

# CONTRACTORS' ALERT

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## PUBLIC CONSTRUCTION AND THE EQUAL ACCESS TO JUSTICE ACT

(R.I.G.L. Section 42-92-1 et. seq.)

By, *David M. Campbell, Esq.*

**W**ith regard to the recovery of attorney's fees, Rhode Island follows the generally accepted "American Rule" requiring that parties to litigation pay their own fees and expenses unless there is bad faith or a clear, contractual provision. In most cases, the parties to the dispute must absorb their own legal expenses and consider them a cost of doing business.

Given the cost to litigate a claim to a successful conclusion, including discovery, motions, trial and maybe an appeal, a small business can win the battle and lose the war. Specifically, the costs of litigation may make the vindication of important rights not practical for the average small business.

Since 1985, the Equal Access to Justice Act ("EAJ") has provided for the "reimbursement of reasonable litigation expenses when the individual or small business prevails in contesting an agency action, which was without substantial justification". The EAJ is often overlooked and should be considered when a contractor is involved in any dispute involving a public entity, state or local.

The EAJ recognizes the public agencies possess "tremendous power" in their ability to affect individuals and this power "tempts" public agencies to act against individuals and small businesses without regard to the "best interest of the public". By contesting unjust public action and prevailing, the small business has performed a service to the public by compelling the fair enforcement of the laws as enacted. The legislature recognizes the "financial burden" incurred by small businesses and to encourage small businesses to "contest unjust actions" the EAJ requires public reimbursement of "reasonable litigation expenses" if the small business prevails in contesting public action, which was "without substantial justification".

To qualify, a small business must be "independently owned and operated, not dominant in its field and which employs 100 or fewer persons" at the time of the claim. Most contractors doing public work in Rhode Island would qualify under this definition.

Under the EAJ, "substantial justification" means that the initial position of the agency must have a "reasonable basis in law and fact". The Rhode Island Supreme Court has stated that the substantial justification test requires that the agency show "not merely that its position was marginally reasonable; its position must be clearly reasonable, well-founded in law and fact, solid, though not necessarily correct". This standard to recover fees is considerably more generous than a typical "bad faith" test.

The EAJ is quite broad in scope. Disputes involving licensing, procurement, the imposition of fees, fines and taxes, environmental, WBE-DBE certification and potentially even contract disputes involving payment and performance issues would come within the reach of the EAJ. The strategic use of the EAJ could discourage unfair decisions before they are made or make litigation expenses recoverable in a wide variety of cases.



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