

S & D CONSTRUCTION COMPANY**CONTRACT NO. V508C-368****VABCA-3885E****VA MEDICAL CENTER
DECATUR, GEORGIA**

John I. Deering, S & D Construction Company, Roswell, Georgia, for the Appellant.

Karol S. Armwood, Esq., Government Trial Attorney, Atlanta, Georgia, and *Phillipa L. Anderson, Esq.*, Acting Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE ANDERS

S & D Construction Company (S & D, Contractor, or Applicant) has filed an Application pursuant to the *Equal Access to Justice Act* (EAJA), 5 U.S.C. Sec. 504, to recover attorney fees and other expenses alleged to have been incurred in connection with its successful prosecution of *S & D Construction Company*, VABCA No. 3885, 95-2 BCA ¶ 27,609. Familiarity with that decision is presumed so that recitation of the facts, and grounds for our conclusion therein will not, for the most part, be repeated here.

S & D was awarded \$3,799 as a result of its appeal. It seeks \$17,545.75 under EAJA: \$1,217.75 compensation for "legal costs," and \$16,328.00 compensation for time spent by personnel of S & D. S & D's assertion, and evidence submitted in support thereof, that it meets the eligibility requirements of EAJA with respect to its net worth and number of employees has not been contested by the Government. Neither does the Government contest the fact that S & D was a prevailing party in the underlying appeal and we so find.

SUBSTANTIAL JUSTIFICATION:

The Government asserts that its position, both in the adversary adjudication and the action upon which the proceeding was based, was justified to a degree that could satisfy a reasonable person. It argues that it was reasonable for the Government to take the position that Applicant's was owed no additional funds for costs incurred in supplying the materials that met with the contract's specifications, and that absent Applicant's specific allegations stating why the Government's position was not substantially justified, the Government is unable to counter such allegations other than to state generally, that its actions were reasonable.

With regard to the complaint that Applicant has not asserted specific allegations stating why the Government's position was not substantially justified, and that, therefore, the Government is unable to counter such allegations, it is important to note that the appeal involved a single issue, *i.e.*, whether the Government's position in refusing to consider a proposed equal product was in accordance with the Contract. Where there are multiple appeals or issues involved in an EAJA application it is important to know which of the various positions taken by the Government the EAJA applicant believes are not

substantially justified, but, as we stated in *A.F. Lusi Construction, Inc.*, VABCA No. 2595E, 90-1 BCA ¶ 22,333, "That situation does not prevail . . . where the dispute was limited solely to [one issue]. There is no difficulty in ascertaining the gravamen of Appellant's application. . . ."

In order to avoid the assessment of the applicant's allowable and reasonable fees and expenses, the Government carries the burden of showing that its position was substantially justified. *Penn Environmental Control, Inc.*, VABCA Nos. 3599E and 3600E, 94-1 BCA ¶ 26,326; *Siska Construction Co., Inc.*, VABCA No. 3381E, 92-1 BCA ¶ 24,730.

The Government argues that "it was reasonable for the Government to take the position that Appellant was owed no additional funds for costs incurred in supplying the materials that met with the contract's specifications." We found in the underlying appeal that the Government refused to consider a proposed equal product as it was required to do under the Contract terms, and that its insistence on strict compliance with the specifications constituted a change to the Contract. Its insistence during the administration of the Contract and during the appeal that it was entitled to strict compliance with the specifications and did not have to consider proposals offering equal products cannot be said to have been substantially justified in the face of clear Contract language allowing the submission of equal products. Since the VA's position in the litigation ignored the clear terms of the Contract, we hold that it was not substantially justified.

OFFICER/EMPLOYEE TIME:

S & D has claimed \$16,328 for time spent by personnel of S & D. The time spent by officers and employees of an appellant in a pro se representation are not recoverable under EAJA. *Preston-Brady Co., Inc.*, VABCA No. 1992E, 88-1 BCA ¶ 20,446. Accordingly, the claim for \$16,328 is denied.

ATTORNEY FEES:

S & D claims attorney fees in the sum of \$1,217.75. All bills are from Smith, Currie & Hancock of Atlanta, Georgia. They include the following:

May 31, 1993 bill for 3.5 hours @ \$145 (total of \$507.50)
plus \$13 for photocopying

July 31, 1993 bill for 1.5 hours @ \$145 (total of \$217.50)
plus long distance and FAX charges of \$35.50 and photocopying \$5.75 (total of \$41.25)

August 31, 1993 bill for \$105, including filing fees \$85; long distance/FAX charges \$2; and photocopying charges of \$18

September 30, 1993 bill for .5 hours @ \$145 (total of \$72.50)

December 31, 1993 bill for 2.2 hours @ \$145 (50% or 1.1 hour claimed) (total of

\$159.50)

March 31, 1994 bill for .7 hours @ \$145 (total of \$101.50)

In summary, S & D claims 7.3 hours @ \$145 (\$1,058.50) and \$36.75 for photocopying; \$37.50 for long distance/FAX; and \$85 for filing fees (\$159.25) for a total of \$1,217.75.

S & D seeks attorney fees at the rate of \$145 an hour. However, the \$75 an hour rate allowed by this Board is set by statute. The Board lacks the authority to award a greater hourly rate absent a Departmental regulation increasing the present limit. *5 U.S.C. Sec. 504(b)(1)(A)*. See *Coffey Construction Co., Inc.*, VABCA No. 3473E, 94-2 BCA ¶ 26,627 and cases cited therein.

The Government objects to the December 31, 1993 billing as covering more than just this case, failing to note that S & D only claimed one-half of that total. The Government also asserts that the September 30, 1993 bill uses the plural of "claim," and that this may indicate that this bill is for work on more than the appeal in question. That bill reads, in part, as follows, "HOURS OF ROBERT C. CHAMBERS 09/20/93 Meeting with John Deering and Bill Schmidt at S & D's offices to discuss claims against VA." The bill states "Re: VA Laboratory Renovation (S2D11A)," which was the Contract involved in the underlying appeal. In the absence of any further evidence by the Government, we will accept S & D's contention that this charge was for the appeal for which these EAJA fees are claimed.

We find S & D entitled to 7.3 attorney hours at \$75 for a total of \$547.50, and \$159.25 for photocopying, telephone/FAX, and filing fees.

DECISION

S & D is awarded \$547.50 in attorney fees and \$159.25 for miscellaneous expenses as described herein for a total award of \$706.75.

DATE: **October 25, 1995**

DAN R. ANDERS
Administrative Judge
Panel Chairman

We Concur:

MORRIS PULLARA, JR.
Administrative Judge

JAMES K. ROBINSON
Administrative Judge

Contracting Officer (508/90C)

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