

# **Board of Contract Appeals**

General Services Administration  
Washington, D.C. 20405

---

GRANTED IN PART: October 19, 2004

---

GSBCA 16442-C(16175)

NVT TECHNOLOGIES, INC.,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Jeffrey A. Lovitky, Washington, DC, counsel for Appellant.

John C. Ringhausen, Office of Regional Counsel, General Services Administration,  
Atlanta, GA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **GOODMAN**.

**GOODMAN**, Board Judge.

NVT Technologies, Inc. (NVT or applicant), has filed an application for attorney fees incurred in connection with an appeal filed with this Board arising from its contract to provide the General Services Administration (GSA or respondent) with mechanical maintenance services and other related services for a federal courthouse.

---

### Background

The appeal involved claims for extra work in the amounts of \$10,999.43 for disposal of lighting material and \$8657 for repair of underground conduit.<sup>1</sup> NVT elected to have its case decided using the Board's small claims procedure. On May 27, 2004, we rendered a decision, denying the first claim and granting the latter claim. NVT Technologies, Inc. v. General Services Administration, GSBCA 16175, 04-2 BCA ¶ 32,655. On June 23, 2004, NVT filed an application for fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504 (2000). The application seeks recovery of attorney fees in the amount of \$3125.

---

### Discussion

To be eligible for recovery of costs under EAJA, NVT must meet the following requirements:

1. have been a prevailing party in a proceeding against the United States;
2. if a corporation, have had not more than \$7,000,000 in net worth and five hundred employees at the time the adversary adjudication was initiated;
3. submit its application within thirty days of a final disposition in the adjudication;
4. in that application, (a) show that it has met the requirements as to having prevailed and size (numbers (1) and (2) above) and (b) state the amount sought and include an itemized statement of costs and attorney fees; and
5. allege that the position of the agency was not substantially justified.

See 5 U.S.C. § 504(a)(1), (2), (b)(1)(B); Doty v. United States, 71 F.3d 384, 385 (Fed. Cir. 1995); McTeague Construction Co. v. General Services Administration, GSBCA 15479-C(14765), 01-2 BCA ¶ 31,462, at 155,333.

A party is "prevailing," for laws such as EAJA which permit the shifting of fees, if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); DRC Corp. v. Department of Commerce, GSBCA 14919-COM(15172-C), 00-1 BCA ¶ 30,841. NVT was the prevailing party in this litigation, as the Board granted entitlement to 44 per cent of the total amount submitted to the Board for decision.

As to the size of NVT at the time its case was filed, the application contains a credible declaration, given under penalty of perjury by the president of NVT, attesting that, at that time, his company employed no more than 130 persons and had a net worth below

---

<sup>1</sup> Appellant's complaint contained two additional counts that were resolved by the parties before the record of the appeal was closed for a decision.

\$7,000,000. Further, the application was timely filed within thirty days of our decision. As required, NVT's application specifically addresses the issues of its status as a prevailing party, a qualifying small business, and the timeliness of its submission. Attached to the application is an itemized statement regarding counsel's services and fees. Finally, the application notes that the position taken by the agency in this case was not substantially justified and explains why the agency will not be able to meet its burden of demonstrating otherwise.

The Government does not dispute that NVT is a prevailing party and otherwise would qualify for an EAJA award based on its size and income. Rather, the Government argues that its position with regard to the repair of the underground conduit was substantially justified. When a party has prevailed in litigation against the Government, the Government bears the burden of establishing that its position was substantially justified. Doty v. United States. Both the Government's prelitigation, administrative conduct and its litigation conduct must be examined in ascertaining whether its position was substantially justified. Id. at 386. The Supreme Court has held that the phrase "substantially justified" means justified in substance or in the main -- that is, to a degree that could satisfy a reasonable person and is equivalent to "having a reasonable basis both in law and fact." Pierce v. Underwood, 487 U.S. 552, 565 (1988); DRC Corp., 00-1 BCA at 152,227.

The Government argues primarily that its position satisfies the requirements of Pierce because:

[N]either party cited case law on the issue of whether repairs to asphalt and underground conduit can constitute "ordinary wear and tear." It appears that this might be a case of first impression. A reasonable person could conclude that asphalt failure is the result of ordinary wear and tear.

Agency's Opposition to Application at 3.

The Government's argument lacks merit. One cannot determine what caused a conduit to fail by examining case law. A reasonable person could conclude that the failure was the result of "ordinary wear and tear" only after conducting an investigation into the circumstances of the case at hand. A&B Limited Partnership v. General Services Administration, GSBCA 15208, 04-1 BCA ¶ 32,439 at 160,505 (2003). NVT prevailed in the instant appeal by offering a contemporaneous documented assessment of the circumstances which indicated that the failure of the conduit was the result of faulty design, not "ordinary wear and tear." The Government did not conduct a pre-litigation investigation into the failure of the conduit, and during litigation it offered nothing more than an unsupported after-the-fact assertion that the damage was caused by "ordinary wear and tear." NVT Technologies, Inc., 04-2 BCA at 161,623-24. The Government's position does not satisfy the Pierce "reasonableness" standard – it is not justified in substance or in the main, to a degree that would satisfy a reasonable person. We conclude that the Government's position was not substantially justified.

Because the Government has not met its burden to demonstrate that its position was substantially justified, NVT is entitled to recover fees and expenses authorized by EAJA. NVT seeks attorney fees at a rate of \$125 an hour, the maximum amount allowable unless

higher fees are justified.<sup>2</sup> Respondent has not addressed whether the number of hours expended by counsel for NVT is reasonable. Having reviewed the invoices submitted, we find the number of hours expended to be reasonable for the tasks performed. However, the total hours claimed are not solely for the effort involved in pursuing the claim for repair to the underground conduit, but also for the other claim in which NVT did not prevail.

Where respondent is substantially justified in its position as to some, but not all, claim items, it is within our discretion to adjust the amount of attorney fees and other expenses in accordance with NVT's success in litigating its appeal. In making an allocation of fees and expenses, the Board is not bound by a set formula. Vehicle Maintenance Services v. General Services Administration, GSBCA 12942-C(11663), 95-1 BCA ¶ 27,513.

Having reviewed the invoice for time and billing, only one attempt was made by the billing attorney to allocate the time expended between the two claims. We are therefore unable to determine the amount of time expended on each claim. In similar instances, we have exercised our discretion and awarded fees and expenses in proportion to the percentage of recovery achieved by the applicant in relation to its total claim. This avoids an award of fees and expenses incurred in advancing claim items in which the applicant did not prevail on the merits, and results in a recovery of an amount which is reasonable in relation to the result obtained. See, e.g., Tele-Sentry Security, Inc. v. General Services Administration, GSBCA 11639-C(10945(7703)-REIN), 93-2 BCA ¶ 25,816; Vehicle Maintenance Services. This approach is appropriate in this instance.

An award of fees in proportion to the percentage of recovery achieved by NVT in relation to the total claim would reasonably approximate the value of the effort performed for the claim items for which respondent's position was not substantially justified. As NVT recovered 44 per cent of the amount it sought, we award that percentage of the \$3125 it seeks in legal fees - \$1375.

### Decision

The applicant is **GRANTED IN PART**. Applicant is entitled to an award of fees in the amount of \$1375.

---

ALLAN H. GOODMAN  
Board Judge

We concur:

---

<sup>2</sup> This Board has previously found that this rate is reasonable for the efforts of the same attorney representing the applicant in previous appeals. NVT Technologies Inc. v. General Services Administration, GSBCA 16195-C(16047), 03-2 BCA ¶ 32,401.

---

STEPHEN M. DANIELS  
Board Judge

---

CATHERINE B. HYATT  
Board Judge