

## Board of Contract Appeals Decision Limits Recoverable Costs Under Equal Access to Justice Act

**Background:** The Equal Access to Justice Act ("EAJA") (5 U.S.C. §504 and 28 U.S.C. §2412) is designed to permit small businesses and individuals, including small government contractors, to recover the costs of pursuing civil litigation against the government, provided that: (1) the contractor meets certain net worth and size requirements, (2) the contractor is the prevailing party in the civil litigation, (3) the government's position was not substantially justified, (4) there are no other circumstances that would make the reimbursement of such costs unjust, and (5) the EAJA application was timely submitted and properly supported. In *Appeals of Marshall Associated Contractors, Inc. and Columbia Excavation, Inc. (J.V.)*, IBCA No. 4397F-2002 (June 1, 2006), the Department of Interior Board of Contract Appeals focused on exactly which costs may be recovered by contractors involved in a lengthy and multi-faceted civil litigation against the government.

**Decision:** *Marshall* is notable for being one of the longest-lived cases on the Board's docket. In 1982 Marshall was given a notice to proceed to utilize aggregate materials from an identified borrow pit in the construction of the Upper Stillwater Dam. When material in the required borrow pit proved unsuitable for its intended use, the Bureau of Reclamation ("BOR"), which was aware of this problem through its own internal tests which were not provided to Marshall prior to award, refused to designate an alternate borrow pit and blamed Marshall for the difficulties encountered.

While struggling to meet the contract's requirements, Marshall became bankrupt and unable to perform, whereupon the BOR terminated the contract for default. Marshall then filed its appeal with the Board. Subsequent to the filing of the appeal, Marshall negotiated a settlement with the Contracting Officer that converted the termination into one for convenience and would have paid Marshall \$3.3 million. Marshall then notified the Board that the appeal had been settled and its appeal was dismissed without prejudice.

Based on erroneous information it received from another office, however, the BOR refused to accept the settlement agreement. After Marshall filed numerous pleadings before the Board and other courts, negotiated the restructuring of its debt, and made repeated "lobbying" efforts with Senators, Congressmen, the Interior Secretary, BOR officials, and the Department of Interior Solicitor's Office in an attempt to get the settlement agreement accepted by the BOR, the Board eventually ruled in Marshall's favor on the merits in 2001 and on quantum in 2002. The parties then attempted to negotiate the amount of Marshall's costs eligible for reimbursement under the EAJA. At issue was the ability of Marshall to recover the "lobbying costs" it had expended in its efforts to end the dispute.

- The Board, while describing the BOR's position on Marshall's original claim as "uncompromising and unconscionable," ruled that the "BOR's poor handling of the claim alone cannot justify every action that Appellant took to try to rectify the situation."
- So-called "lobbying expenses" were found by the Board not to be recoverable because the EAJA "is intended only to mitigate and reimburse legal and related expenses incurred before the forum that had jurisdiction over the case, in this case the IBCA, which ultimately awarded damages to the Appellant/petitioner as a prevailing party in the substantive litigation." Accordingly, the Board found that the "lobbying expenses" were not reasonable and necessary expenses related to Marshall's litigation before the Board, and were therefore not compensable under the EAJA.

- The Board also rejected Marshall's argument that its attorney's fees should be reimbursed at \$125 per hour, the rate that came into effect in 1996 when Marshall's EAJA application was pending. The Board found that the statute in effect when Marshall commenced its appeal plainly and unambiguously limited attorney fees recoverable under EAJA to \$75 per hour.
- In addition, the Board held that the Department of Interior's regulations did not allow for reimbursement of the costs incurred by company employees unless they participated in the appeal as *pro se* litigants or as expert witnesses.

**Practice Pointers:** Although the limitations on reimbursable costs under the EAJA may vary based on a particular court's or board's precedent and a particular agency's regulations, some general guidance may be taken from the statute, *Marshall Associated Contractors*, and other cases:

- It is critical that contractors that may become eligible for reimbursement of attorneys' fees and costs under the EAJA keep accurate and detailed records that will clearly identify the nature and amount of compensable costs and that segregate any non-compensable costs the contractor may decide to incur in pursuing relief through Congressional and Executive agency "lobbying."
- Similarly, contractors should accurately document all employee and officer costs which may be reimbursable, such as time spent representing the company *pro se* and costs of providing expert opinions and testimony.
- Even when reimbursement is available to a contractor, the amount of recoverable attorneys' fees is usually capped at \$125 an hour unless a determination has been made that the cost of living or other special factor justifies higher fees.
- Courts and Boards have held that an attorney's travel expenses, computer research, photocopying costs, telephone and facsimile costs, court reporter fees, and other direct costs of pursuing litigation against the government are in some cases reimbursable under the EAJA. Other costs customarily included in attorneys' fees, however, such as office supplies and secretarial support, may not qualify for reimbursement.

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