



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED WITHOUT PREJUDICE: July 19, 2018

CBCA 6165-C(5540)

MARE SOLUTIONS, INC.,

Applicant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

James R. Mall of Meyer, Unkovic & Scott LLP, Pittsburgh, PA, counsel for Applicant.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA, counsel for Respondent.

Before Board Judges **ZISCHKAU**, **RUSSELL**, and **O'ROURKE**.

O'ROURKE, Board Judge.

Mare Solutions, Inc. (Mare or applicant), submitted its request for costs, fees, and interest prior to the expiration of the agency's 120-day appeal period. Because the application is premature, we dismiss it without prejudice.

Background

On May 16, 2018, the Board granted Mare's appeal from a contracting officer's final decision which held Mare responsible for the installation of expansion couplings on electrical

conduit located on the first-floor ceiling of a veterans hospital parking garage. *Mare Solutions, Inc. v. Department of Veterans Affairs*, CBCA 5540, 18-1 BCA ¶ 37,048, at 180,352. On June 14, 2018, Mare filed an application for costs, fees, and interest pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2012), for reasonable time and expenses incurred related to CBCA 5540. Shortly thereafter, respondent filed a motion to dismiss the application for lack of jurisdiction. Mare replied to the motion, requesting that the Board defer ruling on the application until the decision becomes final or, in the alternative, to dismiss the application without prejudice so that Mare may refile it once the application is ripe.

Discussion

As a sovereign, the United States is immune from suit unless it consents to be sued through an express waiver of sovereign immunity. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). EAJA, which provides for the award of fees and other expenses to a prevailing party in a suit against the United States, is such a waiver. 5 U.S.C. § 504(a). The procedure for recovering these costs is delineated in the statute and the Board's rules. Relevant to the instant motion is the timing for submission of an EAJA application. Both the Act and Board Rule 30 provide that a prevailing party seeking costs, fees, and other expenses may submit an application for the same no later than thirty calendar days after the decision becomes final. 28 U.S.C. 2412(d)(1)(B); 48 CFR 6101.30(b) (2017).

In this case, assuming that neither party files a timely motion seeking reconsideration, the Board's decision becomes final when 120 days have passed (from the date of receipt of the decision) without an appeal to the United States Court of Appeals for the Federal Circuit. *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 863-C, 07-2 BCA ¶ 33,705, at 166,885; 41 U.S.C. § 607(g). Here, only twenty-nine days elapsed between the date of the Board's decision and the date of Mare's EAJA application. The application is premature. *Vidal v. USPS*, 143 F.3d 1475 (Fed. Cir. 1998); *Triad Mechanical, Inc. v. Department of the Interior*, CBCA 3946, 15-1 BCA 35,858, at 175,324.

In its motion, respondent asks the Board to dismiss the application for lack of jurisdiction. Because we find that submitting a premature EAJA application is a procedural issue, not a jurisdictional one, we dismiss it without prejudice. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015); *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004) (citing *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004)); *Moustafa A. Mohamed*, GSBCA 9547, 89-2 BCA ¶ 21,885, at 110,114-15, *aff'd*, 925 F.2d 1478 (Fed. Cir. 1991). "Notably, even the statutory timing requirements provided in Subsection 2412(d) of EAJA are not jurisdictional but rather concern the relief a court may award." *Heger v. United States*, 114 Fed. Cl. 204, 208 (2014). Mare may refile its application at the appropriate time.

Decision

Mare's application is **DISMISSED WITHOUT PREJUDICE**.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

We concur:

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge