

§ 6.9

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than \$7 million and not more than 500 employees.

(6) For the purposes of § 6.9(b), eligible applicants include small entities as defined in 5 U.S.C. 601.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was designated.

(d) An applicant who owns an unincorporated business will be considered an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The number of employees of an applicant includes all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the administrative law judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the administrative law judge may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

(h) An applicant who appears *pro se* in a proceeding is ineligible for award

49 CFR Subtitle A (10-1-03 Edition)

of attorney fees. However, eligibility for other expenses is not affected by *pro se* representation.

[48 FR 1070, Jan. 10, 1983, as amended at 62 FR 19234, Apr. 21, 1997]

§ 6.9 Standards for awards.

(a) An eligible applicant may receive an award for fees and expenses incurred by that party in connection with a decision in favor of the applicant in a proceeding covered by this Part, unless the position of the Department over which the applicant has prevailed was substantially justified or special circumstances make the award sought unjust. The burden of proof that an award should not be made to an eligible applicant is on the Department where it has initiated the proceeding. No presumption arises that the Department's position was not substantially justified simply because the Department did not prevail. Whether or not the position of the Department was substantially justified shall be determined on the basis of the administrative record, as a whole, in the adversary adjudication for which fees and other expenses are sought. The "position of the Department" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the Department upon which the adversary adjudication may be based.

(b) In the context of a Departmental proceeding to enforce a party's compliance with a statutory or regulatory requirement, if the demand by the Department is substantially in excess of the amount awarded to the government pursuant to the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to an eligible applicant party the fees and expenses related to defending against the excessive demand, unless the applicant party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this paragraph shall be paid only as a consequence of appropriations provided in advance. As used in this section, "demand" means the express demand of

Office of the Secretary of Transportation

§ 6.17

the Department which led to the adversary adjudication, but does not include a recitation by the Department of the maximum statutory penalty

(i) In the administrative complaint, or

(ii) Elsewhere when accompanied by an express demand for a lesser amount.

(c) The decision of the Department on the application for fees and other expenses shall be the final administrative decision under this section.

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

[62 FR 19234, Apr. 21, 1997]

§ 6.11 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents or expert witnesses.

(b) No award for the fee of an attorney or agent under these rules may exceed \$125.00 per hour. This amount shall include all other expenses incurred by the attorney or agent in connection with the case. No award to compensate an expert witness may exceed the highest market rate at which the Department pays expert witnesses, or \$24.09 per hour, whichever is less.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the administrative law judge shall consider the following:

(1) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

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

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

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

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or

other matter was necessary for preparation of the applicant's case.

(e) Fees may be awarded only for work performed after designation of a proceeding.

[48 FR 1070, Jan. 10, 1983, as amended at 62 FR 19234, Apr. 21, 1997]

§ 6.13 Delegations of authority.

The Secretary of Transportation delegates to the head of each operating administration of this Department the authority to take final action, other than rulemaking, on matters pertaining to the Act in actions that require section 554 proceedings. The head of each operating administration may redelegate this authority.

Subpart B—Information Required from Applicants

§ 6.17 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. The application shall show that the applicant has prevailed and identify the position of an agency or agencies in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state that it did not have more than 500 employees at the time the proceeding was initiated, giving the number of employees of the applicant and describing briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed \$1 million (if an individual) or \$5 million (for all other applicants, including their affiliates). However, 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 (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt 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 such section; or