

JIMENEZ, INC.

CONTRACT NO. V626C-597

VABCA-6353E, 6611E

**VA MEDICAL CENTER
NASHVILLE, TENNESSEE**

Terrance R. Ketchel, Esq., Ft. Walton Beach, Florida, for the Applicant.

Joan S. Ratliff, Esq., Trial Attorney, Jackson, Mississippi; *Charlma J. Quarles, Esq.*, Deputy Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE PULLARA

Jimenez, Inc. ("Applicant," "Contractor," or "Jimenez") seeks \$60,707.90 in attorney fees and expenses under the *Equal Access to Justice Act (EAJA)*, 5 U.S.C. § 504, following our decision in *Jimenez, Inc.*, VABCA Nos. 6351-54, 6421-23, 6591 & 6611, 01-2 BCA ¶ 31,578, dated September 24, 2002. In VABCA No. 6611, the Contractor had sought to be paid the \$875,736.18 difference between its claimed total costs and the total payments it had previously received under its contract. The claim arose under an alleged improper constructive termination for default stemming from VA's breach of the contract by means of a bad faith dismissal of the Contractor from the job site.

In the alternative, in VABCA No. 6611, the Contractor sought \$768,716.62, which represented the total of (a) \$29,417.90 (termination settlement costs under a constructive termination for convenience theory); (b) \$237,643.27 (the unpaid balance of the contract); and (c) \$501,655.45 (the sum of three claimed equitable adjustments to the contract price). The equitable adjustment claims were for (a)

VA's alleged wrongful limitations on the Contractor's access to perform work in the second floor ceilings, causing delay damages of \$107,200.30 (field office and home office overhead for 166 days)(VABCA No. 6591); (b) VA's alleged wrongful rejection of the Airtherm Air Handler Unit (AHU) delivered to the job site by the Contractor, causing delay damages of \$226,986.84 (field office and home office overhead for 330 days) and direct damages of \$100,954.11 (scrapping and removing the Airtherm AHU)(VABCA Nos. 6351-54); (c) delay by VA in approving Trane AHU submittals, causing delay damages of \$54,756.29 (field office and home office overhead for 82 days) and direct damages of \$11,757.90 (Trane's costs of preparing and delivering multiple resubmittals)(VABCA Nos. 6421-23).

The appeal in VABCA-6353 (direct costs arising from the wrongful rejection of the Airtherm AHU) was sustained in the amount of \$68,998.19 plus interest. The appeals in VABCA-6351, 6352 and 6354 (delay costs related to the Airtherm AHU) were denied. The appeals in VABCA-6421-23 (rejection of the Trane AHU) were denied. The appeal in VABCA-6591 (access to second floor ceilings) was denied. The appeal in VABCA-6611 (retainage/termination) was sustained in part, relative to retainage only, in the amount of \$198,246.94 plus interest, and in all other respects was denied. Essentially, the Contractor recovered approximately one-third of the amounts sought.

Eligibility

Jiminez asserts that it was a prevailing party in VABCA Nos. 6353 and 6611, and provides in its application information supporting its having met limitations regarding size, net worth and number of employees. The Government does not contest those assertions. We find Applicant to be eligible for an *EAJA* award and turn now to other issues.

Substantial Justification

Fees and expenses shall be awarded “unless the adjudicative officer of the agency finds that the position of the agency was substantially justified.” 5 U.S.C. § 504(a)(1). The burden is on the Government to show that its position was substantially justified. The Board must examine the totality of the circumstances. Each determination is made on a case-by-case basis. *Hopkins Heating & Cooling, Inc.*, VABCA No. 4905E & 4906E, 98-1 BCA ¶ 29,449, citing *Essex Electro Engineers, Inc. v. United States*, 757 F.2d 247, 252-53 (Fed. Cir. 1985).

The Supreme Court, in *Pierce v. Underwood*, 487 U.S. 552, 565 (1988), explained that a loss on the merits does not equate to an absence of substantial justification of the Government’s position. The Court stated that the Government has the burden of establishing that its litigation position was “‘justified in substance or in the main’, that is justified to a degree that could satisfy a reasonable person.” Determining whether the Government was substantially justified in the positions it took in these appeals is a matter within the discretion of the Board after review of the entirety of the Government’s conduct. *Chiu v. United States*, 948 F.2d 711 (Fed. Cir. 1991); *Trailboss Enterprises, Inc.*, VABCA No. 5454E *et al.*, 00-1 BCA ¶ 30,800; *Adams Construction Co., Inc.*, VABCA No. 4669E *et al.*, 98-1 BCA ¶ 29,479.

The Government argues here that it was substantially justified in the position it took in VABCA No. 6353 that the Airtherm AHU did not meet the specification requirements even though the Board ultimately concluded that VA was not correct in rejecting the AHU. Applicant argues that the Government’s position was not substantially justified, pointing out in particular the disparity between the level of expertise and experience of its witnesses and those of the Government witnesses at trial. We agree. In fact, that disparity, and the failure

of the Government's mechanical engineering advisor to testify, explained in large part why the Government's position was deemed to be in error in our decision on the merits. Those factors also support our conclusion that the Government's position was not substantially justified.

The Government also argues that the validity of its position in VABCA No. 6353 was recognized by the Board when it "only awarded Applicant \$68,998.18 out of the \$100,954.11 claimed on this issue." In reply, Applicant cites *Baldi Bros. Constr. v. United States*, 52 Fed. Cl. 78 (2002), for the proposition that diminished recovery may merely represent failure to prove specific damages rather than exoneration of the Government's position. We agree and find that proposition to be applicable here. The determination of quantum in this case does not bear on the issue of substantial justification of the Government's position.

With respect to VABCA No. 6611, the Government argues that its position, regarding the funds it withheld, was substantially justified. However, the Government supports its argument for substantial justification by referencing issues on which Applicant did not prevail, and we see no relevance of those matters to the issue of substantial justification presented here. The Government also points to Jimenez' diminished recovery in VABCA No. 6611 as justifying the Government's litigation position. As discussed above, we reject the notion that substantial justification of the Government's litigation position is evidenced by the fact that Jimenez' recovery in VABCA No. 6611 was less than it claimed. In this case, focusing solely on the Government's litigation position regarding the funds it withheld, we find such position not to be substantially justified. As pointed out by Applicant, citing the Board decision on the merits in this case, the record was "devoid of any evidence establishing either the value of the alleged deficiencies or the value of the costs the VA allegedly incurred in

correcting the deficiencies.” Inexplicably, the Government offered no documentary evidence whatsoever into the record to justify or support the amount of its \$198,246.94 withholding.

OVERVIEW OF EAJA APPLICATION

The Board is entitled to examine the fees and expenses claimed and, in its discretion, determine a reasonable award. *Penn Environmental Controls, Inc.*, VABCA No. 3726E, 98-1 BCA ¶ 29,355; *Buckley Roofing Co., Inc.*, VABCA No. 3347E, 92-2 BCA ¶ 24,826. Applicant’s total attorney fees and expenses incurred in all the appeals involved herein exceeded \$130,000. However, Applicant reduced the attorney fee rate to the allowable EAJA rate and limited, through allocation, the fees and expenses to those appeals on which it prevailed. In its initial EAJA Application, FEES AND EXPENSES EXHIBIT, Applicant sought an award of attorney fees in the amount of \$37,323.75 (calculated at the allowable EAJA rate of \$125/hour for 298.59 hours); \$7,418.68 for paralegal fees; travel expenses in the amount of \$9,861.72; and miscellaneous expenses (long distance telephone, copies, courier expenses, subpoena expenses, etc.) in the amount of \$1,059.47. The foregoing figures total \$55,663.62. In an amendment to the Application, as a result of the preparation of the original EAJA Application and the review and response to the Government’s Reply, Applicant increased the amount of attorney fees by \$4,400 (35.2 hours at \$125/hour) and paralegal fees by \$644.28. Adding the net increase of \$5,044.28 to the \$55,663.62 produced the final total Application amount claimed for fees and expenses of \$60,707.90.

Applicant explained that the 298.59 attorney hours were calculated by determining those entries in legal fee invoices paid by Jimenez, Inc., pertaining only to VABCA Nos. 6353 and 6611. Those entries were highlighted in yellow and totaled 127.8 hours. Attorney hours that could be specifically allocated to

appeals that were denied by the VABCA were excluded and were highlighted in blue. The remaining attorney hours that could not be specifically allocated to either of those two categories were included in the application at the rate of 40% based on “the fact that 2 out of the 5 appeals were sustained.” The “uncategorized” attorney hours totaled 426.98. Forty per cent of that figure was 170.79. Adding 127.8 and 170.79 yields 298.59 which, when multiplied by \$125 per hour, yields the \$37,323.75 included in the initial *EAJA* Application.

Paralegal fees totaling \$18,546.70 were actually paid to the paralegal in connection with all the appeals. Forty percent of such fees, \$7,418.68, were included in the initial *EAJA* application.

Travel expenses totaling \$9,861.72 related to two trips taken by Jimenez officials and Jimenez’ attorney. The first trip involved expenses totaling \$6,262.19 and occurred in November 2000 in connection with an attempt to settle the matters through ADR; the second trip involved expenses totaling \$3,599.53 and occurred in July 2001 in connection with the hearing in these appeals.

Uncharacterized Miscellaneous Expenses in connection with the appeals totaled \$2,479.93. Forty percent of such expenses were \$991.97. In addition, \$67.50 was segregated and specifically allocated to VABCA Nos. 6353 and 6611, for a grand total of \$1,059.47 claimed.

In its Reply to the Application, the Government argues generally that even if its substantial justification position does not result in dismissal of the Application, the claim for attorney fees and expenses is unreasonable and not substantiated and, therefore, should be dismissed.

With regard to unreasonableness of the *EAJA* claim, Applicant replies that the Government does not provide any specific examples of entries that were unreasonable or excessive as it related to the prosecution of these appeals. Applicant cites our opinion in *Buckley Roofing Co., Inc.*, VABCA No. 3347E, 92-2

BCA ¶ 24,826, wherein the Board, citing *Sierra Club v. Environmental Protection Agency*, 769 F.2d 796, 807-08 (D.C. Cir. 1985), stated that “[i]f the documentation of the claimed hours is adequate, it is then appropriate for the Government to offer evidence or a reasonable analysis to support a contention that the number of hours is excessive.” This the Government has not done, arguing in generalities only.

Attorney Fees

With regard to substantiation, the Government found Applicant’s accounting method of using different color markers (yellow, blue, green and pink) to be “confusing” and “unsubstantiated.” Further, the Government asserted that it was virtually impossible, due to lack of documentation, to verify the 298.59 attorney hours claimed. While it may be difficult to track that result back to its source, considering Applicant’s presentation format, which is not a model of clarity, the Board was able to do so and to verify that the figures claimed are in fact supported by the accompanying invoices.

A more serious accusation by the Government is that the invoices for fees are “suspect and are not copies of actual invoices kept in the ordinary course of business.” The basis for making that assertion is not explained. In its reply, Applicant’s Counsel strenuously objected to the Government’s accusation and furnished an affidavit to the effect that these were the actual invoices submitted monthly by him to the Applicant. Having received no compelling evidence to the contrary from the Government, we are satisfied that these were in fact the actual invoices submitted.

Next, the Government takes issue with the 40% allocation used by Applicant, noting that only two of nine appeals were sustained. While not clearly stated as such, this appears to be a suggestion to use a 22% (2 divided by

9 times 100) allocation. In that regard, there is no single, correct method of allocating fees and expenses among those appeals on which Applicant prevailed and those on which it did not. Using the number of appeals as a means of comparison may be one of the least accurate, particularly in this case where the separately identifiable issues involved do not necessarily relate to the appeal numbers or the amounts thereof. That is, when the matter is docketed, and appeal numbers are assigned, it is not always clear to the Board precisely what issues are in dispute. Moreover, the amounts involved in different appeals may vary greatly so that some sort of weighted averaging may be necessary, a type of analysis in which neither Applicant nor the Government engaged. Other bases may be considered in arriving at an allocation number. Reviewing the transcript, for example, we estimate that roughly 40% of the trial time, based on the number of pages, related to matters on which Applicant prevailed. It appears to us that such a percentage is a fair representation of the amount of trial effort expended here in connection with the appeals on which Applicant prevailed. Finally, the amounts Applicant ultimately recovered represent perhaps one-third or more of the amounts sought. On balance, we find that the 40% allocation used by Applicant is reasonable.

Finally, the Government challenges attorney fees and expenses associated with a failed ADR attempt as follows:

[A]n ADR was held in December 2000. This ADR on all nine claims was unsuccessful. Applicant has included fees for the ADR which are not part of the hearing award and should not be allowed. These expenses should be disallowed. Additionally, the Government was reasonable in its actions prior to the appeal in attempting to resolve the issues through the ADR. The claimed ADR expenses should be disallowed because the signed ADR Agreement, dated November 20, 2002, specifically states, "4. Each party shall bear its own expenses incurred during the proceeding herein."

Applicant responds that “the Government provides no guidance to the Board in determining which ADR attorney’s fees entries should be omitted and makes a blanket statement based solely upon the contractual provision.” Indeed, the Government urges us to disallow ADR fees and expenses but proposes no figure for disallowance. Nevertheless, we note that the ADR proceeding occurred on December 4, 2000, and we find from Applicant’s invoices that attorney fees were charged that day for 8.7 hours, which equates to \$1,087.50. In addition, travel expenses in the amount of \$6,262.19 were claimed in connection with the ADR. Accordingly, pursuant to the parties’ ADR agreement, the EAJA Application total is hereby reduced by the sum of \$7,349.69.

Paralegal Fees

With respect to paralegal fees, the Government pointed to the lack of documentation supporting this claim. Applicant replies that it did highlight the paralegal fees in the exhibit to the initial Application but acknowledged that the information initially provided was insufficient. Applicant provided extensive additional documentation and an affidavit with its reply to support the paralegal fees. We find the supplemental information to be persuasive and allow the paralegal fees included in the Application.

Travel Expenses

The Government correctly challenged the claim for travel expenses with respect to those expenses attributable to the Contractor and its employees, citing *Baldi Bros. Constr. v. United States*, 52 Fed. Cl. 78 (2002) and *David Boland, Inc.*, VABCA 5858E *et seq.*, 03-1 BCA ¶ 32,170. Applicant conceded that argument. However, neither party made any effort to quantify the unallowable

expenses for the Board. Having carefully reviewed the \$3,584.49 travel expenses incurred in connection with the hearing in this matter, we found half of those expenses to be unallowable. Accordingly, the *EAJA* Application total is hereby reduced by the sum of \$1,792.25.

Miscellaneous Expenses

The Government challenged these expenses, in the amount of \$1,059.47, on the bases of allocation and lack of documentation. As discussed above, we accepted Applicant's allocation method. However, Applicant failed to adequately document these expenses and we reduce the *EAJA* Application by the sum of \$1,059.47.

Allowable Fees and Expenses

As discussed above, the total amount of fees sought, \$60,707.90, is hereby reduced \$10,201.41 (\$7,349.69 in connection with the ADR fees and expenses, \$1,792.25 in connection with the unallowable travel expenses and \$1,059.47 in connection with the miscellaneous expenses) for a net award of \$50,506.49.

DECISION

For the foregoing reasons, under the application in VABCA Nos. 6353E and 6611E, the Applicant, Jimenez, Inc., is awarded fees and expenses under the *Equal Access to Justice Act* in the amount of \$50,506.49.

Date: August 8, 2003

MORRIS PULLARA, JR.
Administrative Judge

We Concur:

Panel Chairman

RICHARD W. KREMPASKY
Administrative Judge

WILLIAM E. THOMAS
Administrative Judge