



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 1, 2016

CBCA 5085-C(3170)

CARE ONE EMS, LLC,

Applicant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Wesley C. McCabe, Chief Executive Officer of Care One EMS, LLC, Van Buren, AR, appearing for Applicant.

Tracy Downing, Office of the Regional Counsel, Department of Veterans Affairs, Nashville, TN, counsel for Respondent.

Before Board Judges **POLLACK**, **KULLBERG**, and **LESTER**.

POLLACK, Board Judge.

In a filing received by the Board on December 1, 2015, applicant, Care One EMS, LLC (Care One), requested an award of attorney fees arising out of its appeal of the termination for default of its contract by respondent, the Department of Veterans Affairs (VA), and the subsequent change by the VA to a termination for convenience. Although Care One is now being represented by its Chief Executive Officer rather than an attorney, Care One asserts that, at an earlier stage of litigation, it incurred several thousand dollars in attorney fees. We docketed the matter as CBCA 5085-C(3170).

We will not repeat here the factual details of the underlying termination for default and conversion of the termination to one for convenience. Instead, we refer to our decision of November 13, 2015, dismissing the appeal as moot, due to the VA withdrawing the default termination that was the subject of the appeal and converting that to a termination for convenience. *See Care One EMS, LLC v. Department of Veterans Affairs*, CBCA 3170, 15-1 BCA ¶ 36,160.

On December 23, 2015, the VA responded to the applicant's filing by submitting a motion to summarily dismiss the case for lack of jurisdiction. The VA identified a number of reasons supporting dismissal, among which were failure of applicant to submit a claim in a sum certain, failure of applicant to request a final decision from the contracting officer, and an allegation that the Board does not have authority to order payment of attorney fees.

It is well settled that the Board has jurisdiction over appeals from a contracting officer decision denying a contractor's claim, Contract Disputes Act (CDA), 41 U.S.C. §§7101-7109 (2012). The filing received in this matter from Care One would not qualify as a "claim" under the CDA. The VA properly points out that Care One presents no claim for fees that has been presented to the contracting officer and no request for a final decision, both of which are prerequisites to an appeal based upon the CDA. *ARI University Heights, LP v. General Services Administration*, CBCA 4660, 15-1 BCA ¶ 36,085, at 176,188. Absent that, we cannot entertain a CDA claim for recovery of dollars. Accordingly, to the extent that Care One is attempting to establish a "claim" under the CDA for its legal fees, we would have to dismiss its request for lack of jurisdiction.

Despite the VA's characterization of Care One's submission as a failed attempt to assert a CDA claim, however, a review of the submission makes clear that, even though not mentioning or citing to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, Care One is seeking to recover legal fees under the auspices of that statute. We cannot grant Care One's request for EAJA fees. The law is clear that the Board can only award EAJA fees where applicant is the "prevailing party" to a judgment on the merits issued by the Board. *Comter Systems, Inc. v. General Services Administration*, CBCA 4878-C(3535), slip op. at 2 (Mar. 7, 2016). Here, the VA withdrew the default termination and thus rendered further proceedings moot. Such does not qualify the matter to EAJA relief. *Id.*; see *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 605 (2001) ("A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change."). Accordingly, we must deny Care One's request for EAJA fees.

We recognize that the applicant is operating without benefit of counsel and is seeking guidance. While the Board has in part been created to allow for a more informal alternative

for a contractor than having to proceed with a matter at the Court of Federal Claims, and the Board was envisioned as a vehicle that could be better navigated by litigants operating without counsel, the Board is limited to the degree of direction and advice we can give. Nevertheless, we note that, in our decision dismissing Care One's appeal, we cited Federal Acquisition Regulation (FAR) 48 CFR 52.212-4 (2009), which sets out and identifies those types of costs that a contractor terminated for convenience under a commercial item contract may be eligible to recover. Care One is entitled to approach the VA about that recovery and may submit a termination settlement proposal or a claim to pursue it. Recovery of settlement expenses following a termination for convenience is a remedy that is sought independent of action at this Board.

Decision

We deny respondent's motion to dismiss the application for lack of jurisdiction, in light of the Government's incorrect characterization of Care One's legal fees request as an incomplete CDA claim. We further **DENY** Care One's request for EAJA fees because it was not a prevailing party in the underlying action.

HOWARD A. POLLACK
Board Judge

We concur:

H. CHUCK KULLBERG
Board Judge

HAROLD D. LESTER, JR.
Board Judge