

28 July 2004

EQUAL ACCESS TO JUSTICE ACT

INTERIM PROCEDURES

1. Definitions

For the purpose of these interim procedures:

- a. "Equal Access to Justice Act," or "EAJA," means 5 U.S.C. § 504, as amended;
- b. "Board" means the Armed Services Board of Contract Appeals; and
- c. "Contract Disputes Act" means The Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613.

2. Scope of interim procedures

These interim procedures are intended to assist the parties in adjudication of EAJA applications for award of fees and other expenses incurred in connection with appeals of decisions made under 41 U.S.C. § 605 until such time as the Department of Defense by rule establishes uniform procedures for the submission and consideration of EAJA applications.

3. Eligibility of applicants

a. To be eligible for an EAJA award, an applicant must be a proper party appellant which has prevailed in a Contract Disputes Act appeal before the Board and must be one of the following:

- (1) An individual with a net worth of not more than \$2 million;
- (2) Any owner of an unincorporated business who has a net worth of not more than \$7 million and not more than 500 employees;
- (3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)) with not more than 500 employees;

(4) Any other partnership, corporation, association, unit of local government, or other organization with a net worth of not more than \$7 million and not more than 500 employees.

b. For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the underlying Contract Disputes Act appeal was filed with the Board.

c. The employees of an applicant include all persons under the applicant's direction and control who regularly perform services for remuneration for the applicant. Part-time employees shall be included on a proportional basis.

d. The aggregate net worth and number of employees of the applicant and all of its affiliates shall be used to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest will be considered an affiliate for purposes of these procedures, unless the Board determines that such treatment would be unjust and contrary to the purposes of the EAJA in light of the actual relationship between the affiliated entities.

#### 4. Standards of awards

a. A prevailing applicant shall receive an award of fees and expenses incurred in connection with a Contract Disputes Act appeal, or in a significant and discrete substantive portion of a Contract Disputes Act appeal, unless the position of the Government over which the applicant prevailed was substantially justified. The position of the Government includes, in addition to the position taken by the Government in the Contract Disputes Act appeal, the action or failure to act by the Government upon which the Contract Disputes Act appeal was based.

b. An award may be reduced or denied if the applicant has unduly or unreasonably protracted the Contract Disputes Act appeal or if special circumstances make the award unjust.

#### 5. Allowable fees and other expenses

a. Fees and other expenses must be reasonable. Awards usually will be based upon the prevailing market rates for the kind and quality of services furnished by attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant. Appellants appearing pro se in the Contract Disputes Act appeal may not recover attorney's fees.

b. No award for the fee of an attorney or agent under these interim procedures may exceed \$125 per hour. No expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, when the attorney, agent, or witness ordinarily charge clients separately for such expenses.

c. The reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on behalf of a party may be awarded, to the extent that the study or other matter was necessary in connection with the appeal and the charge for the service does not exceed the prevailing rate for similar services.

## 6. Time for filing of applications

a. An application may be filed after an appellant has prevailed in the Contract Disputes Act appeal, or in a significant and discrete substantive portion of an appeal, but not later than 30 days after the disposition of the appeal has become final. This statutory 30-day period cannot be extended.

b. For the purposes of these interim procedures, the Board's disposition of the Contract Disputes Act appeal becomes final on the date the Board's disposition is no longer appealable.

c. If an application for fees and other expenses from an applicant who has prevailed in a significant and discrete substantive portion of a Contract Disputes Act appeal is filed prior to the Board's disposition of that appeal becoming final, proceedings on the application will be stayed pending the Board's disposition of the appeal becoming final.

## 7. Application requirements

a. Within 30 days of final disposition of the appeal, an EAJA applicant must comply with each of the following:

- (1) Show that the applicant is a prevailing party;
- (2) Show that the applicant is eligible to receive an award (paragraphs 3 and 8 herein);
- (3) Allege that the position of the Government was not substantially justified;\*

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\* See *Scarborough v. Principi*, 124 S. Ct. 1856, 1865 (2004), in which the Court stated that “a timely filed EAJA fee application may be amended, out of time, to allege ‘that the position of the United States was not substantially justified[.]’ . . . .”

and

(4) Show the amount of fees and other expenses sought, including an itemized statement thereof (paragraph 9 herein).

b. An original and one copy of the application and exhibits should be filed with the Board. The applicant will forward one copy to the Government.

c. When a complaint application has been timely filed, the Board, in order to obtain more detailed information, may require supplementation of one or more of the jurisdictional averments set out in paragraph a. above.

8. Net worth exhibit

a. Each applicant should provide with its application a detailed Net Worth Exhibit showing the net worth of the applicant and any affiliates, as defined in paragraph 3 herein, when the Contract Disputes Act appeal was filed. The exhibit may be in any form convenient to the applicant that provides full disclosure of the assets, liabilities, and net worth of each affiliate and that is sufficient to determine whether the applicant has established eligibility under paragraph 3.

b. Ordinarily, the net worth exhibit will be included in the public record of the proceedings. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the Board in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)-(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the agency against which the applicant seeks an award, but need not be served on any other party to the proceedings. If the Board finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceedings. Otherwise, any request to inspect or copy the exhibit shall be disposed of under established procedures under the Freedom of Information Act.

9. Fees and other expenses exhibit

a. The application should be accompanied by a detailed Fees and Other Expenses Exhibit fully documenting the fees and other expenses, including the cost of any study, analysis, engineering report, test, project, or similar matter, for which an award is sought. The date and a description of all services rendered or costs incurred should be indicated. A separate itemized statement should be submitted for each professional firm or individual whose services are covered by the application showing the hours spent in connection with the Contract Disputes Act appeal by each individual, a description of the particular services performed by specific date, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The Board may require the applicant to provide vouchers, receipts, or other substantiation for any expenses sought.

b. Where appellant has prevailed on only a significant and discrete substantive portion of the Contract Disputes Act appeal, the application should be limited to fees and expenses allocable to the portion of the Contract Disputes Act appeal on which appellant prevailed.

#### 10. Answer to application

a. Within 30 days after receipt by the Government of an application, the Government may file an answer. Unless the Government requests an extension of time for filing or files a statement of intent to negotiate under paragraph b. below, failure to file an answer within the 30-day period may be treated by the Board at its discretion as a general denial to the application on behalf of the Government.

b. If the Government and the applicant believe that the matters raised in the application can be resolved by mutual agreement, they may jointly file a statement of intent to negotiate a settlement. Filing of this statement shall extend the time for filing an answer for an additional 30 days. Further extensions may be requested by the parties.

c. The answer shall explain in detail any objections to the award requested and identify the facts relied upon in support of the Government's position. If the answer is based on factual allegations not contained in the record of the underlying Contract Disputes Act appeal, the Government may include supporting affidavits with the answer.

d. An original and one copy of the answer should be filed with the Board. The Government will forward one copy to the applicant.

#### 11. Reply

Within 15 days after receipt of an answer, the applicant may file a reply. If the reply is based on any factual allegations not already in the record of the underlying Contract Disputes Act appeal, the applicant shall include supporting affidavits with the reply. An original and one copy of the reply shall be filed with the Board. The applicant will forward one copy to the Government.

## 12. Award proceedings

a. The Board may enter an order prescribing the procedure to be followed or take such other action as may be deemed appropriate under the EAJA. Further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application.

b. A request that the Board order further proceedings under this paragraph shall describe the disputed issues, explain why the additional proceedings are deemed necessary to resolve the issues and specifically identify any information sought and its relationship to the disputed issues.

c. Further proceedings shall not include evidentiary hearings or discovery to determine whether the Government's position under the EAJA was substantially justified. Absent good cause shown, evidentiary hearings will not be conducted on other issues related to applications under the EAJA.

## 13. Evidence

### a. Decisions on the merits.

When a Contract Disputes Act appeal is decided on the merits, the record relating to whether the Government's position under the EAJA was substantially justified will be limited to the record in the Contract Disputes Act appeal. Evidence relevant to other issues in the award proceeding may be submitted.

### b. Other dispositions.

When a Contract Disputes Act appeal is settled on terms favorable to the appellant, either party in proceedings under the EAJA may, for good cause shown, supplement the record established in the Contract Disputes Act appeal with affidavits and other supporting evidence relating to whether the position of the agency was substantially justified or other issues in the award proceeding.

## 14. Decision

Decisions under the EAJA will be rendered for the Board by the administrative judge or a majority of the judges who would have participated in a motion for reconsideration of the underlying Contract Disputes Act appeal. The decision of the Board shall include written findings and conclusions and the reason or basis thereof. The Board's decision on an application for fees and other expenses under the EAJA shall be the final administrative decision.

15. Motions for reconsideration

Either party may file a motion for reconsideration. Motions for reconsideration must be filed within 30 days of receipt of the Board's EAJA decision.

16. Judicial review

Applicants may appeal the Board's EAJA decision as provided in 5 U.S.C. § 504(c)(2).

17. Payment of Awards

The Board's EAJA awards shall be paid by the contracting agency over which the applicant prevailed in the underlying Contract Disputes Act appeal. EAJA awards, however, may not be paid from the indefinite appropriation established under 31 U.S.C. § 1304, or Judgment Fund.