

2 December 2010

**EQUAL ACCESS TO JUSTICE ACT**

**ASBCA PROCEDURES**

1. Definitions

For the purpose of these 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 procedures

These procedures are intended to assist the parties in the processing of EAJA applications for award of fees and other expenses incurred in connection with appeals pursuant to the Contract Disputes Act.

3. Eligibility of applicants

a. To be eligible for an EAJA award, an applicant must be a party appellant that 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 which did not exceed \$2,000,000 at the time the appeal was initiated; or

(2) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the appeal was initiated, and which had not more than 500 employees at the time the appeal was initiated; except: A. certain charitable organizations or cooperative associations, and B. for the purposes of 5 U.S.C. § 504(a)(4), a small entity as defined in 5 U.S.C. § 601, need not comply with any net worth requirement (see 5 U.S.C. § 504(b)(1)(B)).

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.

#### 4. Standards of awards

A prevailing eligible applicant shall receive an award of fees and expenses incurred in connection with a Contract Disputes Act appeal, unless the position of the government over which the applicant prevailed was substantially justified, or if special circumstances make the award unjust.

#### 5. Allowable fees and other expenses

a. Fees and other expenses must be reasonable. Awards will be based upon the prevailing market rates, subject to 5(b) below, for the kind and quality of services furnished by attorneys, agents, and expert witnesses.

b. No award for the fee of an attorney or agent 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.

c. The reasonable cost of any study, analysis, engineering report, test, or project, 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

An application may be filed after an appellant has prevailed in the Contract Disputes Act appeal, but not later than 30 days after the Board's disposition of the appeal has become final.

#### 7. Application contents

a. An EAJA application shall 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;

(3) Allege that the position of the government was not substantially justified; and

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

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 compliant application has been timely filed, the Board, in order to obtain more detailed information, may require supplementation of the application.

#### 8. Net worth exhibit

Each applicant for which a determination of net worth is required under the EAJA, should provide with its application a detailed net worth exhibit showing the net worth of the applicant, when the Contract Disputes Act appeal was filed. The exhibit may be in any form convenient to the applicant that provides full disclosure of assets, liabilities, and net worth.

#### 9. Fees and other expenses exhibit

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, or project, 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.

#### 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.

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. 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.

#### 13. Evidence

a. Decisions on the merits.

When a Contract Disputes Act appeal is decided on the merits, other than by a consent judgment, 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, or decided by a consent judgment, 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 therefor. The Board's decision on an application for fees and other expenses under the EAJA shall be the final administrative decision regarding the EAJA application.

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. Payment of Awards

The Board's EAJA awards shall be paid directly by the contracting agency over which the applicant prevailed in the underlying Contract Disputes Act appeal.