

# The Equal Access to Justice Act: Practical Applications to Government Contract Litigation

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## I. Introduction

The Equal Access to Justice Act (EAJA) awards attorneys' fees and litigation expenses to eligible individuals who are parties to litigation against the Government.<sup>1</sup> An eligible party may receive an award when it does not exceed the size limits set by the Act<sup>2</sup> and can show it is a "prevailing party," unless the Government's position was "substantially justified," or "special circumstances" make the award unjust.<sup>3</sup>

This article describes and analyzes these requirements as they apply to government contract litigation. Part I of this article briefly discusses the background and purposes of enacting EAJA and lays out the requirements for eligibility. Part II addresses how courts have interpreted EAJA, focusing on the "prevailing party" requirement, the "substantially justified" standard, and the "special circumstances" exception. Finally, this article describes current contract litigation cases and suggests strategies to successfully litigate against unwarranted applications for fees under EAJA.

### A. Background and Purpose of EAJA

The EAJA is a statutory exception to the standard American practice in which prevailing litigants bear the burden of paying their own attorneys' fees.<sup>4</sup> Congress enacted EAJA as a fee-shifting statute to let private litigants recover certain costs associated with litigation against the Government.<sup>5</sup> The EAJA addresses the concerns of Congress over access to the courts for individuals and

improvement of government policies.<sup>6</sup> Congress's intent in promulgating EAJA was to provide a "means to prevent individuals, as well as small business concerns, from being deterred by potential costs of litigation from seeking redress for allegedly unreasonable government action."<sup>7</sup> Eligibility under EAJA is only the first step in a successful application for costs and attorneys fees. Under EAJA, an eligible party must also meet certain threshold requirements before a court will order reimbursement of their litigation costs.

### B. Threshold Requirements

The EAJA provides that attorneys' fees and certain costs associated with litigation, incurred by a "prevailing party" in either an agency or court adjudication against the Government, may be recovered unless the position of the Government is "substantially justified" or unless "special circumstances" make the award unjust.<sup>8</sup> While EAJA fees may be awarded in many circumstances, this article will focus specifically on the issues that arise during Government contract litigation.

## II. Applying EAJA in Contract Litigation

Under the Contract Dispute Act of 1978,<sup>9</sup> a contractor may file a claim against the Government to resolve a contract dispute.<sup>10</sup> Where a contractor's claim is denied by the Government, the contractor can appeal to either the appropriate Board of Contract Appeals or the Court of Federal Claims.<sup>11</sup> Contractors who prevail may then apply for reimbursement of the fees and costs associated with the litigation.<sup>12</sup> The EAJA authorizes Boards of Contract Appeals and the Court of Federal Claims (COFC) to award attorneys' fees and other expenses to a contractor who meets

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<sup>1</sup> 5 U.S.C. § 504 (2006); 28 U.S.C. § 2412 (2006). The Equal Access to Justice Act, as codified in Title 5, applies to agency adjudications, whereas Title 28 applies to court adjudications.

<sup>2</sup> In general, an eligible party is (a) an individual with a net worth of not more than two million dollars; (b) an organization with a net worth of not more than seven million dollars and not more than 500 employees; (c) a tax exempt organization under § 501(c)(3) of the Internal Revenue Code; or (d) a cooperative association as defined in § 15(a) of the Agricultural Marketing Act. 5 U.S.C. § 504(b)(1); 28 U.S.C. § 2412(d)(2).

<sup>3</sup> 5 U.S.C. § 504 (a)(1); 28 U.S.C. § 2412 (d)(1)(A).

<sup>4</sup> See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (discussing Congress's authority to expressly authorize fee-shifting statutes as an exception to the American Rule); see generally Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. REV. 717 (2010).

<sup>5</sup> Pub. L. No. 96-481, tit. II, 94 Stat. 2321, 2325-30 (1980).

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<sup>6</sup> *Comm'r, Immigration & Naturalization Serv. v. Jean*, 496 U.S. 154, 164 n.14 (1990) (quoting H.R. REP. NO. 96-1418, at 12 (1980)). "[T]he Government with its greater resources and expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views." *Id.* at 10.

<sup>7</sup> *PCI/RCI v. United States*, 37 Fed. Cl. 785, 788 (1997) (citations omitted).

<sup>8</sup> 5 U.S.C. § 504 (a)(1); 28 U.S.C. § 2412 (d)(1)(A).

<sup>9</sup> 41 U.S.C. §§ 601-613 (2006).

<sup>10</sup> *Id.*; Pub. L. No. 95-563, 92 Stat. 2389 (effective Nov. 1, 1978) (enacted to "provide for the resolution of claims and disputes relating to Government contracts").

<sup>11</sup> 41 U.S.C. §§ 601-613.

<sup>12</sup> 5 U.S.C. § 504 (a)(1); 28 U.S.C. § 2412 (d)(1)(A).

the threshold requirements.<sup>13</sup> Although EAJA fees are often awarded,<sup>14</sup> the Government can successfully defend against unwarranted applications for EAJA fees by taking corrective action or by maintaining a reasonable position throughout litigation. Whether a contractor is a “prevailing party” for purposes of EAJA has been an area of much litigation.<sup>15</sup>

#### A. The Prevailing Party Standard

Under EAJA, a contractor seeking to recover costs and attorneys’ fees must be “a prevailing party” in the litigation.<sup>16</sup> Traditionally, courts used the “catalyst theory,” which defined a “prevailing party” as one that “succeed[s] on any significant issue in litigation which achieves some of the benefit sought in bringing suit.”<sup>17</sup> This definition was broadly construed to allow a contractor to claim “prevailing party” status even where the lawsuit brought about a voluntary change in the Government’s conduct.<sup>18</sup> However, the “catalyst theory” was specifically rejected by the Supreme Court.<sup>19</sup>

##### I. *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources—Rejecting the “Catalyst Theory”*

In *Buckhannon*, the Supreme Court rejected the “catalyst theory” as a basis for finding prevailing party status and awarding attorneys’ fees under the Federal Housing Amendments Act (42 U.S.C. § 3613(c)(2)) and Americans with Disabilities Act (42 U.S.C. § 12205).<sup>20</sup> The Court explained that the “catalyst theory” would allow a plaintiff to be considered a “prevailing party” if it achieved the desired result from the defendant’s voluntary change in

conduct without a “judicially sanctioned change in the parties’ legal relationship.”<sup>21</sup> In rejecting this theory, the Supreme Court stated that “a defendant’s voluntary change in conduct although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change.”<sup>22</sup> Thus, an award of attorney’s fees is not authorized “without a corresponding alteration in the legal relationship of the parties.”<sup>23</sup> The Court held that “enforceable judgments on the merits and court-ordered consent decrees create the ‘material alteration of the legal relationship of the parties’ necessary to permit an award of attorneys’ fees.”<sup>24</sup> The Court’s rationale in *Buckhannon* was subsequently applied to the EAJA fee-shifting provisions in contract litigation.<sup>25</sup>

#### 2. Applying *Buckhannon* to EAJA

The first case to apply *Buckhannon* during contract litigation was *Brickwood Contractors v. United States*. In *Brickwood*, the contractor filed a bid protest in the COFC regarding a Navy procurement for repairs to elevated water storage tanks.<sup>26</sup> In response to this protest, the Navy took corrective action and ultimately awarded Brickwood the contract.<sup>27</sup> Subsequently, the *Brickwood* contractor filed an

<sup>21</sup> *Id.* at 605.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 604 (citing *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)).

<sup>25</sup> *Brickwood Contr., Inc. v. United States*, 288 F. 3d 1371 (Fed. Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003); *Rice Servs., Inc. v. United States*, 405 F.3d. 1017, 1018–19 (Fed. Cir. 2005); *Rebecca Ryan*, 75 Fed. Cl. 769 (2007); *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F. 3d 934 (Fed. Cir. 2007).

<sup>26</sup> *Brickwood*, 288 F.3d at 1373, *cert. denied*, 537 U.S. 1106 (2003). The Navy initially issued an invitation for Bids (IFB) to repair elevated water storage tanks, and subsequently issued amendments to the solicitation adding three options to the base requirements, which related to removing contamination from the tanks. After the Navy received five Bids, which included the base bid plus options, Brickwood was identified as the lowest bidder. However, as a result of further testing, the Navy determined that there was no evidence of contamination, and announced that the bids on the options would be excluded from the final evaluation. After evaluating the price without the options, Brickwood was no longer the lowest bidder. The Navy again amended the solicitation, this time converting it from an IFB to a Request for Proposals (RFP), as the Navy intended to negotiate with the bidders. Brickwood filed a bid protest seeking to enjoin the Navy from converting the IFB to an RFP and to direct the Navy to award the contract to Brickwood. *Id.*

<sup>27</sup> *Id.* at 1371. After a hearing on Brickwood’s request for a temporary restraining order (TRO) but prior to any court decision, the Navy filed a Motion to Dismiss based on their voluntary cancellation of the solicitation. The Navy stated that “[a]fter further consideration of both the circumstances surrounding the solicitation and the governing FAR provisions, and in light of the Court’s comments at the TRO hearing, the Navy has cancelled the solicitation and plans to re-solicit using a new IFB.” The Navy’s Motion to Dismiss was granted without reaching the merits of the case. The next day, Brickwood filed a second bid protest,

<sup>13</sup> Pub. L. No. 96-481, 94 Stat. 2321 (effective Oct. 1, 1981), *amended by* Pub L. No. 99-88 (aug. 5, 1985), Pub. L. No. 99-80, 99 Stat. 183 (Aug. 5, 1985).

<sup>14</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-HEHS-98-58R, EQUAL ACCESS TO JUSTICE ACT: ITS USE IN SELECTED AGENCIES (1998). Agencies were required to report data on EAJA claims to the Administrative Conference of the United States from fiscal years 1982 through 1994. *Id.* at 4.

<sup>15</sup> *Id.* at 14.

<sup>16</sup> *See Hensley v. Eckerhart*, 461 U.S. 424 (1983).

<sup>17</sup> *Id.* at 433 (citing *Nadeau v. Helgemoe*, 581 F.2d 275, 278–79 (1978)).

<sup>18</sup> *Id.* (“This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the [ ] court to determine what fee is ‘reasonable.’”); *see also Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Hum. Servs.*, 532 U.S. 598, 610 (2001), *cert. denied*, 537 U.S. 1106 (2003) (“[W]e hold that the ‘catalyst theory’ is not a permissible basis for the award of attorneys fees . . .”).

<sup>19</sup> *Buckhannon*, 532 U.S. at 610.

<sup>20</sup> *Id.* at 601.

application for attorneys' fees under EAJA to recover costs associated with its bid protest. In holding the Navy liable, the COFC applied the catalyst theory, finding Brickwood a "prevailing party" because it had "succeeded on a significant issue in the litigation that resulted in a benefit" to the contractor.<sup>28</sup> The court explained that to be a prevailing party one does not have to gain a final judgment following a full trial on the merits; rather it is enough that a suit is a causal, necessary, or substantial factor in obtaining the requested result.<sup>29</sup>

On appeal, the Court of Appeals for the Federal Circuit reversed the COFC, holding that the term "prevailing party" as used in the EAJA has the same meaning as in other fee-shifting statutes and that the "catalyst theory" relied on by the court had been specifically rejected by the Supreme Court in *Buckhannon*.<sup>30</sup> The Federal Circuit noted that in *Brickwood*, the Government voluntarily took corrective action by cancelling the solicitation, which moved the issue from the purview of the court.<sup>31</sup> Thus, even though the contractor ultimately prevailed on the issue, the contractor could not be a "prevailing party" for purposes of receiving attorneys' fees under EAJA.<sup>32</sup> Prevailing party status under EAJA requires a judicial resolution of the matter in dispute rather than voluntary corrective action taken by the Government as a result of the contractor's claim. Furthermore, not even every judicial resolution will be enough to convey "prevailing party" status on a contractor.

### 3. A Dismissal Order Must Constitute a Material Change in the Legal Relationship of the Parties

In *Rice Services, Inc. v. United States*, the Federal Circuit reversed the COFC's decision to award attorneys' fees under EAJA, holding that the dismissal order entered

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contesting the cancellation of the IFB, alleging the Navy's cancellation of the solicitation had violated the FAR, constituted a breach of the implied obligation to treat each bid fairly and honestly, and initiated and improper action. After the court determined that the Navy did not seem to be acting arbitrarily or capriciously in cancelling the bid and moving to award the contract through a new solicitation, Brickwood voluntarily dismissed its second bid protest. The Navy then issued a new solicitation and Brickwood ultimately won the contract. *Id.* at 1374.

<sup>28</sup> *Id.* at 1374.

<sup>29</sup> *Id.* As the lower court stated, "[a]lthough there was no final judgment on the merits issued . . . the Navy's decision not to convert the IFB to an RFP, but to cancel the original solicitation and resolicit was the product of reconsideration by the government," as a result of plaintiff's bid protest. *Brickwood Contr., Inc., v. United States*, 49 Fed. Cl. 148, 156 (2001).

<sup>30</sup> *Brickwood*, 288 F. 3d at 1378. "Our examination of the text and the legislative history of the EAJA leads us to conclude that there is no basis for distinguishing the term 'prevailing party' in the EAJA from other fee-shifting statutes." *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

after the Navy voluntarily and unilaterally gave Rice the relief it sought did not confer "prevailing party" status.<sup>33</sup> The case arose out of a contract awarded to one of seven bidders. The contract was for one year with a one-year option period. Rice filed a bid protest alleging the Navy's award to another contractor was illegal and requesting the court to order a new award and enjoin the Navy from exercising its option to extend the contract with the successful offeror. Soon after Rice filed its protest, the Navy took corrective action, voluntarily deciding to issue a new solicitation. Each of the original bidders agreed to participate in the new competition. The Navy moved to dismiss the case as the protest was moot. The COFC granted the Navy's motion, issued a dismissal order, and ordered the Navy to carry out the new solicitation. Rice then applied for an award of attorneys' fees under EAJA.<sup>34</sup>

The COFC held that this case was analogous to *Former Employees of Motorola Ceramic Products v. United States*,<sup>35</sup> in which the Federal Circuit had held that when a court remands a case to an agency, and does not retain jurisdiction, the order constitutes success on the merits.<sup>36</sup> Therefore, the COFC held Rice was a "prevailing party" and granted Rice's application for fees under EAJA. The Federal Circuit disagreed with the COFC and reversed the decision, holding that prevailing party status under *Buckhannon* and *Brickwood* depended upon the existence of the equivalent of an enforceable judgment on the merits or a court-ordered consent decree, neither of which was present in this case.<sup>37</sup> The court further held that the dismissal order did not materially affect the legal relationship between the parties because the COFC issued the order after the Navy had voluntarily and unilaterally taken remedial action. The court stated,

*Buckhannon* does not allow a court to take what would otherwise be a "catalyst theory" case and convert it-through language like that used in paragraph one of the Dismissal Order-into a case where the plaintiff is nevertheless accorded 'prevailing party' status. Were we to hold otherwise, the Court's holding in *Buckhannon* could be easily circumvented by any order "directing" a party to take action.<sup>38</sup>

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<sup>33</sup> *Rice Servs., Inc. v. United States*, 405 F.3d 1017, 1026-27 (Fed.Cir. 2005).

<sup>34</sup> *Id.* at 1018-19.

<sup>35</sup> 336 F.3d 1360 (Fed. Cir. 2003).

<sup>36</sup> *Rice*, 405 F.3d. at 1020.

<sup>37</sup> *Id.* at 1025-27.

<sup>38</sup> *Id.* at 1027.

The court determined that Rice's claim was the type of "catalyst theory" claim the Supreme Court had rejected in *Buckhannon*, as Rice had achieved its requested relief through a voluntary—rather than judicially-ordered—change in the Navy's conduct. *Rice* and subsequent cases show that corrective action taken by the Government can preclude the award of attorneys' fees under EAJA.<sup>39</sup>

#### 4. Corrective Action and the Voluntary Cessation Exception

In *Chapman Law Firm Co. v. Greenleaf Construction Co.*, the COFC awarded the protester EAJA fees, as it had in *Rice*. However, this time the COFC entered a judgment that stated there had been an alteration in the legal relationship of the parties in order to leave open the opportunity for the contractors to apply for attorneys' fees under the EAJA.<sup>40</sup> In *Chapman*, the protestor took issue with the Government's treatment of a negotiated procurement in which small businesses were first considered for the contract, and only if there was inadequate competition would other businesses be considered. Chapman was awarded the contract initially, but the Government decided to terminate for convenience and issue a new competitive solicitation. Chapman filed a bid protest, contesting the termination of its contract, cancellation of the existing solicitation, and issuance of a new solicitation. The incumbent contractor and Greenleaf, a competing offeror for the contract, intervened.<sup>41</sup>

In response to the protest, the Government proposed specific corrective action and filed a motion to dismiss. The COFC denied the motion, finding the "proposed corrective action lacked a rational basis and was contrary to law" because it did not include Greenleaf in the small business tier.<sup>42</sup> The Government renewed its motion to dismiss after indicating "it would proceed with the reevaluation in the manner suggested by the [COFC], including both Chapman

and Greenleaf" in the new competition. The COFC held that this proposed course of action was reasonable.<sup>43</sup> Nonetheless, instead of dismissing, the COFC then entered judgment in favor of Chapman and Greenleaf, explicitly finding that the contractors were "instrumental in achieving the final outcome," and that their actions "materially altered the legal relationship among the parties."<sup>44</sup> In refusing to grant the Government's motion to dismiss, the court noted that such a motion might prevent the contractors from applying for attorneys' fees under the EAJA.

On appeal, the Federal Circuit held that the lower court's "entry of judgment was not only unnecessary, but it was improper."<sup>45</sup> Under *Buckhannon*, to justify an award of attorney's fees, "there must be an actual, court-ordered alteration in the legal relationship in the parties in the form of an entry of judgment or a consent decree."<sup>46</sup> But "[w]hen during the course of litigation, it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should generally be dismissed."<sup>47</sup> The lower court was not allowed to consider the award of fees under EAJA when deciding whether to dismiss, as the COFC had improperly done.<sup>48</sup>

The court noted that the Supreme Court had recognized a "voluntary cessation exception" to this rule: the Government's voluntary cessation of the challenged conduct does not require dismissal of the case if there is a reasonable expectation that the conduct will reoccur.<sup>49</sup> However, the court held that this exception does not apply when there is "clearly no 'reasonable expectation' that the alleged violation will recur and 'interim relief or events have completely and irrevocably eradicated the effects of the

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[T]he order stated: In this circumstance . . . further action by the Court is not required or justified . . . and it is **ORDERED** that: (1) The remedial action described and promised in defendant's submission shall be undertaken; . . . (3) Plaintiff's complaint shall be DISMISSED, without prejudice to the assertion of any new protest action addressed to the remedial action in progress.

*Id.* (citing the Dismissal Order).

<sup>39</sup> *Id.*; see also *Ryan v. United States*, 75 Fed. Cl. 769, 776 (2007) (holding that dismissal of a bid protest on the grounds that the claim was moot under circumstances where the contract awardee was decertified from the HUBZone program pursuant to a unilateral request on remand to the Small Business Administration did not render Ryan a "prevailing party" for purposes of awarding attorneys' fees under EAJA).

<sup>40</sup> 490 F. 3d 934, 938 (Fed. Cir. 2007).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 937.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 939.

<sup>46</sup> *Id.* (citing *Brickwood Contr., Inc. v. United States*, 288 F. 3d 1371 (Fed. Cir. 2002), cert. denied, 537 U.S. 1106 (2003)).

<sup>47</sup> *Id.* (citing *Northeast Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993)). Although the court did not explicitly say so in *Chapman*, this doctrine is jurisdictional in nature; when the Government takes the necessary corrective action, the issue may become moot, so that the court lacks jurisdiction to continue with the case and enter judgment. See *Northeast Fla. Chapter*, 508 U.S. at 661–62 (discussing the rule, and the "voluntary cessation" exception to that rule, in terms of jurisdictional mootness).

<sup>48</sup> *Chapman*, 490 F.3d at 939–40.

<sup>49</sup> *Id.* (citing *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); see also *Heartland By-Prods., Inc., v. United States*, 568 F.3d 1360, 1368 (Fed. Cir. 2009) (a defendant's voluntary cessation of a challenged practice does not deprive the court of jurisdiction "unless subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur") (quoting *Friends of the Earth, Inc., v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000))).

alleged violation.”<sup>50</sup> In this case, the Federal Circuit held that the COFC was required to assume that the Government would carry out the corrective action in good faith, because “[g]overnment officials are presumed to act in good faith, and it requires well-nigh irrefragable proof to induce a court to abandon the presumption of good faith.”<sup>51</sup> Furthermore, the COFC had held that the corrective action was reasonable. Accordingly, the Federal Circuit held that the COFC should have dismissed the case.<sup>52</sup> *Greenleaf* suggests there may be a predisposition toward finding “prevailing party” status for eligible litigants (at least at the trial court level) and highlights the importance of solid Government strategies for litigating unwarranted applications for fees under EAJA.

As these cases show, the Government can moot prevailing party status by taking prompt corrective action. Furthermore, under EAJA, even if a litigant is considered a “prevailing party,” an award of attorneys’ fees is not permitted if the Government shows that its position is “substantially justified” or “special circumstances” would make an award unjust.<sup>53</sup>

## B. When the Government’s Position is Substantially Justified

The Government may defend against unwarranted applications for fees under EAJA if its position in the litigation is “substantially justified.”<sup>54</sup> The Equal Access to Justice Act does not define the term “substantial justification”; thus its meaning was the subject of various interpretations before the Supreme Court provided guidance in the seminal case, *Pierce v. Underwood*.<sup>55</sup>

### I. *Pierce v. Underwood*

*Pierce* involved the Secretary of Housing and Urban Development’s decision not to implement an “operating subsidy” program that had been authorized by a federal

statute.<sup>56</sup> The statute “was intended to provide payments to owners of government-subsidized apartment buildings to offset rising utility expenses and property taxes.”<sup>57</sup> A nationwide class of tenants residing in government-subsidized housing challenged the Secretary’s decision, arguing the mandatory language in the statute required the Secretary to implement the program.<sup>58</sup> The District Court agreed with the plaintiffs and awarded attorneys’ fees after finding that the position taken by Secretary was not “substantially justified” within the meaning of EAJA.<sup>59</sup> The Supreme Court affirmed that holding.<sup>60</sup>

In so holding, the Supreme Court held that “[t]he statutory phrase ‘substantially justified’ means justified to a degree that could satisfy a reasonable person.”<sup>61</sup> Even though a position taken is not correct, it can still be substantially justified “if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.”<sup>62</sup> The Government bears the burden of proving that its position was substantially justified.<sup>63</sup> The trial court’s determination on whether the Government has met its burden is reviewed for abuse of discretion.<sup>64</sup>

<sup>56</sup> *Id.* The “operating subsidy” program was “authorized by § 212 of the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, formerly codified at 12 U.S.C. §§ 1715z-1(f)(3) and (g) (1970 ed., Supp. IV).” *Id.* at 555.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* *Pierce* was filed in the U.S. District Court for the District of Columbia. However, when *Pierce* was filed, the Secretary was already appealing several adverse decisions from various plaintiffs in nine different Federal District Courts. *Id.*

<sup>59</sup> *Id.* Before considering the issues in *Pierce*, the Supreme Court consolidated various cases that were pending appeal on the same issue and then granted the Secretary’s petition for writs of certiorari to review those decisions. *Id.* at 556 (citing *Sub Non. Hills v. Cooperative Servs., Inc.*, 429 U.S. 892 (1976), *Dubose v. Harris*, 82 F.R.D. 582, 584 (Conn. 1979), *Ross v. Comty. Servs., Inc.*, 544 F.2d 514 (CA4 1976), and *Abrams v. Hills*, 547 F.2d 1062 (CA9 1976), *vacated sub nom. Pierce v. Ross*, 455 U.S. 1010 (1982)). “Before any other Court of Appeals reached a decision on the issue, and before [the Supreme Court] could review the merits, a newly appointed Secretary settled in most of the cases.” *Pierce*, 487 U.S. at 556. *Pierce* was then transferred for administration of the settlement. *Id.* In settling the case, the newly appointed Secretary “agreed to pay into a settlement fund \$60 million for distribution to owners of subsidized housing or to tenants whose rents had been increased because subsidies had not been paid.” *Id.* While the settlement was pending, Congress passed EAJA and the District Court granted respondent’s motion for an award of attorney’s fees. *Id.* at 557.

<sup>60</sup> *Id.* at 570–71.

<sup>61</sup> *Pierce*, 487 U.S. at 565.

<sup>62</sup> *Id.* at 566 n.2.

<sup>63</sup> *Covington v. Dep’t of Health & Hum. Servs.*, 818 F.2d 838, 839 (Fed. Cir. 1987).

<sup>64</sup> *Pierce*, 487 U.S. at 559.

<sup>50</sup> *Id.* at 940 (citing *Davis*, 440 U.S. at 631 (1979)).

<sup>51</sup> *Id.* (citing *T&M Distribs., Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999) (internal quotations and citation omitted)).

<sup>52</sup> *Id.*

<sup>53</sup> 5 U.S.C. § 504(a)(1) (2006); 28 U.S.C. § 2412(d)(1)(A) (2006).

<sup>54</sup> *See Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) (explaining the 1985 amendment to EAJA “clarified that, when assessing whether to award attorney fees incurred by a party who has successfully challenged a governmental action in a particular court, the entirety of the conduct of the government is to be viewed, including the action or inaction by the agency prior to litigation”).

<sup>55</sup> 487 U.S. 552 (1988).

Subsequently, some courts have applied a three-part test to determine whether the Government met its burden. The Government must show: (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced.<sup>65</sup> *Pierce* established that the reasonableness determination is applied not just to the Government's position in the litigation but also to its pre-litigation position.<sup>66</sup> Although the analysis necessitates a review of the merits decision, *Pierce* makes clear the distinction between a position taken by the Government that is wrong and a position taken by the Government that is unreasonable.<sup>67</sup> A merits analysis differs from one under EAJA, because under EAJA, the court does not consider the current state of the law, but what the Government was substantially justified in believing the law to have been at the time of action.<sup>68</sup> In addition, even if the Government's position is not substantially justified, fees under EAJA "may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings."<sup>69</sup> Thus a loss on the merits does not automatically mean EAJA fees are an appropriate award.<sup>70</sup> Courts must analyze all the pertinent facts to determine why the Government position failed in court.<sup>71</sup> To

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<sup>65</sup> *Tchemkou v. Mukasey*, 517 F.3d 506, 509 (7th Cir. 2008); *Hanover Potato Prods., Inc. v. Shalala*, 989 F.2d 123, 128 (3d Cir. 1993); *Sierra Club v. Sec'y of the Army*, 820 F.2d 513, 517 (1st Cir. 1987); *Deja-Vu-Lynnwood, Inc. v. United States*, 21 Fed. Appx. 691, 692 (9th Cir. Oct. 26, 2001). However, the Fifth Circuit has not adopted the test, and simply requires "reasonableness, as defined by *Pierce*" (i.e., whether a reasonable person would consider the position justified). *Davidson v. Veneman*, 317 F.3d 503, 506 n.1 (5th Cir. 2003). The Federal Circuit does not appear to have addressed this test, whether to adopt or reject it.

<sup>66</sup> 28 U.S.C. 2412(d)(2)(D) (2006) (defining "position of the United States" to include the Government's position, not only "in the civil action," but its "action or failure to act . . . upon which the civil litigation is based"); *Chiu v. United States*, 948 F.2d 711 (Fed.Cir. 1991); *see also Doty v. United States*, 71 F.3d 384, 386 (Fed. Cir. 1995) (defining the position of the government in an EAJA claim analysis as "the government's position throughout the dispute, including not only its litigation position but also the agency's administrative position"). The Government may be able to overcome its unreasonable position before litigation by taking a reasonable position during litigation that "outweigh[s] its prelitigation conduct," so that the court finds its *overall* conduct was reasonable. *Baldi Bros. Constructors v. United States*, 52 Fed. Cl. 78, 82 (2002).

<sup>67</sup> *Pierce*, 487 U.S. at 568; *see also* Gregory C. Fisk, *The Essentials of the Equal Access to Justice Act: Court Awards for Unreasonable Government Conduct (Part Two)*, 56 LA. L. REV. 1 (Fall 1995) (providing an extensive discussion of how courts have treated this issue).

<sup>68</sup> *Sharp v. United States*, 91 Fed. Cl. 798, 802 (2010) (citing *Bowey v. West*, 218 F.3d 1373, 1377 (Fed.Cir.2000)) ("[S]ubstantial justification is measured, not against the case law existing at the time the EAJA motion is denied, but rather, against the case law that was prevailing at the time the government adopted its position.").

<sup>69</sup> 28 U.S.C. 2412(d)(2)(D).

<sup>70</sup> *Pierce*, 487 U.S. 559 ("Conceivably, the Government could take a position that is not substantially justified yet win, even more likely, it could take a position that is substantially justified, yet lose.").

prevail on the issue of substantial justification, the Government must put forth a solid argument of reasonableness in law and fact throughout the dispute. Recent decisions involving contract appeals illustrate this.

## 2. Application in Government Contract Appeals

In *Information International Associates, Inc. v. United States*, a contractor successfully brought suit against the United States seeking reformation of its contract on grounds of a unilateral mistake in the final bid. The contractor applied for attorneys' fees under EAJA, claiming the Government's position was not substantially justified.<sup>72</sup>

*Information International* involved a request for proposal from the United States Air Force "for 'labor and supplies to man and manage' libraries, located on five Air Force Bases."<sup>73</sup> After receiving responses, the contracting officer (KO) determined that two firms had submitted technically acceptable offers and requested both firms submit Final Price Proposals. The KO checked the plaintiff's calculations, comparing them against the other firm's proposed prices, but did not compare the initial proposed prices to the final proposed prices. The KO apparently did not recognize that the plaintiff's total price reflected a decrease. The KO next "created abstracts to compare Plaintiff's and [the other competing firm's] Final Price Proposals."<sup>74</sup> The plaintiff's Final Proposal was 3.6% lower than the other firm's; the plaintiff was awarded the contract.

After performance had begun, the plaintiff identified an error in the Final Price Proposal—the salary of a library assistant had been erroneously omitted from all five years. After the plaintiff was unable to resolve the issue with the KO, the plaintiff filed a claim for an equitable adjustment, to pay the wages omitted from the Final Price Proposal. The plaintiff argued that its unilateral mistake was known or should have been known by the KO. The Government argued, and the court agreed, that section 14.407-1 of the Federal Acquisition Regulation (FAR), which requires KOs to "examine all bids for mistakes," did *not* require the KO to compare the initial and final price proposals from the winning bidder (doing which might have led the KO to spot the error).<sup>75</sup> In deciding for the plaintiffs on the merits of the case, the court nonetheless found that the KO "should have

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<sup>71</sup> *Sharp*, 91 Fed. Cl. at 803; *see also* *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1174 (D.C. Cir. 2005).

<sup>72</sup> *Informational Int'l Assocs. v. United States*, 75 Fed. Cl. 656, 657 (2007).

<sup>73</sup> *Informational Int'l Assocs. v. United States*, 74 Fed. Cl. 192, 195 (2006).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 205 (citing C.F.R. § 14.407-1 (2005)).

been alerted to a possible error” by other documents, so that the plaintiffs were entitled to reformation of the contract.<sup>76</sup>

On consideration of the EAJA claim, the court held that the Government’s position in opposing reformation of the contract on the grounds of a unilateral mistake was “substantially justified.” Specifically, it held that the practical steps that would have alerted the Government to the error (comparing the initial and final price proposals, in toto or line by line) were not required by the FAR. Thus, the Government was “substantially justified” in not taking these steps and in not spotting the error. The court did not award attorneys’ fees.<sup>77</sup>

Similarly, in *Metric Construction Co., Inc. v. United States*, the COFC denied the plaintiff’s application for EAJA fees even though the plaintiff prevailed on the merits, because the Government showed its position during the dispute was substantially justified.<sup>78</sup> *Metric* involved a dispute over the construction of a Deployable Medical Services Warehouse at an Air Force Base.<sup>79</sup> The United States Army Corps of Engineers required Metric to repair damage and install a new roof after the warehouse constructed by Metric developed serious leaks. Metric submitted a certified claim for \$2,173,091.85 to the Corps for costs, but never received a final decision from the KO. Metric then filed suit for an equitable adjustment to the contract, alleging that the Corps’ specifications for the steel underlying the roof were defective, and that Metric had detrimentally relied on misrepresentations by the Corps.<sup>80</sup> The court denied a defense motion for summary judgment, because factual disputes existed about the Corps’ design and specifications. After trial on the merits, the court awarded Metric an equitable adjustment of only \$1,323,214.20.<sup>81</sup>

Metric then filed an EAJA application, asserting “that both the Corps’ failure to issue a final decision on Metric’s claim, and the Government’s litigation position in the subject matter, lacked substantial justification.”<sup>82</sup>

<sup>76</sup> *Id.* at 206.

<sup>77</sup> *Info. Int’l Assocs.*, 75 Fed. Cl. at 659. The court also held that the total comparison, even if made, might not have alerted the contracting office (KO) to the error under the circumstances of the case.

<sup>78</sup> 83 Fed. Cl. 446, 447 (2008).

<sup>79</sup> *Id.* at 447. Metric’s contract was for construction of a warehouse at Hill Air Force Base in Utah.

<sup>80</sup> *Id.* Metric claimed they were entitled to relief based on three theories: “breach of contract, constructive change/extra work, and breach of implied warranty.” *Id.*

<sup>81</sup> *Id.* (citing *Metric Constr. Co., v. United States*, 80 Fed. Cl. 178, 196 (2008)). The trial on the merits dealt primarily with the “factual disputes related to the Corps’ design of structural steel underlying the roof and the issue of whether the Corps’ design specifications and communications with Metric . . . misrepresented information critical to proper roof installation.” *Id.*

In analyzing the EAJA claim, the court examined the Government’s pre-litigation conduct and litigation position under the totality of the circumstances.<sup>83</sup> In doing so, the court divided the case into three parts: “the Corps’ treatment of Metric’s certified claim for \$2,173,091.85; the Government’s litigation of plaintiff’s suit through the time of the court’s decision on defendant’s motion for summary judgment, and finally, the Government’s conduct throughout trial activities.”<sup>84</sup>

The court concluded that failure of the KO to issue a final decision was not an unreasonable position but was substantially justified, because it was a common occurrence provided for by statute.<sup>85</sup> It also concluded that the Corps’ denial of the claim (by inaction) was reasonable because the claim “presented factual issues of considerable complexity...which could just as easily have pointed to liability on the part of the contractor, as to liability on the part of the government.”<sup>86</sup> Likewise, while the Government did not prevail on summary judgment, the court found that it was a “close question,” and “the government’s position had a reasonable basis in both fact and law.”<sup>87</sup> On the subject of defective specifications, the court reasoned that “‘Metric had presented very weak evidence...but that the evidence [was] more than colorable [and thus good enough to defeat summary judgment].’”<sup>88</sup> On the subject of misrepresentation, the court found that it had to resolve issues not only of what the Corps had said, but how Metric had interpreted it, and the Corps had argued from precedent that required the contractor to inquire into ambiguous instructions before proceeding with construction.<sup>89</sup> Thus, “the government’s

<sup>82</sup> *Id.* at 449. Metric also alleged that “the defendant’s response brief [to the EAJA claim], ‘falls woefully short of satisfying the government’s burden of establishing that its overall litigation position was substantially justified.’” *Id.*

<sup>83</sup> *Id.* The totality of the circumstances, as to the government’s pre-litigation conduct, is an examination of the agency’s consideration of the claim. The court stated this analysis requires a “focus on the circumstances pertinent to the position taken by the government on the issue on which the claimant prevailed, such as the state of the law at the time the position was taken.” *Id.* (citing *Smith v. Principi*, 343 F.3d 1358, 1363 (Fed. Cir. 2003)). Likewise, as to the government’s litigation position, courts examine the totality of the circumstances of the prosecution of the case. *Metric*, 83 Fed. Cl. at 449. “In the end, the court must exercise its discretion and judgment in determining whether the government’s overall position was reasonable. *Id.* (citing *Chiu v. United States*, 948 F.2d at 715 (Fed. Cir. 1991)).

<sup>84</sup> *Id.* at 450.

<sup>85</sup> *Id.* at 450–51. The court noted that, under the statute, a failure of a KO to issue a final decision on a claim within the time limit would be deemed a denial, and that contractors routinely filed suit “as a matter of course” in such cases. *Id.*

<sup>86</sup> *Id.* at 451.

<sup>87</sup> *Id.* (citing *Metric*, 73 Fed. Cl. at 613).

<sup>88</sup> *Id.* (citing *Metric*, 73 Fed. Cl. at 614).

<sup>89</sup> *Id.* at 452.

summary judgment position, although unsuccessful, was substantially justified by both fact and law.”<sup>90</sup>

Finally, the court analyzed the Government’s arguments during the trial proceedings.

Although defendant’s primary theory of the case did not prevail at trial, defendant was able to present evidence that was relevant and supportive of its arguments. In essence, if defendant could show that the design specification of the underlying steel was not defective, then Metric’s failure to provide a functioning roof would be, absent any misrepresentation by the government, entirely Metric’s responsibility. Unfortunately for the defendant’s case, plaintiff’s witnesses were persuasive and proved that the design specifications were defective.<sup>91</sup>

The court concluded that a trial on the merits was required in order to determine whether or not plaintiff would prevail on its claim. The Government’s position in litigating the claim was substantially justified because under the facts of this case, plaintiff’s success on the merits was not a foregone conclusion. After reviewing the totality of the circumstances, the court found “it was reasonable for the government to have litigated the dispute to its conclusion.”<sup>92</sup> Furthermore, “the government’s position made sense at all times during this dispute because close questions of fact precluded an easy victory for either side.”<sup>93</sup> Accordingly, the plaintiff’s application for attorneys’ fees was denied.<sup>94</sup>

Although *International Associates* and *Metric* were filed in the Court of Federal Claims, the Armed Services Boards of Contract Appeals will apply the same analysis to determine whether the Government’s position is substantially justified. In *Environmental Safety Consultants, Inc.*, a contractor had succeeded on the merits and filed for attorneys’ fees and costs under EAJA.<sup>95</sup> The Board concluded that “with respect to ‘the action or failure to act by the agency upon which the adversary adjudication is based’<sup>96</sup> . . . the final decision [by the KO] represented a good faith effort to analyze the issues as they were known to

the government at the time, not unjustifiable agency action forcing litigation,” and refused to award fees and costs.<sup>97</sup>

*Environmental Safety Consultants* involved a contract for sludge removal, disposal, and cleaning services for two lagoons at the Naval Air Development Center in Pennsylvania. The contractor alleged that it incurred unexpected costs because the sludge contained more suspended solids than the contract had specified, and sued for an equitable adjustment of the contract. In finding for the contractor on the merits, the Board determined there was an unexpected change in the physical characteristics of the sludge at the lagoons, and that the Government should have disclosed the presence of certain compounds. The Board did not find bad faith or abuse of discretion on the part of the Government, and instead found that the Government had spent considerable time trying to assist the contractor in its performance of the contract. In finding for the Government on the EAJA claim, the Board found that the Government was reasonable in evaluating the evidence and the applicable law.

While *Metric*, *International Associates*, and *Environmental Safety Consultants* all serve as examples of cases where EAJA fees were denied outright, sometimes a court will only partially deny relief. For example, if a contractor has multiple claims but is only successful on some, courts will reduce the award accordingly.

### 3. Multiple Claims May Require a Reduced Award

In *Cems Inc. v. Untied States*, the court awarded attorneys’ fees under EAJA to a government contractor who prevailed on a claim of equitable adjustment. However, the award was reduced to twenty-five percent of the amount claimed by the contractor because the Government was substantially justified on most of the issues presented. The court found that only a quarter of the effort in litigating the claim resulted from unjustified Government action, the Government had to pay only one quarter of the fees and costs.<sup>98</sup> In *Precision Pine & Timber, Inc. v. United States*, the contractor sued, attempting to secure a finding that it was not in breach of its contracts. The Government counterclaimed for damages for breach. The Government prevailed on its counterclaim, but recovered only forty-two percent of the amount it sought. The court found that a substantial portion of the Government’s case was not

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 453.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 454–55.

<sup>95</sup> 07-2 BCA ¶ 33652, ASBCA No. 47498 (2007).

<sup>96</sup> *Id.* (quoting 5 U.S.C. § 504(b)(1)(E) (2006)).

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<sup>97</sup> *Id.* (citing *Comm’r, Immigration & Naturalization Serv. v. Jean*, 496 U.S. 154, 159 n.7 (1990)).

<sup>98</sup> 65 Fed. Cl. 473, 484–85 (2005). The court specifically rejected any mechanical formula based on “number of issues presented” or “number of pages dedicated to briefing each issue,” but instead sought to determine the total effort by examining the entire record before it.

justified, and awarded the contractor fifty-eight percent of the fees and costs of defending against this counterclaim.<sup>99</sup>

While a justified Government position throughout the dispute is considered a defense to a claim of attorneys' fees under EAJA, courts also have discretion to preclude an award where "special circumstances" make an award unjust. Although this exception is rarely used by courts, it has been used to preclude an award even when the Government position is not substantially justified.

### C. When Special Circumstances Preclude Payment

#### 1. Conduct of the Parties and Equitable Considerations

In *Oguachuba v. Immigration & Naturalization Service*, the Court of Appeals for the Second Circuit held that the plaintiff's misconduct constituted "special circumstances" rendering an award of attorneys' fees unjust, even though the Government's actions were not substantially justified.<sup>100</sup> The court examined the House Report accompanying EAJA, which "explicitly directs a court to apply traditional equitable principles in ruling upon an application for counsel fees by prevailing parties."<sup>101</sup> The "special circumstances exception" was enacted as a 'safety valve' which "helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts."<sup>102</sup> It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

In *Oguachuba*, the plaintiff was a serial violator of United States immigration laws. He prevailed on a petition for habeas corpus after being detained for over six months by the United States Immigration and Naturalization Service. After finally being deported, he sued for attorneys' fees in the habeas corpus case under EAJA. Applying equitable principles, the court stated that it must view the application under EAJA in light of all the circumstances, and was not limited to scrutiny of the claim on which the applicant prevailed. While *Oguachuba* "prevailed in his petition for writ of habeas corpus, he would not have been incarcerated in the first place but for his notorious and repeated violations of United States Immigration Law."<sup>103</sup> *Oguachuba* represents a clear case for denial of fees under

the "special circumstances exception," because, as the court stated, "*Oguachuba* [was] without clean hands."<sup>104</sup>

#### 2. Application in Government Contract Appeals

In *Appeal of Insul-Glas, Inc.*, as in *Oguachuba*, the Board of Contract Appeals held that special circumstances would make an award unjust because the contractor was "without clean hands." *Insul-Glas* involved the appeal of a termination for default on a contract for "the replacement of windows at the United States Federal Building and Courthouse in Kalamazoo, Michigan."<sup>105</sup> On appeal, the Board found that the Government "had not met the high standards required for imposition of the drastic sanction of default termination" and converted the termination into "one for the convenience of the Government." However, because "*Insul-Glas* shared the blame for the situation which precipitated the termination," the Board exercised its "equitable powers to deny the contractor the administrative costs to which it would have been entitled under a termination for convenience."<sup>106</sup> The Board called *Insul-Glas's* administration of the contract "as bumbling and deficient as [the Government's]," stating "the record amply supports a finding of special circumstances."<sup>107</sup>

In other cases, courts have reduced EAJA fees when a contractor acts unreasonably in litigating a case, whether failing to accept a reasonable offer from the Government to settle the case, or failing to recognize the actual award would exceed the contractor's claim.<sup>108</sup>

Although the conduct of the parties is one factor to consider, other considerations may constitute "special circumstances" and preclude an award under EAJA.

<sup>99</sup> Precision Pine & Timber, Inc., v. United States, 83 Fed. Cl. 544, 554-55 (2008).

<sup>100</sup> *Ogachuba v. I.N.S.*, 706 F.2d 93, 98 (2d Cir. 1983).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (quoting H.R. REP. NO. 1418, 96th Cong., 2d Sess. at 11), *reprinted in* 1980 U.S.C.C.A.N., 2953, 4984, 4990).

<sup>103</sup> *Id.* at 99.

<sup>104</sup> *Id.*

<sup>105</sup> *Appeal of Insul-Glas, Inc.*, GSBCA No. 8223, 89-3 BCA ¶ 22223 (1984).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* The court also found the Government's conduct and litigation positions to be substantially justified, and noted other cases in which substantial justification alone was sufficient to deny attorney's fees to a contractor when it succeeded in converting a termination for default into a termination for cause.

<sup>108</sup> *Application Under Kos Kam, Inc.*, ASBCA No. 34684, 88-3 BCA ¶ 21049 ("The tender and refusal of a settlement offer may be probative of the reasonableness of attorney's fees and other expenses incurred after the applicant has declined to accept a settlement."); *Application under Equal Access to Justice Act of Sage Const. Co.*, ASBCA No. 34284, 92-1 BCA 24493 (noting that, after rejecting settlement offer, plaintiffs spent \$14,000 in legal fees and expenses to obtain an additional \$2700 of recovery, and refusing to award fees for this portion of the litigation).

### 3. Other Considerations

In *Laboratory Supply Corporation of America v. United States*, the United States Claims Court held that the time constraints placed on the Government from a suit to enjoin agency action were considered a “special circumstances” making an award unjust.<sup>109</sup> The contract was for supplying food packaging trays and plastic packaging film to the Navy. A contractor whose bid had been rejected as nonresponsive sued to prevent the Government from awarding the contract to anyone else. Because the object of the suit was “to enjoin the Navy from purchasing needed supplies from anyone other than [the] plaintiff[, i]t was essential that the case be decided rapidly.” Government counsel in Washington, D.C., consulting with Navy personnel in Honolulu, Hawaii, filed its responses at a breakneck pace, while trying to persuade personnel in Washington and Hawaii to change their positions.

Although the contractor prevailed, the court held that time pressures on the Government were “special circumstances” which made an award of fees under EAJA unjust. The court stated, “declaratory judgment/injunctive cases are by definition fast-paced cases that virtually force the Government into litigation before its litigation counsel know the full story.”<sup>110</sup> Furthermore, “courts have consistently looked to time factors to determine whether or not a litigation position is justified.”<sup>111</sup>

#### D. Strategies to Preclude Fee Shifting

##### 1. Corrective Action

Litigators in contract disputes may only adopt a case after some action taken by the agency brings the case to their attention. A prompt analysis of the facts should indicate whether corrective action is necessary. Although the decision whether to litigate a claim should not be based on whether EAJA fees will be awarded post-litigation, the same considerations regarding reasonable Government action remain a consistent theme. If the action taken by the agency was unreasonable, then prompt action should be taken to correct the deficiency before litigation ensues. Courts and

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<sup>109</sup> *Lab. Supply Corp. of America v. United States*, 5 Cl. Ct. 28, 29 (1984). Note that this case was decided while the “substantial justification” test applied only to the Government’s conduct during litigation, and not the agency’s action beforehand; as discussed above, the Government’s prelitigation conduct is now also tested for substantial justification.

<sup>110</sup> *Id.* at 33.

<sup>111</sup> *Id.* (citing *Greenburg v. United States*, 1 Ct. Cl. 406, 408 (1983); *Clark v. United States*, 2 Ct. Cl. 194, 197 (1983); *Hill v. United States*, 3 Ct. Cl. 428, 430 (1983); *Gould v. United States*, 3 Ct. Cl. 693, 696 (1983); *Ellis v. United States*, 711 F.2d 1571, 1576 (Fed. Cir. 1983)). The court also found that the contractor’s own negligence “was the cause of the confusion that led to the need for the filing of the case,” and this too supported its decision to deny the award based on “special circumstances.” *Id.*

boards will scrutinize the Government’s position in defending its case under the totality of circumstances, considering the conduct of the parties, the merits of the case, and consistency with agency policy and judicial precedent. They will examine the entire record to determine whether the Government’s actions or inaction were reasonable. Other relevant factors may also be considered, such as whether “the government dragged its feet, [or] speedily cooperated in resolving the litigation,”<sup>112</sup> and whether the Government “departed from established policy in such a way as to single out a particular private party.”<sup>113</sup> Furthermore, courts and boards will examine rejected settlement offers to determine the reasonableness of the Government’s litigation position.<sup>114</sup>

##### 2. Negotiated Settlement

The Government may also choose to resolve a dispute by offering to settle the claim. Reasonable offers that are rejected by contractors have been held to preclude an award of EAJA fees. In *Decker & Co.*, the Government attempted to settle a claim for 9,500 deutschmarks (DM). The contractor refused and brought suit for 17,720 DM. The Armed Services Board of Contract Appeals ultimately awarded 9,500 DM because the contractor failed to support the higher figure. The Board also denied fees and costs under EAJA, stating that “[i]f appellant had accepted the Government’s offer instead of insisting before the Board on recovery of the full amount of its claim, this litigation would not have gone forward and the expenses would not have been incurred.”<sup>115</sup> Likewise, in *Freedom NY, Inc.*, the Board of Contract Appeals reduced the EAJA award of fees and expenses incurred after the contractor rejected two very favorable settlement offers and continued the litigation.<sup>116</sup>

#### III. Conclusion

Practitioners involved in litigating contract disputes must keep good administrative records in order to justify their actions or inactions at every stage of litigation. Based on the myriad of cases involving EAJA claims with courts and boards, the actions of all personnel involved, from the contracting officer to the legal counsel, will be scrutinized

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<sup>112</sup> *Essex Electro Eng’rs, Inc. v. United States*, 757 F.2d 247, 253 (Fed. Cir. 1985).

<sup>113</sup> *Id.* at 254.

<sup>114</sup> See *Decker & Co.*, ASBCA No. 38238, 92-2 BCA ¶ 24815; *Freedom NY, Inc.*, ASBCA No. 55466, 09-1 BCA ¶ 34031; *AST Anlagen und Sanierungstechnik GmbH*, ASBCA No. 42118, 93-3 BCA ¶ 25, 979; *Charles G. Williams Constr., Inc.*, 93-3 BCA at 128,914; *Sage Constr. Co.*, ASBCA No. 34284, 92-1 BCA ¶ 24, 493).

<sup>115</sup> *Decker*, 92-2 BCA ¶ 24815.

<sup>116</sup> *Freedom NY*, 09-1 BCA ¶ 34031.

for reasonableness at every stage. Since the burden is on the Government to show their actions or inactions are reasonably justified under the circumstances, thorough documentation could be essential in defending against a claim under EAJA. Although the possibility of losing an

EAJA claim should not dictate whether to litigate a claim on the merits, understanding how courts and boards determine who is a prevailing party and when the Government position is justified can only serve to inform the decision-maker before embarking on time-consuming litigation.