UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: August 11, 2009

CBCA 1472-C(1213)

MICHAEL C. LAM,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Ray M. Shepard and Azim Chowdhury, Duane Morris LLP, Baltimore, MD, counsel for Applicant.

Gabriel N. Steinberg, Office of Regional Counsel, General Services Administration, Atlanta, GA, counsel for Respondent.

Before Board Judges **SOMERS**, **BORWICK**, and **McCANN**.

BORWICK, Board Judge.

Applicant seeks under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504 (2006), reimbursement of $17,019.09 in expenses as the prevailing party in the case of *Michael C. Lam v. General Services Administration*, CBCA 1213, 09-1 BCA ¶ 34,027 (2008), reconsideration denied, 09-BCA ¶ 34,105. We award applicant $117.72 under EAJA.

Background

The underlying appeal involved a claim of breach of a personal property sales contract. The Federal Emergency Management Agency (FEMA) reported electric meter

boxes as excess property to the General Services Administration (GSA). On October 9, 2007, the GSA placed these items on sale on www.GSAAuctions.gov. On October 16, 2007, applicant was notified by e-mail that he was the winning bidder for the meter boxes. After applicant paid the GSA the bid price, he was given until November 9, 2007, to retrieve the property.

Applicant flew to Florida and rented a truck to pick up the property at a FEMA staging area. When applicant arrived at the FEMA staging area, the items could not be located. The GSA sales contracting officer (SCO) agreed to refund applicant's purchase price, but stated that the reimbursement of travel expenses would be the responsibility of FEMA because the terms of the contract limited applicant to a refund of the purchase price.

Applicant incurred $1719.82 in travel expenses for the trip to Florida and back. On February 29, 2008, after the SCO refunded the purchase price, applicant filed a claim for the travel expenses. On March 12, 2008, the SCO denied the claim, maintaining that applicant was not entitled to reimbursement of his travel costs because the Description Warranty clause of the contract limited damages to a refund of the purchase price.

On June 1, 2008, applicant filed an appeal at the Board, electing the small claims procedure. The Board docketed the appeal on June 6. On or about July 1, respondent notified the Board that the parties had reached a tentative settlement of their dispute, in which respondent would pay applicant the $1719.82 for applicant’s travel costs. Respondent requested a suspension of proceedings, which the Board granted. Fruitless settlement negotiations took place between July 1 and August 22. The parties could not reach agreement because applicant increased its settlement claim to $2750 instead of the $1719.82 respondent had offered and applicant had tentatively agreed to. Respondent’s Opposition to Applicant’s Original Application at 3.

On or about August 19, the SCO withdrew her decision and paid applicant the $1719.82 that he claimed, plus interest as calculated by the SCO, for a total of $1775.02. On August 26, the Board issued an order stating that settlement negotiations had ended and requested record submissions from the parties on any remaining issues in the case. However, applicant insisted on a hearing, maintaining that the payment of the $1775.02 was not a sufficient settlement because the SCO had miscalculated the amount of interest due and because he was entitled to an amount that would have reimbursed him for his litigation expenses that would have otherwise been allowable under EAJA. On September 16, applicant increased the amount of his claimed damages to $42,740.63. Applicant maintained that this was half the value of replacement meter boxes, less the refund he had already received. Applicant also argued that he was entitled to interest at

the rate established by the Department of Treasury beginning November 1, 2007, the date of the SCO's e-mail message to FEMA. Applicant's Amended Complaint (CBCA 1213). The Board held a hearing on October 6, 2008.

In its opinion of November 14, 2008, the Board found that the description warranty clause did not limit damages to the purchase price. The Board determined that applicant was entitled to foreseeable, reasonable, and non-speculative breach damages, which consisted of the proven travel costs of $1719.82, plus interest at the Treasury rate from the date the claim was filed until paid. Although applicant argued that interest should have started to run on the earlier date of November 1, 2007, the date of an oral conversation between applicant and the SCO, the Board found that argument frivolous. *Lam,* 09-1 BCA at 168,319. The Board held that applicant did not introduce adequate evidence to show the market price of the used meter boxes he had purchased from respondent. Furthermore, the Board found that applicant failed to establish that his claim for damages was based on the item for which he was the successful bidder. *Id*. To the extent that applicant claimed lost profits, that claim was found to be too speculative, as applicant had no contract or other commitment for the sale of the electric meter boxes. Additionally, there was no reason for respondent to know that applicant would resell the meters, and there were no discussions with applicant about his contemplated future use for the electric meter boxes. *Id*. On March 29, 2009, the Board denied applicant's request for rehearing and reconsideration.

Applicant's EAJA Application

Applicant initially submitted a timely EAJA application and sought $720.18 in litigation expenses. On April 20, 2009, the Board issued an order, noting that applicant had not specifically plead that the position of the Government was not substantially justified as required by 5 U.S.C. § 504(a)(2). The Board provided applicant with an opportunity to correct this pleading defect, as required by *Scarborough v. Principi*, 541 U.S. 401, 416-18 (2004).

In response to that order applicant submitted an amended fee application, maintaining that he was a prevailing party and that the position of the Government was not substantially justified. He sought $17,019.09 in litigation fees and expenses. Applicant's Amended Application at 6. In his amended application, applicant alleges that he is a prevailing party because he succeeded in two of the aspects of the litigation: (1) the claim for the contract price, and (2) the claim for travel expenses. *Id*. at 7. Applicant argues that the position of the Government was not substantially justified because it was undisputed that (1) applicant was the winning bidder on the contract, (2) applicant incurred $1719.12 in travel costs, and (3) applicant had a "legitimate claim for lost profits

as set forth in its motion for reconsideration," although the Board denied applicant's lost profits claim for lack of proof. *Id*. at 11.

Applicant seeks $720.18 in his own litigating expenses. Those expenses consist of the following amounts:

Postage	$175.89
Transcript	$175.00
Parking & Mileage	$26.00
Printing costs	$115.40
Mileage costs	$227.89
Total	$720.18

Applicant's Amended Application, Exhibit A (this is the original application filed by applicant pro se). A review of the backup to applicant's claim for his litigation expenses shows that between the filing of the notice of appeal and August 19, 2008, when the SCO withdrew her decision and paid applicant $1775.02, applicant incurred expenses of $55.22. Applicant's Amended Application, Exhibit A.

Applicant also seeks $16,298.91 in attorney fees and expenses he incurred by his attorneys, the firm of Duane Morris, LLP. Those fees and expenses consist of the following amounts:

Dates	Hours	Amount
Initial retainer		$2,000.00
December 2008 Attorney Fees	26.4	$7,027.50
December Costs		$216.11
January 2009 Attorney Fees	1.2	$427.00
February 2009 Attorney Fees	9.9	$3,364.00
February Costs		$3.80

March 2009 Attorney Fees	2.9	$861.50
March Costs		$19.00
May 2009 Attorney Fees	7.0	$2,380.00
Total Hours Spent	47.4	
Total		$16,298.91

Applicant's Amended Application, Exhibit H.

According to the invoiced schedules of work submitted to applicant by his attorneys, in December 2008, applicant paid Duane Morris a retainer of $2000. Applicant's Amended Application, Exhibit H. The invoiced schedules show that in December 2008, the firm billed applicant 26.4 hours for the work of three attorneys in researching and drafting a motion for reconsideration and a new hearing. The law firm also gave applicant a "courtesy discount" of $1149.50. *Id*. In January 2009, two attorneys of the firm spent 1.20 hours speaking to the clerk of the Board and locating a witness applicant hoped to call if his motion for reconsideration and rehearing had been granted. *Id*. Applicant's counsel billed applicant $3364 in February for the work of three attorneys in reviewing respondent's reply to applicant's motion for reconsideration and drafting a response to respondent's reply. *Id*. In March, applicant's attorneys billed applicant 2.90 hours for the additional work of three attorneys on the unsuccessful motion for reconsideration and for rehearing. *Id*. Finally, in May 2009, applicant's attorneys billed applicant for seven hours for preparing the amended EAJA petition.

Respondent's Opposition

On February 5, 2009, respondent filed an answer to the application for fees and other appeal costs. Respondent denied that applicant should be awarded the sum requested in the application for fees. Respondent argues that its position was substantially justified, but that if the Board rejected that argument, the Board should only award expenses incurred between the time of the filing of the appeal--June 1, 2008--and August 1, 2008, when respondent says settlement negotiations collapsed. Respondent says those expenses amount to $55.22. Respondent's Opposition to Original Application at 5, 7. Respondent argues that the remainder of the hearing expenses would have not been incurred had applicant accepted respondent's reasonable settlement offer. *Id*. at 6.

Respondent argues that its position was substantially justified both factually and

legally. Respondent argues that it immediately refunded the purchase price of the electric meter boxes and it agreed to settle applicant's transportation costs despite limitation of liability provisions in the contract, and it points to its pre-hearing payment of the transportation expenses plus calculated CDA interest. Respondent's Opposition to Original Application at 5.

Discussion

EAJA provides as follows:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. 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.
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> (2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.
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> (3) The adjudicative officer of the agency 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. The decision of the adjudicative officer of the agency under this section shall be made a part

> of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.
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> (b)(1) For the purposes of this section--
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> > (A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) 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, and (ii) attorney or agent 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 or agents for the proceedings involved, justifies a higher fee.);
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> > (B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated. . . .

5 U.S.C. § 504.

Here there is no dispute that applicant qualifies as a "party" under EAJA since respondent does not dispute that applicant was an individual whose net worth was less than $2,000,000 at the time the adversary adjudication was initiated. 5 U.S.C. § 504(b)(1)(B). Cases before boards of contract appeals qualify as adversary adjudications under EAJA. *Id*. § 504(b)(1)(C)(ii).

Prevailing party

Respondent argues that applicant was not a "prevailing party" as required by 5 U.S.C. § 504(a)(1) since applicant did not prevail on the largest portion of his claim, his request for $42,740.63, and because respondent voluntarily paid applicant's travel costs of $1719.82. Respondent's Opposition to Applicant's Amended Claim at 2. We disagree. A prevailing party is one who is successful on any significant issue in the litigation and thereby achieves some of the benefit it sought in the litigation. *Allen Ballew General Contractor v. Department of Veterans Affairs*, CBCA 3-C, et al.(VABCA 6987E), 07-2 BCA ¶ 33,653, at 166,635; *Coleman Group, Inc. v. Department of Homeland Security*, DOT BCA 4454E, 06-2 BCA ¶ 33,319, at 165,200-01. Here, the Board found a contract breach because the electric meter boxes respondent sold to applicant as the high bidder were not available for applicant to pick up. Consequently, we conclude that applicant prevailed on the principal entitlement issue in the case, which caused the SCO to withdraw her original decision, although he did not fully prevail on his damage claim.

Substantial justification

Because applicant is a prevailing party, he is entitled to a reasonable EAJA award unless respondent can show that its position was substantially justified. *Cinciarelli v. Reagan*, 729 F.2d 801, 804 (D.C. Cir. 1984); *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 982-C(50), 08-2 BCA ¶ 33,908, at 167,788, *reconsideration denied*, 08-2 BCA ¶ 33,974. It is proper for a tribunal to assess attorneys fees and costs against the Government for a separate phase of the litigation in which its position lacks substantial justification even though the Government may have adopted wholly reasonable positions in other facets of the case. *Ellis v. United States*, 711 F.2d 1571, 1576 (Fed. Cir. 1983). The Government's position is substantially justified if it is justified in substance or in the main to a degree that would satisfy a reasonable person, *Tidewater*, 08-2 BCA at 167,788, or, stated another way, whether the Government's overall position had a reasonable basis in law or in fact. *Herman B. Taylor Construction Co. v. General Services Administration*, GSBCA 15361-C(12961), 01-2 BCA ¶ 31,491, at 155,476.

Respondent argues that its position was substantially justified because it immediately refunded applicant's bid price upon learning that the meter boxes applicant had purchased were lost, and because it paid applicant's transportation costs of $1719.12 after the collapse of settlement negotiations. Respondent's Opposition to Applicant's Amended Claim at 15. Respondent also argues that the loss of the meter boxes that applicant had purchased presented a rare and unique case, because there was no withdrawal of the property by the Government, but instead, property was lost by the Government, outside of the remedial provisions of the sales contract. *Id*. at 13.

We find that respondent's position was not substantially justified until August 19, 2008, when the SCO withdrew her decision and agreed to pay applicant his transportation expenses. Respondent's position was substantially justified thereafter in all remaining phases of the underlying litigation. In particular, respondent's position that applicant was not entitled to $42,740.63 in additional breach damages was substantially justified given applicant's abject failure to prove any of those damages.

Applicant's undue prolonging of the litigation

As noted above, 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). Costs associated with actions unduly prolonging the litigation are not appropriate for an award under EAJA. *Universal Development Corp. v. General Services Administration*, CBCA 12174-C(11251), 93-2 BCA ¶ 25,836, at 128,584.

In this matter, applicant had two chances to resolve the dispute before insisting on a hearing, by either accepting the check as full settlement or entering into a stipulated judgment under Board Rule 25(b). Instead, he insisted on a hearing, a decision, and reconsideration, with no better result than what respondent had offered, and indeed had paid him, earlier. Consequently, applicant is entitled to only those litigation expenses incurred from the date of the filing of the appeal on June 1, 2008, through August 19, 2008, the date the contracting officer withdrew her decision and paid applicant his travel expenses. As noted above, those expenses amount to $55.22.

Applicant also sought $33.10 for the submission of his claim to the contracting officer on February 29, 2008. Expenses incurred before the filing of the appeal at the Board are not allowable under EAJA. *Golden West Environmental Services Inc. v. Department of Homeland Security*, DOT BCA 2895A, 05-1 BCA ¶ 32,869, at 162,895 (citing *Levernier Construction, Inc. v. United States*, 947 F.2d 497, 502 (Fed. Cir. 1991)). For the reasons stated above, the remainder of his costs incurred after August 19, 2008, i.e., for additional postage and parking, transcript costs, and attorney fees and expenses for preparing the unsuccessful reconsideration motion, are not reimbursable.

Applicant is also entitled to a partial award for its attorneys' preparation of the amended EAJA application. *Herman B. Taylor Construction Co.*, 01-2 BCA at 155,478. Applicant's counsel expended seven hours on that effort. However, the amended application went far beyond the limited out-of-time EAJA "curative amendment" to correct a pleading defect that was contemplated. *Scarborough v. Principi*, 541 U.S. at

417. Instead applicant, through counsel, submitted a supplemental EAJA application asking for an additional $16,298.91, encompassing far more than a simple curative amendment, which included $2380 for preparing the EAJA application. It should have taken one attorney no longer than one-half hour of work to prepare and to submit the curative amendment to the original EAJA application, the type of amendment contemplated by *Scarborough*. The amount we award for that effort is $62.50, which is one half of the hourly EAJA cap of $125. Applicant is thus entitled to a total award of $117.72.

Decision

We **GRANT IN PART** the application and award applicant $117.72 without interest pursuant to the EAJA.

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ANTHONY S. BORWICK
Board Judge

We concur:

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JERI K. SOMERS
Board Judge

_____
R. ANTHONY McCANN
Board Judge