Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

GRANTED IN PART: March 14, 2001

GSBCA 15488-C(15037-C)-REIN

ROI INVESTMENTS,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

John Ammerman of ROI Investments, Marco Island, FL, appearing for Applicant.

Kevin J. Rice, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **HYATT**.

DANIELS, Board Judge.

The Board granted in part an appeal by ROI Investments (ROI) of a decision by a General Services Administration (GSA) contracting officer. ROI Investments v. General Services Administration, GSBCA 14402, 99-1 BCA ¶ 30,353, reconsideration denied, 99-2 BCA ¶ 30,508, aff'd, No. 00-1095 (Fed. Cir. Oct. 12, 2000). ROI has applied, pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (1994 & Supp. IV 1998), for an award of costs it incurred in prosecuting the appeal. The total amount requested is $34,643.76.

GSA opposes the application for three reasons. First, the agency maintains that the contractor was not a prevailing party in the case. Second, GSA contends that its own position was substantially justified. Either of these arguments, if accepted, would cause us to deny the application entirely. We reject the first and a small portion of the second, however. We must consequently consider the third reason for opposition: the contractor may not recover any costs incurred before the contracting officer issued her decision. We not only agree with GSA on this point, but also deny recovery of costs incurred after settlement of the only two claim elements as to which GSA has not proven its position substantially justified. We grant the application only in small part, allowing reimbursement of a percentage of the

costs eligible for reimbursement which is commensurate with the value of claim elements as to which ROI prevailed and GSA's position was not substantially justified.

Background

GSA contracted with ROI for the lease of space in a building in Madison, Wisconsin. Toward the end of the lease, GSA asked ROI to increase the amount of leased space and to build out the additional area to meet the Government's needs. ROI agreed to this request, and following negotiations, the parties entered into Supplemental Lease Agreement (SLA) 7 to reflect their understanding. ROI v. GSA, 99-1 BCA ¶ 30,353, at 150,107-09 (Findings 1-11).

On October 14, 1996, ROI submitted to the contracting officer a claim for additional payments under the contract. ROI revised this claim on November 27, 1996, and again on April 2, 1997. Through this claim, ROI sought payments under two contract clauses which adjusted rent in accordance with changes in the lessor's costs -- the tax adjustment clause and the operating costs clause. ROI also claimed that it was due, under SLA 7, additional rent, remittance of liquidated damages, and five varieties of payments relating to improvements to the property occasioned by the build-out. Appeal File, GSBCA 14402, Exhibits 133, 136, 139. The amounts demanded by the lessor changed with each iteration of the claim, as follows:

	October 1996	November 1996	April 1997
Tax adjustments	$ 40,152.25	$ 36,801.44	$ 37,728.51
Operating cost adjustment	8,227.89	6,013.53	6,013.53
Additional rent per SLA 7	23,754.98[1]	38,891.73	74,748.74
Remittance of liquidated damages		7,050.00	7,050.00
Build-out improvements			
Lump sum payment	44,119.37	44,119.37	44,119.37
Unit cost payment	26,371.80	26,371.80	26,371.80
Moving entry	4,879.00	4,879.00	4,879.00
Amortized reimbursement		9,202.03	9,202.03
Laboratory modifications		5,250.72	6,038.33
Total	$147,505.29	$178,579.62	$216,151.31

On August 18, 1997, the contracting officer issued her decision on the claim (as most recently revised). She agreed to pay ROI $6,014.11 in operating cost adjustments and $23,000 as a lump sum payment for improvements made during the build-out. She denied all other elements of the claim. Appeal File, GSBCA 14402, Exhibit 147.

[1]This is the figure given for a single year. The claim asserts entitlement to additional amounts for other years, but it does not specify those amounts.

On February 6, 1998, ROI submitted a separate claim for $32,597.79 in rent payments for the months of October, November, and December 1995, and for reimbursement of $5,694.74 in legal fees incurred by the lessor in litigation with a bank which held a mortgage on the property and later purchased the property at a foreclosure sale. The contracting officer denied this claim in its entirety. ROI v. GSA, 99-1 BCA ¶ 30,353, at 150,111 (Finding 25).

Shortly before the scheduled hearing in this appeal, the parties settled five of the elements of the principal (1996-97) claim. GSA agreed to pay, and ROI agreed to accept, in full settlement of these elements, $55,785.57 plus interest. The settlement agreement specified these amounts: $11,805.57 in tax adjusted rent (the amount claimed for 1993); and the following for build-out improvements: $30,000 in lump sum payment, $4,879 for moving the entry to the newly-leased space, $4,601 for amortized reimbursement, and $4,500 for laboratory modifications. Appellant's Application for Award of Costs, Appendix A; Transcript, GSBCA 14402, at 8.

The Board heard testimony, accepted briefing, and ruled on the remaining matters. Our hearing was held on November 12, 1998. We granted additional rent payments of $15,879.57. We denied any recovery for remittance of liquidated damages, unit cost payments for build-out improvements, rent payments for the last three months of 1995, or reimbursement of legal fees. ROI v. GSA, 99-1 BCA ¶ 30,353.

Discussion

The purpose of the Equal Access to Justice Act, 5 U.S.C. § 504, is "to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." Commissioner, Immigration & Naturalization Service v. Jean, 496 U.S. 154, 163 (1990); see also Community Heating & Plumbing Co. v. Garrett, 2 F.3d 1143, 1145 (Fed. Cir. 1993); DRC Corp. v. Department of Commerce, GSBCA 15172-C(14919-COM), 00-1 BCA ¶ 30,841, at 152,228 n.1. The Act does this by providing that "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1).

That last sentence contains several phrases whose meaning and application must be explored in order to resolve this case. EAJA is not, after all, a mandatory fee-shifting device. Ramcor Services Group, Inc. v. United States, 185 F.3d 1286, 1290 (Fed. Cir. 1999). We perform the requisite analysis with an emphasis on the issues raised by GSA in opposition to an award of costs.

A. The Act limits the "party" capable of recovering to certain entities, most of which are smaller than prescribed sizes in net worth, number of employees, or both. 5 U.S.C. § 504(b)(1)(B). There is no question that ROI is an eligible party. GSA suggests, however, that ROI was not a "prevailing" party in the underlying appeal. We explained in DRC Corp. the standard against which this assertion should be judged:

> A party is "prevailing," for laws such as EAJA which permit the shifting of fees, if it "succeed[s] on any significant issue in litigation which achieves some of the benefit [it] sought in bringing suit." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 792-93 (1989). "A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." Farrar v. Hobby, 506 U.S. 103, 113 (1992).

00-1 BCA ¶ 30,841, at 152,226.

In the underlying case, ROI challenged contracting officer's decisions which granted only $29,014.11 on claims which ultimately totaled $254,443.84. Through settlement of some elements of the claims, ROI received $55,785. Through the Board's decision on other elements, ROI received an additional $15,879.57. Thus, by prosecuting its appeal of the contracting officer's decisions, ROI succeeded in getting GSA to pay it $71,665.14, or $42,651.03 more than ROI would have gotten if it had passively accepted those decisions. Prosecuting the appeal materially altered the legal relationship of the parties, forcing GSA to pay money it otherwise would not have paid. ROI consequently was a prevailing party in the underlying case.

B. The second issue raised by GSA is whether the position of the agency was substantially justified. Resolving this matter is more complex, for two reasons. First, each claim was composed of various elements, and while the elements had in common that they all related to a single contract, the facts necessary to prove different elements were not identical. Second, most of the elements as to which ROI "prevailed" were resolved through settlement, and we must analyze these matters for the first time before making any determination as to the justification of the agency's position on them.

As with "prevailing party," we explained the basics of the substantial justification defense in DRC Corp.:

> [A]n agency may defeat an eligible party's EAJA cost application by persuading the adjudicative officer that the position of the agency was substantially justified. The Supreme Court has held that the adjudicator should ask, when confronted with this defense, whether the agency's position was "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988). Under this standard, the trier of the case must determine whether the Government's position had a reasonable basis in both law and fact. Chiu v. United States, 948 F.2d 711, 715 (Fed. Cir. 1991); see also Ramcor Services Group, 185 F.3d at 1290; Ace Services, Inc. v. General Services Administration, GSBCA 12067-C(11331), 93-2 BCA ¶ 25,727, at 128,012. The burden is on the Government to show that its position was substantially justified. Doty v. United States, 71 F.3d 384, 385 (Fed. Cir. 1995);

> Community Heating & Plumbing Co. v. Garrett, 2 F.3d 1143, 1145 (Fed. Cir. 1993); Hospital Healthcare Systems, Inc. v. Department of the Treasury, GSBCA 14719-C(14442-TD), 99-1 BCA ¶ 30,282, at 149,785.

00-1 BCA at 152,227.

1. With regard to the claim elements addressed by the Board in its decision in the underlying appeal, on only one of those elements did ROI prevail even in part. That was the demand for increased rent for the period of time between the effective date of SLA 7 and the day on which the Government began occupying the space added to the leased area through that contract modification. On this matter, ROI maintained that GSA owed rent for all the space (including that added by SLA 7), at the rate prescribed by that modification, beginning on the effective date of the modification. GSA insisted that it was obligated to pay rent only for the originally-leased space, at the previously-agreed rate, until it occupied the new space. The Board concluded that neither party's view was correct; SLA 7 required GSA to pay rent at the rate provided by that modification, but only for the pro rata share of the space it occupied, during the time in question. That period of time was the one suggested by GSA, rather than the one suggested by ROI, since the newly-leased space was not ready for occupancy until months after the date on which ROI said it was ready. The agency had to pay the lessor $15,879.57 more rent than it had previously paid. ROI v. GSA, 99-1 BCA at 150,113-15.

Although GSA's position was not right as to rent due, the agency was substantially justified in opposing ROI's demand. The Board granted relief on different legal and factual grounds from those advanced by the contractor, who failed to enunciate a theory on the basis of which we could grant any relief. DRC Corp., 00-1 BCA at 152,228 (citing Lionsgate Corp., ENGBCA 5432-F, et al., 91-3 BCA ¶ 24,148, at 120,838; Crown Laundry & Dry Cleaners, Inc., ASBCA 28889, et al., 87-3 BCA ¶ 20,034, at 101,423). In addition, the amount granted was small relative to the amount claimed -- only twenty-one percent. The overall measure of damages was thus much closer to the position adopted by the agency than the one presented by the contractor. Id. (citing Atlas Construction Co. v. General Services Administration, GSBCA 11088-C(8653), et al., 92-2 BCA ¶ 24,944, at 124,329; On Time Postal Services, Inc., PSBCA 2528, 91-2 BCA ¶ 23,770, at 119,068).

2. Deciding whether GSA's position on the matters resolved through settlement was substantially justified requires further analysis. At the outset, we note that the fact that the agency chose to settle these claim elements is not dispositive of the issue of substantial justification. A contrary conclusion would have a chilling impact on the Government's willingness to settle cases and would therefore be counterproductive, since the purpose of litigation is to resolve disputes, not prolong them. The Board must still evaluate the Government's justification in light of all relevant information presented. Vehicle Maintenance Services v. General Services Administration, GSBCA 12942-C(11663), 95-1 BCA ¶ 27,513, at 137,107; Richerson Construction, Inc. v. General Services Administration, GSBCA 11051-C(10653), 94-1 BCA ¶ 26,278, at 130,740 (1993). The review necessitated is unusual:

> Ordinarily, in evaluating the validity of arguments concerning substantial justification, only the record before the tribunal as a result of the trial of the

> case should be consulted, and new evidence, outside of that record, should not be entertained. When a matter has settled prior to a hearing on the merits, however, it is appropriate to consider evidence that was not in the record of the settled matter in order to make a reasoned determination as to whether the applicant is entitled to an award. . . . [T]he purpose of excluding additional evidence after a hearing on the merits is to avoid wasteful expenditure of resources in relitigating a matter after the parties have already had the opportunity to be fully heard. At the same time, where the existing record is devoid of sufficient information to assess the justification for the Government's position, it would be inappropriate to preclude the opportunity to supplement the record so as to reach a fair and reasoned determination.

Richerson Construction, 94-1 BCA at 130,740 (citations omitted); see also Babenco Development Co. v. United States, 15 Cl. Ct. 637, 641 (1988); Vehicle Maintenance Services, 95-1 BCA at 137,108.

ROI secured some relief on five claim elements through settlement. We examine the justification for the agency's position on each of them.

a. In the final iteration of its principal claim, ROI demanded payment of $37,728.51 under the contract's tax adjustment clause. Through the settlement, the contractor received $11,805.57 of this amount -- the exact sum claimed for 1993 tax adjustments. We hold that GSA's position on this matter was not merely substantially justified, but wholly justified.

The contract required ROI to present receipts for tax payments in order to have rent recalculated in accordance with the tax adjustment clause. The contract provided, however, "The Government will be responsible for payment only if the receipts are submitted within 60 calendar days of the date the tax payment is due." Appeal File, GSBCA 14402, Exhibit 1 at 9. The contracting officer denied ROI's claim for tax adjustment of rent for 1993 (and other years) because the contractor had not provided proof of payment of these taxes within the requisite time period. Id., Exhibit 147 at 2. ROI did not present the necessary proof until October 1996, as an attachment to its original claim. The receipt showed that the taxes for 1993 had been paid at varying dates from December 1993 to December 1994. Id., Exhibit 133 at 10.

On May 11, 1993, the Board issued its decision in Universal Development Corp. v. General Services Administration, GSBCA 12138(11520)-REIN, et al., 93-3 BCA ¶ 26,100. In that decision, we strictly enforced a rental tax adjustment clause somewhat similar to the one included in ROI's contract because the clause clearly stated that the contractor would lose its right to an adjustment in rent if it did not make a timely submission. Id. at 129,739. This decision was in effect when ROI's taxes for 1993 were due and at all times thereafter, including when the claim was filed. On April 17, 1997, while the claim was pending before the contracting officer, we issued our decision in Riggs National Bank of Washington, D.C. v. General Services Administration, GSBCA 14061, 97-1 BCA ¶ 28,920. In that decision, we extended the reasoning of Universal Development to a clause containing a sentence identical to the one quoted here. Id. at 144,179. That decision, of course, was in effect at the time the contracting officer issued her own decision.

GSA's position as to adjustment of rent for 1993 was at all times consistent with existing, relevant case law. The position was therefore substantially justified. Bowey v. West, 218 F.3d 1373, 1377 (Fed. Cir. 2000) (citing Owen v. United States, 861 F.2d 1273, 1274 (Fed. Cir. 1988) (en banc)).

b. The second claim element as to which ROI secured relief through the settlement was a lump sum payment for improvements made to the newly-leased space during the build-out. ROI claimed $44,119.37 for this element; the contracting officer granted $23,000; and in the settlement, GSA agreed to pay $30,000.

SLA 7 contained the statement: "The items identified as Lump Sums shall be paid by the Government upon receipt of invoices when the work is completed and the items are furnished and installed. The Lump Sums are as follows: . . . . Total for Lump Sums, $44,119.37." Among the lump sum items were cabinets and countertops, collectively valued at $25,378.40. Appeal File, GSBCA 14402, Exhibit 22 at 4-5.

During construction, ROI asked and was given permission to substitute inferior quality cabinets for the ones specified in SLA 7. ROI v. GSA, 99-1 BCA at 150,116 (Finding 16 n.7); see also Appeal File, GSBCA 14402, Exhibit 22 at 7-8. ROI failed to complete the build-out, and GSA had to take responsibility for finishing the job. ROI v. GSA, 99-1 BCA at 150,110-11 (Finding 18). In March 1994, GSA told ROI that it would make a lump sum payment only if ROI would submit an itemized invoice. Appeal File, GSBCA 14402, Exhibit 76 at 2. The only invoice ROI ever submitted for this payment was included in the April 1997 version of the claim, and it was not itemized. Id., Exhibit 139 at 4, 12. Thus, the contracting officer never had any basis on which to adjust the amount downward to account for the agency's acceptance of lesser-quality cabinets and the portion of the work performed by GSA which was included in the originally-agreed upon figure. She never knew how much of that amount, $44,119.37, was appropriate for payment.

In opposing ROI's cost application, GSA asserts that during discovery in the underlying appeal -- in particular, during the October 26, 1998, deposition of Wayne Manternach, who assisted ROI with the build-out -- the agency received for the first time some documentation for this element of the claim. Respondent's Opposition to Appellant's Application for Award of Costs (Respondent's Opposition) at 10 (referencing Appeal File, GSBCA 14402, Exhibit 166 at 66). GSA says that it increased its offer as to the claim element once it had this documentation, and ROI accepted the increased offer. Respondent's Opposition at 10. ROI does not contest this recitation of events.

In light of what we have learned about the lump sum payment settlement, we believe that GSA's position on the matter was substantially justified. Where a contractor does not promptly meet its burden to provide evidence supporting the amount it claims, this failure of proof creates an adequate basis for the contracting officer to reduce or deny the amounts claimed, and an agency's defense of the contracting officer's determination is substantially justified. Foremost Mechanical Systems, Inc. v. General Services Administration, GSBCA 14645-C(13584), 99-1 BCA ¶ 30,352, at 150,105. Further, where an agency appropriately and promptly modifies its position after learning relevant facts during discovery, that position is substantially justified. Brener Building Maintenance Co. v. United States, 8 Cl. Ct. 277 (1985). On both counts, GSA's stance on the lump sum payment was well grounded.

c. GSA paid ROI, in settlement, half of the amount claimed under the heading "amortized reimbursement" -- $4,601 of the $9,202.03 sought. ROI raised this matter for the first time in its November 1996 revision of the claim. It explained there that it had expected to be reimbursed for a portion of the costs incurred for build-out improvements "in the form of an amortized payment for the remaining term of the lease." When ROI lost the property due to foreclosure on its mortgage, some of this payment remained to be made. The contractor expected the agency to reimburse it for this remainder. Appeal File, GSBCA 14402, Exhibit 136 at 3. The contracting officer denied this element of the claim on the ground that "[t]he rental rate encompasses the amortized cost for buildout and is paid as a part of the lease rental to whomever holds the lease." Id., Exhibit 147 at 3. GSA's explanation for paying through settlement half the amount sought is that after engaging in discovery, "Respondent made a business decision to settle this uncertain issue with Appellant." Respondent's Opposition at 11.

Although it is always difficult to make an assessment of the strength of parties' positions which have not been fully developed in litigation, we are at a loss to understand what merit there may have been to ROI's demand for "amortized reimbursement." We understood in reviewing the elements of the claim which were presented to us that the costs of the build-out could be recouped in only two ways: through a payment at the outset of the period for lease of the additional space and through increased rent during the remainder of the contract term. ROI v. GSA, 99-1 BCA at 150,112. We did not then, and do not now, understand SLA 7 to provide for any other means of compensating ROI for build-out costs. From our perspective, which has not been enlightened by any further explanation by ROI as to why it might be entitled to payment for this element of its claim, GSA's settlement payment appears to be best characterized as a gift. The agency's earlier decision to contest this part of the claim was more than substantially justified.

d. A fourth element which was encompassed in the settlement was full payment of ROI's demand for $4,789, the cost of moving an entryway in the space added to the lease in SLA 7. The contracting officer did not address this element specifically in her decision. Appeal File, GSBCA 14402, Exhibit 147. GSA justifies its decision to make full payment in settlement with a similar explanation to the one used with regard to the lump sum payment for build-out improvements: "Again, during discovery, Respondent found mention of a discussion between GSA and ROI about the cost to move the entryway. . . . Apparently, both parties missed the inclusion of this item in SLA #7." Respondent's Opposition at 12.

Although the agency's reason for settling this element is the same as the one given for settling the lump sum element, the circumstances are very different. Here, the "mention" allegedly found during discovery was two documents: (a) a letter from ROI's John Ammerman which was sent to the contracting office during the negotiations which led to SLA 7 and which was included in the contractor's claim, and (b) a notation in a GSA contracting officer's contact record of a conversation with Mr. Ammerman. Both indicate an agreement for GSA to pay this amount as a lump sum in exchange for a reduction in the rental rate. Appeal File, GSBCA 14402, Exhibits 21 at 4, 133 at 27. As ROI contends, "[T]he discovery was of information already retained in the government's records." Appellant's Response to Respondent's Opposition to Award of Costs (Appellant's Response) at 4. Opposing a claim when in possession of information showing it to be valid is not justified in any way.

e. The final claim element included in the settlement is laboratory modifications. ROI ultimately asked for $6,038.33 for this element, and GSA paid $4,500. GSA did not address this element in its effort to demonstrate justification for its positions. Because the agency bears the burden of proving substantial justification, and proof on this matter is nonexistent, we cannot find that the agency's position was justified. Vehicle Maintenance Services, 95-1 BCA at 137,108.

In summary, we find that GSA's position was substantially justified on all elements of the claims other than the last two discussed -- moving an entryway ($4,879) and laboratory modifications ($6,038.33). These two elements constitute 4.3 percent of the $254,443.84 ultimately claimed.

C. In its cost application, ROI seeks reimbursement of attorney fees and expenses it incurred from September 4, 1996 -- six weeks before the original claim was submitted to the contracting officer -- until April 5, 1999 -- shortly before the Board issued its decision in the underlying appeal. We now consider which of those fees and expenses are eligible for reimbursement. In the next part of this opinion, we will determine how much of the eligible fees and expenses should actually be paid to ROI.

GSA maintains that we may not award under the EAJA any costs which occurred prior to the issuance of the contracting officer's first decision which was the subject of this appeal. We agree that a decision of the Court of Appeals for the Federal Circuit, Levernier Construction, Inc. v. United States, 947 F.2d 497 (Fed. Cir. 1991), mandates this result. EAJA allows reimbursement of costs which were incurred in connection with an "adversary adjudication," 5 U.S.C. § 504(a)(1), and the adversary action did not begin until ROI had received the contracting officer's decision. See 947 F.2d at 503. We applied this rule even before the court established it, American Power, Inc., GSBCA 10588-C(8752), 91-2 BCA ¶ 23,766, at 119,046, and have faithfully followed it since. Hospital Healthcare Systems, 99-1 BCA at 149,786; S. A. Ludsin & Co. v. Small Business Administration, GSBCA 14175-C(13777-SBA), 97-2 BCA ¶ 29,185, at 145,157; Vehicle Maintenance Services, 95-1 BCA at 137,109; Tele-Sentry Security, Inc. v. General Services Administration, GSBCA 11639-C(10945(7703)-REIN), 93-2 BCA ¶ 25,816, at 128,530; Spectrum Leasing Corp. v. General Services Administration, GSBCA 10902-C(7347), et al., 93-1 BCA ¶ 25,317, at 126,151 (1992).

ROI contends that reimbursement of attorney fees and expenses which were incurred before the contracting officer issued her decision is appropriate because the claim issues had been discussed for two years before the initial claim was submitted, and because the contracting officer did not issue the decision until ten months after receiving that version of the claim. "Appellant was made to wait a considerable period of time. With that in mind, it is not unreasonable that the Appellant continued to consult with an attorney in expectation of an adversarial adjudication, as has certainly been the case." Appellant's Response at 7. This argument comports with neither the facts nor the law. Virtually all of the attorney time which was expended before the contracting officer issued her decision, and for which reimbursement is sought, was devoted to construction of the claim itself; almost none of the time transpired while ROI was waiting for the decision. More important, Levernier establishes a bright-line rule, based on the principle that waivers of sovereign immunity like the EAJA are to be narrowly construed, and we have no license to break free from that rule.

We have also established that if, after a certain point in time, the Government's position on the issues involved in a case becomes substantially justified, reimbursement of costs incurred by the contractor in prosecuting the case further is not appropriate under the EAJA. Universal Development Corp. v. General Services Administration, GSBCA 12174-C(11251), 93-2 BCA ¶ 25,836. In Universal, GSA's position became substantially justified when the agency made a settlement offer which was in an amount no less than the Board awarded after the case was fully litigated. We consequently denied recovery of all costs incurred by the contractor after the offer was made and rejected. Here, after resolution by settlement of the only two claim elements on which the agency's position was not substantially justified, all actions engaged in by ROI's attorneys were for naught. We therefore deny recovery of all costs incurred after the date of settlement of certain elements. Settlement occurred just before our hearing, which took place on November 12, 1998. We allow only costs which resulted from attorney actions prior to that date.

Between the date of the contracting officer's decision (August 18, 1997) and the date of settlement of the only claim elements as to which GSA's position was not substantially justified (presumed to be November 11, 1998), ROI incurred the following costs:

Stolper & Wilcox:	2.75 hours of attorney time at $125 per hour: $343.75 Postage: $1.56
Hanson & Clark:	252.8 hours of attorney time at $100 per hour: $25,280 Photocopies, courier fees: $33.20

Total attorney fees and expenses: $25,658.51.

D. Although we have found that ROI incurred costs of $25,658.51 during the period of time for which EAJA reimbursement is permissible, we cannot conclude that all of this money should be paid to the applicant. The various claim elements involved in the case were distinguishable from one another in factual basis and legal theory, and GSA's position was substantially or wholly justified on all but two of those elements. The two elements constituted less than five percent of the total value of the claims. We consider it appropriate in these circumstances to award only a part of the costs eligible for reimbursement.

The Supreme Court has held that when a tribunal is calculating an award based on only limited success, "There is no precise rule or formula for making . . . [such a] determination[]. The [tribunal] may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." Hensley v. Eckerhart, 461 U.S. 424, 436-37, (1983); see also Community Heating & Plumbing, 2 F.3d 1143, 1146 (citing Naekel v. Department of Transportation, 884 F.2d 1378, 1379 (Fed. Cir. 1989)); Vehicle Maintenance Services, 95-1 BCA at 137,111; Jordan & Nobles Construction Co. v. General Services Administration, GSBCA 11277-C(8349), et al., 93-1 BCA ¶ 25,262 (1992). In a case like this one, where it is impossible to understand which attorney hours were devoted to which of many issues, identifying specific hours for elimination would be impossible. Simply reducing the award to account for the limited success seems the only viable method for accounting for the contractor's limited success, and thereby to craft recovery which is reasonable in relation to the result obtained.

ROI prevailed on claim elements, as to which GSA's position was not substantially justified, constituting about five percent of the total value of the claims at issue in the case. We award to the contractor an amount commensurate with this fraction -- $1,300, which is about five percent of the $25,658.51 in eligible costs.

Decision

This cost application is **GRANTED IN PART**. GSA shall pay to ROI, pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, the sum of $1,300.

_____
STEPHEN M. DANIELS
Board Judge

We concur:

_____
EDWIN B. NEILL
Board Judge

_____
CATHERINE B. HYATT
Board Judge