
In the Matter of:

THE WASHINGTON CONSULTING
GROUP, INC.,

Respondent

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: HUDECA No. 89-4489-EAL
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**RULING AND ORDER ON RESPONDENT'S APPLICATION
FOR ATTORNEYS' FEES AND COSTS**

By Administrative Judge Jean S. Cooper

October 8, 1991

Statement of the Case

The Washington Consulting Group (WCG) has filed an application for attorneys' fees in this case under the Equal Access to Justice Act, 5 U.S.C. S 504 (EAJA). WCG argues that it is a prevailing party as a result of a settlement reached with the Federal Emergency Management Agency (FEMA. or Government) of a contract dispute which had been appealed to this Board. WCG further argues that FEMA position during the contract dispute was not substantially justified. FEMA asserts that WCG is not a prevailing party, that the Government's position was substantially justified, and that special circumstances exist which preclude an award of attorneys' fees.

Findings of Fact

1. WCG was awarded Contract No. EMW-85-C-1956 by FEMA, through the Small Business Association on April 1, 1985, to perform consulting and other support services for a National Defense

Executive Reservists (NDER) Conference to take place later that year. During contract performance, Pat Maloy served as FEMA project officer, and Donna Darlington served as contracting officer. (Govt. Exh. C).

2. On June 14, 1985, soon after contract performance commenced, project director Melba Gandy resigned from WCG. (Resp. Exhs. I, J).

3. Upon learning of Gandy's departure from WCG on June 15, 1985, Darlington had computers, equipment and other government- furnished property (GFP) locked in a room by hotel security. Darlington had the GFP stored away because she believed that the computer databases contained information which was protected under the Privacy Act, 5 U.S.C. S 552a. When Armando Chapelli, Jr., WCG' s president, demanded that Darlington return the GFP, Darlington told him that the property would be returned only when WCG found a suitable replacement for Gandy as project director. During that time period, WCG was unable to perform because it did not have access to the computers and other materials supplied by the Government. (Resp. Exh. N, Govt. Exh. A).

4. WCG did not propose a replacement for Gandy during June or early July, 1985. In a letter dated July 10, 1985, Darlington informed Chapelli that FEMA. was on the verge of partially terminating WCG for default. (Resp. Exh. X).

5. On July 22, 1985, WCG proposed Patricia Mira as Gandy's replacement. Mira joined WCG in 1984, and had experience in planning and managing meetings. Maloy's comments in a July 23, 1985 memorandum questioned Mira's ability to complete the remaining contract work. In that memorandum, Maloy also expressed frustration that contract performance was falling behind schedule, but found that Mira would not be an able substitute for Gandy, whom Maloy believed to be a superior project director. (Resp. Exhs. Z, AA).

6. WCG proposed a second replacement, Margaret Mahoney on July 29, 1985. Mahoney had been WCG's Vice President for Finance and Operations since April 1984 and Senior Conference Assistant since August 1982. In a July 31, 1985 memorandum, Maloy rejected Mahoney as a suitable replacement for Gandy. The memorandum contained a comparison of Mahoney's credentials against Gandy's. Maloy determined that Mahoney lacked adequate computer, conference planning, and management experience. Two weeks later, however, FEMA accepted Mahoney as a member of WCG "key personnel" to act in an administrative capacity in completing the contract. (Resp. Exhs. BB, CC, DD, EE).

7. During this time period, a dispute also arose over documents which FEMA requested from WCG for proper invoicing and payment. In a letter dated June 26, 1985, Darlington informed WCG that three invoices submitted by WCG would need to be resubmitted with supporting documents, including receipts, cancelled checks and time sheets. Darlington also told WCG that supporting documents

had to accompany any subsequent invoices submitted for payment. Maloy asked Darlington to obtain the supporting documents because she questioned some costs billed by WCG. Maloy cited FAR 52.216-7 as authority for her request. (Resp. Exh. Q, Govt. Exhs. A, C).

8. WCG did not resubmit the invoices as requested and did not provide FEMA with supporting documents in subsequent invoices which it submitted for payment. Because WCG failed to provide such proof, Maloy denied payment of WCG's invoices. (Resp. Exh. P, Govt Exh. C).

9. On March 10, 1986, WCG appealed a final decision of the contracting officer denying WCG's claim for \$35,618 to the General Services Administration Board of Contract Appeals. Because of a lack of jurisdiction, the appeal was dismissed and filed with this Board on April 1, 1986. (Resp. Exh. D).

10. Later that year, an audit of WCG was begun by the FEMA office of the Inspector General (OIG) at Darlington's request. On the second day of the audit at WCG's offices, WCG refused to answer the auditors' questions and asked the auditors to leave the premises. The auditors left without completing the audit. (Govt. Exh. D).

11. In order to obtain documentation necessary to settle the contract appeal in whole or in part, OIG performed a second audit in February, 1988 as requested by the FEMA Office of General Counsel. The purpose of the audit was to determine whether costs claimed by WCG were allowable under the contract and properly supported. At this time, WCG's claim for reimbursement against FEMA totalled \$35,618. The audit team questioned \$32,013 of those costs. (Resp. Exh. D).

12. The parties executed a settlement agreement on April 24, 1989 by which WCG received a lump-sum payment of \$19,000 to satisfy all of its claims against FEMA. The agreement did not prohibit WCG from applying to this Board for attorneys' fees under EAJA. (Resp. Exh. E).

13. WCG subsequently filed an application and supporting memorandum for a \$26,742.75 award of attorneys' fees and costs. This amount represents \$25,784.42 in attorneys' fees and \$958.33 in expenses for photocopying, courier service, postage, telephone and electronic research. (Resp. Exh. G).

14. At the time the contract dispute arose in 1985, WCG employed 44 people and had a net worth of \$634,686.56. (Resp. Exh. HH).

Discussion

Because WCG is a corporation which employed fewer than 500 people and whose net worth did not exceed \$7 million at the time the contract litigation was initiated, it is a "party" eligible

or an award of attorneys' fees under EAJA. 5 U.S.C. § 504(b)(1)(B)(ii). In order for WCG to recover attorneys' fees, this Board must find that: (1) WCG is a "prevailing party" within the meaning of EAJA; (2) FEMA's position was not "substantially justified" and; (3) special circumstances do not exist which would make an award of attorneys' fees unjust. See e.g., Hammond Construction, Inc., NASA BCA No. 689-8, 91-1 B.C.A. 23,629(1990).

1. Was WCG a "prevailing Party" as a result of the settlement agreement with FEMA?

To recover attorneys' fees under EAJA, WCG must be a prevailing party. A fee applicant is said to have prevailed when it has achieved some of the benefit sought in its litigation with the Government. The fact that WCG recovered part of its claim through a settlement rather than a decision on the merits is irrelevant, so long as there is a causal connection between the relief sought, the relief obtained, and the settlement of the litigation. Austin v. Department of Commerce, 742 F.2d 1477 (Fed. Cir. 1984); Olivera v. United States, 11 Cl. Ct. 101 (1986); Jen-Beck Associates, Inc., ASBCA Nos. 29844, 29855, 89-3 B.C.A. 22,157. It is an accepted principal that, "how an appellant succeeds in winning a substantial portion of the [relief sought] is not as important as the fact that it did succeed in winning." R & R Enterprises, IBCA No. 2664-F, 90-3 B.C.A. 23,039, at 115,671 (emphasis in original).

According to the settlement agreement of April 24, 1989, WCG received a lump sum payment of \$19,000, approximately 53% of the \$35,618 invoiced to FEMA by WCG. The Government is correct in stating that a numerical comparison between the relief sought and the relief granted is not dispositive in determining whether a party has prevailed. However, such comparisons can be useful to the Board for that purpose. See Delfour, Inc., VABCA Nos. 2049E, 2215E, 2539E, 2540E, 90-3 B.C.A. 23,088. Many Boards and courts have held that a fee applicant, for purposes of EAJA, has prevailed when it receives any relief on its claim through litigation or settlement. See R & R Enterprises, IBCA No. 2664-F, 90-3 B.C.A. ¶ 23,039; Summit Contractors, AGBCA No. 86-259-10, 87-1 B.C.A. ¶ 19,604; Preston-Brady Co., VABCA Nos. 1892E, 1991E, 2555E, 88-2 B.C.A. ¶ 20,574. See also Citizens Coalition for Block Grant Compliance, Inc. v. City of Euclid, 717 F.2d 964 (6th Cir. 1983); Securities and Exchange Commission v. Comserv Corp., 908 F.2d 1407 (8th Cir. 1990); Martin v. Heckler, 773 F.2d 1145 (11th Cir. 1985); Levernier Construction, Inc. v. United States, 21 Cl. Ct. 683 (1990).

WCG is a prevailing party as a result of the settlement agreement because it recovered a significant amount of money for its largest claim arising out of FEMA's seizure of the computers needed to perform the contract, and also recovered money for other relevant expenditures that it was able to document to FEMA's satisfaction. FEMA's reliance on In-Vest Corporation,

GSBCA Nos. 8340 (6365), 8341 (7327), 88-2 B.C.A. 20,807 is misplaced. In that case, the GSBCA denied a request for attorneys' fees because of a "large disparity between the claim and the settlement amount." Id. at 105,177. No such disparity exists here, and the vast body of case law cited above does not require such a test so long as the recovery is not de minimis.

2. Was FEMA's position "substantially justified"?

WCG's request for attorneys' fees must still be denied if the Government's position was "substantially justified." 5 U.S.C. § 504(a)(1). The "substantially justified" standard means that the basis for the Government's position must have been "reasonable in both law and fact." Pierce v. Underwood, 487 U.S. 552, 565 (1988). The burden is on the Government to prove that the agency's action giving rise to the litigation, as well as its position at the litigation itself, were substantially justified. Jones v. Lu-ian, 887 F.2d 1096 (D.C. Cir. 1989). WCG asserts that FEMA's positions on the two main issues in the contract dispute were unreasonable. FEMA argues that the facts of the dispute demonstrate that its actions were reasonable, and, therefore, that its positions were substantially justified.

The first issue raised by WCG involves FEMA's requirement that invoices submitted by WCG be accompanied by supporting documentation. WCG alleges that Maloy's requests for time sheets, cancelled checks, and receipts were excessive and violated provisions of the contract and the FAR. The Government maintains that Maloy's requests were appropriate under the circumstances and consistent with contract provisions.

The Government's position in this regard was substantially justified. Maloy requested back-up documentation because she questioned the propriety of certain charges and wanted to ensure that WCG was adhering to proper billing procedures. This explanation is sufficient to justify FEMA's requests, since pursuant to FAR 52.216-7, Maloy had the discretion to require that invoices submitted by WCG conform to certain levels of "form and detail." See J. A. Jones Construction Company, ENG BCA No. 4977, 86-2 B.C.A. ¶ 18,806. We do not find that Maloy abused her authority or discretion in requiring reliable documentation of WCG's expenses.

The second issue raised by WCG relates to the agency's retention of computers and other equipment which were to be furnished to WCG during contract performance. FEMA based its retention of the equipment on: (1) WCG's failure to timely and properly propose a new project director, and (2) the agency's need to safeguard information contained on computer databases, in accordance with the Privacy Act, 5 U.S.C. S 552a.

Maloy informed WCG that she intended to retain the computers and equipment pending WCG's proposal of a suitable replacement

for Gandy. FEMA asserts that this was a reasonable demand, designed to ensure that the contract was completed properly. WCG, however, states that despite its best efforts to appoint a new project director, Darlington and Maloy were unreasonably critical of WCG's proposed replacements. The record indicates that WCG did not propose a replacement for Gandy for approximately six weeks. On separate occasions in late July, project director. Maloy felt that neither replacement was 1985, however, WCG proposed two employees to replace Gandy as sufficiently qualified to perform as project director, despite the vast amount of contract work left uncompleted after Gandy's resignation. Maloy made clear her intention to retain the computers and equipment pending WCG's proposal of a suitable replacement for Gandy.

FEMA justifies its rejection of WCG'S proposed replacements by asserting the agency's need to ensure successful contract completion. However, Maloy's memoranda of July 23 and July 29, 1985 indicate that time was of the essence in completing the remaining conference close-out work. In light of the uncompleted contract work and the need for its swift completion, it was unreasonable for Maloy to immediately reject both employees proposed by WCG. As an experienced WCG employee, Mira could have done at least an adequate job as project director and made some progress in completing the contract. Furthermore, Mahoney's ultimate appointment as key personnel belies FEMA's original determination that she was unqualified for that position. The Government has failed to show, as its burden requires, that Maloy's rejection of Mira and her initial rejection of Mahoney were reasonable. See Intersea Research Corporation, IBCA No. 2084-F, 89-1 B.C.A. ¶ 21,448.

FEMA also attempts to justify its retention of the computers and equipment by asserting that computer databases provided by the agency contained information which was protected from public disclosure under the Privacy Act, 5 U.S.C. § 552a. It states that personal information such as names and social security numbers was contained on computer software, and that Gandy was the only WCG employee with authorized access to the software under the Privacy Act. Since Gandy was no longer employed by WCG on June 15, 1985, the agency believed that it needed to prevent the databases' information from being disclosed.

To show that its position on this issue was substantially justified, the burden is on the Government to prove that compliance with the Privacy Act was a legitimate basis for retaining the computers and equipment. In attempting to meet its burden, FEMA states that certain information such as names and addresses of conference participants was "Privacy Act type information that is required to be protected." FEMA has not, however, stated with any particularity how or why exposure of the database's information would be harmful, the nature of the harm such exposure would cause, or who would be harmed. Nor has the

Government shown how Gandy's departure from WCG, per se, placed the Government at greater risk. It also has failed to show why such an extreme act as confiscation of GFP was warranted. Apart from generalized allegations of unspecified harm, FEMA has cited no authority which supports its conclusion that compliance with the Privacy Act was a legitimate or reasonable basis for retaining the GFP. Beta Systems, Inc. v. United States, 866 F.2d 1404 (Fed. Cir. 1989).

FEMA's retention of the GFP was inherently unreasonable. When a contract provides that the Government will furnish property to the contractor, the Government must honor that commitment. The duty to furnish GFP includes furnishing the property in a timely fashion, "sufficiently early to permit the contract work to be performed as promised." Finesilver Manufacturing Co., ASBCA No. 28955, 86-3 B.C.A. ¶ 19,243, at 97,308. The Government must also furnish the material in a complete and proper manner, Oxwell, Inc., ASECA Nos. 27523, 27524, 86-2 B.C.A. ¶ 18,967, and cure any defective property, Logicon, Inc., ASBCA No. 39683, 90-2 B.C.A. 22,786. These subsidiary duties ensure that the contractor will not be hindered in performing the contract. FEMA's retention of the GFP frustrated contract performance. It was unreasonable for FEMA to threaten to terminate WCG for default, when FEMA knew that denying WCG access to the GFP was the reason for WCG's delay in performing.

3. Do "special circumstances" exist which preclude award?

WCG may still not be awarded attorneys' fees if special circumstances exist which would make an award unjust. 5 U.S.C. § 504(a)(1). The purpose of this provision is to allow the government to advance "novel but credible extensions and interpretations of the law." Trahan v. Regan, 824 F.2d 96, 104 (D.C. Cir. 1987). The Government bears the burden of showing that special circumstances exist. FEMA asserts that special circumstances exist in this matter, including allegations of misconduct by WCG staff and overall unsatisfactory contract performance. To the extent that FEMA has not advanced novel interpretations of the law, but rather repeated its original allegations and "reiterated its substantial justification arguments," we find no special circumstances exist which would make an award of attorneys' fees unjust. Id. at 104.

Conclusion

This Board must award less than the full amount of attorneys' fees requested when a fee applicant achieves only partial success in its litigation against the government. Hensley v. Eckerhart, 461 U.S. 424 (1983). It would be unjust for WCG to receive the entire amount of attorneys' fees in its application

S since the settlement did not give WCG the \$35,618 it originally claimed, because the petition for attorneys' fees does not indicate that all of the fees sought were related directly and exclusively to those issues on which WCG prevailed. The fee petition is not itemized to support such a finding. Additionally, FEMA has proven that its position on the issue of invoice documentation was substantially justified, and attorneys' fees will not be awarded for that part of WCG's claim.

Therefore, because WCG received approximately one-half of its \$35,618 invoices, and because FEMA has not substantially justified its position on the GFP issue, the jury verdict method is most appropriate in this case to determine a just award of attorneys' fees to WCG. Those fees awarded by this Board are as follows:

1. \$48.37, which represents all attorneys' fees specifically incurred in litigating the GFP issue, based upon the timesheet description of legal work submitted by WCG's attorneys, plus;
2. \$11,457.96, which represents fifty percent of all attorneys' fees not specifically incurred in litigating the invoice documentation issue, plus;
3. \$479.17, which represents fifty percent of all expenses for photocopying, courier service, postage, telephone and electronic research.

Order

For the reasons set forth above, WCG is hereby awarded attorneys' fees and expenses in the amount of \$11,985.50.

It is so ordered.

Jean S. Cooper
Administrative Judge

Concur:

Timothy J. Greszko
Administrative Judge

David T. Anderson
Administrative Judge