

A while ago we [published](#) an article about a small business that was forced to choose between accepting a very bad deal and spending the money to litigate. We were rather hard on the Navy contracting officer who, quite explicitly and intentionally, forced that small business into such a difficult decision. We wrote—

For those small businesses that may be reading this article, you do not have to let yourself be bullied by a prime contractor or by a government contracting officer. You can, *and you should*, choose to litigate when you believe you are correct. You can win and you may be able to get your attorney's fees paid for by the opposition. (

See

: Equal Access to Justice Act.)

Soon after we wrote that bit, we came across [a decision](#) at the Court of Federal Claims that reinforced our advice. The problem with the decision is that, in order to really appreciate it, you need to have followed the long and tortuous road that got the parties there. We have neither sufficient time nor patience to detail the journey. Here's a summary—just a taste—of that journey.

The contractor, SUFI Network Services, initially filed 28 claims to its contracting officer, together worth more than \$130 million. The CO agreed to pay SUFI \$133,000 and denied the rest of the claims. SUFI appealed to the ASBCA, amending its claim to ask for \$163 million. The ASBCA found merit to some of SUFI's claims but only awarded \$3.8 million. Upon reconsideration, the Board increased its award to \$7.4 million. SUFI appealed the ASBCA decision to Court of Federal Claims (CoFC), who found legal errors and awarded SUFI \$118.8 million. The Government and SUFI both appealed to the Federal Circuit, who upheld the CoFC's reasoning but vacated the award and remanded back to the ASBCA to determine the proper quantum. The ASBCA awarded SUFI \$111.8 million.

The Government appealed that decision to the CoFC. The CoFC dismissed the appeal because it found that the Government didn't have appeal rights from the decision of its own Board. The Government appealed that decision to the Federal Circuit, who affirmed the CoFC's decision.

Having been through 10 years of litigation, SUFI requested that its attorney fees be

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reimbursed under the Equal Access to Justice Act (EAJA). As Judge Wheeler, writing for the Court, stated—

The Government disputes nearly every aspect of SUFI's claim, including its liability to pay for any fees at all, the hourly rate at which fees can be recovered, whether interest applies to any fee award, and even whether this Court has the authority to grant SUFI's fee application.

Judge Wheeler also discussed the purpose of the EAJA, writing—

The primary purpose of ... the Equal Access to Justice Act ("EAJA"), is to reduce a potential plaintiff's economic deterrents to contesting unreasonable government action by holding the Government liable for attorneys' fees and expenses when the Government's position was not substantially justified. ... In addition, Congress noted that the Government has greater resources and expertise than the average civil defendant and so the 'standard for an award of fees against the United States should be different from the standard governing an award against a private litigant.'

Judge Wheeler found that SUFI was entitled to recovery of its attorney fees. He wrote "The Court finds that SUFI is entitled to an award of its attorneys' fees and expenses under either subsection of [EAJA] because the Government acted in bad faith and also advanced a position that was not substantially justified."

Importantly, the government's conduct, both before and after SUFI commenced litigation, was deemed to be evidence regarding the government's bad faith. Judge Wheeler wrote—

The facts of this case demand a finding similar to that in *Vaughan v. Atkinson* because the pre-litigation Government conduct literally left SUFI with no choice but to seek formal adjudication. Following the Air Force's willful breach of the contract, the Government continued to delay and obstruct SUFI's every attempt to recover its losses. The contracting officer denied *all* of SUFI's substantial claims despite the Board later finding that the Air Force's breach was willful and material. ... The Air Force took nearly seven months to enter into the Partial Settlement Agreement ('PSA'), and then later argued before the Board that the PSA was unenforceable. ... The contracting officer's decision, despite the unequivocal breach, and the Air Force's

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resistance to entering a PSA, forced SUFI to seek judicial review. In order to obtain judicial review, SUFI was required to first appear before the ASBCA pursuant to its contract with the Air Force.

(Emphasis in original. Internal citations omitted.)

Judge Wheeler had more to say but we believe the point has been made. If you are a small business and your contracting officer puts you in the difficult position of having to choose between accepting an unwarranted profit degradation or hiring an attorney to litigate your claim and appeal, you can be confident that your attorney fees will be reimbursed by the government. (This assumes, of course, that you prevail and you qualify for attorney's fees under the provisions of the EAJA.)

More to the point, when your contracting officer tells you—

I am prepared to offer \$5,164.00 to cover the portion of the claim that we have determined to have merit. That amount probably will not satisfy you though, as I understand that you feel you are due the full \$22k. I have also heard that it can cost more than \$100K to go through the ASBCA appeal process. If that is true, the economics of it don't make much sense to me, but of course you have the right to do so.

--then you can confidently reply, "It may indeed cost me \$100K to go through the ASBCA appeal process; but when I win, *you* will be paying my attorney's fees in addition to the \$17,000 you are trying to screw me out of."