

DULLES NETWORKING  
ASSOCIATES, INC.

CONTRACT NO. V101(93)P-1586  
CONTRACT NO. V693P-2004

VABCA-6077E  
VABCA-6078E

VA MEDICAL CENTER  
WILKES-BARRE, PENNSYLVANIA

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#### **OPINION BY ADMINISTRATIVE JUDGE KREMPASKY**

Applicant, Dulles Networking Associates (DNA), has timely applied for attorney's fees and other expenses of \$25,080.61 under the EQUAL ACCESS TO JUSTICE ACT (EAJA), 5 U.S.C. § 504, in relation to the decision in the appeals in VABCA-6077 and 6078. The Board's decision, dismissing the appeals for lack of jurisdiction, was issued on February 16, 2000. *Dulles Networking Associates, Inc.*, VABCA-6077, 6078, 00-1 BCA ¶ 30,775. Familiarity with that decision is presumed.

The Board has before it the Applicant's APPLICATION FOR COSTS UNDER THE EQUAL ACCESS TO JUSTICE ACT (EAJA), the Government's REPLY TO APPELLANT'S APPLICATION FOR COSTS UNDER THE EQUAL ACCESS TO JUSTICE ACT (EAJA) and the Applicant's REPLY TO VA'S OPPOSITION TO DULLES NETWORKING ASSOCIATE'S, INC. APPLICATION FOR COSTS UNDER THE EQUAL ACCESS TO JUSTICE ACT (EAJA).

## DISCUSSION

DNA asserts that it is an eligible EAJA applicant, that it prevailed in the proceedings in VABCA-6077 and 6078, and that the VA's position in those proceedings was not substantially justified. The VA responds that the Board is without jurisdiction to award attorney fees and expenses under EAJA because the Board dismissed the appeals for lack of jurisdiction because there were no proper Contracting Officer's final decisions under the CONTRACT DISPUTES ACT (CDA) necessary to our jurisdiction. The VA also argues that DNA did not prevail in the litigation.

The circumstance presented here is analogous to the situation confronting us in *Erlich Contracting, Inc.*, VABCA No. 4625E, *et. al.*, 96-1 BCA ¶ 27,962. In *Erlich*, as in the instant action, the applicant requested fees for prosecuting litigation in which the Board found that it was without jurisdiction because there was no appealable final decision as required by the CDA. In *Erlich*, we stated:

[W]e are constrained in terms of remedy by the fact that EAJA is a limited waiver of sovereign immunity, which grants Boards of Contract Appeals the authority to award attorney fees and expenses only in appeals from decisions "made pursuant to Section 6 of the Contract Disputes Act of 1978." 5 U.S.C. § 504(b)(1)(C). Thus, for a board of contract appeals to award attorney fees and expenses, that board must first possess jurisdiction of the underlying claim, pursuant to the CDA. *Oklahoma Aerotronics, Inc.*, ASBCA No. 28006, 88-3 BCA ¶ 20,917; *Maitland Brothers Co.*, ASBCA No. 24032, 86-2 BCA ¶ 18,796.

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Under the facts presented here, the CO's premature issuance of unilateral modifications or Settlements by Determination, as final decisions with appeal language, likely precipitated Elrich's 'protective' appeals. The Applicant may well have incurred attorney's fees as a result of its 'protective' appeals. Unfortunately for Elrich, this is a situation not contemplated by EAJA. EAJA is a waiver of sovereign immunity which 'lifts the bar of sovereign immunity for award of fees in suits brought by litigants qualifying under the statute, [but] does so only to the extent explicitly and unequivocally provided.' *Fidelity Constr. Co. v. United States*, 700 F.2d 1379, 1386 (Fed.Cir.), cert. denied, 464 U.S. 826, 104 S.Ct. 97, 78 L.Ed.2d 103 (1983). Applications for attorney fees and expenses under EAJA are recoverable only for adversary actions conducted pursuant to Board jurisdiction. As we concluded in our May 10, 1995 decision, Elrich did not submit a claim, hence, there is no contracting officer's final decision or proper appeal therefrom to trigger EAJA coverage.

*Erlich Contracting, Inc.*, 96-1 BCA ¶ 27,962 at 139,671, 139,672

DNA urges us to avail ourselves of the alleged leeway provided by *Ed A. Wilson, Inc. v. General Services Administration*, 126 F.3d 1406 (Fed. Cir. 1997). According to DNA, *Wilson* stands for the proposition that we are not limited to a strict construction of the waiver of sovereign immunity here and that we are permitted to look to Congress' purpose and intent in enacting EAJA and to consider issues of fundamental fairness in order to award DNA its attorney fees and expenses. *Wilson* involved the appeal of a decision by the General Services Board of Contract Appeals (GSBCA) holding that, where a third party and not the applicant is liable for payment of attorney fees and expenses, the applicant has not "incurred" those fees for the purposes of reimbursement under EAJA. The Court held that the GSBCA construed the term "incurred" in EAJA, 5 U.S.C. § 504(a)(1), too narrowly. In doing so, the Court looked at the purpose and

legislative history of EAJA and precedent under other fee shifting statutes to determine that fees incurred by or on behalf of an applicant may be reimbursed under EAJA.

*Wilson*, however, is inapposite here. *Wilson* did not involve the more fundamental issue of whether EAJA waives sovereign immunity in the circumstances of these applications. The *Wilson* court recognized this in explaining its approach to interpreting the word “incur” as used in EAJA by saying:

Because the Act exposes the Government to liability for attorney fees and expenses to which it would not otherwise be subjected, it is a waiver of sovereign immunity. As such it ‘must be strictly construed in favor of the United States.’ Once Congress has waived sovereign immunity, however, we should not ‘assume the authority to narrow the waiver that Congress intended.’ [citations omitted] *Ed A. Wilson*, 126 F.3d 1406, 1408.

These applications involve the threshold question of whether the waiver has been made. The Federal Circuit has made it abundantly clear to us that questions as to whether the United States has actually waived its immunity must be strictly construed. *Fanning, Phillips And Molnar v. West*, 160 F.3d 317, (Fed. Cir. 1998). We find nothing in *Wilson* allowing us to change our analysis in *Erlich*.

DNA also argues that, since we initially docketed and “processed” the appeals as actions pursuant to the CDA, EAJA is applicable. Although the underlying appeals were initially handled under the normal Board administrative procedures before we exercised our inherent authority to determine our own jurisdiction, this is not sufficient to overcome the fact that there was no appealable action under the CDA allowing us to award fees and expenses under EAJA.

This application, ultimately deriving from the VA’s ineffectual attempt to issue a proper CDA contracting officer’s final decision, is another one of those circumstances, as identified in *Erlich*, “not contemplated by EAJA.” As sympathetic as we might be to DNA’s plight wherein it was forced to incur fees and expenses by the VA’s questionable actions, we simply are without power to create a remedy here. Thus, based on our analysis in *Erlich*, there is no statutory basis for our award of attorney fees and other expenses to DNA.

Since we were without jurisdiction in VABCA-6077 and 6078, we are without jurisdiction to consider the EAJA applications in VABCA-6077E and 6078E. Lacking jurisdiction over these applications we need not determine whether DNA meets the standards established in EAJA for the award of attorneys fees and other expenses incurred in litigating VABCA-6077 and 6078.

**DECISION**

For the foregoing reasons, the Applications of Dulles Networking Associates, Inc., under VABCA-6077E and VABCA-6078E, are **DISMISSED**.

DATE: **August 10, 2000**

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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