ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access to Justice Act of --	)	
Kostmayer Construction, LLC	)	ASBCA No. 55053
Under Contract No. W921P8-04-C-0001	)	

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OPINION BY ADMINISTRATIVE JUDGE PEACOCK

Kostmayer Construction, LLC (applicant or KC) filed a timely application for attorneys' fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. The underlying dispute involved KC's appeal, pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from the termination for default of a contract with the New Orleans District of the United States Corps of Engineers (Corps or government). The parties' submissions include appellant's application, the government's answer, a supplement from KC, the government's reply, KC's response to the reply, and the applicant's supplemental schedule of fees.

BACKGROUND

KC contracted with the government to enlarge a levee at Lake Cataouatche, Louisiana. The government terminated the contract for default and KC filed a timely appeal dated 9 June 2005. *Kostmayer Construction, LLC*, ASBCA No. 55053, 08-2 BCA ¶ 33,869, finding 75. The Board found the termination improper and converted it into a termination for the convenience of the government. *Kostmayer Construction*, 08-2 BCA ¶ 33,869.

KC submitted an EAJA application on 30 September 2008. The contents of the application were sworn to as "true and correct" by the president and sole owner of KC, James H. Kostmayer, Jr. As revised on 24 April 2009, its application seeks a total of $408,427.96 comprised of $361,428.75 in attorneys' fees and $46,999.21 in expenses (app. supp., ex. EE).

In support of its net worth eligibility, KC includes in its application a balance sheet (along with related statements of income and retained earnings and cash flow) for the year ending 31 December 2005 reflecting Kostmayer Construction, LLC's net worth some six months after the appeal was filed at the Board. The balance sheet shows total assets of $11,702,764 and total current liabilities of $6,868,050, leaving shareholders equity, or net worth, of $4,834,714 on 31 December 2005. The related statements show retained earnings as of the beginning of the year of $2,534,775, which, when combined with common stock of $50,000 and contributed capital of $150,000, indicates net worth at that time of $2,734,775. (Application ex. B)

The largest asset listed on the balance sheet is "Contract Receivables, Net" in the amount of $9,483,487. The "Notes to the Financial Statements" further described "Contract Receivables" as follows:

> Contract Receivables are recorded when invoices are issued and are presented in the balance sheet net of the allowance for doubtful accounts. Contract receivables are written off when they are determined to be uncollectible. The allowance for doubtful accounts is estimated based on the Company's historical losses, the existing economic conditions in the construction industry, and the financial stability of its customers. The Company believes no allowance for doubtful accounts is necessary at December 31, 2005.

(*Id.* at 7)

Accompanying the balance sheet is a letter from a certified public accountant (CPA), stating that the balance sheet (and related financial statements) had been reviewed in accordance with the Statements on Standards for Accounting and Review Services (SSARS) issued by the American Institute of Certified Public Accountants (AICPA). The letter stated that the review was "substantially less in scope" than an audit done in conformity with generally accepted auditing standards (GAAS). He further indicated that he was not aware of any material modifications that should be made to the balance sheet in order for it to be in conformity with generally accepted accounting principles (GAAP). (Application ex. B)

In addition to fees and expenses incurred in connection with the underlying appeal, KC's application seeks recovery of costs incurred by appellant's performance and payment bond surety to negotiate a completion agreement with the Corps and in defense of subcontractor/supplier claims (application exs. D-N).

In its answer to the application, the government conceded that appellant prevailed in the underlying CDA appeal. The Corps further conceded that its position in that appeal was not substantially justified. (Answer at 1) However, the government asserted that KC is not eligible for an EAJA award because it failed to comply with the Board's Interim Procedures 3.d and 8.b. and include all "affiliates" in its net worth calculation. The government contends that KC's net worth may exceed $7 million if "affiliates" are included and seeks further discovery including all tax returns filed by KC and Mr. Kostmayer to explore possible links with other affiliates. However, the government does not dispute that KC had fewer than 500 employees. The government further stated that some of the fees and expenses being sought were for work that was not incurred "in connection with" the adversary adjudication and were, therefore, not recoverable. 5 U.S.C. § 504(a)(1).

The government's answer includes a printout from the Louisiana Corporations Database. The government searched for corporations associated with the names James H. Kostmayer, Jr. or James H. Kostmayer. The printout shows a number of entities with which James H. Kostmayer, Jr. and/or James H. Kostmayer are associated in various capacities. The government states that the net worth of Mr. Kostmayer and any of these other entities that qualify as "affiliates" under the Board's Interim Procedures must be added together to determine the applicant's eligibility.

The government reserved the right to question quantum in detail pending determination of appellant's eligibility, but noted several objections to the fees and expenses listed by appellant. The government's answer alleges that certain paralegal rates claimed by KC exceeded the rate actually incurred and paid. (Answer at 6-7)

Appellant filed a January 2009 Supplement to its application in response to the government's answer and to update the amount claimed through December 2008. Exhibit T to the supplement includes an individual balance sheet for James H. Kostmayer, Jr., also dated 31 December 2005. The balance sheet shows net worth for Mr. Kostmayer of $1,720,312. (App. supp., ex. T)

Accompanying Mr. Kostmayer's balance sheet is a letter from a CPA stating he compiled the statement of financial condition in accordance with the SSARS issued by the AICPA, and that the statement was intended to present assets and liabilities at "estimated current" values. The CPA cautioned that he had not audited or reviewed the statement and did not "express an opinion or any other form of assurance on it," and that

Mr. Kostmayer had "elected to omit substantially all of the disclosures required by generally accepted accounting principles." (App. supp., ex. T)

Appellant's Supplement also noted that its earlier submitted balance sheet for KC included a receivable of $4,600,000 which represented the invoiced, but unpaid, contract amount for the terminated contract. The Supplement maintained that the receivable was erroneously included in KC's 31 December 2005 balance sheet and was not included by the CPA in his determination of Mr. Kostmayer's balance sheet in computing his individual net worth for the same period. Therefore, KC's net worth should have been commensurately reduced by $4,600,000 to $234,714 as of 31 December 2005. (App. supp. at 4, ex. T)

In a sworn affidavit attached as Exhibit S to the supplement, Mr. Kostmayer indicated that KC is a registered limited liability company organized under the laws of Louisiana, that the company's business records, tax records, bank accounts, and insurance policies are separate from his personal records and accounts, and that most of appellant's profits are kept within the company as working capital. Appellant further addressed the other entities that the government says are associated with Mr. Kostmayer. Mr. Kostmayer stated that he is a 13-percent owner of Kostmayer Mortgage Corporation and a 5-percent owner of Kostchild, LLC, but had no "ownership stake" in the other Kostmayer entities identified by the government, most of which were defunct. He also averred that KC had "no ownership interest in, or control over," the other Kostmayer entities. (App. supp. R4, ex. S)

On 24 February 2009, the government filed a Reply to the applicant's Supplement reiterating many of the contentions made in its answer. The government Reply discusses, among other things, whether aggregation of the net worths of appellant, James H. Kostmayer, Jr., and/or the various Kostmayer entities is required, whether appellant must show its net worth as of the date its CDA appeal was filed, and whether the balance sheets that had been provided were accurate. The Reply continues to maintain that Mr. Kostmayer's net worth should be aggregated with appellant's for EAJA purposes. The government also argues that appellant and Mr. Kostmayer should be required to show their net worth at the 9 June 2005 date of filing the appeal from the termination. The government questions whether KC's 31 December 2005 balance sheet may be misleading since appellant and Mr. Kostmayer may have been adversely affected by the August 2005 Hurricane Katrina and since the balance sheet was allegedly inconsistent with an attached 2007 Dun & Bradstreet (D&B) report on KC. Apparently through inadvertence the government did not actually attach the 2007 D&B report. At the Board's request, the government forwarded the report. The report shows net worth for KC of $5,848,294 as of 31 December 2007. Appellant contends the D&B report is irrelevant. The government requests that appellant and Mr. Kostmayer produce copies of their 2004 tax returns to verify KC's net worth.

KC has filed a 24 April 2009 response to the government's Reply that includes balance sheets for appellant and Mr. Kostmayer dated 30 June 2005. Appellant's balance sheet shows total shareholders equity of $1,329,917 and Mr. Kostmayer's shows a net worth of a negative $1,050,577.

Accompanying the balance sheets are letters from a CPA. He stated that he compiled the documents in accordance with the SSARS issued by the AICPA, that he had not audited or reviewed the documents and did not "express an opinion or any other form of assurance on" them, and that KC and Mr. Kostmayer had "elected to omit substantially all of the disclosures required by generally accepted accounting principles."

In a separate letter, the CPA noted that the receivable from the government for the contract at issue had been included in KC's, but not in Mr. Kostmayer's, balance sheet. He also stated that KC had accounts payable of over $3 million and notes at a bank of $3 million but that Mr. Kostmayer was liable for the debt at the bank as well as any money spent by the bonding company if it had had to take over the job. (App. response, ex. W)

Exhibits O and P to the Supplement reflect the elimination of approximately $9,500 from the total legal fees claimed by KC's attorneys, as well as reduction of certain paralegal charges. The revisions removed charges associated with services that were unrelated to the underlying appeal and adjusted the hourly rate to that actually incurred for the paralegal work. (App. supp. at 10-11)

On 24 April 2009, appellant submitted a second supplemental schedule of fees. This submission added attorneys' fees to KC's application based on work done in responding to the government. (App. second supp., exs. CC, DD, EE)

DECISION

The government does not dispute, and we conclude, that appellant was the prevailing party in the underlying CDA appeal and that the position taken by the government in that appeal was not substantially justified. *See Libas, Ltd. v. United States*, 314 F.3d 1362, 1366 (Fed. Cir. 2003); *Gwaduri v. INS*, 362 F.3d 1144, 1146 (9th Cir. 2004). The government does dispute appellant's eligibility to receive an award and whether certain fees and expenses were incurred in connection with the appeal. Only entitlement is before us for decision (Bd. order dtd. 2 Oct. 2008).

I. Eligibility

The government argues that KC's net worth may exceed $7,000,000 when the net worth of Mr. Kostmayer and various "affiliates" are aggregated with that of KC. Therefore, the government maintains that the applicant has failed to meet the "net worth"

prerequisite to eligibility. In addition, the government contends that KC's proof of its eligibility is inadequate and fails to establish net worth on the date of the appeal. The government also requests that it be permitted to conduct discovery to determine whether the net worth of the alleged affiliates should be considered on the issue of eligibility. KC asserts, *inter alia*, that EAJA does not require that its net worth be combined with Mr. Kostmayer's or other entities associated with Mr. Kostmayer. The applicant also avers that the proof submitted is sufficient to establish its net worth.

We hold that the EAJA does not require the aggregation of the net worth of KC's affiliates as a prerequisite to eligibility under the principles discussed in A below.

A. Aggregation of the Net Worth of Affiliated/Related Individuals and Entities

As pertinent to this dispute, the EAJA defines "party" as "any...corporation...the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated...." 5 U.S.C. § 504 (b)(1)(B)(ii). Thus, to be eligible, KC's net worth on 9 June 2005 must have been $7,000,000 or less.[1] Net worth is determined by subtracting an applicant's total liabilities from its total assets. *See Broaddus v. United States Corps of Engineers*, 380 F.3d 162, 167 (4th Cir. 2004); *Shooting Star Ranch, LLC v. United States*, 230 F.3d 1176, 1178 (10th Cir. 2000); *City of Brunswick, GA v. United States*, 849 F.2d 501, 503 (11th Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989).

The EAJA does not expressly address the issue of aggregation. The government relies on the Board's Interim Procedures to support its contentions. Paragraph 3.d. of the Interim Procedures states that the net worth of an EAJA applicant and "all of its affiliates" are to be aggregated to determine eligibility, and further states that "[a]ny individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of [an] applicant...will be considered an affiliate...."

Based largely on the Administrative Conference of the United States' (ACUS) Model Rules for Implementation of the Equal Access to Justice Act, the Board's Interim Procedures were first issued in October of 1985, a few months after the EAJA had been

[1] The government has not argued that any strictures of the Louisiana statues governing the establishment of limited liability corporations in that state warrant treating KC as anything other than a corporation within the meaning of the above provision and, in any event, the same statutory threshold would apply regardless of KC's categorization.

reauthorized.[2] With respect to affiliates and the aggregation requirement, however, we first note that the Model Rule that was the exemplar for section 3.d. of the Interim Procedures was controversial from the outset. Section 104(g) of the proposed Model Rules provided that the "net worth...of the applicant and all of its affiliates shall be aggregated to determine eligibility. 'Affiliates' are other individuals, corporations or other entities directly or indirectly connected to the applicant by a chain of ownership or control of a majority of the voting shares or other interest." 46 Fed. Reg. at 15902. The Department of Justice (DOJ) expressed substantial doubt that the EAJA authorized agencies to promulgate "such substantive standards" by regulation. 46 Fed. Reg. at 32902. The ACUS disagreed stating that in order to administer a statute, agencies had to be able to define terms and make initial interpretations of statutory provisions. *Id.* The relevant provision of the Model Rules was renumbered section 104(f) and restated in language very similar to that presently in Interim Procedures ¶ 3.d. 46 Fed. Reg. at 32912.

Since issuance, the Board's Interim Procedures have been subject to only minimal changes, such as a modification to ¶ 7 reflecting the jurisdictional requirements of *Scarborough v. Principi*, 541 U.S. 401 (2004). Like the ACUS Model Rules which were consultative in nature and not binding, the Board Interim Procedures have not been promulgated and were never intended to be regulatory provisions. We consult the Interim Procedures for "guidance only and determine eligibility using the EAJA alone." *Defense Systems Corp.*, ASBCA No. 42939 *et al.*, 97-1 BCA ¶ 28,895 at 144,074 n.8.

For the most part, the Model Rules and Interim Procedures are based on express provisions of the statute and/or provide useful, noncontroversial, practical guidance that facilitates submission of EAJA applications and conduct of associated proceedings. With respect to a party's eligibility, for example, ¶ 3.a. of the Interim Procedures substantially incorporates the statutory language. In addition, the Department of Defense (DoD) has not chosen to issue regulations implementing procedures for applying for attorneys' fees and expenses under 5 U.S.C. § 504. The ACUS regulations here were expressly issued

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[2] The ACUS issued draft Model Rules and requested comments in March 1981. 46 Fed. Reg. 15895 (March 10, 1981). After review of the comments, final Model Rules were promulgated in June 1981. 46 Fed. Reg. 32900 (June 25, 1981). Following the reauthorization of the EAJA, which included a provision applying the EAJA to proceedings before agency boards of contract appeals, the ACUS issued draft revisions to the Model Rules and requested comments. 50 Fed. Reg. 46250 (Nov. 6, 1985). The final revisions were issued in May 1986. 51 Fed. Reg. 16659 (May 6, 1986). The Model Rules were codified at 1 C.F.R. Part 315. In 1995, Congress terminated funding for the ACUS and it ceased to exist as did the Model Rules.

for "guidance" only and have not been adopted by DoD. Nor do the ACUS provisions in dispute here reasonably interpret the plain language of the EAJA in our view. Although we distribute our Interim Procedures to the parties pending promulgation of regulations by DOD, we have never considered these procedures as binding, particularly when they are found to be in conflict with the EAJA itself. They do not contravene the plain language of the statute**.**

The starting point for analysis of a statutory provision is its "plain meaning." Where the language of the statute is clear on its face, as is the language of the EAJA here, that plain meaning will be given effect. *Cf. Texas Food Industry Ass'n v. USDA*, 81 F.3d 578, 582 (5th Cir. 1996). We do not consider that the plain meaning of the term "party," as defined in the EAJA, envisions aggregation of affiliated or related corporations in determining whether an applicant "corporation" is eligible. *Cf. Tri-State Steel Construction Co. v. Herman*, 164 F.3d 973, 979-80 (6th Cir. 1999) (improper to aggregate net worth of corporate parent)*; see also National Ass'n of Manufacturers v. Department of Labor,* 159 F.3d 597, 600-603 (D.C. Cir. 1998) (aggregation of association's individual members was not required).

Regardless of whether the ACUS considered expansion of the term "party" to include affiliates, individual shareholders and other firms that are "related" to an actual corporate "party" to be the better policy, the "affiliate" restrictions fail to implement the plain language of the statute. The EAJA clearly and unambiguously provides for recovery by the eligible party without exception, assuming that the other prerequisites for recovery are met. *Beta Engineering, Inc.*, ASBCA Nos. 53570, 53571, 03-1 BCA ¶ 32,213 at 159,322; *cf. Airport Building Associates*, GSBCA No. 16429-C(15535), 04-2 BCA ¶ 32,773 at 162,058-060 (declining to require aggregation of individual partners' net worth with net worth of partnership association absent proof of some unique circumstance establishing that partners were real parties in interest). At best for the government, aggregation is a minor exception and not the rule applied in the overwhelming majority of cases focusing on the issue.[3]

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[3] Unlike the Small Business Act where Congress afforded the Small Business Administration considerable discretion to specify detailed definitions and standards for determining whether a business is "small" (*see* 15 U.S.C. § 632), the EAJA contains no similar broad grant of authority to the ACUS to modify the commonly accepted parameters and scope of the terms "party" and "corporation." *See also* 13 C.F.R. § 121 *et seq.* for a sampling of the myriad and detailed rules promulgated by the Small Business Administration to define "small" business in different industries. The breadth of these regulations reinforces our concerns regarding the complexity of the "affiliate" issue and the potential for future extensive litigation regarding threshold eligibility that we do not consider was intended by the EAJA.

We also reject the government's contention that the net worth of a corporation's individual shareholders should be considered in determining the eligibility of the corporation. *See Beta Engineering*, 03-1 BCA ¶ 32,213 at 159,322; *see also Texas Food*, 81 F.3d at 582. Again, the plain language of the EAJA provides that the net worth of the corporation, not its constituent shareholders, is the sole focus of inquiry. Moreover, to the extent that a shareholder's net worth includes an ownership interest in a party applicant, counting both the net worth of the business entity and its owner is duplicative.

The government acknowledges that it "is mindful of the reluctance expressed by courts and boards to aggregate net worth of affiliates when confronting eligibility determinations under the EAJA" (answer at 4). The sole precedent cited in support of the contention that the EAJA requires aggregation of "affiliates" is *National Truck Equipment Ass'n v. NHTSA*, 972 F.2d 669, 672-74 (6th Cir. 1992), holding that in the special case of a trade association representing primarily the interests of its membership, the net worth of its members should be considered in determining eligibility. Nevertheless, it contends that the record is insufficient to establish that the "Application does not substantially benefit another party...." (*id.*). However, even applying the rationale of *National Truck*, there is no indication here that any alleged "affiliate" directly benefited from the litigation or that KC filed and litigated the appeal on anything other than its own behalf. *Compare, National Truck with Caremore, Inc. v. NLRB*, 150 F.3d 628, 630 (6th Cir. 1998); *Texas Food*, 81 F.3d at 581 (even in the case of trade associations, the plain language of the statute precludes aggregation of the assets of its constituent members). There is also no evidence that operations of the alleged affiliates overlap with, or are related to, KC's construction activities. *Love v. Reilly*, 924 F.2d 1492, 1494 (9th Cir. 1991). Nor can we find that any allegedly affiliated individual or entity subsidized the litigation or was the "real party in interest." *Cf. Information Sciences Corp. v. United States*, 78 Fed. Cl. 673, 676-77 (2007)*; Tri-State Steel Construction Co.*, 164 F.3d at 980 n.7; *Defense Systems Corp.*, 97-1 BCA ¶ 28,895 at 144,074 n.2; *U.S.A v. Lakeshore Terminal and Pipeline Co.*, 639 F. Supp. 958, 962-63 (E.D. Mich. 1986); *see also Phillips v. GSA*, 924 F.2d 1577, 1583 n.5 (Fed. Cir. 1991).

Of course, interests in related entities may be required to be reflected in the litigating party's financial statements and, therefore, may affect that party's net worth. However, the consideration of the net worth of such related entities flows from financial reporting requirements to include the interest in the "corporation" balance sheet of the EAJA "party" and not from a nonstatutory requirement to aggregate "affiliates." In this case, there is no assertion that any possible interest that KC may have had in the alleged affiliated entities was required to be included in KC's financial statements.

B. Adequacy of Proof of Net Worth

Having resolved that eligibility will be determined based on KC's net worth alone, we now turn to the adequacy of its proof of net worth. The government questions the sufficiency of KC's and Mr. Kostmayer's 31 December 2005 balance sheets arguing that they may be misleading, particularly since KC and Mr. Kostmayer may have been adversely affected by Hurricane Katrina in August 2005. The government requests that they be required to produce copies of their 2004 tax returns so that the Board can verify "the accuracy of KC's net worth claims…." The government also argues that the applicant and Mr. Kostmayer should be required to prove their net worth at the time the appeal from the termination was filed on 9 June 2005.

Under the EAJA, the applicant bears the burden of proving its eligibility for award.
Broaddus, 380 F.3d at 167; *Shooting Star Ranch*, 230 F.3d at 1177; *Cajun Contractors, Inc.*, ASBCA No. 49044, 00-2 BCA ¶ 31,110 at 153,655; *Defense Systems*, 97-1 BCA ¶ 28,895 at 144,073 (and cases cited therein).

Interim Procedure 8.a. provides for submission of a net worth exhibit as follows:

> 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.

There is no set rule regarding the adequacy of documentation required to establish an EAJA applicant's net worth. However, the effort required to secure an EAJA award should not result in an additional major litigation. *Hensley v Eckerhart*, 461 U.S. 424, 437 (1983). The sufficiency of the evidence is determined on a case-by-case basis. *Airport Building Associates*, 04-2 BCA ¶ 32,773 at 162,060.[4] Practical considerations and some informality of proof appertain. *See, e.g., United States v. 88.88 Acres of Land*, 907 F.2d 106, 108 (9th Cir. 1990); *Broaddus*, 380 F.3d at 168. Supplementation of initial

[4] The Court of Federal Claims has more specific rules relating to proof of eligibility and net worth. *See, e.g., Scherr Construction Co. v. United States*, 26 Cl. Ct. 248, 250-51 (1992); *Fields v. United States*, 29 Fed. Cl. 376, 382 (1993), *aff'd*, 64 F.3d 676 (Fed. Cir. 1995) (table); *Lion Raisins, Inc. v. United States*, 57 Fed. Cl. 505, 508-11 (2003).

deficient applications is generally allowed. *International Foods Retort Co.,* ASBCA No. 34954 *et al.*, 93-3 BCA ¶ 26,249 at 130,570.

Sworn affidavits from knowledgeable officers of corporate applicants have been found sufficient, where their veracity and credibility are unquestioned by the government. *Cf. Airport Building Associates*, 04-2 BCA ¶ 32,773 at 162,060. Absent government challenge, we have accepted such affidavits from the applicant as *prima facie* proof of eligibility. *Compare Infotec Development Inc.,* ASBCA Nos. 31809, 32235, 92-2 BCA ¶ 24,817 at 123,781 *with Finesilver Manufacturing Co.,* ASBCA No. 28955, 88-2 BCA ¶ 20,536 at 103,843 (affidavit insufficient where refuted by documentary evidence proffered by government). Unchallenged affidavits also have been accepted in federal district courts as sufficient proof of net worth. *See, e.g.*, *Donahue v. Heckler*, 600 F. Supp. 153, 157 (E.D. Wis. 1985); *contrast*, *Shooting Star Ranch*, 230 F.3d at 1177 (unsworn, unverified letter).

Affidavits and supporting documentation, however, should not be generalized or conclusory. They should generally include disclosure of assets, liabilities and resulting net worth. *See Defense Systems*, 97-1 BCA ¶ 28,895 at 144,074 (ambiguous, unexplained and contradictory financial information found insufficient to establish net worth with any degree of confidence).

However, the EAJA was not intended to impose onerous new financial statement/reporting requirements on non-publicly-traded, small business entities that do not customarily prepare GAAP/GAAS financial statements. A CPA's balance sheet "Compilation," issued in accordance with the AICPA's SSARS, accompanied by sworn affidavits of a principal shareholder of a corporate applicant and/or an accountant, were sufficient to establish net worth. *Beta Engineering, Inc.*, 03-1 BCA ¶ 32,213 (noting government may seek discovery on the issue of eligibility); *see also Greenville Storage & Investment*, GSBCA No. 13547-C(12989), 98-2 BCA ¶ 29,985 at 148,306-307; *cf. 88.88 Acres of Land*, 907 F.2d at 108 ("qualified" financial statements, accompanied by sworn statement of accountant sufficient); *Broaddus*, 380 F.3d at 168-69 (CPA affidavit along with property appraisal sufficient); *Airport Building Associates*, 04-2 BCA ¶ 32773 at 162,058-060 (tax filings of partnership association sufficient to establish net worth where no conflicting evidence that brought into question their reliability).

Indeed it may not be feasible regardless of cost for a CPA to construct and unqualifiedly certify financial statements for a non-publicly traded small business in accordance with GAAS given the often considerable lapse of time between commencement and conclusion of the underlying litigation. On the other hand, where in appropriate cases there is reasonable doubt concerning an applicant's eligibility, the government must be afforded the right to conduct discovery regarding relevant financial data to confirm that the net worth requirement is satisfied. Common sense, applied liberally on a case-by-case basis, should govern the extent of proof and verification

required to establish the net worth of the applicant, giving due consideration to additional costs of the EAJA litigation that may ultimately be borne by the government.

To the extent that the details of an applicant's computation of net worth are disputed, we look to GAAP for guidance. *Broaddus*, 380 F.3d at 167. GAAP standards have been found determinative of the proper accounting for particular items and transactions when questioned by government audit analysis. *Q.R. Systems North, Inc.*, ASBCA No. 39618, 96-1 BCA ¶ 27,943 at 139,596 ("related party" transaction adjustments violated GAAP requirements applicable to "combined" financial statements; no evidence permitting segregation of net worth of constituent corporations comprising the "combined" entity).

The critical date for determination of eligibility is the time that the CDA appeal was filed. *International Foods Retort Co.*, 93-3 BCA ¶ 26,249 at 130,570; *cf. Broaddus*, 380 F.3d at 168. However, where net worth computations have been prepared that are reasonably proximate in time, the Board has found them sufficient where supported by sworn statements attesting that the computations reasonably reflect the applicant's net worth on the date of appeal. *See Industrial Steel Inc.*, ASBCA No. 50754, 99-2 BCA ¶ 30,399 at 150,289, *recon. den.*, 00-2 BCA ¶ 30,971 (end of year balance sheets straddling the date of appeal); *Logics Inc.*, ASBCA Nos. 46914, 49364, 01-2 BCA ¶ 31,482 at 155,418-419 (financial statements filed in conjunction with bankruptcy petition not on dates of commencement of underlying appeals). There is often no need to increase the costs of litigation (and possibly the EAJA award), if there is no reasonable doubt concerning eligibility. Appellant's latest submission provided us with a 30 June 2005 balance sheet (app. response, ex. W).

Under the totality of the circumstances here, including the associated averments accompanying the net worth data, we find that appellant has proved that it is eligible for an award and that there is no need for discovery. KC's net worth appears to be well under $7,000,000. Appellant's president has sworn to the truth of the application. Its balance sheet as of 31 December 2005, included with the application, shows net worth of $4,834,714 and related statements indicate net worth as of the beginning of the year of $2,734,775. The principal asset identified in the balance sheet is an account receivable of $4,600,000 for payment allegedly owed under the underlying contract that was terminated for default, that net worth figure is highly questionable. Presumably, the government would have found valuation of that receivable to be overstated and dubious as of the date of appeal. Other factors include that the government's speculation that Hurricane Katrina had reduced a prior high net worth proved unfounded when appellant provided an interim balance sheet showing net worth as of 30 June 2005 of $1,329,917, and that the government's attachment to its 24 February 2009 reply, a D&B report, shows net worth as of 31 December 2007 as $5,848,294. The D&B report is not for a relevant period, but it reinforces the thought that this applicant has consistently had a net worth of

$7,000,000 or less. The proof would have been more persuasive had appellant included an affidavit from its president that there was no material change to its net worth as of 9 June 2005. We conclude, however, that the evidence of record is sufficient.

II. Fees Not Incurred in Connection With the Appeal

In addition to seeking the recovery of the attorneys' fees and expenses incurred for work directly on the appeal, KC also requests reimbursement for attorneys' fees and expenses that it incurred in defending subcontractor lawsuits and for attorneys' fees and expenses incurred by its surety in negotiating a completion contract with the government and in assisting in the defense of subcontractors/supplier claims against appellant. The government argues that the fees and expenses incurred by KC in defending the subcontractor lawsuits and all of those incurred by appellant's surety are not recoverable under the EAJA.

In pertinent part, the EAJA provides that "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party...fees and other expenses incurred by that party in connection with that proceeding...." 5 U.S.C. § 504(a)(1). As relevant to this case, adversary adjudication is defined as "any appeal of a decision made pursuant to section 6 of the [CDA] before an agency board of contract appeals…." 5 U.S.C. § 504(b)(1)(C)(ii).

Implementing the statute, ¶ 4 of the Board's Interim Procedures states, "A prevailing applicant shall receive an award of fees and expenses incurred in connection with the [CDA] appeal, or in a significant and discrete portion of a [CDA] appeal...." Moreover, ¶ 9 requires itemized listings of hours claimed to have "spent in connection with" the CDA appeal, as well as an allocation of fees and expenses "to the portion of the [CDA] appeal on which appellant prevailed."

We perceive no authority in the statute for awarding fees and expenses that were incurred in non CDA-related proceedings, activities or forums. Recovery of reasonable fees and expenses is limited to those incurred "in connection with" the "adversary adjudication," *i.e.*, the underlying CDA appeal. *Cf. Oliveira v. United States*, 827 F.2d 735, 744 (Fed. Cir. 1987); *Hughes Moving & Storage, Inc.*, ASBCA No. 45346, 00-1 BCA ¶ 30,776 at 151,990 (fees allocable to debarment proceeding and an unrelated appeal not recoverable); *E.W. Eldridge, Inc.*, ENGBCA No. 5269-F, 92-1 BCA ¶ 24,626 at 122,844-45 (fees incurred in connection with Department of Justice fraud investigation not recoverable); *Logics Inc.*, 01-2 BCA ¶ 31,482 at 155,419 (fees incurred with respect to an unrelated claim); *Marshall Associated Contractors, Inc. and Columbia Excavating, Inc. (JV)*, IBCA No. 4397F *et al.*, 06-2 BCA ¶ 33,295 at 165,102, *aff'd, Marshall Associated Contractors, Inc. v. Kempthorne*, 224 Fed. Appx. 973 (Fed. Cir. 2007) (unpublished) (unrelated "lobbying" activities). Accordingly, the fees and expenses that

KC incurred in defending subcontractor/supplier lawsuits and the fees and expenses incurred by its surety in negotiating a completion contract with the government and in assisting in the defense of subcontractor/supplier lawsuits are not recoverable. They were not incurred in pursuit of the adversary adjudication here – overturning the termination for default. *See also Overflo Public Warehouse, Inc.*, PSBCA No. 4531 *et al.*, 06-1 BCA ¶ 33,160 at 164,339 (no recovery for Service Contract Act negotiations with the Department of Labor or for work addressing potential false claims action by the government). Nor were they incurred in litigation against the government, much less in the underlying CDA appeal. We have no basis to assess the details, issues and merit of such extraneous matters. [5]

However, fees and expenses incurred after issuance of the contracting officer's decision, from which the CDA appeal was taken, are generally includable. *Logics, Inc.*, 01-2 BCA ¶ 31,482 at 155,418. In addition, fees and expenses incurred in connection with the EAJA proceedings, including preparation of the EAJA application, generally may be recovered. *E.g., Schuenemeyer v. United States*, 776 F.2d 329, 333 (Fed. Cir. 1985); *Fritz v. Principi*, 264 F.3d 1372, 1377 (Fed. Cir. 2001); *C.H. Hyperbarics, Inc.*, ASBCA No. 49375 *et al.*, 05-2 BCA ¶ 33,111 at 164,096; *Hughes Moving & Storage, Inc.*, 00-1 BCA ¶ 30,776 at 151,990; *C & C Plumbing & Heating*, ASBCA No. 44270, 96-1 BCA ¶ 28,100 at 140,262; *S.T. Research Corp.*, ASBCA No. 39600, 92-3 BCA ¶ 25,160 at 125,408; *Neiman Sawmill, Inc.*, AGBCA No. 93-196-10, 94-1 BCA ¶ 26,454 at 131,637 n.1.

CONCLUSION

We conclude that appellant is eligible and entitled to the recovery of fees and expenses incurred to the extent indicated in this decision. The case is remanded to the parties for negotiation of quantum consistent with determinations made herein.

Dated: 30 October 2009

ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

[5] We express no opinion on the allowability and recovery of these expenses in connection with any termination settlement.

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals on an application for fees and other expenses incurred in connection with ASBCA No. 55053, Appeal of Kostmayer Construction, LLC, rendered in accordance with 5 U.S.C. § 504.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals