UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: July 11, 2017

CBCA 5772-C(5259)

KIRK RINGGOLD,

Applicant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Christopher L. Campbell and Craig W. Anderson of Baker Manock & Jensen, PC, Fresno, CA, counsel for Applicant.

Elin M. Dugan, Office of the General Counsel, Department of Agriculture, San Francisco, CA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **GOODMAN**, and **CHADWICK**.

CHADWICK, Board Judge.

Kirk Ringgold filed a timely application for attorney fees of $34,620.35 after the Board granted his claim for $6000 in *Ringgold v. Department of Agriculture*, CBCA 5259, 17-1 BCA ¶ 36,629. The respondent, Department of Agriculture (USDA), argues that its position "became substantially justified" during the merits appeal; blames Mr. Ringgold for "derail[ing]" a $6000 settlement; and argues that Mr. Ringgold seeks some fees for legal work unrelated to his appeal. We grant the application in substantial part.

Mr. Ringgold satisfies the five threshold eligibility requirements for a fee award under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a), (b)(1)(B) (2012), *quoted in Paradise Pillow, Inc. v. General Services Administration*, CBCA 5237-C(3562), 17-1 CBA ¶ 36,628. Mr. Ringgold prevailed in CBCA 5259, then filed an itemized fee application less than thirty days after that decision became final, attesting that his net worth is below the

statutory limit and alleging that USDA's position was not substantially justified. He seeks fees for a total of 202.4 hours of work by four attorneys at $150 per hour, and 61.8 hours of work by an unbarred summer associate at $55 per hour, plus expenses.

USDA concedes that Mr. Ringgold is eligible for a fee award, but it urges us to limit the award on two grounds. First, USDA argues that its position "became substantially justified" in August 2016—about eleven months after the dispute arose, and three months after Mr. Ringgold filed the appeal—when USDA offered to settle for the full amount of the claim, $6000. After that, USDA argues, citing *ROI Investments v. General Services Administration*, GSBCA 15488-C (15037-C)-REIN, 01-1 BCA ¶ 31,352, and other decisions, further legal work on Mr. Ringgold's behalf was wasted and should not entitle him to fees.

We emphatically accept USDA's implicit admission that its position was *not* substantially justified *before* August 2016. As described in our merits decision, this dispute arose when a United States Forest Service contracting officer refused, for two weeks, to take responsibility for restoring the Ringgolds' property to its original condition after the Forest Service used it as a helipad during a forest fire. Then, when Mr. Ringgold submitted a disputed invoice for fifteen days of holdover rent, the contracting officer declined to treat the invoice as a Contract Disputes Act (CDA) claim, citing Forest Service "guidance" on preparing claims. Those actions were unreasonable and unjustified.

We cannot agree with USDA that it transformed the agency's position to substantially justified, simply by offering to pay the claim to settle the appeal in August 2016. A well-justified course of action at that point would have been to stop defending the appeal and to stipulate to a Board award. The Department of the Treasury could have promptly paid the claim, with interest to that date, from the permanent indefinite judgment fund, 31 U.S.C. § 1304, and the doctrines of claim and issue preclusion would have done the rest to protect USDA from duplicate liability. *See, e.g.*, *SBBI, Inc. v. International Boundary & Water Commission*, CBCA 4994, 17-1 BCA ¶ 36,722.

USDA insisted, instead, on a formal settlement agreement, and on paying Mr. Ringgold through its electronic System for Award Management (SAM), which required him to register for a Dun & Bradstreet (DUNS) number. (The Forest Service paid the original rent by check, under emergency procedures.) The parties blame each other for a series of misunderstandings surrounding the DUNS and SAM procedures that led Mr. Ringgold's counsel to repudiate the unconsummated settlement in November 2016, and to increase the settlement demand to $14,000, which USDA declined. We need not decide who was more at fault, because USDA thereafter revived its unjustified positions. When the appeal was submitted on the written record, USDA argued, contrary to settled precedent, that the disputed invoice was not a CDA claim, *see Contract Cleaning Maintenance, Inc.*

v. United States, 811 F.2d 586, 592 (Fed. Cir. 1987) ("All that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim."), and that the agency need not pay holdover rent because it did not "use" the land once it stopped landing helicopters there. *See Richard & Terry Ponce*, DOT BCA 2039, 90-1 BCA ¶ 22,517, at 113,010 (1989) ("When a lessee covenants to return the premises in the same condition as when they were leased, the lessor is entitled to rent during the period of the repairs."). This forced Mr. Ringgold's lawyers to brief those points. USDA bears responsibility for extending the litigation with its substantially unjustified objections to jurisdiction and liability. "[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions" of this kind. *Commissioner, Immigration & Naturalization Service v. Jean*, 496 U.S. 154, 163 (1990).

USDA's second argument is stronger. It has two parts. First, the agency notes that the fee statement includes .2 hours that are uncompensable because they were billed before the claim was deemed denied in December 2015. *See TST Tallahassee, LLC v. Department of Veterans Affairs*, CBCA 2472-C(1576), 12-1 BCA ¶ 35,037, at 172,152 (2011) ("The starting point for an EAJA claim is receipt of the contracting officer's final decision."). Second, USDA points to about twenty-two hours billed by lawyers for a Freedom of Information Act request and a discovery request, concerning a different Forest Service lease, awarded to a neighbor of the Ringgolds, which USDA notes was irrelevant to the claim. (It is hard to quantify this time exactly, because some billing entries cover multiple issues.) To ensure that we do not reward "unwise[]" litigation tactics that "did not secure any benefit," *McTeague Construction Co. v. General Services Administration*, GSBCA 15479-C(14765), 01-2 BCA ¶ 31,462, at 155,335, *reconsideration denied*, 01-2 BCA ¶ 131,526, we will exercise our "special circumstances" discretion under EAJA, 5 U.S.C. § 504(a)(1), exclude the latter time as well, and round the attorneys' time down to 180 hours.

USDA does not object either to the claimed top rate of $150 per hour under USDA's EAJA regulations, 7 CFR 1.186(b) (2015), or to the $831.35 that Mr. Ringgold seeks for itemized, incidental litigation expenses, and we see no grounds to question those figures.

Decision

The application is **GRANTED IN PART** in the amount of $31,230.35.

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KYLE CHADWICK
Board Judge

We concur:

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STEPHEN M. DANIELS
Board Judge

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ALLAN H. GOODMAN
Board Judge