

WHITE BUFFALO CONSTRUCTION, INC.,) **AGBCA No. 95-156-10**
)
 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.)
 6653 Shaw Hwy. S.E.)
 Aumsville, Oregon 97325)
)
Representing the Government:)
)
 John Bennett Munson)
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DECISION OF THE BOARD OF CONTRACT APPEALS

April 4, 1996

OPINION BY ADMINISTRATIVE JUDGE SEAN DOHERTY

Pursuant to the Equal Access to Justice Act (EAJA) 5 U.S.C. § 504, White Buffalo Construction, Inc., (Applicant) filed an application for attorney fees and expenses incurred in its appeal of a termination for default and denial of related claims by the Forest Service (FS) U. S. Department of Agriculture. The relevant facts in the underlying dispute are set forth in the Board's decision denying the appeals. 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. The parties stipulated to dismissal with prejudice on entering into a settlement agreement. The court did not address the merits of the Applicant's case.

The settlement agreement reserved Applicant's right to seek costs or fees recoverable pursuant to

EAJA. The agreement converted the termination for default to a termination for convenience of the Government and provided that Applicant would submit a termination for convenience claim to the Government. The agreement specifically stated it was not an admission of liability on the part of either party and was not to prejudice or otherwise affect the rights of the parties.

The Government offers, by way of explanation of the settlement, a letter to Agency Counsel from the United States Department of Justice which states in substantive part “We sincerely believe that the ramifications of this case, if not settled, could result in billions of dollars of liability in the A12 litigation.” Two newspaper articles were attached in support of the conclusion. The articles addressed litigation regarding cancellation of the contract for the Navy A-12 attack jet. Although the significance ascribed to the appeal of this Board’s decision is perplexing, the suggested reason for settlement is outside the record on which the decision was based and does not affect the justification of the position argued by the Government before this Board.

Applicant also submitted an EAJA application to the Federal Circuit and asked this Board to defer action pending consideration by the court. The court, by Order dated December 15, 1995, denied White Buffalo’s application for fees and other expenses incurred during the proceedings on appeal. In the Order the court dismissed White Buffalo’s application for fees and other expenses incurred during proceedings before the Board, stating the better course to be to allow the Board to consider White Buffalo’s application.

Applicant was not the prevailing party before the Board. Under EAJA, fees and expenses may be awarded to a prevailing party when the Government’s position was not substantially justified. Craven Logging Co., AGBCA No. 95-151-10, 95-2 BCA ¶ 27,786. Applicant asserts it was the prevailing party as it achieved a significant portion of the relief requested through the settlement. We have recognized in another case brought by this Applicant that a party may be considered prevailing under such circumstances. White Buffalo Construction, Inc., AGBCA No. 95-144-10, 95-2 BCA ¶ 27,907, citing Hensley v. Eckerhart, 461 U.S. 424, 440 (1983).

Board agreement with the Government's position in the pre-appeal decision does not, in and of itself, justify a conclusion that the Government's position was a reasonable one. R. J. Crowley, Inc., ASBCA No. 34872, 93-3 BCA ¶ 26,041, and an Applicant may be entitled to fees and expenses even though the matter was dismissed as a result of the parties’ stipulated settlement, assuming other criteria in the EAJA are satisfied. Jack L. Olsen, Inc., AGBCA No. 95-119-10, 96-1 BCA ¶ 28,052; Roy L. Matchett, AGBCA No. 86-155-10, 87-3 BCA ¶ 20,088.

Applicant offers substantial reargument of the issues decided by the Board in the underlying appeal. The simple answer to those arguments is that they were considered by the Board and Applicant was not the prevailing party. Even if Applicant were a prevailing party, however, it would be appropriate for the Board to review the record, including the arguments presented in the underlying proceeding, to determine whether the Government’s position was substantially justified. Griffin Services, Inc., GSBCA No. 11171, 94-3 BCA ¶ 27,075. The appeal was from a default termination based on a

failure of Appellant to perform within contract time. The Government argued the propriety of default in such circumstances. Appellant offered arguments of excuse which the Board found unpersuasive. In review we find the Government substantially justified in its position before the Board.

DECISION

White Buffalo's application for fees and other expenses is denied.

SEAN DOHERTY
Administrative Judge

Concurring:

EDWARD HOURY
Administrative Judge

MARILYNN M. EATON **Administrative Judge**

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