

**DAVID BOLAND, INC.**

**CONTRACT NO. V673C-403**

**VA MEDICAL CENTER  
TAMPA, FLORIDA**

**VABCA-5858E, 5931E,  
5932E, 5933E, 5936E,  
5938E, 5942E &  
5943E**

*Denis L. Durkin, Esq., and Ben W. Subin, Esq., Baker & Hostetler L.L.P., Orlando, Florida, for the Applicant.*

*Joan S. Ratliff, Esq., Trial Attorney, Jackson, Mississippi; Charlna J. Quarles, 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 PULLARA**

David Boland, Inc. ("Applicant," "Contractor," or "Boland") seeks \$727,169.24 in attorney fees and expenses under the *Equal Access to Justice Act (EAJA)*, 5 U.S.C. § 504, following our decision in *David Boland, Inc.*, VABCA Nos. 5858, 5931-33, 5936, 5938 & 5942-43, 01-2 BCA ¶ 31,578, dated August 30, 2001. Familiarity with that decision is presumed. These appeals arose in

connection with the Contractor's performance, and the Government's termination for default, of a \$13,423,000 contract for site preparation and construction of a central energy plant at the James A. Haley VA Medical Center (VAMC), Tampa, Florida. In addition to seeking a reversal of the termination for default, Applicant sought additional compensation of nearly two million dollars. Applicant was also faced with a loss of reputation and possible liability for excess contract completion costs in the millions. At the time of the termination for default, the contract was less than 50% complete and less than half of the thirteen million dollar contract price had been paid.

These eight appeals were originally consolidated with eight other appeals. Three of the eight other appeals, VABCA Nos. 5934, 5935 and 5944, were dismissed by the Board in May 2000. Five of the other appeals, VABCA Nos. 5937, 5939, 5940, 5941 and 5945, were the subject of an April 2000 unpublished Board opinion granting Applicant's motion for summary judgment in the aggregate amount of \$26,507 plus interest. That resulted in Applicant's first *EAJA* Application upon which the Board rendered its opinion in *David Boland, Inc.*, VABCA Nos. 5937E, 5939E, 5940E, 5941E and 5945E, 01-2 BCA ¶ 31,577, dated August 30, 2001, finding Applicant entitled to an *EAJA* award of \$2,500 for attorney fees and \$250 for expenses.

As to the instant appeals, our decision of August 30, 2001 sustained VABCA Nos. 5858, 5931 and 5938 with respect to entitlement, denied VABCA Nos. 5932 and 5943, and dismissed VABCA Nos. 5933, 5936 and 5942 without prejudice. Accordingly, Applicant was a prevailing party in VABCA Nos. 5858, 5931 and 5938. In sustaining those three appeals, we found that the Contractor encountered a significant differing site condition in the form of artesian water (VABCA No. 5938), and a weather delay (VABCA No. 5931), both of which circumstances entitled it to substantial time extensions. This resulted in the

conversion of the termination for default into a convenience termination (VABCA No. 5858).

### **Eligibility**

Boland asserts that it meets the eligibility requirements of *EAJA* with respect to its being a prevailing party, that the Application is timely and that it meets limitations regarding size, net worth and number of employees. Boland submitted documentation in support of its assertions. The Government does not contest those assertions but submits that Applicant's *EAJA* request should be denied in its entirety on the grounds that (1) the Government's position was substantially justified and (2) Applicant's Application is conflicting and confusing, and without merit because the fees and expenses requested are not substantiated and are unreasonable. We find Applicant to be eligible for an *EAJA* award and turn now to the other issues raised.

### **Substantial Justification**

Fees and expenses shall be awarded "unless the adjudicative officer of the agency finds that the position of the agency was substantially justified." 5 U.S.C. §504(a)(1). The burden is on the Government to show that its position was substantially justified. The Board must examine the totality of the circumstances. Each determination is made on a case-by-case basis. *Hopkins Heating & Cooling, Inc.*, VABCA No. 4905E & 4906E, 98-1 BCA ¶ 29,449, citing *Essex Electro Engineers, Inc. v. United States*, 757 F.2d 247, 252-53 (Fed. Cir. 1985).

The Supreme Court, in *Pierce v. Underwood*, 487 U.S. 552, 565 (1988), explained that a loss on the merits does not equate to an absence of substantial justification of the Government's position. The Court stated that the Government has the burden of establishing that its litigation position was "'justified in

substance or in the main', that is justified to a degree that could satisfy a reasonable person." Determining whether the Government was substantially justified in the positions it took in these appeals is a matter within the discretion of the Board after review of the entirety of the Government's conduct. *Chiu v. United States*, 948 F.2d 711 (Fed. Cir. 1991); *Trailboss Enterprises, Inc.*, VABCA No. 5454E *et al.*, 00-1 BCA ¶ 30,800; *Adams Construction Co., Inc.*, VABCA No. 4669E *et al.*, 98-1 BCA ¶ 29,479.

The Government argues that its decision to terminate for default was "reasonable and solid." In support of this argument, however, the Government merely reasserts the positions it took in the case in chief, which the Board rejected in its decision. The Government points to the facts that five of the original fifteen monetary claims were paid by the Government and three other claims were dismissed. With respect to the five claims paid by the Government, the Board has already awarded attorney fees and expenses in connection therewith, and we see no relevance to the current substantial justification issue. With respect to the three claims that were dismissed, Applicant did not prevail and an appropriate allocation of attorney fees and expenses, if any, will be considered below. However, we do not view those claims as being relevant to the substantial justification issue as it relates to the appeals on which Applicant prevailed.

The Government suggests that it "continued to be open to and willing to resolve the fifteen original claims denied by the Contracting Officer." This assertion is vigorously disputed by Applicant, which argues that nothing in the record supports that suggestion. Further, Applicant argues that the Contracting Officer summarily denied the Contractor's fifteen monetary claims and that the Government repeatedly refused to participate in alternative dispute resolution proceedings.

We agree with Applicant. The Government's recalcitrance was steadfast once its position was formed. However, that position was formed with the Government having failed to adequately investigate with qualified personnel the Contractor's complaints regarding subsurface conditions. The Government summarily rejected those complaints and consistently refused to fairly consider information provided by the Contractor's experts, without obtaining adequate expert guidance of its own. Even when faced with having to significantly revise its own design to meet the conditions encountered, the Government continued to deny that a differing site condition existed. Not only was VA's position not substantially justified, we find its stubborn refusal to consider the artesian water as a differing site condition to be inexplicable. Similarly, the default termination was unjustified because VA refused to even consider time extensions to which the Contractor was then entitled. Finally, the Government's analysis failed to adequately consider whether the Contractor could have completed on time had it been granted time extensions. We conclude, therefore, that in the context of the case as a whole, the Government's positions in this matter were not substantially justified.

### **Attorney Fees and Expenses**

The Board is entitled to examine the fees and expenses claimed and, in its discretion, determine a reasonable award. *Penn Environmental Controls, Inc.*, VABCA No. 3726E, 98-1 BCA ¶ 29,355; *Buckley Roofing Co., Inc.*, VABCA No. 3347E, 92-2 BCA ¶ 24,826. In its *EAJA* Application, at page 5, Applicant seeks an award of its attorney fees (as billed to Boland) in the amount of \$410,813.00 (calculated at the allowable *EAJA* rate of \$125.00 per hour); \$13,700.00 for unbilled attorney fees (at \$125.00 per hour) in connection with the preparation of this Application and supporting affidavits; and costs and expenses in the amount

of \$248,399.70 covering the period of time from January 1998 through the date of this Application. In addition, a detailed summary of separate costs and expenses incurred and paid directly by Applicant Boland, in the amount of \$12,057.20, was attached. The foregoing figures total \$684,969.90. However, on page 7 of its Application, and without explanation therein, Applicant requests an award in the amounts of \$410,186.75, \$13,700.00, \$272,906.02 and \$12,057.20, totaling \$708,849.97. Finally, in its response to the Government's reply to its Application, Applicant restates the last set of figures above, except that the estimated amount of \$13,700.00 has been finalized at \$27,377.50 for attorney fees and \$4,641.77 for expenses, for a total of \$727,169.24.

The apparent discrepancy between the two different sums claimed for expenses, \$248,399.70 and \$272,906.02, is resolved upon inspection of the accompanying "Affidavit of Costs and Expenses in Support of Appellant's *EAJA* Application." Applicant has included those costs and expenses not allowed by the Board in the earlier *EAJA* Application as not being attributable to 5937E *et seq.*, *i.e.*, \$24,802.86 less \$250, resulting approximately, but not exactly, in the latter figure.

### **Attorney Fees**

Applicant states that the attorney fees claimed reflect only hours attributable to traditional litigation of the termination for default and other appeals and that the number of hours expended was reasonable. Details regarding the hours expended are set forth in the attorney's affidavit of attorney fees accompanying the Application. Exhibit B to the affidavit is a multi-page, multi-column table setting forth on each line the name of the attorney or paralegal performing certain work, the date and number of the invoice to the client, the number of hours billed, the law firm billing rate and the extension of

the fees billed to the client. A second extension was done in two additional columns to reflect the maximum allowable rate of \$125, or the actual rate if lower. The totals at the bottom of the table show 3,473 hours billed, \$687,010.00 fees actually billed to the client and \$412,686.75 fees “per Government Rate.” In order to reflect a credit for the attorney fees previously allowed by the Board in the earlier *EAJA* Application, the \$412,686.75 figure is then reduced by \$2,500 to \$410,186.75. The information summarized in the Exhibit B table described above is further detailed in Exhibit C invoices which reflect time entries describing the task performed and the amount of time expended and entered by each attorney and paralegal relating to the prosecution of the subject appeals.

At the time of the filing of the Application, it was estimated that additional attorney fees, not yet billed to the client, in excess of \$13,700.00 would be incurred in preparation of the *EAJA* Application and related affidavits and exhibits. That estimate was finalized in Exhibit B to Applicant’s response to the Government’s reply to the *EAJA* Application, essentially a mini-version of the Exhibit B attached to the original Application, but setting forth the current additional charges for preparation of the *EAJA* Application and related affidavits and exhibits, plus its response to VA’s reply to the Application, as follows: 225.25 hours billed, \$42,067.50 fees actually billed to the client, then reduced to \$27,377.50 fees based on the \$125 rate. The information summarized in the supplemental Exhibit B table described above is further detailed in a supplemental Exhibit C, containing invoices which reflect time entries describing the task performed and the amount of time expended and entered by each attorney and paralegal relating to the preparation of the initial *EAJA* Application and related affidavits and exhibits, as well as the response to the Government’s reply to the initial application.

The Government argues that the attorney fees are unreasonable and should be denied in their entirety. The Government cites several cases from various circuits involving the total denial of fees where fee requests were deemed to be “manifestly unreasonable” or “outrageously excessive.” *Lewis v. Kendrick*, 944 F.2d 949, 956 (1<sup>st</sup> Cir. 1991) (attorney stretched a routine street arrest into a half-year’s work with ultimately little success on the merits) and *Environmental Defense Fund, Inc. v. Reilly*, 1 F.3d 1254 (D.C. Cir. 1993)(court found “egregious” such billing items as 3.5 hours to prepare a Notice of Appearance, 21.1 hours to complete a boiler-plate fee petition and, considering the extensive experience of the attorney involved, 37.5 hours to conduct research for a claim involving only one issue). However, in the case before us, the Government does not demonstrate in what manner the fee request bears any resemblance to the circumstances of the fee requests in those cases.

The Government also cites *Buckley Roofing Co., Inc.*, VABCA No. 3347E, 92-2 BCA ¶ 24,826, wherein the Board allowed only \$862.50 for 11.5 attorney hours of a claim seeking \$1,920.50 for 18.7 attorney hours. In that case this Board evaluated whether the number of attorney hours claimed for each task were reasonable and necessary in light of the complexity of, and the necessity for, each task. However, citing *Sierra Club v. Environmental Protection Agency*, 769 F.2d 796, 807-08 (D.C. Cir. 1985), we also stated that “If the documentation of the claimed hours is adequate, it is then appropriate for the Government to offer evidence or a reasonable analysis to support a contention that the number of hours is excessive.” This the Government has not done. Instead, the Government merely argues that the fee request should be denied in its entirety because Applicant “only showed a general summary of hours spent on multiple matters” and “did not break down attorney time spent on pleadings or motions

to show if the total amount of time spent on actual legal documents was reasonable and necessary.”

Applicant replies that “invoices reflect daily attorney and paralegal activity with specific descriptions of what was done and how long it took” and that the “amount of time expended on pleadings and all other work on these matters can readily be determined by reference to these records.” Applicant cites *Beta Systems, Inc. v. United States*, 866 F.2d 1404, 1406-07 (Fed. Cir. 1989), in which the Court referred to an attorney’s billing records submitted and stated:

They are typical billing records, showing time and charges, a description of the work done, and by whom. The accounting comports with the statutory and case law for such records; the government’s generalized objection lacks substance.

The *EAJA* requires an itemized statement showing the actual time expended and the rate at which fees are computed. 5 U.S.C. ¶ 504(a)(2). Applicants are expected to state the exact time spent on a case, by whom, their status, and usual billing rates. “Only by knowing the specific task performed can the reasonableness of the number of hours required for any individual item be judged.” *Naporano Iron & Metal Co. v. United States*, 825 F.2d 403, 404 (Fed. Cir. 1987). We find that the documents supporting the fee request meet those requirements. As Applicant points out, the “Government made absolutely no effort to evaluate or identify any single activity or group of activities reflected in the billings which was claimed to be excessive in time or unnecessary.” We agree. As in *Beta Systems*, the Government’s generalized objections lack substance.

The Government does specifically point to the deposition process, but asserts in general terms only, that Applicant conducted an excessive number of depositions, that the depositions were unnecessarily lengthy, that Applicant

asked the person being deposed the same questions over and over, and that Applicant made no effort to be cost and time effective in the discovery process. While the Government does list the total, actual number of hours spent in deposing certain individuals to support its assertions, Applicant points out that the Government does not suggest how these depositions could have been completed in less time, or provide sufficient detail as to why the actual time taken was excessive, nor does the Government cite to line and page of a single deposition in support of the allegation that the same questions were repeatedly asked and that no effort was made to be reasonable in time and cost. We find that the attorney hours for depositions were not unreasonable.

With respect to paralegal fees, the Government argued that Applicant had not shown that the hourly rates charged for the paralegal were reasonable and standard in the community at a market rate. The Government pointed out that a paralegal in the U.S. Attorney's office in Orlando is paid "around \$40,000 per year or about \$25 per hour" whereas Applicant was charged \$110 per hour. Applicant's attorney argues that the paralegal's hourly rate of \$100 to \$110 per hour during the relevant period was consistent with rates charged for similarly experienced paralegals in the Central Florida area. This argument is supported by an affidavit from an attorney in a separate law firm, familiar with reasonable fees charged for paralegal services by major law firms in the Central Florida area, stating that a "reasonable fee for a paralegal experienced in complex civil or construction litigation during the years 1999 through 2001 would range from \$125/hour to \$145/hour." Applicant's attorney argues that the Government does not appreciate the difference between an hourly wage paid to a paralegal in a Government office and an hourly rate charged to a client by a private law firm for services, which includes labor burden "such as payroll taxes, workers compensation insurance, unchargeable time, vacation pay, employee benefits,

and, of course, overhead and profit in establishing a rate.” That is the standard followed by our Board, notwithstanding the fact that some Boards limit recovery for paralegal services to the actual cost to the firm. *Adams Construction Co., Inc.*, VABCA Nos. 4669E, 4900E, 98-1 BCA ¶ 29,479. Accordingly, the paralegal fees are herein allowed at the rates charged to the client.

We have carefully examined the attorneys’ itemized billings. On balance, considering the complexity of the appeals, the amounts at stake and the results achieved, particularly with regard to the conversion of the default termination into a convenience termination, we find the attorney and paralegal fees totaling \$437,564.25 (\$410,186.75 + \$27,377.50) to be reasonable and allowable, subject to allocation discussed below.

The Government validly argues that Applicant failed to segregate or allocate fees and costs for the two appeals dismissed by the Board for lack of jurisdiction, VABCA Nos. 5934 and 5935, or for the appeal withdrawn by Applicant, VABCA No. 5944, or for the two appeals which the Board denied, VABCA Nos. 5932 and 5943. However, the Government suggests no specific amount to be deducted from Applicant’s request and provides no hint as to a methodology to be used in arriving at a deduction. Applicant points out that VABCA Nos. 5934, 5935 and 5944 were dismissed or withdrawn before trial, involved no recognizable discovery, and merit no more than a \$100 deduction, related to the pleading aspect of the three claims. With respect to VABCA No. 5943, the clay differing site condition, Applicant estimated that no more than a total of 50-60 hours of attorney fees at \$125/hour were addressed to that claim, reflecting \$6,250 to \$7,500. Applicant did not address VABCA No. 5932, which involved a small weather delay.

Neither party offers a satisfactory approach to the question of allocation for those portions of Applicant’s appeals in which it did not prevail. While we

are convinced that the majority of Applicant's litigation effort was focused primarily on establishing the artesian water differing site condition and corresponding delay, nevertheless, Applicant did not prevail on the clay differing site condition and a small weather delay. Considering the entire record in these matters, we find that Applicant's attorney fees and expenses otherwise allowable should be reduced by a factor of 5% to reflect such allocation.

Accordingly, the \$437,564.25 amount above is reduced by 5%, or \$21,878.21, to \$415,686.04 as the total for attorney fees allowed in these appeals.

### **Attorney Expenses**

#### **Court Reporters and Deposition Transcripts**

The Government challenges in its entirety, as excessive and unreasonable, the expense of Applicant's use of Case View at \$1.00 per page for instant transcription during each deposition, which the Government estimated to add at least \$3,354 to deposition costs. In addition, the Government argues, Applicant chose to pay \$3,565 for a special expedited copy of the VABCA hearing transcript, which the Government argues is excessive and unreasonable. The Government argues that Applicant's claim of \$43,168.40 in Court Reporters and Deposition Transcripts is excessive and unreasonable.

Applicant responds that the use of Case View, which provided a computer display of testimony, is a warranted and reasonable cost, that it provides electronic means to annotate notes onto the actual testimony, allows the questioner to ensure accuracy and completeness in the deposition process and is a recognized adjunct to the deposition process. Applicant argued that the transcription costs are customary and reasonable in the Central Florida area and in the Washington, D.C. area where the depositions were taken. Moreover, the

Government erroneously overstates Applicant's claim for Court Reporters and Deposition Transcripts by some \$18,000. According to Applicant's affidavits and supporting invoices, such costs total \$25,198.15 rather than the \$43,168.40 cited by the Government. We find these expenses to be reasonable and allowable, except for the \$3,565 charge for the special expedited hearing transcript. We do not find that expenditure to be reasonable or chargeable to the Government since, following the hearing and at the time of setting the briefing schedule, the Board furnishes a complete copy of the transcript to each party, *without charge*. Accordingly, \$3,565 is to be deducted from the total claimed for Attorney Expenses.

### **Geotechnical Consultants**

The Government objects to the "excessive number of technical and legal consultants Applicant utilized and the astronomical number of hours that these people billed," adding that Applicant's use of three geotechnical engineers, Pandorff, Seereeram and Jammal, was unwarranted and repetitive. The Government asserts that such services added up to 351 hours at a cost of \$35,637, which it deems to be excessive and unreasonable. The Government also objects to charges for 300 hours at a cost of \$45,497.57 for a construction consulting firm, HDH Consultants, which cost the Government deems to be excessive, duplicative and unreasonable.

Applicant points out that the Government fails to specifically identify any unreasonable or excessive effort engaged in by any one of the various geotechnical or scheduling experts Applicant employed. As Applicant observes, "proof of the pudding with respect to the reasonableness of these experts' [efforts] is the nature and extent of the testimony which they provided at the final hearing on this matter and which led to the favorable findings of fact and

conclusions of law entered by the Board in favor of Appellant.” Applicant argues that each of the consultants provided invaluable assistance to Applicant’s attorney in evaluating the merits of the differing site condition claim and in providing counsel with necessary background information to effectively depose the Government’s geotechnical engineer. It is asserted that the hourly rates charged were reasonable and that each invoice provided the date, a description of services performed, the number of hours spent and the amount charged. With respect to the services of HDH Consultants, Applicant argues that such services and analysis of the schedule and the contract documents were reasonably and necessarily expended in demonstrating that delay in completion of the project was due to the differing site condition, and in debunking the Government’s rationalization for the default termination. Applicant asserts that HDH Consultants’ bill of \$45,496 was clearly reasonable when compared with the VA’s consultant’s charge of \$58,906 for similar services in evaluating the project and providing a schedule analysis and testimony at trial. In addition, HDH Consultants made possible the extensive presentation of documentary and other evidence via computerization during the course of the hearing, which expedited the process. Based on the foregoing, we find these expenses to have been reasonably incurred and we determine they are allowable.

### **Legal Consultant’s Fees**

Included in Applicant’s attorney’s affidavit in support of costs and expenses were invoices and payments supporting the following charges for four attorneys as legal consultants:

James Keough, Principal, Keough Professional Corporation	\$64,374.93
Lawrence J. Phalin, Principal, Mateer & Harbert, P.A. (jury consultant and mock trial services)	\$1,575.00
V. Fred. Lyon, Principal, Lyon Kirwin, P.A. (jury consultant and mock trial services)	\$1,650.53
Devon E. Hewitt, Partner, Shaw Pittman, L.L.P. (trial consultant for government regulations)	<u>\$3,304.00</u>
Total	\$70,904.46

Applicant’s attorney explained that Mr. Keough provided consultant services to Baker & Hostetler in the area of government contracting regulations and law, that Mr. Keough held a degree in geology and assisted counsel in developing discovery requests, legal arguments and briefing. Mr. Phalin and Mr. Lyon were engaged to evaluate a mini-trial presentation of Applicant’s case prior to final hearing and they were experienced construction contract litigators who provided valuable advice and insights which were incorporated into the actual trial presentation. Mr. Hewitt, a specialist in government contract litigation was consulted on legal issues relating to the differing site condition claim.

The Government objects to the number of hours charged by Applicant for legal consultants, contending that the hours billed are excessive, unreasonable and duplicative of the work Applicant’s attorneys and paralegal were performing. According to the Government, the legal consultants submitted 421 hours and costs totaling \$73,181.84 which should be denied in their entirety. Further, it is argued that in any event hourly rates for fees should be no more than the *EAJA* limit of \$125 per hour.

The Government did not identify any specific hours as unreasonable. However, considering the experience and expertise of Applicant’s attorneys and geotechnical consultants, we are not persuaded that the charges for Mr. Keough

were reasonable, or that they are not duplicative. Accordingly, that charge is denied. The other legal consultant charges are allowed, subject to their being limited to \$125 per hour. *C & C Plumbing & Heating*, ASBCA No. 44270, 95-2 BCA ¶ 27,806; *Union Precision and Engineering*, ASBCA No. 37549, 92-3 BCA ¶ 25,028. We were unable to identify any specific number of hours for Mr. Phalin. The hours we could identify for Mr. Kirwin and Mr. Hewitt were 7.00 and 11.80, respectively, for a total of 18.80 hours. Multiplying that figure by the rate of \$125 per hour results in allowable fees of \$2,350.00. Thus, \$68,554.46 (\$70,904.46 - \$2,350.00) is to be deducted from the total claimed for Attorney Expenses.

### **Subpoena Fee**

From its review of the expenses claimed for depositions and other costs, the Government objected to a charge of \$40 for a subpoena fee for the deposition of a VA employee. According to the Government, the employee was made available at no cost and the witness check was returned to Applicant. The Applicant's attorney's records did not reflect the returned check but Applicant agreed to reduce the expense claim by \$40 based on the Government's representation.

### **Copy Costs**

The Government objected to certain copy costs in the amount of \$1,443.89 for records provided to the Government since it asserts it paid Presentation Group \$1,437.16 for those copies. Applicant replied that the cost claim is valid since the Government and Applicant were each charged separately and each paid separately for its own set of the copies. Now that Applicant is entitled to

attorney fees and expenses, it seeks reimbursement for this expense. Such expense is allowed.

### **Travel Expenses**

Applicant claimed certain travel expenses related to trial preparation and trial, which the Government asserts are excessive and include multiple parties, such as the Contractor's president, who is not an attorney and whose expenses, the Government asserts, are not allowed under *EAJA*. Applicant responded that hotel rates, meals, supplies and bellman tips were reasonable and reflected market conditions. We agree. On the other hand, Applicant acknowledged that a charge for alcoholic beverages in the amount of \$55.64 was not an allowable cost under Government guidelines. Accordingly, that amount is deducted from the claim expenses.

### **Allowable Attorney Expenses:**

From Applicant's claimed attorney expenses of \$272,906.06 are deducted the amounts determined above and summarized as follows:

Expedited Transcript	\$3,565.00
Legal Consultants' Fees	\$68,554.46
Subpoena Fee	\$40.00
<u>Travel Expenses</u>	<u>\$55.64</u>
Total	\$72,215.10

Thus, attorney expenses in the amount of \$200,690.96 (\$272,906.06 - \$72,215.10) are allowed, subject to allocation attributable to appeals in which Applicant did not prevail. Accordingly, Applicant's attorney expenses are reduced by 5% from \$200,690.96 to \$190,656.41.

## Contractor's Expenses

The Contractor incurred its own out-of-pocket costs and expenses for which it seeks reimbursement in the total amount of \$12,057.20. The Contractor's affidavit of costs listed four areas summarized below:

Expert/Consultant (Devo Seereeram)	\$652.50
Exhibit Expenses	\$5,748.92
Document Production Expenses	\$1,562.06
<u>Travel/Lost Wages</u>	<u>\$4,093.72</u>
Total	\$12,057.20

The Government challenged all of these expenses. With respect to the \$652.50 consultant costs, we see no valid basis for denying such expenses, whether paid directly by Applicant or its attorney. However, more serious questions are raised with respect to the other claimed expenses. Although not cited by the Government, Applicant acknowledged *Baldi Bros. Constr. v. United States*, 52 Fed. Cl. 78 (2002), for the proposition that Applicant's employees' expenses are not recoverable under EAJA. In *Fanning, Phillips & Molnar*, VABCA No. 3865E, 97-2 BCA ¶ 29,008, *aff'd. Fanning, Phillips & Molnar v. West*, 160 F.3d 717 (Fed. Cir. 1998), this Board stated that "the cost of employees' time devoted to the litigation, no matter how effective or productive, was not intended to be recoverable under the EAJA." The majority of the \$4,093.72 expenses for travel and lost wages relate to Applicant's president and a former superintendent and such expenses are not recoverable. Similarly, the \$1,562.06 document production expenses are employee expenses and are not recoverable. However, Applicant was able to segregate \$483.66 of the travel costs as being direct expenses incurred on behalf of Applicant's attorneys and paralegal, which sum is allowed.

With respect to the \$5,748.92 exhibit expenses, most of those sums were paid to the Presentation Group and, as the Government asserts, appear to be duplicative. We note that the same expenses were included in Applicant's first EAJA Application. The balance of the expenses are for photos and weather data which are not demonstrated to fall into the category of recoverable EAJA expenses.

Based on the foregoing, Applicant's Contractor Expenses are denied except to the extent of \$1,136.16 (\$652.50 + \$483.66). As with the other categories of allowed fees and expenses, that figure is reduced by 5% to \$1,079.35.

### **Summary of Fees and Expenses**

A summary of fees and expenses allowed herein are set forth below:

Attorney Fees	\$415,686.04
Attorney Expenses	\$190,656.41
<u>Contractor's Expenses</u>	<u>\$1,079.35</u>
Total	\$607,421.80

**DECISION**

For the foregoing reasons, under the applications in VABCA Nos. 5858E, 5931E, 5932E, 5933E, 5936E, 5938E, 5942E and 5943E, the Applicant, David Boland, Inc., is awarded fees and expenses under the *Equal Access to Justice Act* in the amount of \$607,421.80.

Date: January 31, 2003

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MORRIS PULLARA, JR.  
Administrative Judge  
Panel Chairman

We Concur:

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JAMES K. ROBINSON  
Administrative Judge

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RICHARD W. KREMPASKY  
Administrative Judge