Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

RECOMMENDATION

Matter: **Application Under the Equal Access to Justice Act Relating to Contract Dispute of Martin Resnik Construction Company Under Contract No. DTFA05-97-C-50842**

Docket: **99-ODRA-00111 EAJA**

Appearances:

For Martin Resnik Construction Company:	William D.Wheelock, Esq. Popov & McCullough, LLP, La Jolla, California
For the FAA Eastern Region:	Brendan A. Kelly, Esq. Office of Regional Counsel

I. Introduction

By Order issued on December 30, 1999, the Administrator adopted the findings and recommendations ("F&R") of the Office of Dispute Resolution for Acquisition ("ODRA") in the above-captioned contract dispute between Martin Resnik Construction Company ("MRCC") and the Eastern Region ("Region"), and directed the Region to pay to MRCC a net total amount of $136,201.61, plus applicable interest, and to provide MRCC with a contract time extension of 188 calendar days. Subsequently, on March 28, 2000, MRCC submitted to the ODRA an application for the reimbursement of attorneys' fees and associated costs under the Equal Access to Justice Act, 5 U.S.C. §504 ("EAJA") in the total amount of $144,882.21. The Region filed the "Agency's Response to EAJA Application" on May 22, 2000, and MRCC filed a reply thereto on June 5, 2000, which revised the total application amount to $154,222.21, including $10,675.00 for legal fees associated with preparing the EAJA application. The Region filed a further response on

June 21, 2000. For the reasons set forth below, the ODRA Dispute Resolution Officer recommends that MRCC be compensated under the EAJA in the total amount of $41,306.68.

II. The Underlying Dispute and Its Resolution

The contract that was the subject of MRCC's contract dispute involved the construction of an Airport Surveillance Radar (ASR-9) facility at National Airport. The ASR-9 Project was to include, *inter alia*, site preparation work, excavation and pile driving, the construction of a new concrete masonry building to house an engine generator room and an equipment room, external concrete pads for an electrical load bank, an above ground fuel tank, various electrical transformers, and an uninterruptible power supply system. The new concrete masonry building was to include a heating, ventilation and air conditioning ("HVAC") system that, as initially designed, was to consist of eight wall-mounted Bard HVAC units.[1] In addition, the Contract work was to include the construction of a tower foundation, the transportation of previously used tower steel being stored at an FAA site in Suitland, Maryland, which steel was to be provided as Government-furnished material ("GFM"), and the erection with that steel of a 57-foot high ASR-9 tower. F&R ¶1.

The ASR-9 Project, as amended by 5 bilateral and 2 unilateral modifications, was to be completed by November 25, 1997. Actual completion did not take place until June 23, 1998. F&R ¶5. On November 5, 1998, MRCC filed with the ODRA a document entitled "Claim Regarding Contract Dispute With Federal Aviation Administration" (the "Claim"). This document incorporated by reference a May 6, 1998 Request for an Equitable Adjustment (REA) that MRCC had pursued with the Contracting Officer and the ODRA in a pre-dispute alternative dispute resolution (ADR) process, and sought recovery in the amount of $494,600.71, plus interest and attorneys' fees. F&R ¶127. A

[1] Unilateral Contract Modification No. 5, which was the subject of one of MRCC's claims, modified the HVAC system to delete the Bard units and to substitute two Government-furnished HVAC units to be mounted on new concrete pads outside and adjacent to the new concrete building. Under Modification No. 5, the new HVAC units (unlike the wall-mounted Bard units, which would have no associated ductwork) required both exterior ductwork (and associated supports) to carry the air from the units into the new building and interior ductwork (and supports) to distribute the air inside the building. F&R ¶66.

contract dispute was docketed by the ODRA as 99-ODRA-00111. The ODRA's Richard C. Walters, Esq. was designated the Dispute Resolution Officer ("DRO") for purposes of adjudicating the contract dispute. Because the MRCC Claim – a fairly brief document consisting of approximately 1 and ½ pages of information – did not comport with the applicable requirements for the content of a contract dispute, MRCC was asked to prepare and file a supplemental statement that would satisfy those requirements. In particular, the FAA Acquisition Management System in effect at that time[2] specified that contract disputes be in writing and contain the following:

- contractor's name, address, telephone, and fax number;
- the contract number and the name of the contracting officer;
- a detailed statement of the legal and factual basis of the contract dispute, including copies of relevant documents;
- all information establishing that the contract dispute is timely;
- a request for a specific remedy; and
- the signature of a duly authorized representative of the contractor.

AMS §3.9.3.2.2.2 (June 1997). MRCC filed its supplemental claim statement with the ODRA on February 11, 1999. The supplemental claim statement, which bore the same title as the original Claim, consisted of approximately 10 pages of text plus some 2 inches of appended exhibits. At that stage, MRCC was still claiming a total of $494,600.71. That amount consisted of the following items:

Contract Balance	$ 73,012.46
Additional Costs for HVAC Modification	60,718.25
Delay Impact Costs	360,870.00
Total Claim	$ 494,600.71

The claim restatement, although significantly more detailed than the original Claim, still did not provide a causal nexus between identified delay factors and the total delay days and dollars claimed. When the DRO inquired as to whether such information was to be furnished, MRCC advised that it would be securing the services of a claims consultant to

[2] Currently, requirements for the content of contract disputes are set forth in the ODRA procedural rules, 14 C.F.R. §17.25(a).

develop a delay analysis. Based on the report provided by the claims consultant MRCC retained, Management Counseling Corporation ("MCC"), which included a detailed delay analysis, MRCC amended its claim, reducing the total amount sought to $349,914.19[3], as detailed below:

[Contract Balance]		
Original contract	$ 976,772.00	
Bilateral C/O's 1-4 & 6	$ 40,301.67	
Unilateral C/O #5	$ 30,000.00	
Total Contract	$1,047,073.67	
Deduct Payments	$ *995,416.21*	
Contract Balance Due		**$51,657.46**

Unilateral C/O #5 Additional Costs		
10/23/97 Estimate	$ 46,821.97	
Additional Costs, Calvert Jones	$ 54,181.90	
Temporary Air Conditioning	$ 3,518.44	
Unilateral C/O #5	$ (30,000.00)	
Balance Due		
$74,522.31		

Unilateral C/O #7 FAA Credits Taken		
1) Hazard Material Testing	$ 0.00	
2) Manhole Deleted	$ 3,112.00	
3) Concrete Encased RGSC	$ 0.00	
4) Single vs. Dual Transformer	$ 1,100.00	
5) Panel SPA	$ 600.00	
6) Two Disconnected Switches	$ 990.00	
7) HV Cable	$ 200.00	
8) HV Cable Splice	$ 120.00	
9) Panel CPA Cables	$ 200.00	
10) Reduction in Cable Size	$ 200.00	
11) Reduced Number of Conductors	$ 70.00	
12) Metal Cleat	$ 420.00	
13) Remove Alarm Panel	$ 500.00	
14) Concrete Test	$ 0.00	
15) C/O #5 Overcharge	$ 0.00	
C/O #7 (U) Total		**$(7,512.00)**

[3] The $349,914.19 amount reflects some post-hearing modifications presented by MCC. In a document dated 4 June 1999 entitled "Cost Corrections to the 20 May 1999 Deposition of Mark A. Johnson" that was appended to the June 9, 1999 MCC Report, the claim was presented in the total amount of $346,651.00.

Delay Impact Costs

Home Office Overhead

1997
37 CD x $2,284/day = $84,508.00

1998
174 CD x $564/day = $98,092.00
Subtotal $ 182,600.00

Site Overhead

1997
37 CD x $510.70/day = $18,895.90

[1998]
174 CD x $170.98/day = $29,750.52
Subtotal $ 48,646.42

Total Impacts **$231,246.42**

GRAND TOTAL OF CLAIM (exclusive of interest)
$349,914.19

Prior to the hearing, by letter dated June 9, 1999, the Region filed a counterclaim for $111,500 in liquidated damages -- representing 223 calendar days at $500 per day.

After several further efforts at resolving the contract dispute by means of ADR, a hearing was conducted by the ODRA under its default adjudicative process on September 22, 23 and 24, 1999. During the hearing, the parties resolved by negotiation various items, including the amount due for the contract balance and credits taken under Unilateral Contract Modification No. 7, as well as certain backcharges asserted by the Region in a letter to MRCC dated September 21, 1999, Trial Exhibit 1. As of the conclusion of the hearing, MRCC's claim had thus been reduced to a total of $291,764.31, and the Region's sole counterclaim was for liquidated damages in the amount of $111,500.

MRCC's contract dispute, as amended, consisted of essentially two claims: (1) a claim of an equitable contract price adjustment of $74,552.31 for the additional

cost of the aforesaid HVAC system design change – above and beyond the $30,000 allowed under Unilateral Contract Modification No. 5; and (2) a claim for impact costs totaling $217,242.00 ($182,600.00 for unabsorbed/extended home office overhead and $34,642.00 for extended field overhead costs), plus a time extension of 211 calendar days, for 211 days of delay allegedly caused by the Government. The Government delay factors identified in MRCC's claim were: (1) additional time associated with the performance of the HVAC change; (2) delay related to defective and missing GFM tower steel; (3) delay to the permanent electrical power connection in the location of TV 900; (4) delay in GFM delivery other than the tower steel; (5) delays due to temporary power shutdowns; and (6) delay of the Contract Acceptance Inspection (CAI).

The Expert Report of Management Consulting Corporation dated June 9, 1999 (the "MCC Report") that MRCC provided as a delay impact analysis asserted an overall contract performance delay of 155 calendar days for the GFM tower steel delay and an overall contract performance delay of some 229 calendar days for the HVAC delay. MCC Report, page 25. Although the Report characterizes the other delay factors as "impact[ing] the project," no specific numbers of days of overall delay were attributed to those factors. *Id.*, at page 24. On the basis of the MCC delay analysis, MRCC claimed a net of 211 calendar days, representing the time period between the scheduled contract completion date, as amended, November 25, 1997, and the actual completion date,
June 23, 1998.

In its Findings and Recommendations, the ODRA found that the tower steel delay and HVAC change did, in fact, cause overall delay to the project up until May 31, 1998, but that, for the 37-day period from November 25, 1997 through December 31, 1997, there were concurrent causes of delay attributable to MRCC. The ODRA also determined that, for the 23-day period June 1 through June 23, 1998, the project delay was solely attributable to MRCC. Consequently, the ODRA recommended that MRCC be provided with compensable delay for only 151

calendar days (January 1, 1999 through May 31, 1999), that it be afforded a contract time extension of 188 calendar days (for the period November 25, 1997 through May 31, 1999), and that 23 days of liquidated damages be assessed against MRCC at the specified rate for the period June 1, 1999 through June 23, 1999. As to the other delay factors enumerated by MRCC, the ODRA found that the electrical power tie-in delay did not cause the overall project to be extended, since MRCC was not itself completely ready for the tie-in – by reason of its own failure to timely order and install a needed 300 kva transformer and some 500 MCM cable. F&R ¶¶64, 65, 102, 121, 122.

In terms of the claim for CAI delay, taking MRCC's concurrent delays into account, the ODRA found that a CAI for all but the changed HVAC system could and should have been performed on or before December 31, 1997. F&R ¶108. The CAI delay was included as a concurrent source of the overall project delay from January 1, 1998 forward. The alleged delay relating to temporary power shutdowns, the ODRA likewise found to be a concurrent cause of delay, to the extent such shutdowns had been established.[4] Finally, as to the allegation that MRCC experienced overall project delay from GFM delivery delays other than those related to tower steel, the ODRA found this allegation unsupported by any evidence. F&R ¶138.

MRCC had claimed unabsorbed/extended overhead based upon an unprecedented variant of the Eichleay Formula developed by Mr. Mark A. Johnson of MCC, its consultant. The Region's DCAA auditor sought to advance a non-standard Eichleay formulation that would have restricted recovery to the elements of MRCC's overhead pool that the auditor deemed as being "fixed." The ODRA rejected both methods, and determined the appropriate amount of recovery for unabsorbed/extended home office overhead, using the standard Eichleay Formula computation. Because the Operating Expense cost account used by MRCC was

[4] The ODRA was able to identify only one day when such shutdown occurred, November 7, 1997, and the shutdown delay on that date was found to be concurrent with weather delay. F&R ¶44. The ODRA took that delay into account as a concurrent cause of delay in steel tower erection. F&R ¶138.

not solely a home office overhead cost pool, the ODRA found that it had to make adjustments to that account for purposes of the Eichleay Formula computation, in order to remove certain direct job cost items. Also, it added to the cost pool imputed cost for home office rental, based on the recommendation of and evidence provided by the MRCC consultant, Mr. Johnson. However, the ODRA rejected the consultant's recommendation regarding inclusion of imputed compensation for
Mr. Resnik, because it could find no evidence in the record of any draws having actually been taken by Mr. Resnik. As a result, of the $182,600.00 total amount claimed for unabsorbed/extended home office overhead, the ODRA allowed only $83,697.79.

As to extended field (jobsite) costs, of the $34,642.00 claimed, the ODRA allowed only $7,956.22. In this regard, the ODRA concurred with the observation of the Region's auditor (and the admission of MCC's Mr. Johnson) that the Operating Expense pool used for the Eichleay Formula computation appeared to include jobsite costs. The auditor had questioned all claimed jobsite costs on the basis of suspected duplication. The $7,956.22 that the ODRA allowed represented field overhead costs charged not to Operating Expenses, but rather to the direct labor cost category. The Dispute Resolution Officer was able to segregate these costs, based on notations appearing in daily timesheets contained in the record. *See* F&R ¶144.

Regarding MRCC's claim for additional costs associated with Unilateral Contract Modification No. 5, of the $74,522.31 claimed at the hearing, the ODRA recommended a total of $56,047.60. In this connection, the ODRA accepted as reasonable the amounts claimed based on actual costs expended for the HVAC subcontractor. Nevertheless, it rejected MRCC's claim for reimbursement of interest and attorneys' fees paid to that subcontractor as being legally unjustified. Further, the ODRA rejected the portion of MRCC's claim that was developed based on unsupported cost estimates relating to the elements of changed work

performed by MRCC's other subcontractors and instead allowed compensation based on the Government's estimates for those work elements. Conversely, because the Region (having the burden of proof for any credits it might claim) failed to support its own estimate regarding the credit it was claiming for the original HVAC work deleted by Modification No. 5, the ODRA utilized the estimated credit offered by MRCC. Finally, the ODRA found that the $3,518 claimed by MRCC for providing temporary HVAC had been adequately supported in the record and thus included that amount in the overall recovery recommended for Contract Modification
No. 5.

Overall, MRCC was able to recover approximately 50.6% of the total amount being pursued at the hearing as affirmative claims ($147,701.61/$291,764.31). MRCC's degree of success in defense of the counterclaim (89.7% -- $100,000.00/$111,500.00) was significantly higher. The results -- with MRCC achieving a composite degree of success of 61.4% -- can be summarized as follows:

Party	**Claim Element**	**Amount Claimed[5]**	**Amount Awarded/ LDs Disallowed**	**Degree of Success**
MRCC:				
	(1) Modification No. 5	$74,522.31	$56,047.60	
	(2) Delay Impact Costs:			
	Unabsorbed/Extended Home Office Overhead	$182,600.00	$83,697.79	
	Extended Jobsite Overhead	$34,642.00	$7,956.22	
	Subtotals	**$291,764.31**	**$147,701.61**	**50.6%**

[5] Per the June 4, 1999 "Cost Corrections to the 20 May 1999 Deposition of Mark A. Johnson," appended to the MCC Report of June 10, 1999

Region:				
	Liquidated Damages	($111,500.00)	($100,000.00)	
	Subtotals	**($111,500.00)**	**($100,000.00)**	**89.7%**
Overall		**$403,264.31**	**$247,701.61**	**61.4%**

III. EAJA Analysis

The Administrator has previously determined that the EAJA is applicable to ODRA adjudicative proceedings. *See Findings and Recommendation Regarding the Equal Access to Justice Act Application of Weather Experts, Inc. Pursuant to FAA Order ODR 97-25*, 98-ODRA-00013EAJA, and FAA Order No. ODRA-98-1EAJA.

Here, it is undisputed that the EAJA application of March 28, 2000 was timely submitted, and was accompanied by an itemized statement of the claimed attorneys' fees and costs. Accordingly, aside from the dispute regarding the timeliness of the June 5, 2000 supplemental application, which will be addressed as a preliminary matter, the issues to be considered here will include: (1) whether an eligible party "prevailed" over the government; (2) whether the government's position was substantially justified; (3) that no special circumstances make an award unjust; and (4) whether the claimed fees and costs are reasonable. *See generally Weather Experts, supra, quoting from Commissioner, Immigration and Naturalization Service v. Jean*, 496 U.S. 154, 158 (1990).

Timeliness

The EAJA requires that a party seeking an award of legal fees and other expenses to file its application within 30 days of a final disposition of an adversary adjudication. 5 U.S.C. §504(a)(2). The 30-day filing period is recognized as a jurisdictional prerequisite under the EAJA. *J.M.T. Machine Co. v. United States*, 826 F.2d 1042, 1047 (Fed. Cir. 1987). The term "final disposition" has been interpreted to mean the date on which a tribunal's decision becomes final and is

no longer appealable. *Equal Access to Justice Act Application of Steele Contractors, Inc.*, EngBCA No. 6043-F, 00-1 BCA ¶30,688. In the present case, the Administrator's decision was issued on December 30, 1999 and was appealable to a United States Circuit Court of Appeals within 60 calendar days under 49 U.S.C. §46110. On February 28, 2000, the appeal period expired and the decision became final. MRCC filed its original EAJA application on March 28, 2000, which was within 30 days of that "final disposition." The Region does not challenge the timeliness of that filing.

However, in its June 21, 2000 response, the Region objects to MRCC's supplemental application of June 5, 2000 for fees relating to preparation of the EAJA application, contending that the supplemental filing was "untimely, since it was not filed within 30 days of the final disposition of the proceeding." The law appears to be otherwise. There is no specific time limitation on supplementation of a timely application, and, unless the Government can establish prejudice by reason of the supplement, it is ordinarily considered as part of the original application. *Dunn v. United States*, 775 F.2d 99, 104 (3d Cir. 1985); *Aqua-Fab, Inc.*, ASBCA Nos. 34283, 36258, 91-1 BCA ¶23,665 at 118,474; *Application under the Equal Access to Justice Act of Decker & Co. GmbH*, ASBCA Nos. 35051, 38657, 93-3 BCA ¶25,983; *Application under the Equal Access to Justice Act – C&C Plumbing & Heating*, ASBCA No. 44270, 96-1 BCA ¶28,100; *see also Simpson Contracting Corporation*, EBCA No. E-9509186, 96-1 BCA ¶28,178 at n. 3. "Petitioners may supplement later as long as the timely filed application for fees puts the court and eventually the Government on notice that the applicant sought fees under the EAJA." *Bristol Electronics Corp.*, ASBCA Nos. 24792, 24929, 25135-25150, 87-2 BCA 19,697 at 99,731, *citing Dunn, supra.*

Here, the original application, which was timely, put the Government on notice that MRCC was seeking legal fees and specifically reserved the right to supplement the application to include the fees associated with the application. There is no contention or evidence of prejudice to the Government, which had

been afforded a further opportunity to respond to the supplemental application. Accordingly, the ODRA will consider the supplement as part of MRCC's timely application.

Eligibility

MRCC's EAJA application contains a *prima facie* showing of eligibility as a small business entity within the parameters specified by the statute, and the Region has not challenged MRCC's eligibility for EAJA relief. The ODRA therefore finds that MRCC is an eligible party within the meaning of the EAJA.

"Prevailing Party"

As noted in *Weather Experts, supra,* although the EAJA does not define the term "prevailing party," the Supreme Court held in *Texas State Teachers Ass'n v. Garland Independent School District*, that "[p]laintiffs may be considered 'prevailing parties' for attorney's fee purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." 489 U.S. 782, 789 (1989), quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). As noted above, MRCC succeeded in its contract dispute, to the extent it proved to the ODRA's satisfaction and that of the Administrator entitlement to recover a net of $136,201.60. MRCC would not have achieved this recovery, absent the filing of the contract dispute and thus properly is regarded as a prevailing party under the EAJA. *Public Citizen Health Research Group v. Young*, 909 F.2d 550 (D.C. Cir. 1990). Moreover, although MRCC did not achieve success with respect to all aspects of the claim elements it asserted (*e.g.*, it was unable to demonstrate that GFM delivery delay – other than related to the tower steel – contributed to overall project delay), it succeeded in establishing entitlement to each of the major categories of claim – *i.e.*, both (1) its claim for additional costs related to Unilateral Contract Modification No. 5; and (2) its claim for Government-caused delay impact costs and time extension. It also was

able to defend successfully against approximately 90% of the Government's counterclaim for liquidated damages.

Substantial Justification

As to the second threshold issue, *i.e.*, that of "substantial justification" on the part of the Government, it is clear that the burden of demonstrating such substantial justification rests with the Government. *Stratton v. Bowen*, 827 F.2d 1447, 1449-50 (11th Cir. 1987). Only one threshold determination on substantial justification is to be made for the entire civil action. *Commissioner, Immigration and Naturalization Service v. Jean, supra.* In *Pierce v. Underwood,* 487 U.S. 552, 565-556 (1988), the U.S. Supreme Court held that the "substantially justified" standard under the EAJA requires that there be a "reasonable basis both in law and fact" for the Government's action, and that the "reasonable basis" standard is no different from "justified in substance or in the main - that is, justified to a degree that could satisfy a reasonable person." *Id*. At 566 n.1. Whether or not the position of the agency is substantially justified is to be determined on the basis of the administrative record as a whole, which is made in the adversary adjudication for which fees and other expenses are sought. 5 U.S.C. § 504(a)(1). The ODRA must "look at the entirety of the Government's conduct and make a judgment call whether the Government's overall position had a reasonable basis in both fact and law." *Chiu v. United States,* 948 F.2d 711, 715 (Fed. Cir. 1991).

In its Response, the Region argues that its actions were substantially justified:

> The primary reason the Government could not resolve the matter prior to hearing was the suspect and ever fluctuating claims from MRCC regarding the amount of damages, particularly in the area of overhead expenses. The FAA's contracting officer could not, in accordance with her warrant and obligations as a contracting officer, authorize the expenditure of money based on the information provided by MRCC throughout the history of this contract dispute. Additionally, it wasn't until the actual hearing that the FAA was aware of exactly what MRCC was seeking. It is important to note that changes in the amount of damages sought by MRCC were not small amounts. Often the amount sought changed

> by hundreds of thousands of dollars. For example, as referenced in MRCC's November 4, 1998 "claim," MRCC initially sought $952,538.93 in additional compensation. In its claim filed February 11, 1999 MRCC was seeking $494,600.71. In MRCC's expert report dated June 9, 1999 MRCC was seeking $326,651.00. At the hearing, MRCC again changed its damages and sought $291,764.31.
>
> Although it is understandable that there may be minor errors in calculations, the differences in the amount sought by MRCC throughout the history of this dispute was [sic] tremendous. The burden was on MRCC to prove its damages through reliable means. The FAA was substantially justified in not considering MRCC's damage claim meritorious since MRCC failed, at least until the time of the hearing, to reliably prove what its damages were.
>
> If MRCC had shown reliable and specific evidence of its damages, the FAA, in all likelihood, would have been capable of making a settlement offer that would have resolved the necessity for a hearing. It was the opinion of the FAA that MRCC failed to allege with specificity the reasons how the Agency's actions caused MRCC damage and exactly what those damages were. Consequently, the FAA was substantially justified in fact and law to proceed to the hearing.

Response, pp. 6-7.

Along these lines, the Corps of Engineers Board of Contract Appeals observed:

> Whether the Government is substantially justified in opposing a contractor's claim depends in part on the Government's ability to analyze and consider the merits of the claim intelligently. Essential to this exercise is sufficient, clear, information upon which the Government may rely and the contractor is obligated to set forth its claim/theory of recovery with sufficient clarity to allow for a reasoned decision. *Great Western Utility Corp.,* Eng BCA Nos. 4866-F, 4899-F, 4934-F, 86-3 BCA ¶19,011; *Alta Construction Company,* PSBCA Nos. 1334, 1487, 87-3 BCA ¶20,165; *Zinger Construction Company, Inc.,* PSBCA Nos. 1015, 86-3 BCA ¶19,286; *accord, Hurlen Construction Co., supra; Benjamin S. Notkin & Associates,* ASBCA No. 29336, 87-1 BCA ¶19,483.

Lionsgate Corporation, EngBCA Nos. 5425-F, 5426-F, 5432-F, 91-3 BCA ¶24,148; *see also E.W. Eldridge, Inc.*, EngBCA No. 5269-F, 92-1 BCA ¶24,626; and *The Little Susitna Company*, PSBCA Nos. 2216, 2333, 25211, 93-1 BCA ¶25,497. Here, until early June 1999, with the submission of the final MCC Report, the MRCC claim had been a "moving target", especially with respect to quantum. However, at least as of June 10, 1999, the Region had sufficient information about the nature of MRCC's claim and the elements of damages that it was seeking to be able to complete a Government audit and to formulate a reasonable position as to the equitable adjustment due the contractor. The Region does not identify specific information provided at the hearing that was not available to it as of June 10, 1999. *Compare Morris Mechanical Enterprises v. United States*, 1 Cl. Ct. 443 (1983) ("The difficulty with plaintiff's present application for fees and expenses . . . is that most of those facts were not developed until trial and post-trial briefing.") Significantly, Mr. Ronholm's Diary – a document that figured very heavily in the ODRA's analysis and decisionmaking – had been provided by MRCC as a Dispute File Supplement in March 1999.

As of June 10, 1999, the Region sought to dismiss the contract dispute for alleged failure to state a cause of action.[6] At that stage, the Region also asserted its counterclaim for 223 days of liquidated damages. In the ODRA's view, the Region's position throughout the course of the adjudication after June 10, 2000, consistently refusing to recognize any entitlement whatsoever to additional time and cost for the HVAC design change, was unreasonable and unjustified. Likewise, the Region's failure to acknowledge and compensate for major project delays produced by defective and missing GFM tower steel had no "reasonable basis" either in fact or law. In terms of quantum, although MRCC did not succeed completely in connection with its delay impact claim, the Region's position – based on that of its auditor – was without foundation in fact or law and

[6] On June 9, 1999, the Region filed a motion to dismiss based, in part, on an alleged failure to state a cause of action. During trial, after MRCC concluded its direct case, the Region again moved for a dismissal on similar grounds.

was contrary to case precedent that considered and rejected the auditor's theory regarding "fixed" and "variable" home office overhead.

Although the ODRA recognizes that a contractor must bear the ultimate burden of proving its claims in any litigation, it is also well established that the Government has a duty to cooperate with contractors and to provide equitable adjustments when Government actions cause them delay and added cost. *See Southeastern Airways Corporation,* PSBCA Nos. 262 and 263, 1977 PSBCA LEXIS 45 (October 7, 1977) (Board recognized that contracting officer had a duty to "make a positive effort" to "reach an equitable adjustment".); *see also John V. Boland Construction Company,* Eng C&A Board Decision No. 1094, 1958 Eng. BCA LEXIS 281 (June 10, 1958) (Government had a duty to make an equitable adjustment, even in the absence of an assertion of entitlement from appellant.); *Whitman v. United States,* 124 Ct. Cl. 464, 110 F. Supp. 444 (1953) (Where there was found to be a change in the scope of the contract work, "there existed on the part of the government a positive duty to make an equitable adjustment.") There was nothing in this case that would have prevented the Region from issuing a further unilateral modification once the claim was definitized, if MRCC were unwilling to agree to a reasonable settlement offer and to execute a bilateral contract modification. Under these circumstances, the ODRA concludes that, for the period beyond June 10, 1999, when MRCC's claim was finally definitized, the Region's overall position in this matter, refusing to recognize any MRCC entitlement, despite the facts available to it, was not "substantially justified."

Special Circumstances

The Region has not identified any "special circumstances" that would render EAJA recovery unjust in this case, and the ODRA can find none.[7]

[7] The "special circumstances" exception is applied in relatively rare cases to negate the Government's responsibility for attorneys' fees under the EAJA. "This 'safety valve' helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. '" *Dougherty v. Lehman,* 711 F.2d 555, 563 (3d Cir. 1983). *quoting,* H.R. No. 1418, 96th Cong. 2d Sess., at 10-11, *reprinted in* 1980 U.S. Code Cong. & Ad. News, at 4989-90.

Reasonableness of Fees and Costs

Although the Region has not demonstrated "substantial justification" beyond June 10, 1999 or asserted the existence of "special circumstances" to preclude EAJA recovery, the ODRA must still determine the reasonableness of the fees and costs claimed for the period starting on June 11, 1999, that they are not disproportionate to the value of the claim amounts involved and the degree of success achieved by the adjudication. *Sardis Contractors,* EngBCA No. 5256-F, 90-3 BCA ¶23,010. Standing alone, the monetary value of a claim is not necessarily an accurate measure of the amount of attorney's time needed to prosecute that claim. *See Buckley Roofing Company, Inc.,* VABCA-3374E, 92-2 BCA ¶24,826; *Compare International Travel Arrangers, Inc. v. Western Airlines, Inc.,* 623 F.2d 1255, 1275 (8th Cir. 1980); *J.V. Bailey Co., Inc.,* EngBCA No. 5348-F, 91-3 BCA ¶24,350; *T.H. Taylor, Inc.,* ASBCA No. 26494-0(R), 86-3 BCA ¶19,257. At the same time, the Government should not be obligated to pay excessive fees for a case which involved a simple issue, quickly resolved once the Government counsel became involved in the substance of the matter. An EAJA award will be reduced, where the time expended is inordinately high for the work performed. *Buckley, supra, citing Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979); *Sage Construction Company,* ASBCA No. 34284, 92-1 BCA ¶24,493; and *Western Avionics, Inc.,* ASBCA No. 33158, 90-2 BCA ¶22,664.

1. Attorneys' Fees and Expenses

a. Adjustments

The attorneys' fees claimed in this case (other than those expended in preparing the EAJA application – as discussed below) do not appear so disproportionate to either the initially asserted claim value or to MRCC's ultimate recovery as to preclude reimbursement under the EAJA. *See Application under the Equal Access to Justice Act of Oneida Construction, Inc./David Boland, Inc., Joint*

Venture, ASBCA Nos. 44194, 47914, 47915, 47916, 95-2 BCA ¶27,893. The issues involved in the case were somewhat complex, and, from a review of the time records presented, it does not appear that MRCC's attorneys expended an inordinate amount of time for any of their tasks. Nor does there appear to have been duplicative effort expended by them in the adjudicative process.

However, as noted above, MRCC's contract dispute was not adequately definitized until June 10, 1999, and up until that juncture, the ODRA cannot find that the Region's position was without "substantial justification." Review of the billings included in the EAJA application indicates that the total amount of legal fees incurred for matters related to the instant contract dispute from June 11, 1999 forward, other than in conjunction with the failed ADR effort[8], was $46,245.00 and that the total of legal related expenses billed by MRCC's counsel during the same period was $6,823.89.

The expenses claimed appear to be reasonable, especially considering the travel and associated costs relating to the hearing in Washington, D.C.[9]

b. Apportionment

In the present case, the attorneys' efforts did not result in complete success for MRCC. Here, the ODRA found some concurrent delay having been caused by MRCC. Further, its counterclaim for liquidated damages was at least partially sustained. Moreover, the ODRA rejected several major aspects of the methodology used by MRCC to quantify its claims and radically reduced the

[8] In its June 5, 2000 reply, MRCC concedes that legal fees associated with ADR efforts are to be removed. The ODRA has previously held that the EAJA cannot apply to ADR efforts that are separate from the ODRA's default adjudicative process, that do not cause a party to "prevail" and that have no impact on subsequent adjudicative proceedings. *See EAJA Application of Camber Corporation*, 98-ODRA-00102 EAJA.

[9] Although the Region correctly challenges reimbursement for the extra cost of first-class airfare for MRCC's counsel attending a deposition in New York City, the trip in question took place in April 1999 – i.e., prior to June 10, 1999 -- and therefore is not included in the $6,823.89 expense total in any event.

award accordingly. Under such circumstances, apportionment of EAJA recovery for the fees and expenses incurred after June 10, 1999 would be appropriate. *Hensley v. Eckerhart, supra.*

As noted by the Department of Agriculture Board of Contract Appeals in *Staff, Inc., Applicant, Application for Attorneys' Fees and Expenses Under the Equal Access to Justice Act,* AGBCA No. 98-152-10, 99-1 BCA ¶30,260:

> While the degree of success will not automatically cause a downward adjustment of a fee [under the EAJA], it is one matter that can be and often is considered in deciding the proper amount to award. It is well established that in arriving at a reasonable EAJA award and in allocating or apportioning EAJA fees and costs, Boards have broad discretion and have used various approaches and formulas to determine what constitutes a fair EAJA recovery. *See* Eagle Contracting, Inc., AGBCA No. 93-114-10, 93-3 BCA ¶26,049; Teems, Inc. v. General Services Administration, GSBCA No. 14090-C, 98-1 BCA ¶29,646; Fletcher & Sons, Inc., VABCA No. 3248E, 93-1 BCA ¶25,472; J. V.Bailey Co. Eng BCA No. 5348-F, 91-3 BCA ¶24,350.

As the Corps of Engineers Board of Contract Appeals observed *in Midland Maintenance, Inc.*, Eng BCA Nos. 6080-F, 6083-F, 6092-F, 97-1 BCA ¶28,849:

> The Supreme Court has stated that the determination of what is a reasonable EAJA fee is a factual matter best left to the deciding Board/ court 's discretion, in order not to have continuing, protracted appellate litigation over the issue of EAJA. See *Hensley v. Eckerhart, supra; Commissioner I.N.S. v. Jean, supra.*

Courts use a variety of methods to apportion or allocate fees to achieve overall fairness. In some instances, fees have been apportioned by reference to individual issues or litigation segments. *See Goldhaber v. Foley,* 698 F.2d 193, 197 (3rd Cir. 1983)*; Cinciarelli v. Reagan,* 729 F.2d 801, 805 (D.C. Cir. 1984)*; Dougherty v. Lehman,* 711 F.2d 555, 560 (3rd Cir. 1983)*; Ellis v. United States,* 711 F.2d 1571, 1576 (Fed. Cir. 1983). In *Ellis, supra,* for example, the court awarded EAJA recovery for fees expended in establishing entitlement, but not those incurred for

proving quantum. Although *Ellis* involved a bifurcated proceeding, with quantum issues handled independently of entitlement, the case does "illustrate the flexibility provided a court or board when dealing with EAJA**."** *Staff, Inc., supra; see also, generally, KMS Fusion, Inc. v. United States,* 39 Fed. Cl. 593 (1997).

As noted above, overall, of the amounts at issue, MRCC's success rate was only 61.4%. The ODRA has found one case where a small amount of legal fees apportioned to an individual claim was not reduced based on the contractor's failure to achieve total success on that claim. *See Fanning, Phillips & Molnar*, VABCA-3856E, 97-2 BCA ¶29,008 (Board allowed 100% of the $1,221.30 of legal fees apportioned to the one claim (of two) that was successful, even though the contractor had only recovered $16,500 of the $49,743.31 sought for that claim, reasoning that those fees "were necessarily expended by the Applicant in order to recover even the $16,500 which the Board awarded. . . .") However, there are also cases where the percentage of claim recovery has been applied to apportion a more significant amount of legal fees being claimed, using a "jury verdict" approach. *See Application of Mark A. Carroll and Sons, Inc.*, IBCA No. 3582-F, 96-2 BCA ¶28,610 (Applicant awarded, as a "jury verdict," 20% of $11,715.00 of EAJA legal fees sought, based on recovery of approximately 20% of its original dollar claim.) The ODRA believes the "jury verdict" approach to be more appropriate in the present case. The ODRA would thus permit MRCC reimbursement for 61.4% of its attorneys' fees and expenses incurred after June 10, 1999 in the adjudication.

c. Fees for EAJA Application

It is well established that reasonable fees incurred in preparing and submitting EAJA applications are recoverable. *Commissioner, Immigration and Naturalization Service v. Jean,* ***supra;*** *Scheuenemeyer v. United States,* 776 F.2d

329 (Fed Cir. 1985). However, in this instance, the Region contends that the fees sought by MRCC for its EAJA application, $10,675.00, are unreasonable and excessive. *See Buckley, supra.* The Region asserts that the application should have consumed no more than 10 hours of legal time. This estimate is unreasonably low, considering that the application involved not only assembly of documentation for the attorneys' fees and expenses, but also the fees and expenses for MRCC's consultant, as well as an appropriate amount of legal research and drafting, plus some consultation with the client and its accountant for purposes of preparing a net worth exhibit. In the ODRA's view, the application in this case should not have involved more than a week's worth of legal work (*i.e.*, 40 hours or $5,000.00 at the EAJA rate of $125 per hour) to prepare and file. Accordingly, the ODRA recommends compensation for legal fees for preparing the application in the amount of $5,000.00.

The total amount of legal fees and expenses the ODRA recommends, $37,584.30, is computed as follows:

Fees for Case Prosecution	$46,245.00	
Related Expenses	6,823.89	
	Subtotal	$53,068.89
	Success Percentage	x 61.4%
	Subtotal	$32,584.30
Plus: Attorneys' Fees for EAJA Application	5,000.00	
Total of Attorneys' Fees and Expenses Allowed		$ **37,584.30**

2. Consultants' Fees

MRCC is claiming a total of $49,032.50 for MCC's consultants' fees. For the reasons previously enunciated, the ODRA will not recommend reimbursement under the EAJA for any consultants' fees incurred prior to June 10, 1999. The detail for MCC's June 30, 1999 billing indicates that all but 3 hours of time

during the month of June 1999 was expended prior to June 10, 1999. The 3 hours in question were billed for Mr. Johnson's services on June 30, 1999, in the total amount of $525. Accordingly, the amount of consultants' fees the ODRA will consider for reimbursement under the EAJA will be for the $525 and the time reflected on billings beginning in July 1999. From the ODRA's review of the MCC billings, it appears that a total of $7,562.50 was billed to MRCC from July 1999 forward. Thus, the total of consultants' fees being considered herein is $8,087.50.

Compensation for consultants has been limited to the hourly rate prescribed for attorneys under the Act. 5 U.S.C. § 504 (b)(1)(A)(ii); *See Union Precision and Engineering*, ASBCA No. 37549, 92-3 BCA ¶25,028. In this case, other than for Mr. Johnson, the rates charged for MCC personnel were below the $125 per hour attorneys' rate. Mr. Johnson's rate was billed at $175 per hour. MRCC did not explain why Mr. Johnson should command a higher rate than the limit specified for attorneys under the Act, and the ODRA sees no reason for allowing more than that limit.

As for trial testimony, claims consultants, such as MCC's Mr. Johnson, are normally treated as expert witnesses for EAJA purposes. *See Application under the Equal Access to Justice Act – C&C Plumbing & Heating, supra*. Fees for such witnesses may not be in excess of the highest rate paid for expert witnesses by the agency, 5 U.S.C. 504(b)(1)(A)(i). *Union Precision, supra*. The Region failed to provide any information regarding expert witness rates paid by the FAA. Accordingly, the ODRA recommends that the same $125 per hour maximum rate be permitted for Mr. Johnson in his role as an expert witness. Limiting Mr. Johnson's fees in this manner would reduce the overall amount claimed for MCC from $8,087.50 to $6,062.50, *i.e.*, by a difference of $2,025.00.[10]

[10] Aside from the 3 hours billed for June 30, 1999, the five subsequent monthly invoices from MCC contained in the EAJA application reflect a total of 37.5 hours billed for Mr. Johnson. At a $50.00 per hour reduction, the total reduction for the 40.5 hours would amount to $2,025.00.

The Region contends that the numbers of hours expended by Mr. Johnson and the MCC staff were excessive for the instant contract dispute. Response at 18. In the ODRA's view, based on a review of the billings and the ODRA's knowledge of the case, it does not appear that the hours expended after June 10, 1999 were excessive.

Finally, as with other aspects of claimed EAJA fees, there should be apportionment of amounts claimed for consultants, based on the value of the services performed in terms of the degree of success achieved. *See C&C Plumbing & Heating, supra.* In the present case, although the major claims were not themselves "unsuccessful," the more significant quantum theories espoused by the consultant were rejected outright by the ODRA. On the other hand, the MCC delay analysis did contribute significantly to establishing entitlement to some form of delay impact compensation and to most of the additional compensation claimed for the HVAC contract modification as well as to MRCC's successful defense against the Region's counterclaim for liquidated damages. In the ODRA's view, an appropriate apportionment of the consultant's fees in this case would be to apply the same 61.4% success rate as derived above.

Thus, the ODRA would recommend reimbursement under the EAJA for consultant fees in the total amount of $3,722.38 ($6,062.50 x 61.4%). Together with attorneys' fees and expenses, the total amount recommended for EAJA recovery would thus be $41,306.68, derived as follows:

Attorneys' Fees and Expenses	$37,584.30
Consultants' Fees	3,722.38
Total EAJA Recovery	$**41,306.68**

IV. Conclusion

For the foregoing reasons, the ODRA Dispute Resolution Officer recommends that MRCC be awarded a total of $41,306.68 as compensation for attorneys' fees and associated expenses under the Equal Access to Justice Act in conjunction with the instant contract dispute.

_____/s/_____
Richard C. Walters
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

_____/s/_____
Anthony N. Palladino
Associate Chief Counsel and Director
FAA Office of Dispute Resolution for Acquisition