Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

MOTION FOR RECONSIDERATION DENIED: July 26, 2001

GSBCA 15479-C(14765)-R

McTEAGUE CONSTRUCTION CO., INC.,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

L. Wesley Nichols, P.A., Palm Beach Gardens, FL, counsel for Appellant.

Kevin J. Rice, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **DeGRAFF**.

DANIELS, Board Judge.

McTeague Construction Company, Inc. (McTeague), moves the Board to reconsider its decision awarding some of the attorney fees and other costs it incurred in prosecuting an appeal of a decision by a General Services Administration (GSA) contracting officer. The fees and costs were sought under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1994 & Supp. V 1999). McTeague Construction Co. v. General Services Administration, GSBCA 15479-C(14765) (May 9, 2001). We deny the motion.

In our decision, we limited McTeague's recovery of attorney fees and costs in two ways. First, we allowed recovery only to the extent commensurate with the contractor's success in the underlying case -- about twenty-eight percent of the total amount sought on a myriad of claim elements, most of which contained numerous sub-elements. Second, we did not allow recovery of any fees and costs incurred after the contractor refused a Government settlement offer, reasoning that by prolonging litigation after that point in time, McTeague acted to its detriment by spending money unwisely.

In its motion for reconsideration, McTeague asks us to focus on three objections to the limitations. As advanced by the contractor, these objections are as follows.

> (1) Prior to hearing, GSA had been willing to pay virtually none of the contested amounts, so unless the contractor had spent all the money it did, it would not have achieved any success. Since the agency has not contested the reasonableness of the fees and costs incurred, all of them should be awarded. "Otherwise, a claimant making a relatively small claim cannot afford to litigate with the government and thus the goal of [t]he Equal Access to Justice Act would be defeated." Motion for Reconsideration at 3.
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> (2) If the contractor had known, at the time that the settlement offer was made, that the Board would grant only twenty-eight percent of the claim, it would still have acted reasonably in rejecting the offer. The reason is that the combined amounts of the award, interest on the award, and fees and costs incurred by the date of the offer were greater than the amount of the offer.
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> (3) The contractor acted prudently in rejecting the settlement offer because after the hearing, and before the offer was made, the Board judge who had presided at the hearing had suggested that the parties settle the case by having GSA give McTeague at least the amount of the offer in payment of the claims alone. Therefore, if McTeague had accepted the offer, it would have had to forego its right to any interest on the claim and any recovery of fees and costs.

We do not believe that any of these arguments is sufficient ground for reconsideration of our decision.

McTeague's first thesis, if accepted, would effectively eliminate the authority of the Board to reduce an award to account for a contractor's partial success on the merits of its case. In our decision, we explained that under cost-shifting statutes, "[t]he 'results obtained' factor is important in fashioning an award, and is 'particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief.'" McTeague, slip op. at 2 (quoting Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). We remain convinced that we exercised our authority under this principle in an appropriate way.

McTeague's second argument presumes that we agree with the contractor that its partial success on the merits deserves a full award of fees and costs sought. Having rejected that position, for reasons explained as to the contractor's first argument, we reject the second asserted ground for reconsideration as well.

McTeague's third reason for reconsidering our decision is based on the theory that a presiding judge's suggestion for settlement is an indicator with high predictive value for how the Board will rule in a case. The contractor places far too much emphasis on this informal comment. As McTeague admits, "Of course, these discussions with Judge Parker were not binding on anyone especially Judge Parker or this [Board]." McTeague's Response to GSA's Memorandum in Opposition to [McTeague's] Application for Fees and Costs (Mar. 2, 2001) at 3; see also Motion for Reconsideration at 4. Furthermore, as McTeague also appears to acknowledge, a judge's recommendation for settlement may be directed toward an equitable

result; it may therefore have no relation to his assessment of the extent to which the contractor might recover if the Board were to write a decision evaluating the evidence presented by the parties under legal standards for proof. See Motion for Reconsideration at 4. The suggestion made by the presiding judge in the underlying appeal is not relevant to our conclusion that because McTeague proved so little of the amount of recovery it claimed, the contractor was unwise in rejecting the agency's settlement offer and the Government was substantially justified in persisting in its opposition to the appeal once that offer was spurned.

Decision

McTeague's motion for reconsideration is **DENIED**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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ANTHONY S. BORWICK
Board Judge

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MARTHA H. DeGRAFF
Board Judge