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Supreme Court Rules that Paralegal Fees are Recoverable at the Prevailing Market Rate under the Equal Access to Justice Act

On June 2, 2008, the U.S. Supreme Court held that paralegal fees are recoverable at the prevailing market rate as part of an award of “attorneys’ fees” under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A). See *Richlin Security Service Co. v. Chertoff*, 503 U.S. ____ (2008) (*Richlin*). In so holding, the Court overruled a divided panel of the Federal Circuit in *Richlin Security Service Co. v. Chertoff*, 472 F.3d 1370 (Fed. Cir. 2006), *reh’g en banc denied*, (2007), which held that paralegal services are only recoverable as “expenses at the cost to the attorney,” not “attorneys’ fees” at the cost to the party. *Id.* at 1381.

Background: EAJA is a federal fee-shifting statute that allows eligible individuals and companies to recover “fees and other expenses incurred by that party” if they are a “prevailing party” in certain adversarial adjudications with the federal government. 5 U.S.C. § 504(a)(1). A prevailing party will not be entitled to EAJA fees and expenses, however, if the government’s position during the litigation was not “substantially justified or that special circumstances make an award unjust.” *Id.* Only small businesses with a net worth of less than \$7 million and less than 500 employees, or individuals whose net worth does not exceed \$2 million, are eligible for an award under EAJA. By allowing prevailing parties to recover fees and expenses incurred during litigation, EAJA lessens the financial barrier for small government contractors to adjudicate their contractual rights with the federal government.

The issue in *Richlin* was whether paralegal fees are recoverable as part of the “fees and other expenses” allowed by EAJA at the rate billed by the law firm. The government took the position that paralegal fees are recoverable as “other expenses” and should be limited to the cost to the law firm, not the party. EAJA defines “fees and other expenses” to include “reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party’s case, and reasonable

attorney or agent fees.” 5 U.S.C. § 504(b)(1)(A).

Decision: The *Richlin* litigation stemmed from a mutual mistake in Richlin’s guard services contracts with the Immigration and Naturalization Service in the early 1990s. The mistake was a misclassification of the guards under the Service Contract Act of 1965 which caused the guards to be paid less than the required wage. After the Department of Labor found that Richlin was obligated to pay over \$1.5 million in back wages and associated taxes for the mistaken underpayment, Richlin filed a claim at the Department of Transportation Contract Appeals Board seeking reformation of its contracts to require the government to reimburse Richlin for the back wages and taxes. Richlin eventually succeeded in obtaining a judgment from the Board and, thereafter, filed an application for attorneys’ fees under EAJA.

The Board found that Richlin was an eligible party under EAJA and that the government’s position throughout the dispute was not substantially justified. *See Richlin Security Service Co. v. United States*, DOTCAB No. 3034E, 05-2 BCA ¶ 33021, Jun. 30, 2005. However, the Board rejected, among other things, Richlin’s request to recover paralegal fees billed at an average of \$95 per hour on the basis that, under EAJA, “paralegal expenses are recoverable at the cost to the firm rather than at the billed rate.” Therefore, the Board limited Richlin’s recovery to \$35 per hour for paralegal services, which was the amount the Board determined was the reasonable cost to the firm based on the Washington, DC area market for paralegal services. On appeal, the Federal Circuit affirmed the Board’s decision over Judge Plager’s dissent. *See Richlin*, 472 F.3d 1370.

The Supreme Court reversed the Federal Circuit, however, rejecting the government’s argument that paralegal fees should be classified as a subset of “other expenses” rather than “attorneys’ fees” because paralegals are more analogous to attorneys than traditional expenses such as “studies, analyses, reports, tests, and projects.” *Richlin* at *6. Perhaps more fundamentally, the Court rejected the government’s position that paralegal fees should be calculated at the cost from the perspective of the law firm rather than the actual party. Justice Alito explained that the plain language of EAJA, which provides for the recovery of “fees and other expenses incurred by that party,” 5 U.S.C. §(b)(1)(A)) (emphasis supplied by the Court), “leaves no doubt” that Congress intended fees and expenses to be calculated from the perspective of the litigant, not their law firm. *Id.* at *7.

Importantly, the Court relied on its interpretation of the Civil Rights Attorney’s Fees Awards Act, 42 U.S.C. § 1988, in *Missouri v. Jenkins*, 491 U.S. 274 (1989), in holding that the term “attorneys’ fees” under EAJA should be construed to encompass paralegal fees on the basis that paralegal fees were historically part of attorneys’ fees. *See Richlin* at *8-11. In so holding, Justice Alito noted that the Court’s ruling was not based on “extratextual policy goals but on the traditional meaning of the term ‘attorneys’ fees.’” *Id.* at *11. As a result, the Court held that an otherwise eligible party under EAJA is entitled to recover paralegal fees from the government at the prevailing market rate.

Practitioner's Tips: EAJA is an important statute for small business government contractors involved in an adjudication with an agency. The Court's *Richlin* decision reversing the Federal Circuit is an encouraging signal to future EAJA applicants because it should lead to larger fee awards.

- While EAJA caps recoverable fees at \$125 per hour, the government will bear much of the legal expense and associated litigation cost if you prevail and the government's position was not substantially justified. If you believe the government is taking a position that is not substantially justified, consider the availability of EAJA fees if litigation costs would otherwise prevent you from challenging government actions.
- Because paralegal fees are recoverable at market rate and not merely the cost to the attorney, contractors should remember to take advantage of paralegal services when available to lower overall litigation costs.
- Remember to document thoroughly all fees and expenses incurred in connection with an adjudication with the government. Contractors will not be awarded fees and expenses that are unsupported and unrelated to or beyond the scope of the adjudication.

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