

WHITE BUFFALO CONSTRUCTION, INC.,)

AGBCA No. 95-144-10

Applicant)

Application for Attorney Fees)
and Expenses under the Equal)
Access to Justice Act)

Representing the Applicant:)

Luther L. Clevenger, pro se)
White Buffalo Construction, Inc.)
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Representing the Government:)

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DECISION OF THE BOARD OF CONTRACT APPEALS

August 23, 1995

OPINION BY ADMINISTRATIVE JUDGE SEAN DOHERTY

White Buffalo Construction, Inc. (Applicant), seeks \$3,641¹ in costs and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. The Applicant appealed a deduction of \$25,687.15 in excess administrative costs assessed by the Government. The assessment followed completion under a takeover agreement of a construction contract after a default termination of White Buffalo Construction, Inc.² This Board determined excess administrative costs were properly recoverable if supported by reasonable estimates, but that the record fell far short of that needed to support the amount retained or to allow estimation of a reasonable reduced amount. The Board sustained the appeal. White Buffalo Construction, Inc., AGBCA No. 92-113-1, 94-3 BCA ¶ 27,176.³

¹ Applicant sought \$4,133 initially, but reduced its claim in response to Government objections.

² The default termination was found proper in a decision of this Board, White Buffalo Construction, Inc., AGBCA Nos. 90-133-1, 90-178-1, 93-3 BCA ¶ 26,236. That decision was appealed to the United States Court of Appeals for the Federal Circuit, White Buffalo Construction Inc. v. Espy (CAFC 94-1041), but was dismissed with prejudice February 3, 1995, pursuant to Rule 42 of the Federal Rules of Appellate Procedure. In a separate EAJA action pending before this Board, White Buffalo Construction, Inc., AGBCA No. 95-156-10, Applicant seeks costs of CAFC 94-1041 and the underlying Board proceeding. The record in that case includes a copy of a settlement agreement stated to be the basis for dismissal of the Federal Circuit appeal. The settlement included an agreement that the termination for default would be converted to a termination for the convenience of the Government. We do not consider that decision as bearing on this appeal. The basis of the assessed excess administrative costs considered herein was default of the terminated contract.

³ The case was consolidated for prosecution and decided along with AGBCA No. 92-191-1 currently on appeal CAFC 95-1122.

The Government argues Applicant was not the prevailing party, as the Board did not find that the Forest Service was unjustified in demanding excess administrative costs but only that it had failed to determine those costs adequately. The Government argues alternatively that it was substantially justified in its defense of the assessed administrative costs because the prior default termination had been sustained. Finally, the Government argues Applicant failed in its proof of costs.

We find Applicant was the prevailing party because it recovered the full remedy it sought. Receipt of a significant portion of the relief requested qualifies an applicant as a prevailing party. Hensley v. Eckerhart, 461 U.S. 424, 440 (1983); White & McNeill Excavating, Inc., IBCA No. 3108-F, 94-1 BCA ¶ 26,360.

We do not find the Government substantially justified simply because the prior default had been sustained. The Government has offered only the statement of principle on this issue; nevertheless, we have looked to the entirety of the Government's conduct to judge whether the overall position had a reasonable basis in both law and fact. Griffin Services, Inc., GSBCA No. 11171, 94-3 BCA ¶ 27,075. In law, the Government had the right to assess damages; in fact, the Board was unable to find evidence supporting even a portion of that assessment.

The Government asserted a lack of support for the fees sought by Applicant based on Applicant's first submission. Whatever the Board might have concluded on such submission, Applicant supplemented the record with verification of claimed amounts in affidavits by Applicant's expert witness, an attorney who provided advice, and Applicant's president. Amendment of an application is permissible. Ronald Adams Contractor, Inc., AGBCA No. 95-126-10, 1995 WL 437941 (July 25, 1995); Francis Payne Logging, AGBCA No. 91-156-10, 92-3 BCA ¶ 25,043.

Applicant’s claim consists of the following items:

attorney fees (\$75 per/hour (hr.) x 9.3 hrs.)	\$ 698
expert (\$100 per/hr. x 10 hrs.)	1,000
travel	307
copies	693
witness and room fees	81
phone	32
postage	10
computerized legal research	<u>820</u>
Total requested	\$3,641

The items claimed are in general recoverable by a pro se litigant in a proceeding before the Board. Cost items of the same character were allowed this Applicant in an appeal before the Interior Board of Contract Appeals, White Buffalo Construction, Inc., IBCA Nos. 2918-F, 2919-F, 91-3 BCA ¶ 24,221. That case has been cited by this Board as illustrative of application of the proper standard for allowed costs. Labco Construction, Inc., AGBCA No. 95-104-10, 95-2 BCA ¶ 27,677. On the basis of these cases and the supporting affidavits, we find the amounts claimed recoverable with two exceptions. The full amount claimed for the expert witness and that claimed for copies is not supported by the record.

Applicant and the expert both state the amount claimed is based on \$100 per hour for ten hours. Applicant, however, stated that the agreed payment was to be \$50 per hour if the appeal was unsuccessful and \$100 per hour if successful. Applicant’s president’s affidavit states in part “I have now agreed to pay him [the expert] at the rate of \$75.00 per hour taking into account the partial victory.” In Labco Construction, Inc., supra, we noted recovery for consultants is generally allowed at the same maximum fee as that allowed for attorneys’ fees, i.e., \$75/hour. We find the \$75 limit applicable in this case. The \$1,000 claimed is reduced to \$750.

Applicant’s claim for \$693 for copies was more fully stated by Applicant as follows:

There are 417 pages in Appellant’s Supplement to the Appeal file. Of these, 60 pages deal with the stairs and the costs for these are excluded.

Color cop[y]ing.	\$222.00
Photocopying.	\$387.00
Film and developing 4 rolls.	\$ 32.00

Dividers, cover sheets 50%=	.	.	.	\$ 14.00
Post hearing briefs and EAJA 50%=	.	.	.	\$ 38.00

Applicant further states in part:

All copying other than the color copying was done in my office because it is much easier than driving into town. The copying of USFS documents in Eugene was accomplished with my HP Fax-200 because it was less expensive to do that than pay the USFS \$.20 per page and the hourly charge and postage.

Applicant offered no explanation of the cost of copying at its office or the actual cost of use of the HP Fax-200. The amount claimed for photocopying is not supported by the figures offered. Applicant does not separate the numbers of color and other copies. The Board has not separated and counted record pages. Assuming all pages were photocopied, Applicant's figure of 417 less 60 would be 357 divided into the claimed \$387 equals \$1.08 per page. That figure is inconsistent with common experience and Applicant's assertion that Fax-200 equipment was used to keep costs below a \$.20 per page rate, although not accounting for charges and postage.

Applicant succeeded in the underlying appeal because the Government did not offer evidence on which a reasonable adjustment could be made. It would be inconsistent with that holding to allow recovery of costs on such insubstantial evidence as that offered regarding the claim for photocopying. The claimed \$387 is disallowed.

Applicant's other claimed costs are found reasonable on the basis of the record in this and the underlying appeal.

DECISION

White Buffalo Construction, Inc.'s Application for EAJA costs is allowed in the amount of \$3,004. That amount is reached by deducting from the \$3,641 claimed, the disallowed photocopying cost of \$387 and the reduction of \$250 in expert witness costs.

SEAN DOHERTY
Administrative Judge

Concurring:

MARILYNN M. EATON
Administrative Judge

ROBERT M.M. SETO
Administrative Judge

Issued at Washington, D.C.
August 23, 1995