Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED IN PART: October 10, 2001

GSBCA 15572-C(14900, 14901, 14902)

GRANCO INDUSTRIES, INC.,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Darcy V. Hennessy of Moore Hennessy & Freeman, P.C., Kansas City, MO, counsel for Applicant.

Robert T. Hoff, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

WILLIAMS, Board Judge.

This is an application for costs under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1994 & Supp. V 1999). Applicant, Granco Industries, Inc. (Granco), seeks attorney fees, costs, and compensation for the time of its employees called as witnesses at the hearing. In the underlying appeal, Granco successfully challenged the termination for cause of two contract line items, correctly claiming that it withdrew its bid for those line items, and that no contract existed between Granco and the Government for such items. Granco Industries, Inc. v. General Services Administration, GSBCA 14900, et al., 01-1 BCA ¶ 31,173.

The Government does not dispute that Granco is a prevailing party which would qualify for an EAJA award based on its size and income, but attempts to defeat Granco's application, claiming that GSA's position was substantially justified. In the alternative, the Government contends that any attorney fees should be capped at a maximum rate of $125 per hour, and that there should be no reimbursement for Granco's employees. We conclude that the Government's position in failing to respond to or act upon Granco's withdrawal of its bid and then attempting to enforce and terminate a nonexistent contract was not substantially

justified. We grant Granco its costs and attorney fees limited to the $125 per hour cap set by EAJA. We deny reimbursement for the time of Granco's principals, as EAJA does not permit such recovery.

Background

On July 14, 1997, the General Services Administration (GSA) issued an invitation for bids (IFB) for the supply of socket wrenches for the period of October 1, 1997, through September 30, 1999. The date specified for the receipt of bids was August 26, 1997. The solicitation contained the "Minimum Bid Acceptance Period" clause, which provided that the Government required a minimum acceptance period of 120 calendar days. Appeal File, Exhibit 1 at 74. The IFB further provided that "bids may be modified or withdrawn by written or telegraphic notice." Id. at 75.

The IFB contained clause 552.225-71, Notice of Procurement Restriction - Hand or Measuring Tools or Stainless Steel Flatware (May 1989), which provided that awards would only be made to offerors that furnish hand or measuring tools that are domestic end products.

The IFB defined "domestic end product" as:

> Any hand or measuring tool . . . wholly produced or manufactured, including all components, in the United States or its possessions.

Appeal File, Exhibit 1 at 74.

The solicitation required delivery to be made at destination within ninety calendar days after receipt of an order. Appeal File, Exhibit 1 at 49. The solicitation's Termination for Cause clause stated that the Government could terminate the contract, in whole or in part, for cause in the event of any default by the contractor, or if the contractor failed to comply with contract terms and conditions, or failed to provide the Government, upon request, with adequate assurances of future performance. Id. at 40.

The solicitation included a schedule soliciting seventeen separate line items. Appeal File, Exhibit 1 at 27-31. Multiple offers were encouraged, and the Government could accept individual items of an offer or groups of items. Id. at 73.

Granco's Bid

On August 14, 1997, Granco submitted a bid including unit prices for all but two line items. In particular, appellant bid a unit price of $4.40 for line item 5, hinged handles, national stock number (NSN) 5120-00-240-5396 (5396), and a unit price of $4.80 for line item 8, socket wrench handles, NSN 5120-00-240-5364 (5364). Appeal File, Exhibit 1 at 29. Granco's bid was valid for 120 calendar days. Id. at 74.

On December 17, 1997, one week before Granco's bid would have expired, the contracting officer sent Mr. Dennis Waldo, the vice president of Granco, the following letter:

> The date within which the Government may accept your bid on the above captioned invitation is specified in block 2 above [December 24, 1997].
>
> Due to the time required to complete the orderly evaluation of bids received, we request an extension of the acceptance period shown in block 3 above [February 24, 1998].

Appeal File, Exhibit 12.

On the face of that same letter, Mr. Waldo, in his capacity as vice president of Granco, signed a statement which provided: "The undersigned extends the date for acceptance for subject bid to February 24, 1998." The statement was dated December 17, 1997. Appeal File, Exhibit 12.

Granco's Attempt to Withdraw Portions of its Bid

When the Government requested an extension of a bid, Granco's vice president typically contacted his suppliers to make sure the pricing was still correct. Transcript at 16-17. In the process of doing this here, Mr. Waldo noticed the clause in the IFB requiring that domestic end-products, including all components, be wholly produced or manufactured in the United States. Id. at 17-18; see Appeal File, Exhibit 1 at 74. Mr. Waldo questioned his suppliers on whether items 4, 5, 7, 8, and 9 were domestic end-products and learned that they were foreign in that "the forging came from Taiwan." Transcript at 17. Mr. Waldo, therefore, withdrew Granco's bid for items 4, 5, 7, 8, and 9 because he believed that these items did not meet the IFB's requirements for domestic end-products. Id. at 16-17, 27.

Specifically, on January 23, 1998, Granco sent a letter to GSA stating that Granco "is hereby notifying you of our intent to withdraw our bid on the following items: 4, 5, 7, 8, and 9. Please note that as of January 23, 1998, Granco Industries, Inc. has withdrawn our bid on the above mentioned items." Appeal File, Exhibit 12. Granco never received a response to this January 23 letter. Transcript at 18, 130-31.

The GSA contract specialist who worked on the procurement had been in her position for two years and was still in training. She testified:

> Q And did you receive [the January 23 letter from Granco]?
>
> A Yes, ma'am.
>
> Q But, you did not process it, I understand that.
>
> A No I didn't do anything with it.
>
> Q Now, was it your responsibility to act on that at the time?
>
> A My personal opinion is, yes.
>
> Q It was? So, it came to the right person?

A Yes. I would have taken it to the Contracting Officer.

Q Did you take it to the Contracting Officer?

A No ma'am, not that I recollect.

Q Now, why didn't you do that?

A I have no idea.

. . . .

Q Well, can you enlighten us at all -- this letter never got to the Contracting Officer at the time, you didn't take it to her?

A No, not at this date.

Transcript at 152-53.

Granco's Extension of the "Subject Bid"

On February 18, 1998, Granco's vice president signed a form letter identical to that which he had signed on December 17, 1997, except this time extending the date for acceptance of "the subject bid" until March 28, 1998. Appeal File, Exhibit 13. Again, no notations were made on this letter indicating that any line items had been excluded from the bid extension. Id. Granco's vice president signed the document extending its bid until March 28, but did not believe that Granco had extended its bid with respect to the items listed in its January 23, 1998, letter. Transcript at 19-20. Granco's vice president testified that it was not Granco's intention to extend its bid for items 4, 5, 7, 8, and 9. Id. The contract specialist believed that the "subject bid" in the extension referred to the original bid, and that the extension qualified the January 23 letter to show Granco had decided to extend its full bid. Id. at 156. The contract specialist did bring Granco's letter of January 23 to the attention of the contracting officer before making award. Id. at 155. The administrative contracting officer (ACO) received copies of Granco's request to withdraw its bid, but never discussed this with Granco and never responded to the request. Id. at 130-31.

The Award

On February 25, 1998, GSA awarded Granco a contract for items 4, 5, and 8 under contract number GS-06F-78629 and items 1, 14, 15, and 16 under contract number GS-06F-78624. Appeal File, Exhibit 1 at 1, 26; Transcript at 21. On March 2, 1998, Granco received the letter notifying it of this award. Id. Granco was not expecting the award on items 4, 5, and 8 because it had withdrawn its bid as to those items, and Granco's vice president was shocked to receive the award. Transcript at 23.

Granco's vice president called GSA's contract specialist and asked if she had received the letter withdrawing the bids. The contract specialist said she would have to look into it. The contract specialist called Granco's vice president back a couple of days later and said she "would have to get with [her] ACO [administrative contracting officer] and look

in on that further." Transcript at 23, 143. The contract specialist did not advise him that Granco could not withdraw its bid. Id. at 24.

In addition, after he was notified of the award, the president of Granco called the procuring contracting officer (PCO). Granco's president testified:

> Q Now, at any point in time after GSA had attempted to award these items to Granco, did you have any conversations with anyone at GSA about Granco's request to withdraw its bid?
>
> A Well, once we thought we had withdrew them and thought it was we weren't getting them. Then, when we started getting them, I called Roy Trickle [the PCO] and I says I used pretty plain words. I told him I didn't want to go down that road being putting myself in a position that Inspector General's Office would come up and file a lawsuit against me for fraud because there's no such thing as being wholly produced in the United States.
>
> I said I need a letter from you guys or something giving me some exceptions. Raw materials, chrome, nickel whatever. And he said yeah he understood what I was talking about. But, I never received any letter.

Transcript at 106-07.

No one at Granco signed the award document because Granco had withdrawn its bid on items 4, 5, and 8 and its vice president "didn't want to compound the issue and sign something [he] really didn't want to start with." Transcript at 22.

On April 27, 1998, one order was placed for line item 5 and two orders were placed for line item 8. All three orders were due to be shipped on July 29, 1998.

Granco's Efforts to Perform

Because Granco had not heard anything from GSA regarding its request to withdraw its bid, it believed this request was still being reviewed. Transcript at 26. However, once Granco received the orders for these items it believed that GSA was going to enforce the award of the contract and that it had to perform. Id.

Therefore, Granco attempted to obtain clarification of what the domestic end-product requirements were. Transcript at 34-37. However, between April and July Granco never received any official GSA interpretation. Id. at 36. In July, Granco's vice president called the contract administrator and ACO, Peter Smolinski, for this interpretation, and the ACO told Mr. Waldo to put his request in writing. Id. at 37-38. Additional orders were placed for these items.

By letter dated July 22, 1998, Granco's vice president, Mr. Waldo, asked Mr. Smolinski the following question regarding whether the tools it was to provide must be "domestic end products":

> Is raw material, raw forgings, etc., acceptable coming from foreign sources? These items are manufactured, plated, and assembled in the United States, but as stated, the raw material is of foreign source, which only makes up less than 10% of the total cost. Granco has spent a great deal of time attempting to locate a supplier who could supply 100% American made material. We have found any such materials to be non-existent [sic].
>
> . . . .
>
> If it is not GSA's interpretation of the clause, then Granco respectfully requests the no cost termination of this contract for the subject line items. Granco attempted to withdraw its bid for the subject line items before bid opening, but GSA would not let Granco withdraw it [sic] bid. Although Granco subsequently worked with GSA on this contract, Granco did not intend to supply the subject line items, because of its concern over GSA's possible adverse interpretation of the subject clause.

Appeal File, Exhibit 3.

On August 13, 1998, GSA responded to the July 22 letter as follows:

> With regard to your 7/22/98 letter, inquiring whether or not raw material used from foreign sources would meet the domestic end products clause in [the] contract . . . , the following opinion was received: If only the raw material is foreign and there are at least 2 distinct manufacturing processes through which the material goes . . . to produce the final product, . . . the tool is considered a domestically manufactured item.

Appeal File, Exhibit 8.

Based upon this response, Granco believed it could use foreign raw forging material, subject it to numerous manufacturing processes, and still meet the domestic end-product requirements, so Granco procured sample parts for use in manufacturing line items 5 and 8. Transcript at 45-46.

In late August, a GSA inspector came to Granco's plant on other business, reviewed Granco's proposed materials and parts, and expressed doubts as to whether those materials and parts would meet the requirements of the subject clause. Transcript at 55-56. The GSA inspector advised Granco that if the raw material forging looked like the end product it would not be considered a domestic end-product. Id. at 55-57. Therefore, Granco believed GSA had given it a definitive answer that its raw forging material was from a foreign source and could not be used. Id. at 57. During the inspector's visit, Granco's vice president "conveyed to him a number of times that he tried to withdraw his bid before award was made." Appeal File, Exhibit 11. This information was transmitted to the ACO, PCO, and contract specialist on August 28, 1998. Id.

Granco's vice president subsequently attempted to find a supplier of items 5 and 8 whose product would meet the interpretation given him by the inspector, but was

unsuccessful in locating any parts meeting the requirements at a commercially practical price. Transcript at 58. Obtaining the raw forging from a domestic source would have cost $5 more per item -- $9 to $10 as opposed to Granco's bid price of $4.80. Id. At this point Granco could not produce the items by the due date, and some orders were already overdue. Id. at 59.

By letter dated August 26, 1998, GSA advised Granco that certain orders were delinquent and that it was considering terminating purchase orders under line items 5 and 8 for default. Appeal File, Exhibit 10. The letter invited Granco to explain in writing why it had failed to perform within ten days after receipt of the notice. Appeal File, Exhibit 10.

By letter dated September 10, 1998, Granco offered a monetary consideration of $2957 to extend the delivery dates of the delinquent orders until November 26, 1998, through January 23, 1999. Appeal File, Exhibit 13. On September 22, 1998, GSA requested Granco to clarify its September 10 offer specifying the amount of consideration attributable to each order and asking if Granco could reduce the length of the requested extensions and provide specific reasons for the delay. Id., Exhibit 20. By letter dated September 30, 1998, Granco gave GSA the requested breakdown and advised that the main reason for the delay of the subject purchase orders was in receiving GSA's clarification on raw material versus forged material for the domestic end-product requirement. Id., Exhibit 17.

After receiving the clarification on forged material, Granco found two domestic sources to manufacture the subject items and again requested it be granted the extended delivery dates of November 26 and January 23. Appeal File, Exhibit 17 at 2.

On October 6, 1998, GSA issued a modification extending the delivery dates of several orders to October 30, 1998. Appeal File, Exhibit 4. GSA explained:

> As there are backorder demands for these items, it is not in the Government's best interest to grant the extensions requested by Granco. As such, the Government is exercising its right to unilaterally reestablish the delivery dates for these orders . . . to October 30, 1998. In the event that your firm fails to deliver these purchase orders . . . by the reestablished date, the Government may terminate the orders for cause.

Id., Exhibit 20 at 2.

By letter dated October 27, 1998, Granco, through its counsel, requested that GSA cancel or rescind the contract at no cost to the Government or reestablish a realistic delivery date, recognizing that all components had to be produced domestically. Appeal File, Exhibit 21. It was not possible for Granco to supply domestic end-products by the end of October, given the lead time required by the domestic suppliers. Transcript at 71-76, 81.

The Terminations for Cause

On November 18, 1998, GSA terminated for cause appellant's right to proceed further with purchase orders under line items 5 and 8. Appeal File, Exhibit 24. Granco failed to deliver items under additional purchase orders for line items 5 and 8. On December 22, 1998, GSA terminated line item 8 in its entirety for cause for failure to deliver. Id.,

Exhibit 30. By letter dated January 28, 1999, GSA terminated line item 5 in its entirety for failure to deliver. Id., Exhibit 37.

The Appeal

In granting the underlying appeal, the Board found that the Government's attempted terminations for cause were ineffectual since the award had been made on the extended bid which excluded line items 5 and 8 and no contract on the withdrawn items had been formed. Granco Industries, Inc., 01-1 BCA at 153,995.

The EAJA Application

Granco seeks attorney fees totaling $10,155 and costs totaling $579.10. Granco claims an attorney fee rate of $150 per hour, instead of the standard maximum EAJA rate of $125 per hour, on the grounds that "there is a limited availability of . . . attorneys in the Kansas City area experienced in Government contract law" and "even the claimed $150 rate is far below the prevailing rate for the attorneys in this area with twenty years experience." Application for Award of Costs and Fees at 2. Granco also seeks reimbursement in the amount of $396 for the time of its two principals who were fact witnesses at the hearing.

Discussion

Under the EAJA, a private party which has prevailed in litigation against the Government may recover its attorney fees and expenses if the position of the Government was not substantially justified. 5 U.S.C. § 504(a)(1). The Act provides:

> 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.

The Government does not dispute that Granco is a prevailing party and otherwise would qualify for an EAJA award based on its size and income. Rather, the Government argues that its position was substantially justified. When a party has prevailed in litigation against the Government, the Government bears the burden of establishing that its position was substantially justified. Doty v. United States, 71 F.3d 384, 385 (Fed. Cir. 1995). Both the Government's prelitigation, administrative conduct and its litigation conduct must be examined in ascertaining whether its position was substantially justified. Id. at 386. The Supreme Court has held that the phrase "substantially justified" means justified in substance or in the main -- that is, to a degree that could satisfy a reasonable person and is equivalent to "having a reasonable basis both in law and fact." Pierce v. Underwood, 487 U.S. 552, 565 (1988); DRC Corp. v. Department of Commerce, GSBCA 15172-C(14919-COM), 00-1 BCA ¶ 30,841, at 152,227. Applying this standard here, we conclude the Government's position was not substantially justified as it lacked a reasonable basis both in law and in fact.

By letter dated January 23, 1998, Granco unequivocally withdrew its bid on line items 4 through 9. Although the bid withdrawal was ineffectual during the initial acceptance

period, award was not made until after such acceptance period had ended and was based upon an extension of Granco's "subject bid," which as of that time included only the line items it had not withdrawn. The Government unreasonably interpreted Granco's bid extension to apply to the withdrawn items, ignoring Granco's withdrawal letter which fully complied with the contractual requirements for withdrawing a bid. Moreover, the GSA contract specialist received the bid withdrawal letter, but did not process it at the time, though it was her responsibility to act on the letter and take it to the contracting officer. Later, the letter was brought to the contracting officer's attention, but still the Government never responded. Granco Industries, Inc., 01-1 BCA at 153,991. Instead, the Government attempted to force Granco to perform a nonexistent contract at a price and delivery schedule Granco could not achieve due to its admitted inability to meet Buy American Act requirements as interpreted by a GSA inspector.

The Government argues that the facts were murky and that Granco had a "duty to clarify" but instead sent a "mixed message of revoking a contract term, then subsequently agreeing to an extension of the bid opening, without restriction." Response to Application for Award of Fees and Costs at 2. This characterization is factually and legally erroneous. The facts as developed at the hearing were not murky at all. GSA contracting personnel admitted they received the letter withdrawing the bid and never responded to it or addressed it, preferring to interpret appellant's "subject bid" as though that withdrawal letter did not exist. Respondent contended that the bid was irrevocable during the extension period, but did not cite any applicable legal authority for this contention.[1] Moreover, contrary to respondent's suggestion, Granco could not have revoked a "contract term" because no contract had been formed, as its letter withdrawing portions of its bid was a clear restriction on the bid extension.

In its decision, the Board, applying fundamental legal principles, found that Granco had effectively withdrawn its bid for line items 5 and 8, concluding:

> The legal principles which impel this decision lie . . . in fundamental elements of contract formation. When the contracting officer signed the notice of award, the only bid appellant had open for acceptance was a bid it extended after withdrawing the items in question. Since the award was not in conformity with appellant's only outstanding bid, the signing of the notice of

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[1] As we recognized in our decision, respondent's reliance on Western Adhesives, GSBCA 7449, 85-2 BCA ¶ 17,961, to support this assertion was misplaced:

> Respondent points out that Western Adhesives holds that an extended bid is irrevocable during the extension period. While this legal conclusion is accurate, it does not address the situation we face here - where a bidder has attempted to withdraw a bid prior to executing its extension, believing its extension has excluded certain items. Western Adhesives presented a clear cut case of a contractor attempting to withdraw its entire bid, after it had extended the bid, before the bid expired.

Granco Industries, Inc., 01-1 BCA at 153,995.

> award could not give rise to a valid contract; it was no more than a counter-offer by the Government requiring acceptance by appellant in order for a contract to arise . . . . The Government did not accept appellant's counter-offer but instead took the legally erroneous position that the notice of award gave rise to a legally binding contract conforming to appellant's original bid.

Granco Industries, Inc., 01-1 BCA at 153,995.

Because the Government has not met its burden to demonstrate that its position was substantially justified, Granco is entitled to recover fees and expenses authorized by EAJA. Granco seeks attorney fees at a rate of $150 an hour, but EAJA sets the maximum amount allowable for reimbursement at $125 an hour, unless higher fees are justified. 5 U.S.C. § 504(b)(1)(A). Granco argues that the higher rate is justified due to a lack of attorneys in the Kansas City area who are experienced in Government contract law, and states that $150 an hour is far below the prevailing rate for an attorney, such as its counsel, with twenty years of experience. These considerations do not warrant a higher fee. "There are, of course, those who might argue that government contract law provides its own rather daunting maze of arcana; however, no court has ever found it sufficiently complicated to accord it special factor treatment. To the contrary, Courts ruling on the question hold that expertise in construction and government contract law does not warrant an enhanced award." Kumin Associates, Inc., LBCA 94-BCA-3, 98-2 BCA ¶ 30,008, at 148,444 (citations omitted); see also Herman B. Taylor Construction Co., GSBCA 13874-C(12915), 99-1 BCA ¶ 30,123, at 149,026; American Power, Inc., GSBCA 10558-C(8752), 91-2 BCA ¶ 23,766, at 119,048. Appellant's hourly rate reimbursable under EAJA is $125, making the fee award $8462.50.

Granco seeks reimbursement for the time that its principals, Mr. Ray Waldo and Mr. Dennis Waldo, spent in trial and in preparation for trial, at the rate of $33 per hour for a total amount of $396. We deny this portion of Granco's claim. The ineligibility of a corporation's employees to receive compensation under an EAJA application is well settled. The Board has long held that this type of recovery does not fall within the definition of "fees and expenses," and thus, is not recoverable under EAJA. "What makes the expenses not reimbursable under EAJA is that they are not 'fees' or 'expenses' in the sense of money that was actually spent by the litigants. . . . The courts have evidently decided that the economist's concept of 'opportunity costs' -- earning potential forgone in exchange for doing something else -- is not to be considered when determining EAJA reimbursement." American Power, Inc., 91-2 BCA at 119,048 (citing Naekel v. Department of Transportation, 845 F.2d 976 (Fed. Cir. 1988)); see also Roberts Construction Co., ASBCA 31033, 86-2 BCA ¶ 18,846, quoting legislative history as follows:

> A further indication of the intended scope of recovery is the fact that, at the time the EAJA was enacted, Congress also considered a similar bill in which the definition of recoverable "fees and other expenses" expressly included: "the cost of the party's personal absence from business at an hourly rate." H.R. 6429, 96th Cong., 2d Sess. (1980). This provision was dropped from the EAJA as enacted.

See additionally Giancola & Associates v. General Services Administration, GSBCA 12305-C(12128) 93-3 BCA ¶ 26,146, at 129,980; M. Bianchi of California,

ASBCA 26362, et al., 90-1 BCA ¶ 22,369, at 112,403-04; Preston-Brady Co., VABCA 1892E, et al., 88-2 BCA ¶ 20,574 (salaries of officers not compensable).

Respondent has not challenged appellant's claimed costs of $579.10 representing Westlaw research ($156.60), overnight mail ($38.65), transcript ($381), and postage ($2.85). These expenses are justified in the instant litigation and are reasonable. See Oliveira v. United States, 827 F.2d 735, 744 (Fed. Cir. 1987) (trial tribunal may award reasonable and necessary trial expenses customarily charged to the client where case is tried). Reimbursement in this amount is granted.

Decision

The application is **GRANTED IN PART**. Applicant is entitled to an award of $9041.60 in fees and expenses.

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MARY ELLEN COSTER WILLIAMS
Board Judge

We concur:

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STEPHEN M. DANIELS
Board Judge

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ANTHONY S. BORWICK
Board Judge