

**BRANT CONSTRUCTION  
MANAGEMENT, INC.****LEASE NO. O84B-020-94****VABCA-5391E****VA OUTPATIENT CLINIC  
ROCHESTER, NEW YORK**

*Michael L. Muenich, Esq.*, Highland, Indiana, for the Appellant.

*Dennis M. Foley, Esq.*, Trial Attorney; *Philip S. Kauffman, Esq.*, Deputy Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

**OPINION BY ADMINISTRATIVE JUDGE KREMPASKY**

Brant Construction Management, Inc. (Brant or Applicant) has submitted an application for \$7,687.54 in attorney fees and expenses under the *Equal Access to Justice Act (EAJA)*, 5 U.S.C. § 504, in relation to the appeal in VABCA-5391 which has been answered by the Department of Veterans Affairs (VA or Government).

The Board issued its decision in VABCA-5391 sustaining Brant's appeal of the VA's final decision denying Brant's claim for an equitable adjustment under Lease No. 084B-020-94 (Contract) on October 8, 1998. *Brant Construction Management, Inc.*, VABCA No. 5391, 98-2 BCA ¶ 30,073. Familiarity with that decision is presumed. The Board has before it Contractor's Preliminary Application For Attorney's Fees and attached exhibits (Application), Respondent's Brief (Response), and Contractor's Response To Respondent's Brief Regarding Application For Attorney's Fees (Reply) and attached exhibits.

**DISCUSSION****Timeliness And Itemization Of Application**

This application is timely and we find it to be sufficiently itemized to support an award of fees and expenses pursuant to *EAJA*.

**Size Eligibility for recovery of attorney fees and expenses**

In its Response, the VA asserted that Brant had not met its burden to prove that it had a net worth of less than \$7,000,000 and employed less than 500 employees. Consequently, the VA averred, Brant is not eligible for an award under the *EAJA* §(b)(1) (B) size standards.

Brant, in its Application, included as an Exhibit an affidavit of William J. Brant. Mr. Brant is the President of Brant Construction Management, Inc and the Managing Partner of the affiliated VA Venture Rochester, LLC. In his affidavit, Mr. Brant attested that "neither Contractor [Brant] nor VA Venture Rochester had a net worth in excess of

\$7,000,000 and both Contractor and VA Venture Rochester, LLC had fewer than 500 employees." In its Reply, Brant included the affidavit of Mr. Ronald Schulz, the Chief Financial Officer of both Brant and VA Venture Rochester, LLC. Mr. Schulz attests that, on April 10, 1997, the date of the underlying appeal, both Brant and VA Venture Rochester, LLC. each had fewer than 500 employees and a net worth of less than \$7,000,000. Included with Mr. Schulz's affidavit were Balance Sheets for Brant and VA Venture Rochester, LLC. that reflect the net worth of Brant and VA Venture Rochester, LLC as of December 31, 1996 and December 31, 1997. The Balance Sheets corroborate Mr. Schulz's assertions concerning the net worth of the two entities.

It is clear that Brant carries the burden to prove its eligibility to receive an *EAJA* award. Included in that burden is an applicant's obligation to prove that it meets *EAJA* size criteria. The VA cites us to *Fields v. United States*, 29 Fed.Cl. 376 (1993); *aff'd* 64 F.3d. 676 (Table), 1995 WL 479327(Fed. Cir.) for the proposition that an affidavit by an *EAJA* applicant as to its size eligibility unaccompanied by any supporting, competent, financial data is insufficient to meet an applicant's burden. It is not necessary for us to reach the question of whether an unsupported affidavit alone is sufficient to establish an applicant's size eligibility. The Balance Sheets submitted by Brant with the Schulz affidavit are sufficient documentary evidence to establish that Brant meets the *EAJA* size standard.

We note that the Board is not bound by decisions of the Court of Federal Claims and the Court of Appeals for the Federal Circuit's non-precedential affirmation of *Fields*. We are persuaded that the Armed Services Board of Contract Appeals' approach treating unsupported affidavits as *prima facie* evidence of size eligibility in the absence of any Government evidence refuting the affidavit is more consistent with board practice. *Infotec Development, Inc.*, ASBCA No. 31,809, 32,235, 92-2 BCA ¶ 24,817; *R&B Bewachungsgesellschaft MBH*, ASBCA No. 42,900, 92-2 BCA ¶ 24,990. Applicants for *EAJA* awards before this Board are reminded, however, that Paragraph 9 of the Board's *Interim Procedures For Claims Under Section 504 of Title 5 of the United States Code (Equal Access To Justice Act)* requires an applicant to include a net worth exhibit with its application.

We find that Brant is an eligible party for award of fees and expenses under *EAJA*.

### **Prevailing Party**

In order to recover fees and expenses incurred in litigating this appeal, Brant must be a "prevailing party" in the litigation. Brant was successful in its appeal and, essentially, recovered the relief it sought. The VA does not contest that Brant is a prevailing party. Thus, under the standard established by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), Brant is a prevailing party. *See also Farrar v. Hobby*, 506 U.S. 103 (1992); *Warbonnet Electric, Inc.*, VABCA-3731E, *et al.*, 96-2 BCA ¶ 28,480; *Penn Environmental, Inc.*, VABCA-3599E, *et al.*, 94-1 BCA ¶ 26,326.

### **Substantial Justification**

As the prevailing party in the action, Brant may recover its attorney fees and expenses if the Government's position during the course of the actions was not substantially

justified. 5 U.S.C. § 504(a)(1); *Warbonnet*, 96-2 BCA ¶ 28,480. Brant has made the requisite threshold averment that the VA's position in the appeal was not substantially justified. Consequently, the burden shifts to the VA to prove that its position was "substantially justified" in order to avoid the assessment of the applicant's allowable and reasonable fees and expenses against it. *Adams Construction Co., Inc.*, VABCA-4669E, 4900E, 98-1 BCA ¶ 29,479; *Marino Construction Co., Inc.*, VABCA No. 2752E, 92-2 BCA ¶ 25,015.

The VA has not contested that its position was not substantially justified. We found in the principal decision that the VA, throughout the litigation, adhered to a position contrary to the plain language of its contract with Brant. The question of whether the VA's position was substantially justified is a matter within the discretion of the Board after review of the entirety of the Government's conduct. Viewing the Government's conduct as a whole, we find the VA's position in VABCA-5391 not to have a reasonable basis in law or fact and, therefore, was not substantially justified. *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) citing *Pierce v. Underwood*, 487 U.S. 552 (1988).

## Fees and Expenses

Brant, an eligible small business prevailing party presenting a timely and properly itemized application and the VA's position in the appeal not being substantially justified during the action, is entitled to recover its reasonable fees and expenses incurred in the prosecution of the appeal in VABCA-5391.

Brant has applied for the recovery of fees and expenses totaling \$7,687.54. Brant requests attorney fees for 51.3 hours of service at the EAJA statutory rate of \$125.00 per hour, a total of \$6,412.50. Brant claims expenses as follows:

Item	Amount \$
<b>LONG DISTANCE</b>	<b>4.01</b>
<b>POSTAGE/DELIVERY</b>	<b>66.39</b>
<b>FACSIMILE</b>	<b>17.86</b>
<b>COPY/PRINTING</b>	<b>27.40</b>
<b>ON-LINE RESEARCH CHARGE</b>	<b><u>1,159.38</u></b>
<b>TOTAL</b>	<b>1,275.04</b>

Award of fees and expenses where the threshold *EAJA* conditions are met is not automatic upon an applicants' surmounting the size, prevailing party, and substantial justification thresholds. The Supreme Court and the Federal Circuit clearly instruct that the amount of fees to be awarded is a matter for the Board's discretion. *Commissioner, Immigration and Naturalization Service v. Jean*, 496 U.S. at 154 (1990); *Neal & Company v. United States*, 121 F.3d 683 (Fed. Cir. 1997); *Chiu*, 948 F.2d 711 (Fed. Cir. 1991).

The VA has questioned none of Brant's request for fees and expenses and we find that

the request for award of fees and expenses in the amount of \$7,687.54 is reasonable.

### DECISION

For the foregoing reasons, the Applicant, Brant Construction Management, Inc., is awarded fees and other expenses under the *Equal Access to Justice Act* under the application in VABCA-5391E in the amount of \$7,687.54.

Date: **April 9, 1999**

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Richard W. Krempasky  
Administrative Judge  
Panel Chairman

We Concur:

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Morris Pullara, Jr.  
Administrative Judge

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William E. Thomas, Jr.  
Administrative Judge