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Department's position was not substantially justified simply because the Department did not prevail.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding.

§ 4.607 Allowable fees and expenses.

(a) The following fees and other expenses are allowable under the Act:

(1) Reasonable expenses of expert witnesses;

(2) Reasonable cost of any study, analysis, engineering report, test, or project which is found necessary for the preparation of the party's case; and

(3) Reasonable attorney or agent fees.

(b) The amount of fees awarded will be based upon the prevailing market rates for the kind and quality of services furnished, except that—

(1) Compensation for an expert witness will not exceed the highest rate at which the Department pays expert witnesses; and

(2) Attorney or agent fees will not exceed $75 per hour.

(c) In determining the reasonableness of the fee sought, the adjudicative officer shall consider the following:

(1) The prevailing rate for similar services in the community in which the attorney, agent, or witness has performed the service;

(2) The time actually spent in the representation of the applicant;

(3) The difficulty or complexity of the issues in the proceeding;

(4) Any necessary and reasonable expenses incurred; and

(5) Such other factors as may bear on the value of the services performed.

INFORMATION REQUIRED FROM APPLICANTS

NOTE: *Information Collection*. The information collection requirement contained in §§ 4.608 through 4.610, requiring an application for fees and expenses in an adversary adjudication under the Equal Access to Justice Act, has been approved by the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3507, and has been assigned clearance members 1084–0011. The information is required to seek an award of fees and expenses.

§ 4.608 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. Two copies of the application shall be filed with the adjudicative officer. The application shall show that the applicant has prevailed and identify the position of the Department in the proceeding that the applicant alleges was not substantially justified.

(b) The application shall include a statement that the applicant's net worth at the time the proceeding was initiated did not exceed $1 million if the applicant is an individual (other than a sole owner of an unincorporated business seeking an award in that capacity) or $5 million in the case of all other applicants. An applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3) and is exempt from taxation under section 501(a) of the Code or in the case of an organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under section 501(c)(3) of the Code; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) If the applicant is a partnership, corporation, association, or public or private organization (including charitable or other tax exempt organizations or cooperative associations) or a sole owner of an unincorporated business, the application shall state that it did not have more than 500 employees at the time the proceeding was initiated, giving the number of its employees and describing briefly the type and purpose of its organization or business.

(d) The application shall itemize the amount of fees and expenses for which an award is sought.

(e) The application may include any other matters that the applicant believes should be considered in determining whether and in what amount an award should be made.

(f) The application shall be signed by the applicant or an authorized officer of the applicant. The application shall

contain or be accompanied by a written verification under oath or affirmation under penalty of perjury that the information provided in the application and all accompanying material is true and complete to the best of the signer's information and belief.

§4.609 Net worth exhibit.

(a) Each application except a qualified tax-exempt organization or a qualified cooperative association must submit with its application a detailed exhibit showing its net worth at the time the proceeding was initiated. If any individual, corporation, or other entity directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or if the applicant directly or indirectly owns or controls a majority of the voting shares or other interest of any corporation or other entity, the exhibit must include a showing of the net worth of all such affiliates or of the applicant including the affiliates. The exhibit may be in any form convenient to the applicant, provided that it makes full disclosure of the applicant's and all affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards of 5 U.S.C. 504(b)(1)(B)(i). The adjudicative officer may require an applicant to file additional information to determine the applicant's eligibility for an award.

(b) The net worth exhibit shall describe any transfers of assets from, or obligations incurred by, the applicant or any affiliate, occurring in the one-year period to the date on which the proceeding was initiated, that reduced the net worth of the applicant and its affiliates below the applicable net worth ceiling. If there were no such transactions, the exhibit shall so state.

(c) Ordinarily, the net worth exhibit shall be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the adjudicative officer in a sealed envelope labeled ''Confidential Financial Information,'' accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552, and whether it is covered by the Trade Secrets Act, 18 U.S.C. 1905, or other applicable statutes; why public disclosure of the information would adversely affect the applicant; and why disclosure is not required in the public interest. The material in question shall also be served on counsel representing the agency against which the applicant seeks an award, but need not be served on any other party to the proceeding. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Department's established procedures under the Freedom of Information Act, 43 CFR 2.11 *et. seq.*

§4.610 Documentation of fees and expenses.

(a) The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, or project, for which an award is sought.

(b) The documentation shall include an affidavit from each professional firm or individual whose services are covered by the application, stating the actual time expended and the rate at which fees and other expenses were computed and/or charged and describing the specific services performed.

(1) The affidavit shall itemize in detail the services performed by the date, number of hours per date, and the services performed during those hours. In order to establish the hourly rate, the affidavit shall state the hourly rate billed to and paid by the majority of clients during the relevant time periods.

(2) If no hourly rate is paid by the majority of clients because, for instance, the attorney or agent represents most clients on a contingency