



**Update:<sup>1</sup> The Sixth Circuit Court of Appeals allows Attorneys' Fees Against the Government in a False Claims Act Case because (i) the Government's demand was Substantially in Excess of the Award Obtained by the Judgment, and (ii) the Government's Ultimate Award was Unreasonable Compared to that of the Judgment.**

*United States ex rel. Wall v. Circle C Constr.*, (6th Circ. 2017)

By Christine V. Williams

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The defendant, Circle C Construction, is a family-owned general contractor that built 42 warehouses for the United States Army in Kentucky and Tennessee. In the course of building all those warehouses, over a period of seven years, a subcontractor, Phase Tech, paid two of its electricians about \$9,900 less than the wages mandated by the Davis-Bacon Act. That underpayment rendered false a number of “compliance statements” that Circle C submitted to the government along with its invoices. As a result, the government thereafter pursued Circle C for nearly a decade of litigation, demanding not merely \$9,900—Phase Tech itself had paid \$15,000 up front to settle that underpayment—but rather \$1.66 million, of which \$554,000 was purportedly “actual damages” for the \$9,900 underpayment. The government’s theory in support of that demand was that all of Phase Tech’s electrical work, in all of the warehouses, was “tainted” by the \$9,900 underpayment—and therefore worthless. The Sixth Circuit Court of Appeals eventually awarded less than 1 percent of what the Government sought.

The Government's pursuit of \$1.6 million compared to the \$9,900 underpayment over a course of seven years, caused the contractor to incur attorneys' fees of \$468,704. The contractor then pursued a reimbursement of its attorneys' fees because Equal Access to Justice Act (EAJA) provides that, if a court awards damages to the federal government, but the government’s original demand for damages was both “substantially in excess of the judgment finally obtained” and “unreasonable when compared with such judgment,” then (subject to two exceptions) the court must “award to the [defendant] the fees and other expenses related to defending against the excessive demand.”

The Sixth Circuit visited EAJA and wrote the following:

If, in a civil action brought by the United States . . . the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts

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<sup>1</sup> Not to be used as legal advice.

and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

Under this subsection, the party seeking fees bears the burden of proving (i) that the government's demand was substantially in excess of the award obtained by the judgment and (ii) that the government's demand was unreasonable compared to that judgment. (Internal citations omitted).

As to the first factor, the Sixth Circuit Court of Appeals found that: "the judgment finally obtained by the United States was \$14,748. To say that the government's demand was substantially in excess of the judgment, therefore, only understates matters." As to the second factor, the Sixth Circuit took both what it called a common sense and legal approach. Namely, it adjudged the Government's stance to be unreasonable. "[W]hether the government's demand for \$1.66 million as compensation for Phase Tech's \$9,900 underpayment of its electricians, in a project spanning seven years, was justified to that degree. The short answer to that question, as we said in the last appeal, is that the damages the government sought to recover in this case were "fairlyland rather than actual." *Wall*, 813 F.3d at 618.

To rebut this presumption, the Government had to show that there was bad faith, which the Sixth Circuit did not find. Rather, the Court found that it was a mistake, not a systematic series of acts to defraud the Government. Accordingly, the Sixth Circuit allowed the contractor to seek reimbursement for "the fees and other expenses related to defending against the [government's] excessive demand, 28 U.S.C. § 2412(d)(1)(D), including, to the extent appropriate, fees incurred during this appeal and on remand."