditions for fees, tribunals have the "discretion to adjust the amount of fees for various portions of the litigation, guided by reason and the statutory criteria." *Immigration & Naturalization Service v. Jean*, 496 U.S. 154, 165 (1990).

We must, therefore, decide whether USDA was substantially justified in challenging the two primary issues in the underlying appeal: a breach of the implied duty of good faith and fair dealing and an express breach of the contract.

Good Faith and Fair Dealing

We determine that USDA's decision to litigate MJL's claim for a breach of the doctrine of good faith and fair dealing was substantially justified. The Board adopted USDA's overall position on the good faith and fair dealing claim. MJL recovered nothing under this portion of its claim, and there are no facts in the current record to suggest that USDA's conduct in deciding to challenge MJL's claim was not substantially justified. Therefore, MJL cannot receive fees and costs incurred related to this issue.

Express Breach

We determine that USDA's decision to litigate MJL's claim for the express breach was not substantially justified. As we noted in our decision, USDA's miscalculation of the contract extension deposits was not a mere administrative error but rather a gross miscalculation resulting in an express breach of the contract. Consequently, we find that charging a fee of more than 6000% above what the contract required was a patent error that caused MJL to incur litigation costs to redress the same, and, as such, the agency's position with respect to that issue was not substantially justified.

As USDA was not justified in its conduct surrounding its express breach, MJL may recover fees related to litigating USDA's express breach of the contract. Since the agency's breach also impacted CBCA 5619, which we decided in favor of applicant, we further find that the agency's position in CBCA 5619 was not substantially justified. We therefore allow MJL to recover costs related to that appeal. The Supreme Court has been clear that the amount of fees and expenses awarded must be commensurate with the degree of success obtained. *Hensley*, 461 U.S. at 435–36. Both parties agree that any award should be limited to 8% of the total eligible fees and costs, to match MJL's 8% recovery on its total claim. However, this recovery percentage fails to consider MJL's additional success in CBCA 5619 against a government claim for $21,551.86. Taking this amount into consideration, the total amount in claims from both parties before the Board was $1,133,968.86. MJL achieved success on $110,976.86 of the claims, representing a 9.8% success. Therefore, MJL is eligible to receive 9.8% of the total eligible fees and costs.

The parties further disagree on the amount of total eligible fees and costs. MJL argues that all fees and costs identified in Exhibit A (totaling 672.3 billable hours and $38,215.16 in costs, for a total of $203,575.16) are eligible for recovery under EAJA. According to USDA, Exhibit A includes several fees and costs that are *ineligible* for recovery. USDA takes issue with the following categories: fees and costs incurred before the contracting officer's final decision (COFD) on November 6, 2015; fees and costs incurred after the Government's offer of judgment (OOJ) on October 23, 2018; fees billed by "OLD" without explanation as to who OLD was, whether this person was an attorney, or why OLD billed at three different rates; fees billed by JEC without adequate explanation as to what was performed; expert costs that relate to the portion of the claim on which MJL did not have success; and various other expenses that are unsupported (e.g., postage, copies, travel, court reporter, Lexis Nexus expenses, and requests under the Freedom of Information Act (FOIA)).

"The starting point for calculating recoverable costs in an EAJA claim is the date of the contracting officer's final decision." *Vet4U, LLC*, 20-1 BCA at 182,188–89 (citing *TST Tallahassee, LLC v. Department of Veterans Affairs*, CBCA 2472-C(1576), 12-1 BCA ¶ 35,037, at 172,152 (2011)). Therefore, the forty-eight billable hours and $295.50 in costs that were incurred before the COFD on November 6, 2015, are non-recoverable.

Additionally, EAJA provides that the adjudicative officer may "reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy." 5 U.S.C. § 504(a)(3). In order to determine whether the contractor prolonged the litigation, we look to the amount the party ultimately recovered and the amount of the Government's OOJ to see if the party acted to its own detriment. *See, e.g.*, *McTeague Construction Co. v. General Services Administration*, GSBCA 15479-C(14765), 01-2 BCA ¶ 31,462, at 155,335; *Systems Integration and Management, Inc.*

v. General Services Administration, CBCA 3815-C(1512), et al., 15-1 BCA ¶ 35,886, at 175,442–43. On October 23, 2018, the Government offered MJL $90,000 to settle both appeals using the following language: "The Government offers to allow judgment to be taken against it by Michael Johnson Logging in the lump sum amount of $90,000.00, which includes all costs, fees, and interest incurred up until this point." Ultimately, the Board awarded MJL $89,425. At first glance, MJL's rejection of the OOJ appears detrimental, as the amount of the rejected offer exceeds the ultimate damages award. However, the OOJ was all inclusive and did not separately account for costs and attorney fees that MJL incurred in pursuit of its claims. Federal Rule of Civil Procedure (FRCP) 68 is instructive here, providing that, "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Fed. R. Civ. P. 68(d). For a lump-sum offer of judgment to be more favorable, it must be greater than the sum of the actual damages plus recoverable pre-offer attorney fees and litigation costs. *JP ex rel. Peterson v. County School Board of Hanover County*, *Virginia*, 641 F. Supp. 2d 499, 508 (E.D. Va. 2009). In this case, the actual damages award plus recoverable costs and fees incurred up until the date of the offer exceeded the agency's lump-sum offer, making MJL's rejection of the offer reasonable. Thus, MJL's rejection of the OOJ does not affect or limit its entitlement to costs and fees incurred after October 23, 2018 (the offer date).

We also find MJL's costs of experts to be recoverable. As we are applying a recovery rate of 9.8% across all eligible costs to account for some costs covering both aspects of MJL's claim, we do not need documentation specifying which portions of the claim the experts worked on. Under this method, we only need assurance that the experts were working on this case in order for their costs to be eligible before the deduction is applied, else we would be double-discounting MJL's incurred costs. We have received such assurance through the declarations that MJL provided with its application. This logic extends to the costs of the FOIA requests included by MJL in its costs.

With regard to the rates of MJL's experts, USDA urges us to limit their rates to the highest rate USDA paid its own expert in this case, $65 per hour. EAJA provides that "no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved." 5 U.S.C. § 504(b)(1)(A); *see, e.g.*, *LabMD, Inc. v. Federal Trade Commission*, No. 1:19-mi-00071-WEJ, 2019 WL 11502794, at *22 (N.D. Ga. Oct. 1, 2019). Mr. Penderson's rate was $225 per hour and Mr. Zapel's rate was $125 per hour. The highest expert rate paid by the agency was Ms. Christine Anderson's at $65 per hour. Mr. Zapel's costs therefore shall be reduced from $11,965.06 to $6221.83, and Mr. Penderson's costs shall be reduced from $12,567.35 to $3630.57.

Regarding hours billed by "OLD," we determine that there is sufficient information contained in Exhibit A and the declarations of Mr. John E. Cushman and Ms. Elizabeth

Cushman to determine that these billable hours were related to the litigation at hand. However, MJL has failed to provide us with any documentation to identify whether OLD was a paralegal, intern, or attorney. Based on our review of the tasks undertaken by OLD, we determine that OLD was at least a paralegal and had a market rate of $125 per hour applied to 75% of OLD's hours (242.9 of 323.6 billable hours). As this amount does not exceed the statutory maximum, and MJL has not alleged any special circumstances to increase it, we cap OLD's hours at this rate. As to USDA's concerns about various other costs and JEC's billable hours, we find that the declarations attached to MJL's application are sufficient to tie these costs to the case at hand.

In conclusion, we find the total eligible costs to be $23,239.65 and the total eligible fees to be (1) 298.7 billable hours attributable to attorneys JEC and JWS and (2) 323.6 billable hours for paralegal OLD. Applying the regulatory maximum ($150 per hour) to the attorneys,[1] and applying OLD's rate as described above ($125 per hour), we find that the total eligible fees are $85,255, bringing the total eligible fees and costs to $108,494.65. Applying a 9.8% recovery rate, we find that MJL is entitled to $10,632.48 in costs and fees. The Board concludes that this award is commensurate with MJL's litigation efforts and the degree of recovery achieved in these appeals. *See Wagner v. Shinseki*, 640 F.3d 1255, 1260–61 (Fed. Cir. 2011).

Decision

The cost application is **GRANTED IN PART**. MJL is awarded fees and costs in the amount of $10,632.48.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

We concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

[1] While EAJA has a statutory cap of $125 per hour unless otherwise authorized, USDA's regulations raise that cap to $150 per hour. 7 CFR 1.186(b) (2022).