W. L. HOLBROOK,	)	**AGBCA Nos. 2003-139-10**
	)	**2003-168-10**
Applicant	)	**2003-178-10**
	)	
Application for Attorneys'	)	
Fees and Expenses Under	)	
the Equal Access to Justice Act	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

November 25, 2003

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges. Separate opinion by Administrative Judge VERGILIO, concurring in part and dissenting in part.

Opinion for the Board by Administrative Judge POLLACK.

On July 31, 2003, W. L. Holbrook (Applicant) of Etowah, Tennessee, filed an application, under the Equal Access to Justice Act (EAJA) (5 U.S.C. § 504, as amended by Pub. L. No. 99-80, 99th Congress) for fees and expenses incurred in connection with appeals decided by the Board on November 14, 2002. Those appeals were AGBCA Nos. 2000-174-1, 2000-175-1, 2001-110-1, 2001-131-1, 2001-146-1 and 2001-148-1, 03-1 BCA ¶ 32,103, mot. for reconsid. denied, AGBCA No. 2003-140-R, 03-1 BCA ¶ 32,189. The appeals arose out of a lease to the Forest Service (FS) for an office building. The Board awarded Applicant compensation in AGBCA No. 2000-175-1 in

the amount of $11,474.15 and denied recovery in the other appeals. The successful appeal involved claims for damage to a number of rooms of the leased facility, as well as site work repairs.

In pursuing its EAJA application, Applicant submitted several premature filings. Those were docketed as AGBCA Nos. 2003-139-10 and 2003-168-10. In each instance, the Applicant was notified by the Board that the Application was premature. In a letter dated August 5, 2003, the Board notified the parties that the premature Applications would ultimately be formally dismissed. The Application now before us, docketed as AGBCA No. 2003-178-10, dated July 31, 2003, was timely filed. In it, Applicant requests $6,550.20 which represents 42.9 hours of legal work at $150 per hour and $115.20 for costs of transcript and mailings.

In order to recover under EAJA, an Applicant must first establish that it prevailed on the appeal. In the case of matters with multiple issues, an Applicant need not prevail on all matters. Recovery of EAJA costs can be apportioned to those matters on which there was an affirmative recovery. Staff, Inc., AGBCA No. 98-152-10, 99-1 BCA ¶ 30,260.

Establishing that an Applicant has prevailed does not automatically qualify the Applicant to recovery. An Applicant will not recover if the Government, in this case the FS, was substantially justified in contesting Applicant's claims. Substantial justification can be found, notwithstanding a decision in favor of the Applicant on the appeal. B&M Construction, Inc. AGBCA No. 93-160-10, 93-3 ¶ 26,126; Staff, supra.

The Board had before it a number of appeals filed by Holbrook. Some of the appeals addressed multiple issues. As noted above, Applicant prevailed on one docketed appeal and did not prevail on the others. Further, in the matter in which it prevailed, there were multiple issues and the Applicant prevailed on some of those issues but did not prevail on others. We do not allow recovery where the Applicant did not prevail and need go no further in addressing those items. Our determination and assessment as to the items for which the Applicant did prevail, are set out below.
Many of the items on which Applicant prevailed dealt with questions such as how much patching or remedial work, within a room or area, was compensable, as compared to what the FS contended was normal wear and tear and use under the lease. The instances where we allowed recovery in AGBCA No. 2003-175-1 for additional patching and other associated work can be broken down into two categories. In some, there was significantly more damage than the FS was willing to acknowledge. In others, the line between significant damage and wear and tear was not as clear. In those latter instances, we find that the FS (notwithstanding our finding entitlement to damages) was substantially justified in its initial positions.

On some other matters, such as allowing recovery for a tear in the carpet, we find that while we decided in favor of the Applicant, the judgment call of the FS was sufficiently close, and that the FS position cannot be labeled as lacking substantial justification. As to the calculation of damages, we note that while we often did not accept the FS dollar estimates as set forth in the final decision (even where the FS had acknowledged some entitlement), our award of dollars generally followed a FS revised estimate, presented at trial. We generally found the FS revised pricing to be more reliable than the less well supported dollars sought by Applicant in the appeals.

As noted above, we do find that there were some items which did, however, meet the EAJA test and where the FS position in denying the claim was not substantially justified. We identify those items below.

In the mechanical storage room we allowed $55.30 for repair of electrical work done by Mr. Merrill, a FS employee who was not an electrician. Given the potential danger involved in an improper electrical repair, the Applicant had a clear right to bring in an electrician to assure there was no potential safety problem. Accordingly, the FS had no substantial basis for not allowing Appellant the costs to have an electrician come in to check and complete that work.

As noted above, whether patching and repair could be classified damage or wear and tear was often a matter of judgment. In many instances, the FS position did not merit a finding by the Board that the FS lacked substantial justification. One area, where we find otherwise, was in the reception area. There we allowed for a greater amount of patching than acknowledged by the FS, as well as some electrical work, for a total recovery of $242.95 over what the FS had allowed in CO's final decision. In that area, there were excessive outlets and the damage to the wall was sufficiently obvious to negate the argument that the FS position, as to minimal repair, was substantially justified.

In the computer room, we allowed for the capping of the condensate line and for the cost of an electrician to examine wiring placed by Mr. Merrill (who was not an electrician). The dollars we allowed are $54.19 and $55.30 respectively. Again we find it obvious that work of this nature need be checked or performed by an electrician. The FS was not substantially justified in denying a claim for these costs.

The door in secured storage was obviously more damaged than the amount of wear and tear claimed by the FS. There, we allowed $260.78.

On the wooden sidewalk removal, we allowed $768.68. The sidewalk led to a bulletin board (information board). The FS removed the board, leaving the boardwalk to go nowhere. Had the FS left the bulletin board, we would not have concluded in favor of the Applicant on the underlying appeal. However, once the FS removed part of the item, then it should have removed the entire structure. We also found that failing to pay the Applicant the $41.39 for removing the electrical box sign was not justified.

The FS was not justified in the scope and dollar figure it assigned to the repair of stone wall. We allowed an additional $439.87. The position taken by the FS that damage was minor was not justified.

The largest item for which we allowed recovery was outside work, for which allowed $8,211.42. This was primarily the removal of three concrete pilings approximately 15 feet into the ground which had supported a radio tower, as well as related site work. The FS removed the tower but left the foundations. We allowed costs for removing the foundations and restoring the area. While the Board found in favor of Appellant on this item, we do not find that the Government lacked

substantial justification in denying the claim. The Government relied on the Alterations clause of the contract and on its interpretation of a number of cases. While the Board did not find the clause or cases controlling, the determination to allow recovery was a close call. Accordingly, we do not allow any EAJA recovery for time spent on this item.

Appellant did not make, nor would the Board have expected, an apportionment of legal costs to each item of its claim. However, it is clear from the testimony, the briefing, and recovery, that to the extent some matters rise to a finding of a lack of substantial justification, those matters, when viewed in light of the overall case, are a relatively small segment. The Board points out that a significant issue in these appeals involved the hallways (AGBCA No. 2000-174-1), and on that the Board granted no monetary relief. This Board has in the past apportioned EAJA where no breakdown was provided. Staff, Inc. There is no specific method required in making that apportionment and the determination is a function of looking at the issues, and allocating a reasonable time. Here, the Board finds that approximately 15% of Appellant's time and effort are reasonably allocated to items for which we find no substantial justification. Fifteen percent represents approximately 6 of the 42.9 hours for which compensation is sought. At a rate of $125, the regulatory rate allowed by Agriculture Regulations, implementing EAJA, the recovery is $750 in legal fees and $15.02 for the transcript.

DECISION

The Applicant is entitled to $765.02 for EAJA fees for AGBCA No. 2003-178-10. AGBCA Nos. 2003-139-10 and 2003-168-10 are dismissed as untimely (premature).

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HOWARD A. POLLACK
Administrative Judge

Concurring:

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ANNE W. WESTBROOK
Administrative Judge

Opinion by Administrative Judge VERGILIO, concurring in part and dissenting in part.

I concur with the majority's decision that the initial two applications, AGBCA Nos. 2003-139-10 and 2003-168-10, were filed prematurely and, consistent with Board practice, should be dismissed as such.

Regarding the timely-filed application submitted pursuant to the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. § 504 (2000), relief is available only regarding the appeal on which the applicant prevailed. I conclude that regarding the underlying claim and throughout that appeal, the Government's position was substantially justified. Of particular relevance in reaching the conclusion is the nature of the claim, the support the contractor provided for each item of the claim, and the dollar value of the claim and ultimate amount awarded (initially by the Government and subsequently by a majority of this Board); this is not the situation where the sole issues of dispute were those for which the Board granted relief. Given the terms of the lease and condition of the building, I do not fault the Government for its position throughout the claim resolution process, as I find that the facts and law reasonably supported its position so as to substantially justify the position of the Government.

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JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
November 25, 2003