U.S. Department of Labor

Board of Contract Appeals
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	:	Date Issued: August 3, 1998
KUMIN ASSOCIATES, INC.	:	
Appellant	:	Case No. 94-BCA-3
	:	
Contract No. 99-1-4907-14-032-01	:	

For Appellant:

R. R. DeYoung, Esq.
Wade & DeYoung
Anchorage, Alaska

For Contracting Officer:

Vincent C. Constantino, Esq.
U.S. Department of Labor
Office of the Solicitor

BEFORE: LEVIN, MILLER, and VITTONE
Levin, Member, Board of Contract Appeals

DECISION AND ORDER ON APPLICATION FOR ATTORNEY'S FEES

This matter arises pursuant to an appeal by Kumin Associates, Inc. ("Appellant") from a Contracting Officer's December 14, 1993, final decision denying a claim totaling $84,154.00 for architect/engineer services provided to the U.S. Department of Labor on a Job Corps construction project at Palmer, Alaska. A formal hearing on Appellant's claim convened at Anchorage, Alaska on June 5-8, 1995. By Decision and Order issued July 21, 1997, this Board granted Appellant's claim in its entirety. Appellant thereafter filed, on August 21, 1997, an Application for Attorney's Fees in the amount of $34,595.48 pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. §504. The Contracting Officer opposes the award of any legal fees or costs Appellant incurred while pursuing its appeal.

The Contracting Officer agrees that Appellant is eligible to receive an award under EAJA, as a prevailing party in an adversarial adjudication. The Contracting Officer further does not dispute either the number of hours claimed by counsel or the timeliness or completeness of

Appellant's applications. He does, however, oppose the application alleging that his position in denying the original claim was substantially justified, and, alternatively, the fees sought, including paralegal fees, are excessive. In addition, the Contracting Officer opposes reimbursement for any cost incurred by Appelant's employees as a consequence of time devoted to the litigation.

Findings of Fact

1. Appellant is an architectural planning firm, which employs about 30 people, half of whom are architects. Jonathan P. Kumin is Appellant's managing principal and a licensed architect. Charles Bannister was Appellant's project architect at the Palmer jobsite. (DO Finding 4.)

2. As of December 31, 1993, the approximate date that proceedings were initiated, Appellant had a total net worth of $1,768,792, and employed fewer than 500 people. (EAJA Exh. A.)

3. Appellant retained the law firm of Wade and DeYoung of Anchorage, Alaska to represent it before this Board. Appellant agreed to a rate of $150 per hour for services rendered by Mr. Wade and Mr. DeYoung, a rate of $130 per hour for services rendered by other senior attorneys, and a rate of $50-65 per hour for services rendered by paralegals. Mr. DeYoung in particular has extensive skill and experience in federal procurement matters. (Affidavit of R.R. DeYoung; EAJA Exh. F)

4. Appellant seeks recovery of:

(a) $12,368.00 in attorney's fees, including $12,225 for 81.5 hours of work performed by DeYoung at a rate of $150 per hour, and $143 for 1.1 hours of work performed by David M. Freeman at a rate of $130 per hour. (EAJA Exh. B.)

(b) $12,864.00 in paralegal fees, including 214.4 hours of paralegal services billed at a rate of $50-$65 per hour, the rate actually billed to Appellant. (EAJA Exh. C.)

(c) $633.48 in "standard expenses." These expenses include computerized legal research, photocopies, express shipping, postage, telephone and fax charges, and parking. (EAJA Exh. E.) The Contracting Officer does not dispute these expenses. (CO's Brief in Opposition to Application, p. 12, note 2.)

(d) $8,730.00 for time expended by Kumin and Banister in preparation for the hearing in this matter. (EAJA Exh. E; EAJA Exh. F.)

Discussion and Conclusions of Law
I.
Substantial Justification

This Board is authorized to award attorney's fees under the EAJA to a qualified prevailing party, 5 U.S.C. §504(b); Pierce v. Underwood, 487 U.S. 552 (1988)); unless the Contracting Officer establishes that his position was "substantially justified" or that "special circumstances" exist which would make the award of attorney's fees unjust. Doty v. United States, 71 F.3d 384 (Fed. Cir. 1995), citing Gavette v. Office of Personnel Management, 808 F.2d 1456 (Fed. Cir. 1986) (en banc). The Contracting Officer does not argue that "special circumstances" exist which would make the award of attorney's fees unjust.

Initially, then, we just resolve whether the Contracting Officer's position was substantially justified. The United States Supreme Court in Underwood determined that "a position can be justified even though it is not correct and ... it can be substantially justified if a reasonable person could think it correct, that is, it has a reasonable basis in law and fact." Underwood, supra at 566, n.2. The standard of "substantial justification," however, requires "more than mere reasonableness." Schuenemeyer v. United States, 776 F.2d 329, 330 (Fed. Cir. 1985). Indeed, the government's position must be "clearly reasonable," and the mere existence of a colorable legal basis, is, alone, insufficient. Gavette, supra. In particular, the government must show that it has not, "persisted in pressing a tenuous factual or legal position, albeit one not wholly without foundation." Gavette, supra at 1571; see Operative Plasters and Cement Masons International Association/National Plastering Industries Joint Apprenticeship Fund, LBCA No. 89-BCA-6; 91-2 BCA ¶23,782.

The Contracting Officer argues that his position was substantially justified because, "the Contractor never sought a change order request at the appropriate time and had accepted the modification to the size of the female dormitory as being within the original scope and work that could be accomplished within the original fee." He argues the Contractor had not met its burden of demonstrating, "it suffered increased costs which necessitated an equitable adjustment." (CO's Brief at 4). The Contracting Officer further argues that the Board resolved close issues of law and fact based on conflicting witness testimony, and, therefore, his position was substantially justified. Finally, the Contracting Officer contends that Appellant's claim was not sufficiently specific to allow a reasoned analysis by the Contracting Officer.

Contrary to these assertions, the Board concludes that the Contracting Officer lacked substantial justification in this matter. In essence, he insisted the architect produce designs for a building not contemplated in the original scope of work. Appellant followed the procedure for seeking an equitable adjustment, and did not accept a no-cost modification. At the time of the 15% review meeting with the Contracting Officer's representatives, a representative of Appellant stated his belief that the requested change to the contract was beyond the scope of work, (DO Finding 35), and Appellant continued to insist the change would have a "serious cost impact"

because the requested changes were not merely "design refinements" as asserted by the Contracting Officer. (DO Findings 36 and 37). Work under the contract continued, as required by the Disputes Clause of the contract, but Appellant clearly did not agree to a no-cost modification.

Following completion of the project design and the issuance of the invitation for bids for the construction contract, Appellant submitted its request for an equitable adjustment to the Contracting Officer in January 1993, after the Government Authorized Representative advised Appellant to do so. Appellant reiterated its request in October, 1993. (DO Finding 53). The Contracting Officer cannot now complain that the request was not properly or timely submitted after his representative advised Appellant to submit the request. There is nothing in the record to indicate that this request was untimely.

The Contracting Officer has presented no evidence of deficiencies in Appellant's original submission which prevented an adequate analysis of the request. Indeed, the Contracting Officer requested no additional information from Appellant, and the eleven month period between the submission of Appellant's request and the Contracting Officer final decision suggests that the Contracting Officer had both adequate information and ample time to analyze the claim. We also reject the contention that Appellant failed to establish increased costs as a result of the change. Although the Contracting Officer insisted, and apparently continues to insist, that Appellant may only prove its monetary damages based on contemporaneous documentation, such as time records, we concluded that Appellant reasonably estimated the additional costs consistent with Neal & Company, Inc. v. U.S., 19 Cl. Ct. 463 (1990).

Finally, we are unable to concur with the Contracting Officer's suggestion that this was, factually and legally, a close case. The Contracting Officer challenged the sufficiency of Appellant's certification of its claim on jurisdictional grounds arguing for dismissal on grounds of improper certification. Yet, the certification provision upon which the Contracting Officer relied was not in effect at the time Appellant certified its claim. Considering the applicable provision, we concluded that Appellant did indeed properly certify its claim. Nor do we share the Contracting Officer's view that the case was "close" in respect to the issue of constructive change. Appellant was ordered to perform additional work not contemplated by the contract when it was instructed to design a 96-person dormitory in addition to the 120-person dormitory and the 24 person single family wing. While the Contracting Officer denied knowledge of the change, we nevertheless, found sufficient basis to impute knowledge to him. He received copies of the design documents, and attended monthly briefings on the progress of the project. Under such circumstances, efforts by the Contracting Officer and his staff to deny that a change had occurred and their demand that Appellant perform substantial additional design work at no cost was without substantial justification.

The Contracting Officer also contested the costs of Appellant's subcontractors, because Appellant had not actually paid the subcontractors for their work. As the Decision and Order stated, these objections were not well founded. Appellant followed the standard procedures for

asserting the claims of its subcontractors before a Board of Contract Appeals. The subcontractors had no other recourse against the Contracting Officer to receive their portion of the equitable adjustment. Appellant was obligated by the terms of its subcontracts, which were available to the Contracting Officer, to pay its subcontractors upon receipt of payment by the Department of Labor. Under these circumstances, we conclude the Contracting Officer's challenge to Appellant's assertion of its subcontractors' claims was not substantially justified.

For all of the foregoing reasons we conclude that the Contracting Officer has failed to show that he pressed factual or legal positions with a reasonable basis in law and fact. Underwood, supra at 566. Appellant, therefore, is entitled to an award of attorney's fees under EAJA.

II.
Attorney's Fees

The Contracting Officer objects to Appellant's application for attorney's fees on grounds that a fee rate of $150.00 per hour for an experienced law firm partner practicing in Anchorage, Alaska is excessive under the EAJA, since Department of Labor's regulations do not provide for a fee in excess of $75 per hour. 29 C.F.R. §16.107. [1] Appellant argues that cost-of-living and special factors exist which permit the Board to award a fee in excess of $75 per hour.

The EAJA, in pertinent part, states: "[t]he amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that ...(ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee." 5 U.S.C. §504(b)(1)(A).

A.
Augmentation of Fees by Regulation or Adjudication
Cost-of-Living v. Special Factor

Various Boards of Contract Appeals have considered whether a regulation is necessary to award an increased fee based on special factors. A majority of the Boards have held that in the absence of an agency regulation authorizing a fee higher than the statutory cap, the Boards cannot exceed the cap even when justified by a special factor. Eagle Contracting, Inc., AGBCA No. 93-114-10, 93-3 BCA ¶26,049; Triple K Contractors, AGBCA No. 89-144-10. 90-1 BCA ¶22,413; AST-und Sanierungsterchrick GmbH, ASBCA No. 42118, 93-3 BCA ¶25,979; Hart's Food Services, Inc., ASBCA No. 102880R, et al, 93-1 BCA ¶25,524; Walsky Constr. Co., ASBCA No. 36940, 92-1 BCA ¶24,694; Murphy Brothers, Inc., DOTCAB No. 1836, 87-1 BCA ¶19,500;

[1]Appellant's reliance upon EAJA rules promulgated by at 5 C.F.R. 2610 et seq. by the Office of Government Ethics is misplaced.

AKCON, Inc., ENGBCA No. 5593-F, 93-1 BCA ¶24,147; Gracon Corp., IBCA No. 2582-F, 90-1 BCA ¶22,550; Hawkins and Powers Aviation, Inc., IBCA No. 2243-F, 89-3 BCA ¶22,117; Fulton Hauling Corp., PSBCA No. 2778, 93-1 BCA ¶25,249; Jamco Constructors, Inc., VABCA Nos. 3271E, 3516E, 95-2 BCA ¶27,632.

Boards have, at times, cited both the absence of regulations and the absence of special factors in denying a petition which exceeds the cap. The Agriculture Board of Contract Appeals, for example, has denied fees higher than $75 per hour, stating that there is no regulation authorizing such fees and, "we discern no shortage of qualified attorneys' which would justify a higher fee." OK's Company, AGBCA No. 88-260-10, 89-2 BCA ¶21,751; Ken Rogge Lumber Co., AGBCA No. 85-510-10, 87-1 BCA ¶19,341. The Armed Services Board of Contract Appeals has similarly limited fees on the ground that it found, "no justification nor any regulatory basis" for awarding fees in excess of $75 per hour. Jen-Beck Associates, Inc., ASBCA Nos. 29844, 29845, 89-3 BCA ¶22,157; Harrell-Patterson Contracting, Inc., ASBCA No. 30801, et al, 88-1 BCA ¶20,150; Benjamin S. Notkin & Assoc., ASBCA No. 29336, 87-1 BCA ¶19,483.

Boards have, however, determined that special factors, as distinguished from cost-of-living increases, may be considered in the absence of an agency regulation. This Board was among the first to hold that an hourly fee in excess of $75 per hour can be justified on the basis of special factors in the absence of a regulation. Operative Plasterers and Cement Masons International Association National Plastering Industries Joint Apprenticeship Fund. LBCA No. 89-BCA-6, 91-2 BCA ¶23,782. The General Services Administration Board of Contract Appeals (GSA Board) has similarly determined that it may award attorney's fees at a rate exceeding $75 per hour upon a finding of special factors even in the absence of a regulation providing for the higher hourly rate. American Power, Inc., GSBCA No. 8752, 91-2 BCA ¶23,766. The GSA Board in American Power noted that, "no agency regulation provides that an increase in the cost of living justifies an award at a higher fee;" however, it determined that it was authorized to consider "special factors" in the absence of an agency regulation. Id. at p. 119,046. The rationale of American Power thus applies the statutory prerequisite of an agency regulation to situations involving fee petitions seeking to exceed the cap based upon cost-of-living considerations. Special factors, in contrast, are litigated before the GSA Board on a case-by-case basis. American Power, Inc.; see also, Marty's Maid and Janitorial Service, GSBCA No. 11980-C, et al, 93-2 BCA ¶25,713; Gilroy-Sims & Assoc., GSBCA No. 11778-C, 93-1 BCA ¶25,547; Jordan & Nobles Constr. Co., GSBCA No. 11277-C et al, 93-1 BCA ¶25,262.[2]

The Postal Service Board of Contract Appeals has also denied an award of attorney's fee

[2] American Power rejected the petition seeking fees in excess of the statutory cap on grounds that all of the special factors cited by Appellant, including prevailing market rates in counsel's geographic area of practice, counsel's experience and expertise in handling construction litigation, and the complexity of the issues raised on appeal, were rejected by the Supreme Court's decision in Pierce v. Underwood, 487 U.S. 552, 572 (1988).

in excess of $75 per hour on the ground that appellant did not contend that special factors existed to justify an increased hourly fee. Coastal, Inc., PSBCA No. 1728, 89-2BCA ¶21,876. Coastal thus suggests, at least in dicta, that the statutory cap applies in the absence of special factors, but special factors might justify exceeding the cap in the absence of a regulation.

While various Boards have divergent opinions regarding the need for an authorizing regulation as a prerequisite to entertaining an EAJA petition to exceed the attorney fee cap based upon special factors, we construe the statute as requiring a specific regulation only when the cap is exceeded by a cost-of-living adjustment. The circumstances under which special factors may justify a fee increase are, as Underwood demonstrates, case specific. Cost-of-living considerations, in contrast, take into account general economic factors in particular geographic areas effecting entire communities, not the requirements or exigencies of a particular case. Consequently, unlike special factors, cost-of-living adjustments are generally ascertainable in advance of litigation and broadly applicable regardless of the "unique" requirements of any specific adjudication or appeal.

Thus the cost-of-living in Anchorage, Alaska, for example, would have a reasonably foreseeable impact on all litigation arising in Alaska regardless of the particular subject matter of the case. A rulemaking proceeding, instituted either on petition by a local bar or others, or sua sponte by an agency, is an especially appropriate process for determining the method of calculating a cost-of-living adjustment applicable to the base statutory fee. In this way, an agency can set a uniform cost-of-living adjustment based on general economic conditions in an area, anticipate a potential budget impact on its adjudications, and parties may rely on a fairly uniform rate notwithstanding the particular forum within the agency before whom they may litigate. At the Department of Labor, for example, the EAJA applies not only to BCA proceedings, but a wide range of other proceedings any one of which could, as the instant matter, involve parties in Anchorage, Alaska. See, 27 C.F.R. §16.104. As such, cost-of-living adjustments, unlike special factor situations, are amenable to prospective rulemaking and formulas of general applicability. See, e.g., Dept. of Transportation EAJA regulations, 49 C.F.R. §826.6.

In contrast with cost-of-living regulations which are readily susceptible to rulemaking, the EAJA's "special factor" provision mandates consideration of circumstances which are not well suited to regulations drafted by rulemaking. To the contrary, in Underwood, the Supreme Court specifically observed that a special factor should not be something of a generalized nature, such as the market rate for attorney's fees in the area, the difficulty or novelty of the case, or the ability of counsel. Underwood, supra, 487 U.S. at 571-73. A special factor, therefore, must be very specific, and applicable to the case at bar, not a wide range of cases. Further, the extent to which a special skill is "needful for the litigation in question,"(See, Underwood, supra at 572,) may arise in an adversary setting after the commencement of litigation. In these respects, the statute does not require a private party in adversary proceedings against an agency to seek a regulation from its adversary agency acknowledging the party's special litigation needs. The EAJA requires the implementation by regulation of any general application of a cost-of-living adjustment. It does not specifically mandate, and we do not construe it as requiring, a party who succeeds in

establishing that an agency may have forced litigation without "substantial justification" to then secure from that agency a regulation rewarding the party's lawyer with a "special factors" adjustment. The determination of a "special factor" unique to a particular case is an issue singularly well-suited for objective determination by the forum before which the parties appeared.

We note further that Congress amended the EAJA in 1985 not only to clarify that proceedings before agency Boards of Contract Appeals are covered by the Act, but also to preserve the balance of alternative remedies for government contractors found in the Contracts Dispute Act of 1978. Under the CDA, the contractor may either bring his dispute before an agency board or file suit directly in the Court of Federal Claims. The legislative history of the 1985 amendments clearly demonstrates that Congress intended to minimize the disparities in attorney fee recoupment a successful litigant may recover depending upon the choice of forums a party elects in pursuing a government contract claim. Thus, the only disparity expressly maintained in the Amendment's treatment of attorney's fees involved cost-of-living adjustments. The 1985 Amendments permitted the Court, without a prerequisite agency regulation, to award cost-of- living adjustments to successful litigants against an adversary agency in proceedings brought before the Court. Boards of Contract Appeals, in contrast, were authorized to award a cost-of-living adjustment only when expressly authorized by the agency which disputed the contractor's claim.

Although the courts now routinely award EAJA cost-of-living adjustments, as determined by the consumer price index, which is, of course, a statistical data compilation of the Department of Labor's, Bureau of Labor Statistics, the Department of Labor, in the thirteen years since enactment of the EAJA Amendment, has never promulgated an EAJA cost-of-living adjustment regulation for implementation in its administrative adjudications. The net result is a growing disparity between the statutory attorney fee cap, as augmented by court approved cost-of-living adjustments, and attorney fee caps before Boards at agencies such as the Department of Labor which lack EAJA cost of living regulations. Obviously, the greater the disparity the greater the disincentive to file cases before agency boards.[3]

To the extent the language of Act may give rise to an ambiguity with respect to whether or not fee adjustments based upon the existence of "special factors," unlike COLA's, need be specifically predicated upon the existence of an authorizing agency regulation, the legislative history supports the interpretation which minimizes any "special factor" disparity in attorney fee

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[3]Congress specifically included contract dispute adjudication before Boards of Contract Appeals in the 1985 EAJA amendments with the intention of minimizing disincentives to filing appeals before the Boards. Many agencies, unlike the courts, never adopted cost-of-living regulations. As a consequence, while the $75 statutory cap is inflation adjusted upward by the courts, the statutory cap at many agencies remained unadjusted and frozen in 1985 dollars until Congress raised the cap to $125 per hour in 1996. (PL 104-121, §233). Like the prior cap, the new cap, when applicable, remains frozen at many agencies.

recoupment which may influence the contractor's choice of forum. The historical absence of agency cost-of-living regulations frustrates Congressional intent to maintain a measure of equality in EAJA matters brought before agency boards and the courts. In the absence of a specific contrary proscription in the language of the Act, we find no basis to magnify the disencentives to include special factors as well. (See, H.R. Report No. 99-120 to accompany HR 2378, May 15, 1985, 99th Cong. 1st Sess., p. 15.) We conclude that the EAJA authorizes the Board, in the absence of an agency regulation, to consider, and, in appropriate circumstances demonstrating the existence of special factors, to augment the statutory attorney fee cap.

B.
Special Factors

Appellant proffers several factors which it contends should warrant favorable consideration of its petition for attorney's fees in excess of $75 per hour. In considering Appellant's contentions, we are mindful of the 1989 decision by a panel of this Board in Operative Plasterers and Cement International, 89 BCA 6 (LBCA, 1991). Operative Plasterers held that the "complexity of the issues involved in government contract law as well as the rate usually charged...constitute special factors which would justify an hourly rate in excess of $75."

In this instance, Appellant's lead counsel, Mr. R.R. DeYoung, is a senior partner in his firm and has many years of experience in government contract law and construction law. Mr. DeYoung's customary fee at times here pertinent was $150.00 per hour, for other senior attorneys in the firm the rate was $130.00 per hour, and it is not disputed that these rates were comparable to or below rates charged by other lawyers for similar services in Alaska. Appellant emphasizes that its counsels' expertise in government contract litigation permitted the matter to be adjudicated more efficiently than a less experienced attorney could likely manage. The reasonableness of counsels' customary rates in light of their expertise is further buttressed by Appellant's plea for consideration of Alaska's unusually high cost-of-living in comparison with living costs in the "lower 48." Finally, we are asked to consider what Appellant describes as the agency's "intransigence" and "animus toward Kumin or at least its procedural bad faith" as a special factor which justifies fee rates in excessive of $75.00

Having considered Appellant's contentions and the Board's decision in Operative Plasterers, we are, nevertheless, constrained to conclude that none of appellant's arguments constitute "special factors" within the meaning of the Supreme Court's decision in Underwood. To the extent Operative Plasters is inconsistent with the Board's conclusions herein, it is overruled.

In Underwood the Court reasoned that:

> [t]he "special factor" formulation suggests Congress thought that $75 an hour was generally quite enough public reimbursement for

> lawyers' fees, whatever the local or national market might be. If that is to be so, the exception for "limited availability of qualified attorneys for the proceedings involved" must refer to attorneys qualified for the proceedings in some specialized sense, rather than just in their general legal competence. We think it refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question–as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation.

Applying Underwood, the U.S. Claims Court in Griffin & Dickson v. U.S., 21 Cl. Ct. 1, 9-10 (1996), observed that an "attorney may not receive enhanced fees simply for specialized knowledge in general American law, but must show peculiar expertise beyond American law. An applicant might, for instance, possess engineering skills for a patent case or language skills for an international case." Griffin at 9. In U.S. v. Sam Ellis Stores, Inc., 981 F.2d 1260 (9th Cir. , 1992), certification as a CPA was accepted as a specialized skill for a tax attorney. While these cases seem to suggest that special factors may be found under circumstances in which an attorney brings to counsel table some dual expertise which might support him or her in a profession other than the law, courts in the Eleventh circuit have held that a specialized law practice alone justifies a rate higher than $75 per hour. Jean v. Nelson, 863 F.2d 759, 774 (11th Cir. 1988) (immigration law "is a narrow legal specialty" that might justify a higher rate); In Re Brickell Inv. Corp., Case Nos. 89-0715 and 89-1051, 1995 WL 478857 at *2-*a3 (S.D. Fla. March 24, 1995) (report and recommendation of Magistrate Judge Johnson that $150-per-hour rate was justified under Section 7430 because attorney specialized in bankruptcy law, aff'd by Judge Aronovitz on May 17, 1996); Blasberg v. U.S., Case No. 94-1844, (S.D. Fla. June 3, 1998) (report and recommendation of Magistrate Judge Bandstra that $150-per-hour rate was justified under the EAJA because attorney specialized in civil and criminal tax cases, aff'd. by Chief Judge Davis on June 2, 1998). Similarly, in National Farmers' Organization, Inc. v. Yeutter, 925 F.2d (6th Cir., 1991), an attorney's legal skills were found sufficient on their own merits to constitute a special factor. In Yeutter, the Court observed that, "the milk problem is exquisitely complicated" and that "peculiar talents were required to 'traverse the labyrinth of the federal milk marketing regulation provisions.'" Yeutter at 1464. Consequently, an attorney's milk marketing specialization satisfied the special factor requirement of knowledge or skill "needful for the litigation in question."

There are, of course, those who might argue that government contract law provides its own rather daunting maze of arcana; however, no court has ever found it sufficiently complicated to accord it special factor treatment. To the contrary, Courts ruling on the question hold that expertise in construction and government contract law does not warrant an enhanced award. See, Cox Construction Co. v. U.S., 17 Cl. Ct. 29, 35 (1989); Esprit Corp. v. U.S., 15 Cl. Ct. 491, 494 (1988); Everett Plywood Corp. v. U.S., 3 Cl. Ct. 705 (1983); Prowest Diversified, Inc. v. U.S., 39 Fed. Cl., 276, 287-88 (1997); Eastern Marine, Inc. v. U.S., 10 Cl. Ct. 184 (1986). In this instance, Mr. DeYoung is a skilled litigator who has impressed this Board with the depth and breath of his expertise in the matter before us. We must, nevertheless, conclude that his

experience and ability are not cognizable as a special factor within the meaning of Underwood as applied by the Court of Federal Claims.

Nor are we able to enhance counsel's fee based upon the cost-of-living in Alaska, comparable rates in Alaska or elsewhere, or customary fee considerations. As previously discussed, cost-of-living adjustments must be predicated upon an agency regulation, and the Department of Labor has not provided a cost-of-living regulation upon which Appellant may rely. Similarly, we recognize counsel's rates may be less than comparable rates in Alaska. As described by counsel, however, his comparable rate discussion seems to be a comparison of his rates with the prevailing rate in Alaska for the kind and quality of the services furnished by counsel.

The EAJA provides that attorney's fees "shall be based upon prevailing market rates" but "shall not be awarded in excess of $75 per hour..." absent special factors. Thus, the prevailing market rate applies unless it exceeds the cap. When the prevailing market rate exceeds the cap, the cap applies. Since the cap itself places a limit on the applicability of the prevailing market rate, the prevailing market rate can never alone constitute a special factor. Given this statutory framework, a prevailing market rate above the cap can only be awarded when some other special factor justifies its use.

Appellant next urges us to consider counsel's customary fees. In Underwood, the Supreme Court proscribed the use of several factors, including the "novelty and difficulty of issues," the "undesirability of the case," the "work and ability of counsel," and "the results obtained," as applicable to a broad spectrum of litigation. A focus of singular criticism by the Court, however, was consideration of "customary fees" as a special factor and we, accordingly believe we need address it no further here. See, Underwood at 573.

Finally, Appellant urges us to enhance counsels' fees based upon a perceived "animus" or bad faith on the part of the agency in dealing with Appellant. Even if the Board were to accept the notion that an agency's animus or bad faith could deteriorate to a level of behavior sufficiently egregious to warrant consideration as a special factor under the EAJA, we could not find such circumstances here. While we have concluded that the agency's position was not "substantially justified," Appellant has made no showing sufficient to persuade us that the agency's decisionmaking was either motivated by any animus toward Kumin or imbued with bad faith.

Thus, for all of the foregoing reasons, we conclude that we cannot order reimbursement for attorneys fees at a rate higher than $75 per hour. We, therefore, award the following attorney's fees to Kumin:

For R. R. DeYoung, 81.50 hours at a rate of $75 per hour totaling $6,112.50;

For David M. Freeman, 1.1 hours at a rate of $75 per hour totaling $82.50.

The total amount of attorney's fee for which reimbursement is awarded under the Act is

$6,195.00.

C.
Paralegal Fees

Appellant seeks $12,864 in paralegal expenses. The paralegal expenses are based on a market rate of $50-$65 per hour. The Contracting Officer does not contest that paralegal time is separately compensable, or that the number of hours claimed for paralegal time is unreasonable. The Contracting Officer does, however, argue that paralegal time is recoverable under EAJA only at the cost to the attorney, not the market rate charged to the client. Appellant argues that paralegal time should be recoverable at the market rate, citing Missouri v. Jenkins, 491 U.S. 274 (1989), a case arising under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988.

While a majority of the Boards of Contract Appeals hold that paralegal expenses are recoverable only at the cost to the law firm, which provided the service, Francis Paine Logging, AGBCA No. 91-156-10, 92-3 BCA ¶25,043; EW Eldridge, Inc., ENGBCA No. 5268-F, 92-1 BCA ¶24,626; Gracon Corp., IBCA No. 2582-F; 90-1 BCA ¶22,550; Coastal, Inc., PSBCA No. 1728, 89-2 BCA ¶21,876; Walsky Construction Co., ASBCA No. 41541, 95-2 BCA ¶27,889, Banks Trucking, PSBCA No. 3528, 96-2 BCA ¶28,350; we are persuaded by contrary authorities which hold that paralegal fees are recoverable at the rate charged to the client so long as the fees are reasonable and do not exceed the statutory cap of $75 per hour. Spectrum Leasing Corp., GSBCA No. 10902, et al, 93-1 BCA ¶25,317; Industrial Refrigeration Service Corp., VABCA No. 2532E, 93-1 BCA ¶25,291, Adams Construction Co., Inc., VABCA No. 3731E, 98-1 BCA ¶29,479. Both the General Services Board of Contract Appeals and the Veterans' Administration Board of Contract Appeals hold that paralegal fees are recoverable at the rate charged to the client, and their decisions are consistent with the practice in federal courts.

Thus, the United States Court of Appeals for the Federal Circuit allows recovery of paralegal fees at the market rate. Levernier Construction, Inc. v. United States, 947 F.2d 497 (Fed. Cir. 1991); U.S. v. Boeing Co., 747 F.Supp. 319, (E.D.VA 1990). In Levernier, the court stated that "EAJA allows for the recovery of paralegal fees for whom the "prevailing market rate" is less than $75 per hour...," and although the court was citing language from the Equal Access to Justice Act applicable to courts, 28 U.S. C. §2412, the statute here applicable contains language identical to that cited by the court.

The prevailing party under the EAJA in this instance is Kumin, not its attorneys. Goods and services obtained by Kumin in pursuit of its appeal were purchased by Kumin at market rates, not at cost to the supplier. Recovery by Kumin of the cost of paralegal services billed to it at reasonable market rates, therefore, results in no windfall. See, Missouri v. Jenkins, supra.

We are, of course, mindful of the arguments analyzing Levernier as dicta which need not be followed. Since nothing in the language of Act nor its legislative history, however, compels us

to conclude that paralegal fees may be recovered only at cost to the contractor's law firm, we are persuaded that the Court's rationale in Levernier is equally applicable here, and its guidance may be followed consistent with Congressional intent to minimize the disincentives for filing cases before the Boards of Contract Appeals expressed in the legislative history of 1985 EAJA Amendments.

The Contracting Officer disputes neither that market rates for paralegals in Alaska range from $50 to $95 per hour depending upon the paralegal's experience, nor the number of hours claimed. Appellant was billed paralegal fees in the amount of $65 per hour for Tina Hardwick, $60 per hour for Ami Taylor, Shelly Taylor, Elizabeth Stark, Suzanne Kurnik, and $50 per hour for Glen Earls. Alaska Rules of Civil Procedure, moreover, require that attorney fee petitions include actual fees billed for paralegals. Rule 82(b)(2). Further, the prevailing practice in the community bills paralegal time separately at market rates. As such, "fees awarded the attorney at market rates for attorney time would not be fully compensatory if the court refused to compensate hours billed by paralegals or did so only at 'cost'". Missouri v. Jenkins, supra.

We believe the rates and hours are reasonable and fall within the statutory cap. The Board, therefore, awards the following paralegal fees to Kumin:

For Glen Earls, 1.5 hours at $50 per hour totaling $75.00;

For Amy Taylor, 182.6 hours at $60 per hour less 1.3 hours not billed, totaling $10,878;

For Suzanne Kurnik, 2.8 hours at $60 per hour totaling $168.00;

For Shelly Taylor, .1 hour at $60 per hour totaling $6.00;

For Elizabeth Stark, 29.10 hours at $60 per hour less 3.40 hours not billed totaling $1,542.00;

For Tina Hardwick, 3.0 hours at $65 per hour totaling $195.00.

The total amount of paralegal fees for which reimbursement is awarded under the Act is $12,864.00.

D.
Appellant's Expenses

Appellant seeks to recover $8,730.00 for time spent by employees Jon Kumin and Chip Banister, in preparation for the hearing "which could have been spent in producing revenue for Kumin Associates, Inc." The Boards of Contract Appeals, as well as the United States Court of

Appeals for the Federal Circuit, have consistently held that costs incurred by employees of the appellant do not fall within the definition of "fees and expenses," and thus, are not recoverable under EAJA. American Power, Inc., GSBCA No. 8752, 91-2 BCA ¶23,766; Walsky Construction Co., ASBCA No. 41541, 95-2 BCA ¶27,889; Naekel v. Department of Transportation, 845 F.2d 976 (Fed. Cir. 1988). Appellant's petition for $8,730.00 to recover these expenses is denied.

In summary, the Board awards Kumin recovery of the following fees and expenses under the Equal Access To Justice Act:

Attorney's fees	$ 6,195.00
Paralegal fees	12,864.00
Office Expenses	633.38
TOTAL	$19,692.38

For all of the foregoing reasons, therefore:

ORDER

IT IS ORDERED that Kumin Associates, Inc. shall be awarded fees and expenses in the amount of $19,692.38 under the Equal Access To Justice Act.

STUART A. LEVIN
Administrative Law Judge and
Member of the Board

Concur:

JOHN M. VITTONE
Chief, Administrative Law Judge and

Chairman of the Board

Concur:

EDWARD TERHUNE MILLER
Administrative Law Judge
and
Member of the Board