



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED WITHOUT PREJUDICE: October 16, 2007

CBCA 863-C(50)

TIDEWATER CONTRACTORS, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Joseph A. Yazbeck, Jr., of Yazbeck, Cloran & Hanson, LLC, Portland, OR, counsel for Appellant.

David Sett, Division Counsel, Federal Highway Administration, Lakewood, CO, counsel for Respondent.

Before Board Judges **STERN**, **FENNESSY**, and **SOMERS**.

SOMERS, Board Judge.

Tidewater Contractors, Inc. (Tidewater) has filed an application for fees and expenses incurred in connection with an appeal arising from its contract to perform road work for the Department of Transportation, Federal Highway Administration (FHA).

Background

On March 22, 2007, the Board granted in part Tidewater's appeal from an FHA contracting officer's final decision denying its claim for an extension of the contract performance period. *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50, 07-2 BCA ¶ 33,525. Tidewater filed a motion for reconsideration, seeking the remainder of its claim. On June 29, 2007, the Board granted Tidewater's motion for

reconsideration and amended the decision, granting the appeal in its entirety. *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50-R, 07-2 BCA ¶ 33,618.

On July 31, 2007, Tidewater filed an application for fees and other expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000). On September 14, 2007, respondent filed a response to Tidewater's application. On October 2, 2007, Tidewater filed a supplement to its application.

Discussion

The pertinent section of the EAJA, 5 U.S.C. § 504(a)(2), and Board Rule 30 states that a party seeking an award of fees and expenses may submit an application no later than thirty calendar days after a final disposition in the underlying appeal. The Board's decision becomes final (for the purposes of Rule 30) when it is not appealed to the United States Court of Appeals for the Federal Circuit within the time permitted for appeal, i.e., 120 days from the date of the party's receipt of a copy of the decision. 41 U.S.C. § 607(g)(1994).

The law is clear that a claim for fees under the EAJA is premature if made before a final adjudication of a case on the merits. *Cogefar-Impresit, U.S.A., Inc.*, DOT BCA 2721E, 99-1 BCA ¶ 30,154, at 149,263 (1998)(citing *Vidal v. USPS*, 143 F.3d 1475 (Fed. Cir. 1998)). A party can demonstrate that it is the prevailing party only after the Board's decision becomes final. *Id.* at 149,264. In addition, the Board cannot determine whether the position of the United States is substantially justified until its decision is final. *Id.* (citing *Murphy Brothers, Inc.*, DOT BCA 1836, 87-1 BCA ¶ 19,500 (DOT BCA 1986).

As noted above, the Board issued its decision and faxed a copy of the decision to the parties on June 29, 2007. Assuming that appellant received its copy of the decision on that date, the Board's decision does not become final until October 29, 2007. Accordingly, the application is premature.

Decision

Tidewater's application for the recovery of costs under the Equal Access to Justice Act is **DISMISSED WITHOUT PREJUDICE**.

JERI KAYLENE SOMERS
Board Judge

We concur:

JAMES L. STERN
Board Judge

EILEEN P. FENNESSY
Board Judge