

# Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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GRANTED IN PART; DISMISSED FOR LACK OF  
JURISDICTION IN PART: June 29, 2001

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GSBCA 15361-C(12961)

HERMAN B. TAYLOR CONSTRUCTION CO.,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Christina Stone of Gaughan & Stone, Houston, TX, counsel for Applicant.

Sharon J. Chen, Office of General Counsel, General Services Administration,  
Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **NEILL**, and **HYATT**.

**BORWICK**, Board Judge.

Applicant, Herman B. Taylor Construction Co. (applicant or HBT), seeks an award of fees and expenses under the Equal Access to Justice Act (EAJA) as the prevailing party in Herman B. Taylor Construction Co. v. General Services Administration, GSBCA 12961, 98-2 BCA ¶ 29,836, rev'd, Herman B. Taylor Construction Co. v. Barram, 203 F.3d 808 (Fed. Cir. 2000). We grant in part the remaining application for fees and expenses for pursuing the case before this Board. We deny for lack of jurisdiction that portion of the application that seeks fees and expenses for legal services rendered before the United States Court of Appeals for the Federal Circuit.

The case involved three alleged grounds for default: (1) failure to make progress endangering performance of the contract, (2) abandonment, and (3) labor standards violations. We conclude that the Government's positions on the first two grounds were not substantially justified but that the Government's position regarding violations of labor standards, although unsuccessful before the United States Court of Appeals for the Federal Circuit, was substantially justified.

The underlying adversary adjudication involved an appeal of the Government's default

termination of the contract for renovation of the United States Post Office and Courthouse, El Paso, Texas, docketed as GSBCA 12961. We consolidated that docket with GSBCA 12915, a claim for equitable adjustment.

On August 27, 1996, in GSBCA 12915, we granted in part the equitable adjustment claim and awarded HBT \$62,046.57 plus interest as the cost of changed work. Herman B. Taylor Construction Co. v. General Services Administration, GSBCA 12915, 96-2 BCA ¶ 28,547, reconsideration denied, 97-2 BCA ¶ 29,127.

On the default termination docket, GSBCA 12961, we suspended proceedings to await a decision of the Department of Labor (DOL) on alleged Davis-Bacon Act violations. On December 17, 1997, DOL entered into a consent decree with HBT on the disputed matter. We asked the parties for further briefing on the significance of the consent decree. Final briefs on that issue were submitted on or about May 7, 1998. On June 24, 1998, we denied HBT's appeal of the default termination. Herman B. Taylor Construction Co. v. General Services Administration, GSBCA 12961, 98-2 BCA ¶ 29,836. On September 4, 1998, respondent, objecting to some of our findings of fact, filed a motion for reconsideration of that decision.

On September 14, 1996, HBT filed an EAJA application as the prevailing party in the above cases and sought \$89,836.03 for attorney fees and expenses. HBT also appealed the Board opinion sustaining the default termination in GSBCA 12961, however, and on October 27, the United States Court of Appeals for the Federal Circuit docketed that appeal.

On October 28, 1998, the Board found that HBT was the prevailing party in GSBCA 12915 and concluded that the position of the Government in that docket was not substantially justified. The Board, unaware of the filing at the Court of Appeals, also concluded that HBT was not the prevailing party in the appeal of the default termination. Herman B. Taylor Construction Co. v. General Services Administration, GSBCA 13874-C(12915), 99-1 BCA ¶ 30,123 (1998). We determined, based on our knowledge of the pre-hearing and hearing record, that HBT's litigation effort was evenly split between the docket on which HBT had prevailed and the docket on which it had not prevailed. Id. After examining the schedules submitted by HBT with its EAJA application, we awarded HBT \$28,297.61 for allowable attorney fees and expenses. That award was based on fifty percent of the attorney hours devoted by HBT's attorney, Ms. Christina Stone; fifty percent of the attorney's expenses; and eighty percent of HBT's expert witness expense. Id. We based our attorney fee award on the \$75 per hour rate cap then in effect, refusing to find that special factors would entitle HBT to an attorney fee award based on a higher hourly rate. Id. Of the total expenses claimed, \$23,250.18 were sought in connection with GSBCA 12961, upon which HBT did not prevail. Id.

On February 15, 2000, the Court reversed and remanded GSBCA 12961 to the Board. Herman B. Taylor Construction Co. v. Barram, 203 F.3d 808 (Fed. Cir. 2000). On May 5, 2000, the Board denied for untimeliness respondent's motion for reconsideration of the underlying agency adjudication in GSBCA 12961. Herman B. Taylor Construction Co. v. General Services Administration, GSBCA 12961-R, 00-2 BCA ¶ 30,935. On June 20, 2000, the Board issued an order granting the appeal and converting the default termination to a termination for the convenience of the Government. Herman B. Taylor Construction Co. v.

General Services Administration, GSBCA 12961-REM, 00-2 BCA ¶ 30,989.

On July 5, 2000, HBT filed another timely EAJA application as the prevailing party in GSBCA 12961. HBT sought \$52,690.45 in attorney fees and expenses. HBT maintains that the Government position in GSBCA 12961 was not substantially justified. Application at 2.

As part of the current application, HBT seeks the \$23,250.18 of fees and expenses the Board considered and denied in its opinion in Herman B. Taylor Construction Co. v. General Services Administration, GSBCA 13874-C (12915), 99-1 BCA ¶ 30,123. HBT also seeks the attorney fees and attorney expenses allegedly incurred after August 1996. HBT seeks to recover \$26,484.81 for fees and expenses of Ms. Christina Stone. That subtotal includes 26.16 attorney hours at \$150 per hour, 3.13 attorney hours at \$175 per hour, 0.3 attorney hours at \$60 per hour, and \$260 worth of expenses.

HBT also seeks expenses of \$26,205.64 for the fees and expenses, allegedly incurred after August 1996, of two other attorneys: Schirmeister Ajami and George Diaz-Arrastia. The subtotal includes 108.4 attorney hours at \$205 per hour, 4.2 attorney hours for an unnamed associate attorney at \$95 per hour, 23.7 paralegal hours at \$65 per hour, and attorney expenses of \$2044.14.

As noted by respondent, Schirmeister Ajami and George Diaz-Arrastia provided HBT legal services in connection with its appeal of the Board's decision in GSBCA 12961 to the United States Court of Appeals for the Federal Circuit. Respondent argues that the Board lacks jurisdiction to award such fees because administrative tribunals such as the Board lack jurisdiction to award fees for legal services rendered before an appellate court reviewing a decision of the administrative tribunal. Respondent's Reply to Application at 2 (Aug. 10, 2000). Respondent also argued that some of the claimed fees were for activities not associated with the termination for default case, but for a related case at the Department of Labor. Respondent's Reply to Application at 4-5. Respondent argued there that if HBT were entitled to any additional amount of EAJA costs, it would be entitled at most to the \$23,250.18 of fees and expenses that the Board considered and denied in its earlier EAJA decision.

In a supplemental reply, respondent maintained that HBT is not entitled to even the \$23,250.18 or any additional award for legal fees and expenses for work on GSBCA 12961 because the position of the Government on the Davis-Bacon Act issue was substantially justified. Respondent's Supplemental Reply to Application (Oct. 2, 2000). Later, the Government argued that its position on the issues of failure to make progress and abandonment were also substantially justified. Respondent's Second Supplemental Reply to Application at 3 (June 6, 2001).

### Discussion

We consider first the remainder of the application for \$23,250.18 for fees and expenses incurred by Ms. Christina Stone referenced in our cost decision in GSBCA 13874-C(12915). The Government argues that HBT is not entitled to reimbursement of these expenses because the position of the Government was substantially justified.

EAJA allows a prevailing party in a suit against the United States to recover attorney fees and expenses in adversary adjudications involving agencies unless the position of the Government was substantially justified. 5 U.S.C. § 504(a)(1) (1994).<sup>1</sup> The Government, as the losing party, bears the burden of establishing that its position was substantially justified. American Sheet Metal Corp. v. General Services Administration, GSBCA 15165-C (14066, et al.), 00-2 BCA ¶ 31,126. The fact that the Government lost the case on a particular issue, however, does not force the conclusion that the Government's position was not substantially justified. A determination of whether the position of the Government was substantially justified involves looking at the entirety of the Government's conduct to make a judgment call whether the Government's overall position had a reasonable basis in law and in fact. Massie v. United States, 226 F.3d 1318, 1320 (Fed. Cir. 2000); Foremost Mechanical Systems, Inc. v. General Services Administration, GSBCA 14645-C(13854), 99-1 BCA ¶ 30,352.

With regard to failure to make progress, GSA argues that HBT was faced with a ninety page punchlist that was only fifty percent complete and that the Government's position on the progress issue was substantially justified. Respondent's Supplemental Reply at 3. This argument is not convincing for four reasons. First, a significant defect in the punchlist dealt with installation delays of a fire alarm system, which delays we have found were the Government's fault and delayed associated finish work. Herman B. Taylor Construction Co., 98-2 BCA at 147,710 (Finding 10). Second, the Government demanded completion of the punch list by June 24, despite the contract completion date of October 1. Id. (Findings 12, 13). Third, the Government never established that HBT would have been unable to complete the punch list by the contract completion date of October 1. Fourth, the record established that the contracting officer's technical representative (COTR) was of the opinion that as of May 10, 1994, the work had sufficiently progressed that HBT could have completed the punch list at least as early as June 24, 1994. Id. (Finding 12). For these reasons, the Government has not shown that the position of the Government was substantially justified on the ground of failure to make progress.

GSA argues that its position that HBT had abandoned the contract was substantially justified. We rejected that ground of default because HBT had not shown an unequivocal and unconditional intent not to perform in any event and at any time. Herman B. Taylor Construction Co., 98-2 BCA at 147,713. The Government has not shown that its position on this issue was substantially justified.

GSA argues that its position on HBT's labor standards violations was substantially justified. The Government notes that during the construction project involved in the contract, the DOL had found substantial violations of the Davis-Bacon Act and Contract Work Hours and Safety Standards Act, and that "GSA was under an obligation under the applicable law to take action against HBT to preclude further violations of law." Respondent's Supplemental Reply at 3-4. The Government's position had a reasonable basis in fact. There

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<sup>1</sup> EAJA establishes maximum size and net worth criteria which a party may not exceed to be eligible for an award. 5 U.S.C. § 504(b)(1)(B) (Supp. V 1999). The Government does not dispute that based, on its size and number of employees, HBT falls within these criteria.

was substantial DOL documentation and evidence of Davis-Bacon violations. See Herman B. Taylor Construction Co., 98-2 BCA at 147,711-12 (Findings 18-20). Further, DOL stated in the consent findings document that it "enter[ed] this agreement with the position that Davis-Bacon and Contract Work Hours and Safety Standards Act violations occurred." Herman B. Taylor Construction Co., 98-2 BCA at 147,712-13 (Finding 22). HBT agreed in the consent findings document to remit to DOL half of the relief that DOL had claimed. Id.

The legal issue was whether the consent findings document represented a final DOL determination that Davis-Bacon violations had occurred. The Court of Appeals concluded that the consent findings document represented a settlement of the termination for default issue, even though the consent findings document did not mention the default termination. Herman B. Taylor Construction Co., 203 F.3d at 813. Prior case law, moreover, held that consent decrees were to be construed narrowly within their four corners to effectuate their objects. See United States v. Armour & Co., 402 U.S. 673, 681-82 (1971); Foster v. Hallco Manufacturing Co., 947 F.2d 469 (Fed. Cir. 1991). This principle, combined with (1) DOL's statement in the consent findings document that Davis-Bacon Act violations occurred, (2) HBT's payment of half of the relief DOL had sought, and (3) the lack of any mention of waiver of the termination for default, made the Government's position eminently reasonable, even if in the mind of the Court of Appeals, the DOL consent finding document was not final action by DOL justifying termination of HBT's contract for default.

The alleged labor standards violation represented a relatively minor aspect of time and effort HBT's attorneys spent on the hearing on the merits of the appeal. A partial award is appropriate. See Cinciarelli v. Reagan, 729 F.2d 801, 809 (D.C. Cir. 1984). We determine from our knowledge of the record that HBT's counsel devoted about ten percent of her time and effort in GSBCA 12961 to try and brief the labor standards issue before the Board. We therefore award HBT ninety percent of the remaining \$23,250.18, or \$20,925.16.

HBT seeks \$26,205.64 for fees and expenses incurred in connection with the appeal before the United States Court of Appeals for the Federal Circuit generated by Schirmeister Ajami and George Diaz-Arrastia. This portion of HBT's EAJA application must be dismissed. We lack jurisdiction to make an EAJA award for fees and expenses incurred before the United States Court of Appeals for the Federal Circuit. Phillips v. General Services Administration, 924 F.2d 1577, 1581 (Fed. Cir. 1991); Oliveira v. United States, 827 F.2d 735, 744 (Fed. Cir. 1987); Sysorex Information Systems, Inc. v. Department of the Treasury, GSBCA 10781-C(10642-P)-REIN, 93-1 BCA ¶ 25,428 (1992) (full Board); Gilroy-Sims & Associates v. General Services Administration, GSBCA 11778-C, 93-1 BCA ¶ 25,547; EAJA Application of Hardrives, Inc., IBCA 3283-F, 96-1 BCA ¶ 27,935.

HBT sought \$26,484.81 for additional fees and expenses incurred by Attorney Stone after August 1996 and "incurred on GSBCA . . . 12961 only." Application at 3. HBT also sought an additional \$1000 for preparation of the EAJA petition. In response, the Government accurately noted that much of HBT's schedule did not distinguish between the hours spent on the termination for default case, the administrative action before the DOL, the appeal to the United States Court of Appeals for the Federal Circuit, the equitable adjustment claim before the Board docketed as GSBCA 13884, or the separate suit brought by Ohio Casualty Insurance Company against HBT. Respondent's Reply at 4.

HBT submitted a response to respondent's reply in which HBT sought to clarify exactly which fees and expenses were generated solely in GSBCA 12961. HBT says that on February 4, 1997, its attorney spent 0.7 hours (and \$13 in expenses) reporting to the Board regarding the DOL administrative proceeding. The Board did order that HBT keep the Board advised of the status of the DOL proceedings, and those hours are properly charged. HBT's attorney also spent 4.5 hours responding to respondent's motion for reconsideration, and those hours are properly charged.

HBT's clarification also seeks fees for work that was ostensibly related to GSBCA 12961 but without a demonstration that the work was in connection with prosecution of the appeal before the Board. For example, HBT seeks reimbursement of 0.83 hours of attorney effort and costs for work on August 6, 1997, for receipt and review of a facsimile from HBT's owner and a letter to another individual without identifying that the work was performed in connection with GSBCA 12915.

HBT claims that 10.05 hours of work performed from December 30, 1998, through February 2, 1999, involved work in the "12961 file," Appellant's Response at 2, but the attached schedule indicates that was work performed in connection with the appeal before the United States Court of Appeals for the Federal Circuit.

HBT seeks fees for 5.1 hours of attorney effort between April 25, 2000, and May 10, 2000. HBT states it incurred expenses on April 28, 2000, for 0.2 hours of effort related to GSBCA 12961 in reviewing a Board order, but our review of the reading files does not reveal a Board order relating to GSBCA 12961 issued for the month of April.

HBT claims 2.4 hours for attorney effort on May 9 and 10, 2000, for activities which HBT claims relate to GSBCA 12961. HBT's schedule, however, includes matters not involving GSBCA 12961: "preparation of new claim for termination for convenience" and "calculating judgment from Ohio Casualty." Although HBT had the right to file and submit a termination for convenience claim once the termination for default was overturned, the agency's consideration and disposition of a termination for convenience claim is the aftermath of a default termination that is found to be invalid. While it is undoubtedly related to the agency adjudication, the consideration of a termination for convenience claim is an administrative action separate from the default termination. HBT's attorney did spend time reviewing the Board's decision on respondent's untimely motion for reconsideration of the decision in GSBCA 12961. HBT, however, did not segregate those hours from the hours spent in preparing the termination for convenience claim; we have no basis for making an award for that time.

HBT also claims 2.4 hours of attorney work and costs incurred on May 8 through May 19, but identifies that work as work involving the termination for convenience claim and not GSBCA 12961, which as we have explained above, is related to, but not the same as, the default proceeding involved in GSBCA 12961.

HBT has established that, in addition to the \$20,925.16, HBT is entitled to 5.2 hours at \$75 per hour, which was the cap at the time the agency adjudication was commenced, and \$13 of expenses. 5 U.S.C. § 504(a)(1) (1994). This additional amount is \$403. HBT's attorney states that the fees incurred for preparation of the EAJA petition, if billed at a \$75

per hour rate, would be \$1335.60. HBT's Response to Respondent's Reply at 2. In other words, HBT's attorney spent 18.07 hours preparing the petition and responding to the Government's objections. HBT's attorney, however, only seeks \$1000 for preparation of the EAJA petition. The time spent in preparing the petition is reasonable and the amount requested for that time is reasonable, being lower than the total at the \$75 per hour cap. We award HBT \$1000 for expenses incurred by its attorney in preparing the EAJA petition.

Decision

HBT's application for EAJA fees is **GRANTED IN PART** and **DISMISSED IN PART** for lack of jurisdiction. HBT is awarded \$22,328.16 without interest pursuant to the EAJA.

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ANTHONY S. BORWICK  
Board Judge

We concur:

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EDWIN B. NEILL  
Board Judge

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CATHERINE B. HYATT  
Board Judge