UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: October 25, 2023

CBCA 7858-C(5997, 6464)

SBC ARCHWAY HELENA, LLC,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Diana Parks and Hadeel N. Masseoud of Curran Legal Services Group, Inc., Johns Creek, GA, counsel for Applicant.

Justin S. Hawkins, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **KULLBERG**, and **CHADWICK**.

VERGILIO, Board Judge.

The applicant, SBC Archway Helena, LLC, timely seeks to recover attorney fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2018), following the Board's decision granting in part its appeals. *SBC Archway Helena LLC v. General Services Administration*, CBCA 5997, 6464, 23-1 BCA ¶ 38,298. The General Services Administration (agency) requests that the Board deny relief, asserting that the applicant was not a prevailing party and that the agency's positions at the agency level and throughout the course of litigation were reasonable and substantially justified. Further, the agency contends

that the applicant has failed to support its costs, particularly that it has not associated any costs with alleged improper agency actions and inactions.

The Board concludes that the applicant was the prevailing party, as it obtained some of the relief sought. The agency's position was not substantially justified. Throughout, the agency maintained that the applicant was entitled to zero relief. Its position that the applicant simply sought lost rent was inconsistent with the claims and the complaint. Its position that the applicant was responsible for delay for the entire period asserted was not factually supportable or reasonable. The agency's actions and inactions clearly were the cause of a delayed issuance of the notice to proceed such that the applicant could not move ahead with construction and begin receiving rent. On the application, the Board reduces the requested recovery initially to actual, potentially compensable costs and then further to reflect reasonable costs for the benefit achieved, which was substantially less than the amount in the claims and the complaint.

Background

On January 4, 2018, the applicant, as lessor, received the initial decision by a contracting officer, who found the applicant responsible for all asserted delay and denied the claim. In the underlying appeals, the applicant initially sought its uncompensated costs said to be $276,871.95, later modified to $349,714.31, and finally changed to $395,474.58, ultimately based on 277 days of alleged Government delays for two distinct periods of 234 and forty-three days. Throughout (during performance, in response to the claims, and before the Board), the agency asserted that the applicant was entitled to no relief because it was seeking rent and because it was responsible for the delay (a concurrent or sole cause of delay). In denying an agency motion for summary judgment, the Board determined that the applicant was not seeking rent; on the merits, the applicant was to recover for 138 days of Government delay (that is, without concurrent delay by the applicant) during the first period and no relief for the second period. Various costs were factually and/or legally not proven or available. The applicant received $59,215.29, plus interest. The amount (pre-interest) is just under fifteen percent of the quantum and just under one-half of the delay days sought in the final claim.

The applicant seeks $95,096.15: $83,811.25 in legal fees capped at $125 per hour (the maximum rate of recovery) and $11,284.90 in expenses. The applicant provided accountings of its legal billings, identifying the general work performed, the hours and rates billed, and the expenses incurred. The applicant seeks payment for 299.07 hours for the managing partner and 371.43 hours for an associate of the law firm.

The expenses are itemized with receipts or explanations. The expenses include $578.60 for plane tickets to attend the scheduled hearing on the merits; however, the hearing

was held virtually. The itemization specifies that the airline provided a credit to the accounts. The record does not establish that the credit was lost or is a true cost of the applicant.

The record fails to support some of the hours claimed as compensable under the application. Hours expended in 2017, prior to receipt of the denial of the initial claim are at least 37.03 (invoices 11066, 11127, 11157). Hours expended after the record closed and prior to issuance of the opinion did not further the resolution of the dispute. Those hours are 2.37 (invoices 755 and 790). Although the application seeks payment for 55.77 hours referencing invoice 1361, which reflects work principally regarding the application, the invoice charges only for 1.17 hours. The difference, 54.6 hours, does not reflect a cost to the applicant; however, the applicant seeks payment for the uncharged hours.

The agency mentions none of the above, as it alleges only one basis to question the costs: namely, that the applicant claims its costs were increased by improper motions and actions and inactions of the agency but the applicant fails to specify time or dollars attributable to the same. The allegation is correct. The applicant identifies no hours as having been incurred for what the applicant deems an improper action or inaction by the agency. The applicant makes much of the agency not entering into a stipulation under which the applicant sought agreement that the Government solely was responsible for 277 days of delay. The submissions do not indicate even tentative agreement by the agency to enter into such an agreement. Of relevance, the agency's decision not to enter into the proposed stipulation was ultimately sound, given that the panel found the agency liable for 138, not 277, days.

From the outset, but particularly without the stipulation it sought to obtain, the applicant should have reconsidered its pursuit of relief for the two delay periods. It demonstrated agency liability for a portion of the first period and no agency liability for the second period. The applicant expended efforts on this and other unsuccessful aspects of its claims. Various of the claimed costs were not available factually or legally. The record does not detail time spent on each aspect. Such detail is not required. However, the applicant has not demonstrated that it should be compensated for all of its costs given the significant aspects of its unsuccessful pursuits. Counsel for the applicant expended unquantified effort on submissions with vitriolic commentary not useful to the resolution of the disputes.

Based on the above, of the 670.49 (= 299.06 + 371.43) hours sought, we deduct 94 (= 37.03 + 2.37 + 54.6) hours to get 576.49 hours expended as potentially compensable in pursuit of the appeals. Expenses, adjusted for the plane tickets, are $10,706.30.

Discussion

The applicant, with a timely application, satisfies the net worth and employee size requirements of EAJA. Recoverable costs under EAJA begin on the date the applicant received the contracting officer's decision and are limited to allowable rates. *Vet4U, LLC v. Department of Veterans Affairs*, CBCA 6612-C(5387), 20-1 BCA ¶ 37,504, at 182,188-89.

In opposing compensation, the agency notes that the relief the applicant obtained on appeal is much closer to the dollar amount of the agency's position (zero relief) than to the applicant's claims and complaint. The agency contends that it, not the applicant, is the prevailing party, in asking the Board to apply a definition of "prevailing party" similar to that used for eminent domain cases. In an eminent domain proceeding case relied upon by the agency, the "prevailing party" is "the party whose highest trial valuation of the property is closest to the final judgment." *United States v. 515 Granby, LLC*, 736 F.3d 309, 314 (4th Cir. 2013) (citing 28 U.S.C. § 2412(d)(2)(H)). In its proposed comparison, the agency utilizes the incorrect test for a "prevailing party." This underlying appeal was not an eminent domain proceeding. Regarding EAJA cases similar to this, the United States Supreme Court has stated that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The applicant obtained monetary relief for its delay claims; it succeeded on a significant issue while the agency opposed any relief. The applicant prevailed in the underlying cases.

EAJA specifies that "[w]hether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought." 5 U.S.C. § 504(a)(1). Further, statute defines the phrase "position of the agency" to mean:

> in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings[.]

Id. § 504(b)(1)(E). Given these directives, the analysis of the reasonableness of the agency's position looks beyond the actions of the agency during the appeal and considers the actions and inactions prior to the appeal being filed. This language distinguishes analysis under EAJA contract appeal disputes from those for EAJA patent disputes under 28 U.S.C. § 1498(a). *Hitkansut LLC v. United States*, 958 F.3d 1162, 1166-67 (Fed. Cir. 2020) (lacking a definition of "position of the United States," the Court looked to the plain meaning of the

phrase to focus only on the position taken by the Government in the adversary adjudication, not the prior period).

Because of Government delays, the applicant incurred costs prior to receipt of rent for a period longer than without the delays. It should have been clear to the agency that there was Government liability. However, the agency asserts that its position was substantially justified throughout the course of the dispute, prior to the contracting officer's decisions and thereafter. Factually, the record does not support the agency's position. It maintained that the applicant fully was liable for the entire delay period. That position is not supported, particularly when an active contracting officer was absent from decision making at critical times during performance, such as when the applicant was seeking determinations to move forward toward design agreement, to receive a notice to proceed, and to obtain other approvals. Legally, to conclude that the agency was liable for no day of delay, the agency would have had to establish that the applicant's actions and inactions caused the delay for the entire period. Without such facts being plausible on the record, the agency has failed to establish that its position was substantially justified. Separately, the agency's repeated assertion that the applicant simply sought rental payments was not true factually and relied upon a misreading of the claims and cases cited by the agency to support its position.

The Board concludes that the agency is liable for attorney fees and expenses; its position was not substantially justified. The applicant achieved limited success. The applicant made no accounting for concurrent delay in the first period sought and established no delay for the second period. Many costs it sought were not available factually or legally. Consistent with *Hensley*, 461 U.S. 440 ("We hold that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award . . . . But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.") and *Hubbard v. United States*, 480 F.3d 1327, 1333-34 (Fed. Cir. 2007) (a nuanced approach, that considers the results achieved, is part of the determination of the reasonableness of fees awarded), we award 60% of the costs sought for compensable hours and all of the compensable expenses. *See also Ringgold v. Department of Agriculture*, CBCA 5772-C(5259), 17-1 BCA ¶ 36,793, at 179,334-35 (recognizing "special circumstances" exception to limit recovery); *CKY, Inc.*, ASBCA 60451-EAJA, 23-1 BCA ¶ 38,310, at 186,016 (board limits recovery to reflect limited success, while recognizing that the contractor vindicated its contractual rights). This recognizes that many of the hours could have been eliminated or refocused and reduced to address more plausible relief, while there is no indication that the expenses necessarily would have been lessened. Accordingly, the applicant is to recover $43,236.75 (= 576.49 x $125 x 0.60) in fees and $10,706.30 in expenses.

Decision

The Board **GRANTS IN PART** the application. The applicant is to recover $53,943.05.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

We concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge