UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: March 29, 2024

CBCA 7857-C(5964)

HUGHES GROUP LLC,

Applicant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Robert A. Klimek, Jr. of Klimek & Casale, P.C., Upper Marlboro, MD, counsel for Applicant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Bend, OR, counsel for Respondent.

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

O'ROURKE, Board Judge.

Applicant, Hughes Group LLC (Hughes), filed an application under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2018), seeking $149,201.50 in attorney fees and $8532.12 in costs, for a total of $157,733.62. These expenses relate to Hughes' appeal of the decision of respondent, Department of Veterans Affairs (VA or agency), to terminate Hughes' contract for cause. Because we find that Hughes met the statutory qualifications for award and the agency's position was not substantially justified, we grant Hughes' application in the amount of $68,237.97. We deny the remainder of Hughes' application because we find that Hughes unduly and unreasonably protracted final resolution of the dispute.

Background

The Board assumes familiarity with the facts of *Hughes Group LLC v. Department of Veterans Affairs*, CBCA 5964, 23-1 BCA ¶ 38,297, in which the Board granted Hughes' appeal of the agency's termination for cause and converted it to a termination for the convenience of the Government. Hughes timely filed an application for attorney fees and costs under EAJA. Submitted with Hughes' application were exhibits detailing attorney fees and costs incurred by two law firms, Klimek & Casale, P.C. (K&C) and Edward Bentley, Esq. (Bentley), which Hughes retained to represent it in the litigation before the Board. The accompanying exhibits included an itemized report from K&C of attorney fees for Robert Klimek, Jr., at the EAJA rate of $125 per hour for a total of $64,787.50; an itemized list of appeal-related costs from K&C in the amount of $8532.12; and a record of payments to Bentley totaling $84,414 for invoiced work at Bentley's rate of $120 per hour.

Notwithstanding the Board's decision on the merits, the VA objected to any EAJA award, arguing that the agency's litigation position was substantially justified and Hughes' refusal to engage in settlement discussions significantly prolonged the litigation. In addition, the agency pointed to Hughes' poor performance during the life of the contract to support its position during the litigation. The agency also identified six instances where the VA invited Hughes to negotiate or pursue Board-assisted mediation, beginning as far back as December 2017, and occurring as late as January 29, 2021. In each instance, the VA said it was willing to convert the termination for cause into a termination for convenience, but Hughes declined to negotiate a settlement and even questioned the utility of mediating—a posture that resulted in protracted and costly litigation. This, the VA insists, amounted to a self-inflicted wound that warrants denial of the requested costs and fees.

Hughes maintains that refusing to settle was a business decision and that a formal settlement offer was not presented by the VA until January 29, 2021. The offer itself, says Hughes, was unacceptable because the VA agreed to convert the termination "at no cost to the Government whatsoever for past or future, direct or indirect costs to include attorneys' fees or any costs that could be sought under a termination for convenience cost proposal." Hughes argues that accepting that offer would have precluded any termination settlement proposal, as well as attorney fees and any potential claims stemming from the Changes clause of the original contract.

There is no evidence in the record that Hughes made a counteroffer to the VA's formal settlement offer or submitted any requests to the Board pursuant to Rule 54, 48 CFR 6101.54 (2023) (alternative dispute resolution), to secure a more favorable settlement. During status conferences with the parties to address escalating discovery disputes, the Board raised concerns about the time and expense of litigation in light of the strong potential for a negotiated settlement agreement, especially since Hughes' contract was terminated so close

to its originally scheduled expiration date. In response to these entreaties, Hughes expressed its intention to depose the contracting officer a second time, file a summary judgment motion, and revise and resubmit to the contracting officer multiple, previously submitted requests for equitable adjustment (REAs).[1]

The Board cautioned Hughes, during a December 2, 2020, status conference, that insufficient time remained in the schedule to fully brief and decide a summary judgment motion prior to the March 2, 2021, hearing date. Undeterred, Hughes filed a 106-page summary judgment motion on December 28, 2020, asserting ten different supporting arguments, several of which involved patent factual disputes. Hughes commented that it was common practice for parties to file such motions at the conclusion of discovery. That same day, Hughes served its first set of interrogatories on the VA and its third set of requests for production of documents.

During a conference call on February 1, 2021, Hughes explained that the REAs were the reason why Hughes had been hesitant to engage in mediation. Upon hearing about the forthcoming REAs, the VA was not dissuaded from mediation. The VA responded, "if the parties are going to settle the appeal, all items relating to the contract, to include any REAs, had to be addressed together, rather than a piece-meal approach." The Board further explained to Hughes that even though the REAs were not part of this appeal proceeding, the parties were free to address the REAs, and any other matters, in mediation. Despite these reassurances, Hughes remained steadfast in its position against mediation.

The dispute proceeded to a hearing and the Board issued a decision on the merits. The Board granted the appeal and converted the termination for cause into a termination for the convenience of the Government. The agency did not appeal the decision. Hughes subsequently filed this application for the costs and fees it incurred defending against the termination.

Discussion

To successfully recover under EAJA, an applicant must:

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

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[1] The record contains eight conference memorandums issued by the Board during the course of the underlying dispute. These memorandums provide a summary of the issues discussed during the parties' status conferences with the Board.

> (2) if a corporation, have not more than $7,000,000 in net worth and five hundred employees at the time the adversarial adjudication was initiated;
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> (3) submit its application within thirty days of a final disposition in the adjudication;
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> (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.

Paradise Pillow, Inc. v. General Services Administration, CBCA 5237-C(3562), 17-1 BCA ¶ 36,628, at 178,365-66 (citing 5 U.S.C. § 504(a)(1), (2), (b)(1)(B)). In reviewing Hughes' application, we find that Hughes meets all of the eligibility requirements under EAJA.[2] Eligibility alone, however, is insufficient to recover litigation expenses. An agency may successfully argue that its position during the litigation was substantially justified or that the award should be reduced because the applicant unduly prolonged litigation. 5 U.S.C. § 504(a)(l), (3). Here, the VA advanced both of these arguments, which we evaluate below.

Substantial Justification

Once an applicant has fulfilled the statutory requirements under EAJA, the burden shifts to the agency to show that its position was substantially "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988), *quoted in Greenhill v. United States*, 96 Fed. Cl. 771, 776 (2011). "Whether 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)(l); *see Chiu v. United States*, 948 F.2d 711, 714-15 (Fed. Cir. 1991).

An inquiry into whether the Government was substantially justified extends beyond its legal stance during litigation and includes factors such as the degree of success achieved by the contractor in the underlying dispute, whether the Government forced the contractor to litigate to obtain relief, and whether the Government's conduct during contract administration was unjust or unreasonable. *See Michael Johnson Logging v. Department of*

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[2] Hughes filed a correction to its application stating it inadvertently omitted the fact that Hughes had less than 500 employees when the application was filed. The correction included the required declaration.

Agriculture, CBCA 7187-C(5089, et al.), 23-1 BCA ¶ 38,460, at 186,938 (citing *Vet4U, LLC v. Department of Veterans Affairs*, CBCA 6612-C(5387), 20-1 BCA ¶ 37,504, at 182,187-88; *Dream Management, Inc. v. Department of Homeland Security*, CBCA 5739-C(5517), 17-1 BCA ¶ 36,916, at 179,861; *DRC Corp. v. Department of Commerce*, GSBCA 15172-C(14919-COM), 00-1 BCA ¶ 30,841, at 152,227-28). These three factors provide a framework for analyzing whether the VA was substantially justified in the underlying dispute.

The first factor we consider is the degree of success that Hughes achieved in its appeal of the termination for cause, which was based on Hughes' poor performance of the contract. Hughes requested, and was granted, a termination for convenience. Notwithstanding that result, the VA makes the same argument to contest this application. Even if Hughes' performance justified adverse action, the Board found that the termination for cause was legally deficient. Proffering the same failed argument here will not defeat an EAJA award. "The Government has been cautioned about the folly of simply rearguing the merits of its case as a defense to an EAJA application." *Allen Ballew General Contractor, Inc. v. Department of Veterans Affairs*, CBCA 3-C(VABCA 6987E), et al., 07-2 BCA ¶ 33,653, at 166,636 (citing *Data Enterprises of the Northwest v. General Services Administration*, GSBCA 16536-C(15607), 05-1 BCA ¶ 32,968; *David Boland, Inc.*, VABCA 5858E, et al., 03-1 BCA ¶ 32,170). Hughes was fully successful in the underlying dispute. The VA did not appeal the result.

The second factor we consider is whether Hughes had to litigate to obtain relief. Our predecessor Board found that "when the contractor is entitled to some relief and the Government forces that contractor to litigate to obtain the relief . . . the position of the Government is deemed to be *not* substantially justified." *Universal Development Corp. v. General Services Administration*, GSBCA 12174-C(11251), 93-2 BCA ¶ 25,836, at 128,585 (emphasis added) (citing *Gilroy-Sims & Associates v. General Services Administration*, GSBCA 11778-C(8720, et al.), 93-1 BCA ¶ 25,547 (1992)). Here, with the severest of sanctions asserted against it, Hughes was forced to appeal the termination for cause in order to obtain relief.

As to the third factor, the VA's conduct during contract administration, we observed in our termination decision that the VA gave Hughes numerous opportunities to correct deficient work, which Hughes repeatedly failed to do. However, instead of taking deductions from Hughes for those deficiencies—as the contract permitted it to do—the VA stopped paying Hughes altogether. Hughes continued to work for nearly three months without compensation, a course of conduct by the VA that was not only unreasonable, but also, as the Board found, constituted a breach of contract. One week after fully compensating Hughes for the unpaid work, the VA issued Hughes a defective termination for cause notice which, among other defects, simultaneously terminated the contract *and* directed Hughes to

continue performing for an additional three weeks, which was nearly at the end of the contract period. In an attempt to cure the deficiencies, the VA issued an amended termination for cause notice one day prior to the expiration date of the contract.

No reasonable person would conclude that the VA's conduct in the last four months of the contract was substantially justified. There were other ways to hold Hughes accountable for its poor performance, such as allowing the contract to expire and issuing Hughes an adverse performance rating. Or the VA could have withdrawn the termination notice instead of amending it and then issued an adverse performance rating. By insisting on following through with the termination for cause, however, the agency initiated a course of litigation that was both ineffective and expensive.

Protracted Litigation

The VA's second argument against an EAJA award is that Hughes unnecessarily prolonged the litigation by "rejecting the VA's settlement offers and refusing the VA's requests to mediate." Under EAJA, "[t]he 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); *see Systems Integration & Management, Inc. v. General Services Administration*, CBCA 3815-C(1512), et al., 15-1 BCA ¶ 35,886, at 175,442; *Michael C. Lam v. General Services Administration*, CBCA 1472-C(1213), 09-2 BCA ¶ 34,227, at 169,177.

The VA identified an entry in Hughes' time log showing that the VA contacted Hughes to "seek settlement" on December 13, 2017—less than one week after Hughes appealed the termination decision to the Board. An email between the parties four days later supports this claim but reflects that Hughes was proposing to send the Government a settlement offer. Either way, neither party reveals the terms of the referenced settlement, and Hughes did not pursue it. The record also contains an email, dated January 26, 2021, from the VA to Hughes, stating:

> Several months ago, I received the authority to accept the offer to convert the [termination for default] to a [termination for convenience] in the interest of resolving the litigation.
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> [The Contractor Performance Assessment Reporting System (CPARS)] now states that Hughes was terminated for default but CPARS will be updated and will . . . reflect that the [termination for default] has been converted . . . .

> Please advise Mr. Hughes position as you previously rejected this offer and stated your client was not interested in mediating the case but I believe we were not on the same page about what was meant by mediation.

This offer makes no mention of precluding costs. Since a conversion was all that Hughes could achieve in the litigation before the Board, this offer seemed completely responsive to Hughes' demands.[3] Hughes cautiously responded that it needed to know what the VA wanted in exchange for the conversion. Three days later, the VA clarified its offer. "The Government agrees to covert [sic] the termination for default to a termination for convenience at no cost to the Government whatsoever for past or future, direct or indirect costs to include attorneys' fees and or any costs that could be sought under a termination for convenience cost proposal." The stipulation of having to waive attorney fees and give up the opportunity to submit a termination for convenience cost proposal made the offer unacceptable from Hughes' perspective because it was less than what Hughes could potentially achieve at the Board. A conversion from the Board would open the door to an EAJA application and a termination cost proposal. There was no guarantee that Hughes would prevail in either case, but litigating and winning on the termination issue at least preserved the opportunity for Hughes to submit such claims.

At that time, neither the Board nor the VA knew that Hughes was working on revising and resubmitting REAs that Hughes had presented to the VA in the past. Hughes first disclosed this during the Board's conference call with the parties on February 1, 2021, and said it was the reason that Hughes was hesitant to pursue mediation. Any confusion that Hughes may have had about what issues could be considered during mediation, or presented in a settlement offer, was cleared up during that call when the VA stated, "if the parties are going to settle the appeal, all items relating to the contract, to include any REAs, had to be addressed together, rather than a piece-meal approach."

In case Hughes did not understand, the Board further explained during the call that "even though the REAs were not part of the appeal proceeding, the parties were free to address the REAs, and any other matters in mediation." Indeed, from that day forward, there can be no doubt that Hughes understood that settlement negotiations did *not* exclude other costs and that Hughes had nothing to lose by presenting a counteroffer or pursuing Board-assisted mediation. Despite these clarifications, Hughes continued to pursue litigation and increase its costs. After years of urging by the VA and the Board, Hughes would not even

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[3] The offer to update CPARS did not make this settlement offer better than what Hughes could achieve in litigation, since CPARS could not reflect a termination for cause if the Board were to convert it to a termination for convenience. According to the offer, the VA was not proposing a favorable CPARS rating.

attempt a less costly, more efficient means of resolving the termination. Paying Hughes to sit on its rights and drive up costs is not conduct that merits endorsement. An EAJA award for any amount past the February 1, 2021, conference call would only serve to encourage additional litigation—not efficiently resolve it. Had Hughes presented such a counteroffer and the VA balked at it, that would be a different story.

"The Supreme Court has instructed that the amount of fees to be awarded is a matter for the Board's discretion." *Golden West Environmental Services v. Department of Homeland Security,* DOT BCA 2895A, 05-1 BCA ¶ 32,869, at 162,897 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *Chiu*, 948 F.2d at 713). Hughes may have prevailed at the hearing, but the Board found ample evidence of Hughes' deficient performance throughout the contract—so deficient, in fact, that we noted in our decision that a termination for cause may have been sustained had the VA not improperly withheld payment for three months, thereby breaching the contract and rendering the default decision defective. It was not lost on the Board that Hughes' performance failures led to the litigation in the first place. Instead of dedicating sufficient resources to cure those failures, however, Hughes chose to fund protracted litigation—a choice we decline to ratify through an unrestricted award of fees.

A review of Hughes' EAJA application reflects a Pyrrhic victory. Hughes seeks substantial costs for two law firms to defend against a claim in which the Government had the burden of proof, no experts were required, and no monetary damages were sought by Hughes. The administrative record is replete with conference memorandums and orders from the Board requesting status updates. Some of these can be attributed to the COVID-19 pandemic hindering discovery, but many of them are due to Hughes' own delays, for which it now seeks compensation. On the whole, we find that the administrative record reflects a practice by Hughes of unduly and unreasonably prolonging litigation. Reimbursing Hughes for excessive or unnecessary costs and fees would be unjust and violate the provisions of EAJA. *See* 5 U.S.C. § 504(a)(3), (b)(1)(A). For these reasons, we deny all costs and fees incurred beyond February 1, 2021, which was when the full scope of settlement negotiations was clearly explained to Hughes. We further find that Hughes' "kitchen sink" motion for summary judgment, submitted less than two months before the scheduled hearing date, served no litigation purpose and did not inform the Board's decision. Therefore, costs and fees related to that motion are also denied.

Finally, Hughes seeks fees and costs from two law firms. It is not uncommon for attorneys who have long supported a small business client, but who are unfamiliar with the practice of federal government contracts, to withdraw their appearance and allow their clients to pursue a matter with more specialized counsel. Simply because Hughes retained two firms and incurred costs from both of them does not mandate payment to both. This was not a

complex case. In reviewing itemized lists of costs and fees from both firms, however, we find a reasonable division of the work and no overlapping fees or costs.

EAJA Award

Consistent with the above determinations, we make the following EAJA award to Hughes. For the period between the date of the contracting officer's initial final decision (November 3, 2017) to the date that Hughes clearly understood that mediation and any resulting settlement could include discussions about costs and forthcoming REAs (February 1, 2021), Hughes presents billing records from Klimek totaling 378.3 hours at the $125 EAJA hourly statutory cap. We reduce those hours to 338.4 to account for hours billed beyond that date and for hours that relate to change orders, CPARS, discussions about other contracts that Hughes bid on, the motion for summary judgment (with the exception of some discussions and research very early on in 2017 and 2018), and review of other irrelevant contracts. We apply the EAJA hourly rate of $125 to 338.4 hours, for a total of $42,300. In addition to those attorney fees, we find costs in the amount of $8369.97 to be reasonable since most of those costs relate to production of deposition transcripts and travel related to discovery. The only cost denied was the rental fee for the conference room for the hearing, since the hearing took place after February 1, 2021.

Billing records from Bentley for the same time frame—November 3, 2017, to February 1, 2021—show 392.1 hours, billed at $120 per hour. We subtract from that all costs and fees related to the motion for summary judgment (with the exception of some discussions and research very early in 2017 and 2018) and time related to "coming up to speed" after long periods of dormancy, which reduce the hours to 146.4. We multiply that number by the rate of $120, for a total of $17,568 in attorney fees to Bentley. Based on these totals, we award Hughes $59,868 in attorney fees and costs in the amount of $8369.97, amounting to a total EAJA award of $68,237.97.

Decision

The application is **GRANTED IN PART**. Hughes is awarded fees and costs totaling $68,237.97.

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

We concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge