

# ATTORNEY FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT IN GOVERNMENT CONTRACT CLAIMS CASES

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A SMALL CONTRACTOR THAT HAS A CONTRACT claim against the government which cannot be resolved with the contracting officer either informally or early in the formal disputes process must decide whether to initiate an appeal in pursuit of the claim if it wishes to obtain relief. Often, upon receipt of a contracting officer's adverse final decision, a small contractor will be deterred from pursuing its claim further because of the expense of litigation.

Under the Equal Access to Justice Act (EAJA),<sup>1</sup> however, a small contractor that meets certain eligibility criteria may be able to recover all or a portion of its litigation expenses from the government if the government's position is not substantially justified and no special circumstances exist that would make such a recovery unjust. For many small contractors, the possibility of recouping some of the costs of litigation may mean the difference between deciding to give up on or to pursue their claim.

Unless otherwise provided by a particular statute, the EAJA generally applies to all adversarial administrative proceedings and civil litigation with the government where a hearing is required by statute.<sup>2</sup> The basic rules and standards for an award of fees under the EAJA apply to all such proceedings

including government contract claims proceedings

under the Contract Disputes Act.<sup>3</sup>

First enacted in 1981, the EAJA provides small businesses and individuals with a mechanism for recapturing litigation costs, including attorney fees and expenses, associated with the prosecution of an appeal from a contracting officer's adverse final decision before either the appropriate board of contract appeals<sup>4</sup> or the United States Court of Federal Claims (formerly the United States Claims Court). Congress enacted the EAJA because it was concerned that individuals and small businesses "may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings."<sup>5</sup>

Congress further stated that the purpose of the EAJA is "to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States."<sup>6</sup>

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## PREVAILING PARTY

Whether an award of litigation expenses under the EAJA is justified in a particular case requires that certain criteria be met. First, the contractor must be a "prevailing party."<sup>7</sup> Although the contractor does not necessarily have to have succeeded in every portion of its claim or even on a majority of its claim, it must have prevailed on at least one significant issue that achieves some of the benefit it sought in bringing the case in order to qualify as a prevailing party. The amount of money obtained or number of issues on which the contractor prevailed as compared to the amount or number initially pursued generally is irrelevant to this determination.

For example, a contractor that won on only one of 10 issues raised nonetheless was eligible to recover fees and expenses as a prevailing party under the EAJA because, in prevailing on the one issue, it achieved some of the benefit it sought in bringing the case.<sup>8</sup> In another case, a contractor that obtained relief from only 2 percent of the liquidated damages charged by the government nevertheless was found to be a prevailing party for purposes of the EAJA and was entitled to recover attorney fees and expenses related to those issues on which it prevailed.<sup>9</sup>

Furthermore, a party that settles a case brought before a board or court and receives a benefit as a result of the settlement is a prevailing party, even though the party's success was not directly pursuant to an adjudicating order. Because there is no hard and fast test for determining whether a party is a prevailing party, each case is viewed individually on its merits for purposes of making such a determination.

## SUBSTANTIALLY JUSTIFIED

The second requirement for an award of fees and expenses under the EAJA is that the government conduct that is being challenged must not be "substantially justified."<sup>10</sup> What constitutes government conduct that is not substantially justified has been the subject of much attention and litigation over the years. Although each situation must be viewed on its own merits, the standard for determining if government conduct is substantially justified

is whether the government's conduct is reasonably supported in law or in fact.<sup>11</sup> The EAJA requires that the applicant seeking recovery of EAJA fees and expenses allege that the government's conduct was not substantially justified. Once this allegation is made, however, it is the government that has the burden of establishing that its conduct was substantially justified.

That the government lost in the board or court proceeding does not necessarily mean that the government's position was not substantially justified. Similarly, that the government prevailed in the board or court proceeding does not necessarily mean that the government's position was substantially justified when the government loses on an appeal of that decision.

In determining whether the government's position is substantially justified, the court or board must look at the entire administrative record, not merely at the government's litigating position. This is because even though the government's litigating position at trial may be substantially justified, the underlying governmental conduct which gave rise to the dispute may not have been. In such a circumstance, the litigant should not be precluded from recovering under the EAJA because, but for the government's unreasonable or otherwise not substantially justified conduct at the outset, there would have been no need for it to litigate in order to vindicate its rights.

## SPECIAL CIRCUMSTANCES

The third requirement for recovery under the EAJA is that no "special circumstances" exist that would make an award unjust.<sup>12</sup> The legislative history indicates that Congress meant for this exception to apply as a safety valve in those situations where the government, in good faith, advocates a credible, though novel, rule of law or in those situations where equitable considerations dictate that an award should not be made.<sup>13</sup>

Not surprisingly, the government has argued that the special circumstances exception applies in a wide range of cases. Most of these arguments have been rejected. For example, the government has argued

unsuccessfully that special circumstances existed where the cost of the attorneys' efforts far exceeded the additional amount recovered as a result of those efforts<sup>14</sup> and where the government did not have sufficient time to prepare its response to a particular issue raised by the contractor.<sup>15</sup>

In at least one case, however, even though the government's position was found not to be substantially justified, special circumstances were found to exist which justified denial of a requested EAJA award. In that case, the court ruled that even though the plaintiff's position technically was correct, the plaintiff had engaged in unlawful conduct and therefore was not entitled to fees under the EAJA.<sup>16</sup> In the instances where the government attempts to invoke this exception, the government bears the burden of showing that sufficient special circumstances exist.

## TIMELY FILING AND ESTABLISHING FEES

Fourth, the prevailing party also has the burden of timely filing its application and establishing the amount of fees and expenses incurred. The EAJA application must be submitted within 30 days of the final judgment in the action.<sup>17</sup> This is a critical deadline. The 30-day period begins to run from the date the judgment is issued, not the date when it is received by the litigant. A judgment that is subject to appeal, however, is not a final judgment for purposes of the EAJA until 30 days after the expiration of the appeal period.

In those situations where a party submits its EAJA application before the expiration of the time provided to the other party to appeal from the underlying decision, the EAJA application may be either held in abeyance or denied without prejudice to its being refiled at the conclusion of the appeal period if no appeal is filed. Once the appeal period expires or, if an appeal is filed, after the issuance of the appellate decision, the 30-day period within which to file the EAJA application runs anew and the litigant must either re-submit its application or supplement its previously submitted application if necessary. Again, remember that the 30-day period within which to submit the application runs from the date of

the decision, not from the date on which it is received by the prevailing party/EAJA applicant.

The EAJA makes clear that the prevailing party must submit an itemized statement setting forth the actual time expended and identifying the rate at which attorney fees and other expenses are computed. This documentation does not necessarily have to consist of contemporaneous records; it merely needs to contain sufficient detail of the fees and expenses incurred. For example, an itemized computation showing the date, hours expended, and an identification of the work done in each time increment generally is sufficient for purposes of recovering fees under the EAJA.

### NET WORTH AND NUMBER OF EMPLOYEES

The fifth and final requirement for recovery under the EAJA is that the contractor must be either an individual whose net worth did not exceed \$2,000,000 at the time the litigation was initiated or a business whose net worth did not exceed \$7,000,000 at the time the action was filed *and* which had no more than 500 employees at the time.<sup>18</sup> These limitations were designed to address the stated congressional purpose of "reducing the disparity in resources between individuals, small businesses, and other organizations with limited resources and the federal government."<sup>19</sup> The party seeking to recover its attorney fees and expenses under the EAJA has the burden of establishing that it meets the net worth and number of employees criteria as well as each of the other four requirements.

### RECOVERING FEES

If a contractor demonstrates that it is a prevailing party and properly documents its fees and expenses and the government does not show that its position was substantially justified, the final step in an EAJA analysis is a determination of the amount of fees and expenses that may be awarded. Courts have held that to be recoverable under the EAJA, "fees and other expenses" must be incurred.<sup>20</sup> As a result, companies cannot recover for time spent by nonattorney employees in represent-

ing the company in place of an attorney. Expenses otherwise recoverable under the EAJA, however, may be recovered even if incurred by non-attorney employees during the course of the litigation.

For example, in addition to the attorney fees and expenses incurred in litigating the case on the merits, the EAJA also provides for the recovery of the fees and expenses associated with the preparation of the EAJA application itself and, if necessary, any additional fees and expenses incurred in litigating any proceedings surrounding the application. A second substantial justification determination regarding the merit of the government's opposition to the award of fees under the EAJA, if any, is not required before an award may be made for the preparation of the EAJA application or for litigating an EAJA award determination.

The EAJA includes a built-in limitation on the rate at which fees may be recovered. The act specifies a cap of \$75 per hour unless the reviewing court or tribunal determines "that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."<sup>21</sup> Most courts have ruled that the cost of living adjustment runs from the original 1981 enactment of the act, not the 1985 reauthorization. The cost of living adjustment is calculated based on the increase in the cost of living in the area where the legal services were rendered and is calculated from 1981 through the date on which the services were rendered.

Some courts have permitted the party to estimate the cost of living adjustment by using the midpoint of the litigation as the date at which the cost of living adjustment is determined and then using that rate for all rates that are adjusted.<sup>22</sup> In contrast, some contract appeals boards have held that where there are no departmental regulations permitting recovery of a higher rate, \$75 per hour is the maximum allowed.<sup>23</sup> For attorney fees that are charged at rates below \$75 per hour, the actual rates are the maximum that are allowable.

Additionally, the amount of the award may be limited by the extent of the party's success and the interrelationship among the issues involved in

the case. Where an adjudicating official does not adopt each contention made by a party but the party nonetheless wins substantial relief on related issues, the party's award should not be reduced. Where a party fails to prevail on a particular claim that is distinct from its successful claims, however, the party generally can recover only those amounts attributable to its successful claims.

Where it is not possible to determine the amount attributable to the successful claims directly, some judges have found that an appropriate formula for determining an award is to multiply the total award requested by the proportion of the number of claims prevailed upon to the total number of claims raised.<sup>24</sup> Other judges have advocated a formula whereby a prevailing party is to be awarded a percentage of the requested award where the percentage reflects the proportion of the amount actually recovered to the amount initially sought.<sup>25</sup> Still other judges have rejected these types of formulas and have awarded EAJA amounts based on case-specific analyses because general formulas did not provide a satisfactory measure of the success of the litigation effort.<sup>26</sup> Regardless of the amounts requested or received for the underlying claim, a party's EAJA award is not necessarily capped by the amount of the underlying judgment received.

### NOT A GUARANTEE

The EAJA by no means guarantees a small contractor the recovery of its attorney fees and expenses incurred in contract claim litigation against the government. It does provide for recovery in those cases where, among other things, the government's conduct is not substantially justified. Because it has fairly specific requirements and is a potentially available remedial measure for small businesses, the EAJA affords a small business contractor, guided by legal advice, the opportunity to assess the likelihood of recovering contract claim litigation fees and expenses before initiating the litigation. A contractor can then weigh the potential benefits provided by the EAJA as one additional factor in making the

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decision whether to proceed to litigate a particular claim. □

#### ENDNOTES

1. 5 U.S.C.S. § 504 (1989); 28 U.S.C.S. § 2412 (1990).
2. 5 U.S.C. § 504(a)(1).
3. 5 U.S.C. § 504(b)(1)(C); 28 U.S.C. § 2412(d)(2)(E).
4. When the EAJA was first enacted in 1981, the courts held that it did not apply to boards of contract appeals. *See Cox Construction Co. v. United States*, 17 Cl. Ct. 29, 31 (1989). Congress amended the statute in 1985 to make clear that contract appeals board proceedings were included within the act's coverage. Because it originally intended board proceedings to be covered, Congress made the amendment retroactive to contract appeals board proceedings that were conducted since the original enactment of the EAJA in 1981. 5 U.S.C.S. § 504(b)(1)(C) (1989); Public Law 99-80, § 7, 99 Stat. 186 (Aug. 5, 1985). The EAJA now clearly applies to proceedings before all of the major forums that hear contract disputes between a contractor and the government.
5. H.R. Rep. No. 1418, 96th Cong., 2d Sess., reprinted in 1980 U.S.C.C.A.N. 4953, 984.
6. *Id.*
7. 5 U.S.C.S. § 504(a)(1) (1989); 28 U.S.C.S. § 2412(d)(2)(B) (1990); *Cox Construction Co. v. United States*, *supra* note 4.
8. *Isc-Serco*, ASBCA Nos. 37226, 37239, 91-3 BCA ¶ 24,086 (1991).
9. *N&P Construction Co., Inc.*, VABCA Nos. 3283E, 32886E, 93-3 BCA ¶ 26,257 (1993).
10. 5 U.S.C.S. § 504(a)(1) (1989); 28 U.S.C.S. § 2412(d)(1)(A) (1990).
11. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).
12. *See supra*, note 10.
13. H.R. Rep. No. 96-1418, 96th Cong., 2d Sess., at 11, reprinted in 1980 U.S.C.C.A.N. 4953, 4984, 4990.
14. *Sage Construction Company*, ASBCA No. 34284, 91-2 BCA ¶ 23,976 (1991).
15. *J.R. & Associates*, ASBCA No. 41377, 92-3 BCA ¶ 25,121 (1992).
16. *Oguachuba v. INS*, 706 F.2d 93 (2d Cir. 1983). The court found that even though the government's conduct in detaining the plaintiff beyond the maximum six-month period authorized by the immigration laws was not substantially justified, it was the plaintiff's illegal flouting of the immigration laws that led to his detainment in the first place. In these circumstances, the plaintiff was found not to have "clean hands" and thus that equitable considerations dictated against an award of attorney fees.
17. 5 U.S.C.S. § 504(a)(2) (1989); 28 U.S.C.S. § 2412(d)(2)(B) (1990).
18. 5 U.S.C.S. § 504(b)(1)(B) (1989); 28 U.S.C.S. § 2412(d)(2)(B) (1990). The limits in the statute as originally enacted were \$1,000,000 for an individual and \$5,000,000 for a business. These limits were increased to the current levels as part of the 1985 amendments to the act.
19. H.R. Rep. No. 120, 99th Cong., 1st Sess., pt. 1 at 15 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 144; *see Texas Instruments, Inc. v. United States*, 991 F.2d 760, 767 (Fed. Cir. 1993).
20. *See, e.g., Phillips v. General Services Administration*, 924 F.2d 1577, 1583 (Fed. Cir. 1991); *Naekel v. Department of Transportation*, 845 F.2d 976, 981 (Fed. Cir. 1988).
21. 5 U.S.C.S. § 504(b)(1)(A) (1989); 28 U.S.C.S. § 2412(d)(2)(A) (1990).
22. *Secretary Construction Co. v. United States*, 15 Cl. Ct. 135, 140 (1988).
23. *See, e.g., Hart's Food Services, Inc.*, ASBCA Nos. 30756R, 30757R, 40280R, 40281R, 93-1 BCA ¶ 25,524 (1992); *Triple K Contractors*, AGBCA No. 89-144-10, 90-1 BCA ¶ 22,413 (1989); *Berkeley Construction Co., Inc.*, VABCA No. 1962E, 88-3 BCA ¶ 20,941 (1988).
24. *Esprit Corp., Inc. v. United States*, 15 Cl. Ct. 491, 493-94 (1988).
25. *See Sardis Contractors*, Eng BCA No. 5256-F, 90-3 BCA ¶ 23,010 (1990).
26. *See Harvey C. Jones*, IBCA No. 2758F, 92-3 BCA ¶ 25,145 (1992) (where amounts denied in claim were large but only a minor issue in litigation, award amount would not be reduced proportionately).

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