

**WARBONNET ELECTRIC, INC.****CONTRACT NO. V531C244****VABCA3731E &  
3875E-3880E****VA MEDICAL CENTER  
BOISE, IDAHO**

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**OPINION BY ADMINISTRATIVE JUDGE PULLARA**

Warbonnet Electric, Inc. ("Applicant," "Contractor," or "Warbonnet") seeks \$59,270.60 in attorney fees and expenses under the *Equal Access to Justice Act (EAJA)*, 5 U.S.C. § 504, following our decision in *Warbonnet Electric, Inc.*, VABCA Nos. 3731 & 3875-3880, 96-1 BCA ¶ 27,938. In its APPLICATION FOR FEES AND EXPENSES (APPLICATION), Warbonnet asserts that it meets the eligibility requirements of *EAJA* with respect to its size, net worth and number of employees, and the Government has not contested that assertion. The Government has filed an OPPOSITION TO APPLICATION FOR ATTORNEYS FEES on the grounds that (1) the APPLICATION should be dismissed in its entirety for lack of jurisdiction as untimely, (2) Warbonnet was not a prevailing party and (3) even if Warbonnet is deemed to be a prevailing party, any fee allowed should be limited to a small fraction of the fee amount sought, in order to reflect the relatively small amount of relief obtained by Warbonnet in the Board's underlying decision. Eligibility for attorney fees requires: (1) that the claimant prevailed in the action, (2) that the Government's position was not substantially justified, (3) that the award of attorney fees is not unjust, and (4) that the fee application is timely filed and supported by an itemized statement. *Immigration and Naturalization Service v. Jean*, 496 U.S. 154, 158 (1990). We first address the timeliness issue raised by the Government.

**TIMELINESS OF APPLICATION**

The Board's July 30, 1992 Notice of Docketing in VABCA No. 3731 advised both parties that all correspondence sent via U.S. Mail should be addressed as follows:

Department of Veterans Affairs  
Board of Contract Appeals (09)  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420

The notice also advised that "Use of the Board's mail symbol (09) was important to internal mail delivery." Finally, with respect to correspondence via private express carriers, the Board provided its actual street address at 1425 K Street, zip code 20005, changed in May 1994 to 1800 G Street, zip code 20006, without reference to a mail symbol. Correspondence sent to the Board's physical location on K Street (later, G Street)

does not go through the VA's mail system at the Central Office on Vermont Avenue. Consequently, no mail symbol needed to be included in the physical location address.

The Board's October 25 decision was received by the Contractor on November 2, 1995. That decision became final 120 days later, on Friday, March 1, 1996, and the time for filing an *EAJA* application expired 30 days later, on Monday, April 1, 1996. On March 19, 1996, Applicant posted an *EAJA* application by United States mail, addressed as follows:

Recorder  
Department of Veterans Affairs  
Board of Contract Appeals  
Office of General Counsel (025B4)  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420

On March 21, 1996, Applicant sent a second copy of its APPLICATION for fees and expenses by Federal Express as follows:

RECORDER  
VETERANS ADMINIS. BCA  
810 VERMONT AVE. NW  
WASHINGTON, DC 20420

The Federal Express verification indicates that on March 22, 1996, the APPLICATION was delivered to and "signed for" at "810 VERMONT AVE NW B12." We understand Room B-12 to be the basement mail room for the VA at the 810 Vermont Avenue location.

By March 25, 1996, both of the foregoing applications had been received at the office of VA agency counsel but no notice was taken of the addresses or the addressees. Neither application reached the Board's offices at that time.

Sometime after March 25, 1996, Government Counsel contacted the clerk of the Board to inquire about the scheduling of the Government's response to the APPLICATION and was advised that the APPLICATION had not been received by the Board. That day, Government Counsel contacted Counsel for Applicant and informed him or his secretary that the APPLICATION had apparently been misdirected, and advised him or his secretary to submit an application to the Board. On April 3, 1996, Warbonnet sent copies of the APPLICATION to the Board by fax machine and by Federal Express, which copies were received on April 3 and April 4, 1996, respectively.

The mailing address used by the Applicant on or about March 19, 1996, differed from that provided to it by the Board in three respects: (1) Applicant added the word "Recorder" at the beginning; (2) It omitted the Board's mail code symbol "(09)" from the third line; and (3) It inserted the words "Office of General Counsel (025B4)" in the fourth line. In all likelihood, based on the mail symbol (025B4), the VA mail room forwarded that package to General Counsel rather than to the Board, notwithstanding the simultaneous reference to the "Board of Contract Appeals." We note from past

experience that other, similarly addressed mail has managed to make its way to the Board's offices without delay. It is more difficult to understand how the March 21, 1996 package, which was addressed solely to the "RECORDER, VETERANS ADMINIS. BCA" was delivered to the Office of General Counsel. On the other hand, the Applicant might have avoided all confusion by following the Board's address instructions more carefully.

Each party seeks to blame the other for the *EAJA* application not having reached the Board on or before April 1, 1966. The Government argues that the applications were improperly addressed and misdirected to agency counsel by the Applicant, contrary to the Board's filing instructions. The Applicant argues that the VA mail room mishandled the packages and simply disregarded the lines identifying the addressee as the Recorder of the Board, erroneously sending the packages to the General Counsel.

Although the Applicant did not address the filings exactly as provided by the Board, the fact is that both the March 19 and 21, 1996 filings by the Applicant were nominally addressed to the Board. The first filing included not the Board's mailing symbol (09) but, rather, included reference to the Office of General Counsel and its mailing symbol (025B4) thus more fault may lie with the Applicant than the mail room in that case. However, the second filing was addressed solely to the Board, although no mailing symbol was included. On balance however, we find that the addressing should have been sufficient for the mail room to have directed the package to the Board.

Even if we were to hold the Applicant responsible for the misdirected mail, since the filing actually arrived timely at the agency, it is deemed timely with respect to the Board. While we are aware of no case precisely on point with the facts here, each party has noted the approach taken by the Armed Services Board of Contract Appeals in *International Foods Retort Co.*, ASBCA Nos. 34954, *et al.*, 93-3 BCA ¶ 26,249. There the ASBCA cited its holding in *Bristol Electronics Corp.*, ASBCA Nos. 24792, *et al.*, 87-2 BCA ¶ 19,697, "that the long-standing rule applicable to misdirected notices of appeal should also be applied to misdirected *EAJA* fee applications." Under that rule, timely filing with the contracting officer is tantamount to timely filing with the Board. We see no basis for distinguishing between the contracting officer, the Office of General Counsel, or the VA mail room in that regard.

Accordingly, we hold that the APPLICATION in the instant case was timely filed and we have jurisdiction.

### **PREVAILING PARTY**

The underlying appeals were taken from the Contracting Officer's final decisions denying claims by Warbonnet for additional compensation totaling \$399,731.89, under a half-million dollar contract to install fire alarm and security systems for the Department of Veterans Affairs Medical Center, Boise, Idaho ("VAMC").

The Contractor sought compensation in the amount of \$135,475.95 for being required to "flush mount" cabinets, or panel boxes, rather than "surface mounting" them. The Contracting Officer denied the claim but determined that if there was any entitlement, the required recessing of the panels was valued at no more than \$2,851. That amount was paid to the Contractor. The Contractor appealed and the matter was docketed as VABCA

No. 3731. Warbonnet later filed several other claims for delays, disruption and three constructive changes totaling \$ 19,905.55, identified as Rejection of Color Code & Wiring (\$4,065.28), Rejection of Annunciator Panels (\$12,218.74), and Amendment Four (\$3,621.53). Seeking an equitable adjustment of \$117,388.70, the Contractor also alleged 350 days (ultimately reduced to 324 days) of delay arising out of the recessing-of-panels claim in VABCA No. 3731, the three constructive changes, and other miscellaneous causes, including an alleged delay of 43 days in returning the Contractor's initial submittals. For its disruption claim Warbonnet simply sought one fifth of its total labor costs, or \$126,961.69. The Contracting Officer's final decisions, dated May 25, 1993, denied all of the claims, citing various reasons for her decision. Warbonnet appealed the constructive changes claims, which were docketed as VABCA Nos. 3875 (Rejection of Color Code & Wiring), 3877 (Rejection of Annunciator Panels), and 3878 (Amendment Four). The delay and disruption claims were docketed as VABCA Nos. 3879 and 3880 respectively. VABCA No. 3876 was also docketed but was eventually determined to be a duplicate of VABCA No. 3731.

In our decision in VABCA No. 3731, we found for the Contractor on entitlement and determined quantum to be \$3,403.14, as opposed to the \$135,475.95 claimed by Warbonnet. Essentially, we awarded the Contractor only \$552.14 more than the \$2,851 previously paid by the Contracting Officer. This small differential was due to the fact that we found a slightly higher number of panels required to be recessed than the number used by the Contracting Officer. However, we found that the Contracting Officer's unit price per panel was "a reasonable one for compensating the Contractor for the costs to recess the panels." Thus, the Applicant was a "prevailing party" under the EAJA. In *Skip Kirchdorfer, Inc. v. United States*, 35 Fed.Cl. 742, 746 (1996), the court said:

Prevailing party status is a statutory hurdle. The prevailing party requirement is a generous formulation that brings a party only across the statutory threshold. *Comm'r Immigration & Naturalization Serv.*, 496 U.S. at 160, 110 S.Ct. at 2320. A typical formulation is 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 the suit." *Hensley v. Eckerhart*, 461 U.S.424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983) Plaintiff prevailed as to a portion of [its claims].

In VABCA No. 3879, with respect to the delay claim of 324 days and \$117,388.70, the Board found that a lag in the approval of initial submittals resulted in a 27 day delay for which the Government owed Warbonnet extended home office overhead in the amount of \$2,433.24. Thus, the Contractor was also a prevailing party in VABCA No. 3879.

We denied VABCA Nos. 3875, 3877, 3878 and 3880, and accordingly the Applicant does not meet the standard of "prevailing party" set forth in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). See also *Integrated Clinical Systems, Inc.*, VABCA Nos. 3745E & 3914E-3917E, 1996 WL 403380 (July 15, 1996). The Applicant argues, however, that it "proved improper Government action," and, therefore, that it "clearly prevailed on entitlement, and should be entitled to those [attorney fee] costs." For example, in connection with VABCA No. 3875, while denying the appeal, the Board did find that the VA's rejections of the color coding submittals were not justified or warranted, and that

such action resulted in delay in the obtaining of certain wiring. The Contractor sought compensation for direct costs and delay costs. The Board denied any compensation, finding that the direct cost claim was barred by a release and that the delay claim was not proven, i.e., the Contractor did not prove that delay in receipt of the wiring resulted in delay in the performance of the entire project. Thus, the Contractor did not establish entitlement, either with respect to direct costs or delay costs.

The Applicant asserts that it established entitlement merely because the Board found wrongful Government action. We disagree. Appellant did not establish entitlement in either case since entitlement to recover direct costs was barred by a release, and since entitlement to any amount of overall delay damages, due solely to Government action, was not established. Until such delay is proven, entitlement has not been established. In order to prove entitlement, a claimant must show more than just wrongful action by the other contracting party. At least a threshold showing of damage is required as part of the entitlement case. *Cosmo Construction Co. v. United States*, 451 F.2d 602, 196 Ct.Cl. 463 (1971); *Argo Technology, Inc.*, ASBCA No. 30522, 88-1 BCA ¶ 20,381, *aff'd on recon.* 89-1 BCA ¶ 21,395 (An essential element of the proof of entitlement to recover for the error in the contract is evidence showing that appellant had been damaged thereby.); *Engineering Technology Consultants, S.A.*, ASBCA No. 45065, 95-2 BCA ¶ 27,804.

### SUBSTANTIAL JUSTIFICATION

Once the Applicant has demonstrated, that it is a prevailing party, the Government "shall award . . . fees and other expenses incurred by that party . . . 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." 5 U.S.C. § 504(a)(1) (emphasis added). Upon the applicant establishing that it meets the *EAJA* size and net worth requirements, and that it has prevailed on at least a portion of its claim, the burden shifts to the Government to establish that its position was substantially justified. *Marino Construction Co., Inc.*, VABCA No. 2752E, 92-2 BCA ¶ 25,015; *Blosam Contractors, Inc.*, VABCA No. 2187E, 88-3, BCA ¶ 20,942. The Government is "substantially justified" if, in view of the law and facts, it is "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

The Government proves that its position was substantially justified based on the record and "'the substantial justification determination' will not involve additional evidentiary proceedings or additional discovery of agency files, solely for *EAJA* purposes." H.R. REP. NO. 120, 99th Cong., 1st Sess. at 13 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132 at 142. Thus, "[w]here the Board decides the merits of a *CDA* [*Contract Disputes Act*] dispute, the administrative record available for use in determining whether the Government's position was substantially justified consists of those documents filed in the underlying appeal together with the hearing record, the [Rule 4 file], and such arguments as opposed to facts, as may be found in the parties *EAJA* filings." *Thomas J. Conlon*, ASBCA No. 44588, 94-3 BCA ¶ 26,980.

As an element in the award of fees, the Board must determine that the Government's position was not substantially justified. In making this determination we look at the totality of the circumstances. There is no set criterion that the Government must offer to meet its burden, and each determination is made on a case-by-case basis. *Essex Electro Engineers, Inc. v. United States*, 757 F.2d 247, 252-53 (Fed. Cir. 1985).

Although the Government declined to address the issue of substantial justification, the Government's decision does not relieve the Board of its responsibility. As the General Services Administration Board noted in *Griffin Services Inc.*, GSBCA No. 11171, 94-3 BCA ¶ 27,075 at

134,936:

In cases where a record exists such that the tribunal is in a position to make an independent assessment of whether the Government's actions were substantially justified, an award of fees is not automatic simply because the Government chooses not to argue the issue. [citations omitted] It is thus appropriate for the Board to review the record, including the arguments presented in the underlying proceeding, to determine whether the Government's position was substantially justified or not. [citations omitted]

The Applicant addressed the substantial justification issue in its REPLY TO GOVERNMENT OPPOSITION TO APPLICATION FOR ATTORNEY FEES. There, it argued that we should follow our decision in *Preston-Brady Company, Inc.*, VABCA No. 1892E, *et al.*, 88-2 BCA ¶ 20,574 at 104,002, in which we found the Government's position was not substantially justified "[b]ecause Counsel does not address that issue in its response to the Applicant's allegation." There, based on the record and the totality of circumstances, we did not believe the Government's position was substantially justified. Here, however, the facts contained in the administrative record and decision lead us to a different conclusion regarding the substantial justification determination.

After considering the entire record in this case, with respect to VABCA No. 3731, we find that the Government was substantially justified in its refusal to pay the unsupported figure demanded by Warbonnet for the recessing of panels. The Government approached the problem fairly and reasonably by proffering its own figure, based on the Contractor's own previous calculations for similar work. The Government did not press a tenuous factual or legal position.

As previously mentioned, the difference in our award and the Government's payment resulted from a slight difference in the number of affected panels found. Reviewing the totality of the circumstances presented in VABCA No. 3731, we find that it was the Applicant's own actions that forced the parties to litigation when Warbonnet took the position that it was entitled to costs we ultimately determined were excessive and unsupported. See *Hedstrom Lumber Company, Inc. v. United States*, 7 Cl. Ct. 510 (1985). The Government is entitled to resist excessive claims and *EAJA* relief will be denied when it is found that the contractor's actions cause an appeal. *Kay Manufacturing Co. v. United States*, 699 F.2d 1376, 1379 (Fed. Cir. 1983).

Turning to VABCA No. 3879, the only other appeal in which the Applicant prevailed, we find that the Government's position was also substantially justified. The major dispute there was Warbonnet's claim of 324 days of delay, which it alleged arose out of a variety of circumstances which included the recessing of panels, three constructive changes, and other miscellaneous causes. Among these miscellaneous causes was an alleged delay in returning the Contractor's initial submittals. The Government took the position in this appeal that the Contractor was not entitled to any delay damages. We found for the Government on all of the alleged delays but one, the delay associated with the initial submittals.

In considering VABCA No. 3879, we generally observed that during Contract performance and in presentation of this appeal, neither party used Critical Path Method (CPM) analysis, a simple bar chart or other type of schedule to track and demonstrate how the work progressed, and that our review would have been simplified if some type of schedule had been offered. The Government is entitled to clear information upon which it may rely and make a reasoned decision. *MJW Enterprises, Inc.*, ENG BCA No. 5813-F, 93-3 BCA ¶ 26,045.

For most of the alleged delays we found that Warbonnet had either failed to prove a change occurred, failed to show the change caused a delay, or failed to meet its burden of proving the relationship between delay in the performance of the changed work and delay in the entire project.

**Warbonnet** at 139,537-51. Nevertheless, we found, in one instance, that the Contract completion date was extended 27 days when the Government failed to approve the initial submittal in a timely fashion. Of the 324 days sought, we granted the Contractor only 27 days of extended overhead. In making this determination, we found that the VA offered no evidence to explain why it took an excessive amount of time to return its approval of the submittals, especially after both its own architect and VA Central Office had completed their reviews. We concluded:

Nevertheless, we find that, under any type of analysis, it would be reasonable to expect that two activities, submitting and approving material submittals, are among the earliest and most critical activities to be performed in the performance of the contract. Here, the Contractor was not allowed to bring onto the work site materials needed to commence contract work until the VA had issued its approval of those materials.

Appellant performed its part, submitting the information within two days after receiving the Notice to Proceed. We find that the Government should have performed its part, returning the submittal, a critical activity within no more than 30 days and that any delay thereafter would effect a day-for-day delay in the scheduled overall contract completion date. . . . Thus, the delay in approval of submittals amounted to delay in a critical activity that extended the contract completion date by 27 days.

**Warbonnet** at 139,538. We used the \$90.12 daily rate for extended overhead proffered by Warbonnet because the Government did not dispute the rate, and awarded the Contractor \$2,433.24. However, given the facts and evidence presented by Warbonnet to support its delay claim, and viewing the totality of the circumstances presented here, we believe the Government acted reasonably in disputing the 324 days of delay claimed by the Applicant. In making this determination, we have looked to the entirety of the Government's conduct to judge whether the overall position had a reasonable basis in law and in fact. In law, the Government had the right to deny delay damages where there was a lack of evidence supporting the delay or the relationship between delay in the performance of the changed work and delay in the entire project. Factually, the lack of schedules and overall proof was a significant problem throughout this entire litigation.

Although we decided Warbonnet's completion date was delayed 27 days, it would not be reasonable for us to require the Government, in order to avoid attorneys fees, to sift through and analyze this 324 day delay claim to find the 27 days we settled upon. In the present case, the Applicant failed to present adequate information and documentation to enable the Government to adequately analyze its delay claim in whole or in part. Faced with this lack of essential information, we conclude that the Government's position in contesting the appeal had a reasonable basis in both law and fact. **Olson's Mechanical & Heavy Rigging**, ENG BCA Nos. 5260-F, 5293-F, 90-1 BCA ¶ 22,472. Furthermore, due to the nature of delay claims and the circumstances here, Warbonnet's small victory on the submittals cannot be sufficiently segregated from the total delay claim and effectively analyzed separately.

The ASBCA commented on a similar situation in **M. Bianchi**, ASBCA No. 36518, 94-3 BCA ¶ 27,243. This was an appeal from a \$6,173,468 claim arising out of a Value Engineering Change Proposal (VECP) where the appellant sought \$2,175,807 in instant savings and \$3,997,660 for collateral savings. The Board found that Bianchi was entitled to \$58,613 instant savings and was not entitled to collateral savings, commenting at 135,745:

In addressing the *EAJA* definition of "substantial justification" in **Battles Farm Co. v. Pierce**, 806 F.2d 1098 (D.C. Cir. 1986), the court reached the following

conclusion where a far-reaching and unreasonable claim was linked to a justified one, and the claims were so intertwined that the matters had to be litigated as a whole:

. . . We hold only that if a private plaintiff, in its complaint, combines one adventurous far-reaching losing claim with a more orthodox winning claim, and the two are intertwined, we must consider the justification of the government's *entire* litigating position before awarding attorneys fees. Just as the government must subsidize litigation costs when it "take[s] a long shot," *Spencer v. NLRB*, 712 F.2d 539, 558 (D.C. CIR. 1983), *cert. denied*, 466 U.S. 936, so too must private parties bear the risk when they aim at fences.

In *Skip Kirhdorfer, Inc. v. United States*, 35 Fed.Cl. 742, 746 (1996), the U.S. Court of Federal Claims recently discussed the meaning of the phrase "substantially justified" in the following terms:

A position is "substantially justified" if it is "justified in substance or in the main--that is justified to a degree that would satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 2550, 101 L.Ed.2d 490 (1988). A loss on the merits is not equated with a lack of substantial justification under the EAJA. The Government "could take a position that is substantially justified, yet lose." *Pierce*, 487 U.S. at 569, 108 S.Ct. at 2552. When a party has prevailed in litigation against the Government, the Government bears the burden of proving that its position was substantially justified. *Gavette v. OPM*, 808 F.2d 1456, 1465-66 (Fed.Cir.1986) (en banc).

A trial court's decision to award attorney fees under the EAJA is discretionary. To determine whether the position of the United States is substantially justified, trial courts are instructed 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 both in law and fact." *Chiu v. United States*, 948 F.2d 711, 715 (Fed.Cir. 1991).

In *Kirhdorfer*, the contractor's claims against the Government involved three categories of wrongful takings of property without due process of law. Specific values were not attributed to each of the categories. The contractor had sought nearly \$1,000,000 at trial. Eventually, only one claim was found to be eligible for compensation, for which the contractor received a judgment in the amount of approximately \$24,000. The Court concluded:

Plaintiff fails to take into account the variety of property claims it pursued in this litigation, only one of which ultimately was found to be eligible for compensation under the Fifth Amendment. The fact that the Government lost as to one category of property does not show that its position in defending the case was not substantially justified. The decision on an award of attorney fees is a judgment

independent of the result on the merits. When the entire action is looked at as a whole, defendant's position was substantially justified and reasonable in both fact and law.

Similarly, in the instant case, the Contractor's delay claim was for 324 days based on a variety of causes. The Contractor did not prove that any specific days of contract delay were attributable to any particular cause, with the exception of the initial submittal delay for which the Board found 27 days of delay at the beginning of the contract performance. On the basis of the entire record in this litigation, the position of the VA was substantially justified.

This is not to say that the Board is never justified in considering individual claims on their individual merits. The circumstances in the instant case and in the cases discussed above can be contrasted with *Decker and Co., GmbH*, ASBCA Nos. 33285, 38656, 92-1 BC