



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: August 31, 2016

CBCA 5437-C(4068)

SYSTEMS MANAGEMENT AND RESEARCH
TECHNOLOGIES CORPORATION,

Applicant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Laura Shelkey Yeo of Law Office of Laura Shelkey Yeo, Arlington, VA, counsel for Applicant.

James J. Jurich, Office of the General Counsel, Department of Energy, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **KULLBERG**, and **LESTER**.

LESTER, Board Judge.

Pending before the Board is an application by Systems Management and Research Technologies Corporation (SMARTECH), filed on August 11, 2016, for \$36,950 in attorney fees and \$135.02 in costs pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2012).

Discussion

On April 6, 2016, the Board issued a decision in *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 16-1 BCA ¶ 36,333, awarding

SMARTECH \$722,236.79, plus interest pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), on its claim for payment of a “fixed fee” that respondent, the Department of Energy (DOE), had not fully paid, but denying SMARTECH’s claims for Prompt Payment Act (PPA) interest and a claim that DOE improperly diverted work away from SMARTECH’s contract. The time for appealing that decision expired on August 4, 2016 (120 days after the parties received it), without action by either SMARTECH or DOE, rendering that decision final. See 41 U.S.C. § 7107(a)(1) (Board decision is final except to the extent that a party appeals to the Court of Appeals for the Federal Circuit within 120 days of the decision’s receipt). We possess jurisdiction to entertain SMARTECH’s EAJA application because, in accordance with 5 U.S.C. § 504(a)(2), SMARTECH timely submitted it within the thirty-day period after our April 6, 2016, decision became final and unappealable. See, e.g., *Middlesex Contractors & Riggers, Inc.*, IBCA 2625-F, 89-2 BCA ¶ 21,756, at 109,494 (“in the absence of special circumstances, the proper time for filing an EAJA application is within 30 days after the appeal period has expired, not before and not after those 30 days”); *Benjamin S. Notkin & Associates*, ASBCA 29336, 87-1 BCA ¶ 19,483, at 98,454-55 (1986) (Board possesses jurisdiction to entertain EAJA application if it is submitted within thirty days after 120-day period for appeal to the Federal Circuit has expired).¹

“Under EAJA, ‘[a]n agency that conducts an adversary adjudication [such as a board of contract appeals] shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.’” *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 574 (2008) (quoting 5 U.S.C. § 504(a)(1) (2006)); see 5 U.S.C. 504(b)(1)(C) (2012) (including adjudications of CDA appeals by agency boards of appeals in list of eligible EAJA award proceedings). For a corporation like SMARTECH to constitute a “party” for purposes of an EAJA award, it must have had a net worth not in excess of \$7 million, and not more than 500 employees, when the Board proceeding was initiated. *Texas Instruments Inc. v. United States*, 991 F.2d 760, 766 (Fed. Cir. 1993) (citing 5 U.S.C. § 504(b)(1)(B) (1998)). Such a party becomes a “prevailing party” if “it is successful on any significant issue in the litigation that achieves some of the benefit sought.” *Allen Ballew General Contractor, Inc. v. Department of Veterans Affairs*,

¹ “The 30-day filing period is a jurisdictional prerequisite to the awarding of an attorney fee.” *J.M.T. Machine Co. v. United States*, 826 F.2d 1042, 1047 (Fed. Cir. 1987); see *Action on Smoking & Health v. Civil Aeronautics Board*, 724 F.2d 211, 225 (D.C. Cir. 1984) (“thirty day time limitation . . . is a jurisdictional prerequisite to governmental liability”).

CBCA 3-C(VABCA 6987E), et al., 07-2 BCA ¶ 33,653, at 166,635 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The EAJA applicant bears the burden of establishing that it is a “prevailing party” eligible for an EAJA award and, further, must allege that the Government’s position was not substantially justified. *Davis v. Nicholson*, 475 F.3d 1360, 1366 (Fed. Cir. 2007); 5 U.S.C. § 504(a)(2) (2012). DOE does not contest that SMARTECH has satisfied its burden to show that it is a prevailing party, nor can it: SMARTECH clearly prevailed in this litigation through our affirmative monetary award in its favor, has supported its net worth and size limitations with declarations from its president and its outside accountant, and has alleged that DOE’s position was not substantially justified. Accordingly, SMARTECH has satisfied its initial burden of establishing entitlement to fees and costs under EAJA.

Once the applicant makes the appropriate substantial justification allegation and has shown that it is a prevailing party, the burden shifts to the Government to establish that its position was “substantially justified,” *Cotton & Co.*, EBCA 441-2-90(E), 91-1 BCA ¶ 23,507, at 117,864 (1990), a test that essentially looks at the reasonableness of the Government’s position. *Ellis v. United States*, 711 F.2d 1571, 1575 (Fed. Cir. 1983)). DOE has elected not to allege or attempt to establish that its position was substantially justified and, instead, consents to the entry of an order in SMARTECH’s favor granting the request for fees and costs. Because the burden of proving substantial justification (once the applicant has satisfied its initial burden) is upon DOE, *Cotton & Co.*, 91-1 BCA at 117,864, and because DOE has elected not to raise that defense, DOE has failed to meet its burden, and SMARTECH is entitled to recover its attorney fees and costs under EAJA.

DOE does not contest the amount of SMARTECH’s claimed fees or claimed costs, which total \$37,085.02, and we find them to be reasonable and properly documented. SMARTECH claims 266 hours of work by Lorenzo F. Exposito, Esq., from June 9, 2014, to March 21, 2016, on its underlying merits case (including development of SMARTECH’s complaint, briefing on the Government’s partial motion to dismiss, and summary relief briefing) and 29.6 hours of work by Laura Shelkey Yeo, Esq., from July 26 to August 11, 2016, on its EAJA claim. SMARTECH has properly capped the hourly rate that it is claiming for its attorneys’ time at \$125, even though the hourly rates that the attorneys actually billed exceed that figure, to account for the statutory limit imposed by EAJA. *See* 5 U.S.C. § 504(b)(1)(A) (“attorney or agent fees shall not be awarded in excess of \$125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor . . . justifies a higher fee”); *see also TST Tallahassee, LLC v. Department of Veterans Affairs*, CBCA 2472-C(1576), 12-1 BCA ¶ 35,037, at 172,152 (2011) (“an administrative tribunal, such as ours, cannot [increase the \$125 statutory rate] in the absence of an agency regulation addressing that issue”). DOE has not requested that the claimed fees and costs be reduced to account for work on issues upon which SMARTECH did not prevail.

Decision

For the foregoing reasons, the Board **GRANTS** the EAJA application. DOE shall pay SMARTECH a total of \$37,085.02 in attorney fees and costs.

HAROLD D. LESTER, JR.
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

H. CHUCK KULLBERG
Board Judge