UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: May 9, 2019

CBCA 6462-C(6031)

WOOLERY TIMBER MANAGEMENT INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Charlotte Woolery, President of Woolery Timber Management Inc., Tuolumne, CA, appearing for Appellant.

John Eichhorst, Office of the General Counsel, Department of Agriculture, San Francisco, CA, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **ZISCHKAU**, and **LESTER**.

LESTER, Board Judge.

On May 3, 2019, appellant, Woolery Timber Management Inc. (WTM), filed an application seeking to recover $54,824.50 in costs and fees associated with this appeal pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2012).[1] Familiarity with the Board's original merits decision, issued on January 31, 2019, and the Board's decision

[1] Woolery also cites to 28 U.S.C. § 2412 as a basis for its EAJA application. That statutory provision authorizes courts, but not boards of contract appeals, to award fees and costs in certain circumstances. *Moore Mill & Lumber Co.*, AGBCA 90-210-10, 91-1 BCA ¶ 23,484, at 117,805 (1990). It creates no statutory authority in the circumstances here.

on reconsideration, issued on April 4, 2019, is presumed. *See Woolery Timber Management Inc. v. Department of Agriculture*, CBCA 6031, 19-1 BCA ¶ 37,245, *reconsideration denied*, CBCA 6031-R, slip op. (Apr. 4, 2019). We deny the application.

Discussion

Timeliness

WTM's EAJA petition was filed within thirty days of the Board's April 4, 2019, decision on reconsideration. Under Board Rule 30, which implements EAJA, "[a] party may file an application for fees and other expenses only after the time to seek appellate review of a Board decision has expired" and must file its application "within 30 calendar days after that date." 41 CFR 6101.30(b) (2018). Here, WTM elected to pursue this appeal under the Board's small claims procedure, as permitted by section 7106(b) of the Contract Disputes Act (CDA), 41 U.S.C. § 7106(b), and implemented through Board Rule 52 (48 CFR 6101.52). A decision issued under that procedure is final and unappealable except for fraud, although the Board will allow a party to seek reconsideration of the decision under Board Rule 26 if, as happened in this case, the reconsideration request is filed within thirty days of the party's receipt of the decision. *Woolery Timber Management*, slip op. at 2 (Apr. 4, 2019). Because appellate review "is essentially precluded" under the small claims procedure, an EAJA application is due "within 30 days of the Board's final disposition." *Timber Rock Reforestation*, AGBCA 97-117-10, 97-2 BCA ¶ 29,122, at 144,892, *reconsideration denied*, 98-1 BCA ¶ 29,360 (1997). WTM's EAJA petition, filed within thirty days of the date upon which WTM received the reconsideration decision, was not too early and not too late.

Review by the Panel

Typically, under the Board's rules, a panel of three judges, one of whom presides, is assigned to decide contract dispute cases. *See* Board Rule 1(d) (48 CFR 6101.1(d)). Under the small claims procedure that WTM elected, however, a single board judge, rather than a three-judge panel, decides the appeal. As one of our predecessor boards held, there is nothing inherent in the CDA's small claims procedure that would limit the board's "ability to consider an EAJA cost application relating to the case." *DRC Corp. v. Department of Commerce*, GSBCA 15172-C(14919-COM), 00-1 BCA ¶ 30,841, at 152,228 n.1. Nevertheless, because entitlement to elect the small claims procedure arises out of the CDA, the board has historically not applied that election to EAJA claims, even when filed in a small claims procedure case. As a result, even though merits decisions in small claims procedure cases are issued by a single judge, decisions on EAJA claims in those cases have routinely involved the full three-judge panel. *See, e.g.*, *Michael C. Lam v. General Services Administration*, CBCA 1472-C(1213), 09-2 BCA ¶ 34,227; *NVT Technologies, Inc. v.*

General Services Administration, GSBCA 16195-C(16047), 03-2 BCA ¶ 32,401; *Giancola & Associates v. General Services Administration*, GSBCA 12305-C(12128), 93-3 BCA ¶ 26,146; *Sixth & E Associates*, GSBCA 9165-C(8914), 88-3 BCA ¶ 21,089. Following that practice, the full three-judge panel is addressing WTM's EAJA claim here.

The Merits of WTM's EAJA Request

Under EAJA, the Board "shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the [Board] finds that the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1). WTM meets EAJA's definition of a "party," as the corporate appellant did not have a net worth of more than $7 million and did not employ more than 500 employees when it filed this appeal. *See id.* § 504(b)(1)(B)(ii). Further, WTM is a "prevailing party" in light of the Board's entry of an enforceable judgment in WTM's favor on some issues in the appeal "that created a 'material alteration of the legal relationship of the parties'" and achieved some of the benefit sought. *Richter Developments, Ltd. v. General Services Administration*, CBCA 6060-C(5449), 18-1 BCA ¶ 37,138, at 180,830 (quoting *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 602-04 (2001)).

Having satisfied these prerequisites, WTM would be entitled to fees and other expenses unless the position of the agency in this appeal was substantially justified. *See* 5 U.S.C. § 504(a)(1). An agency's position "means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based." *Id.* § 504(b)(1)(E). If that position has "a reasonable basis in law and fact to a degree that could satisfy a reasonable person," it will be deemed "substantially justified" for purposes of EAJA. *Allen Ballew General Contractor, Inc. v. Department of Veterans Affairs*, CBCA 3-C(VABCA 6987E), et al., 07-2 BCA ¶ 33,653, at 166,636. In making that evaluation, we look at the "case as an inclusive whole, rather than as atomized line-items." *Commissioner, Immigration & Naturalization Service v. Jean*, 496 U.S. 154, 162 (1990); *see Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) (deciding substantial justification by looking at "the entirety of the government's conduct and mak[ing] a judgment call whether the government's overall position has a reasonable basis in both fact and law"). "[T]hat the [word] 'position' is . . . denominated in the singular . . . buttresses the conclusion that only one threshold determination for the entire civil action," rather than an issue-by-issue analysis, "is to be made." *Jean*, 496 U.S. at 159.[2]

[2] WTM asks that we factor its financial struggles as a small business status into this part of the EAJA analysis. "The financial state of the prevailing party, however, is not

We find that the USFS's position was substantially justified. The Board denied the bulk of WTM's monetary requests, finding that what WTM characterized as an improper termination for convenience (T-for-C), which WTM argued should entitle it to reallocate its fixed costs across the acreage remaining under its contract, never happened. Instead, the agency sent WTM a proposed bilateral modification in April 2017 through which the USFS proposed to eliminate some acreage from WTM's mastication contract, but WTM never signed it, and the USFS never issued it unilaterally. As a result, the T-for-C that WTM was challenging never happened. Eventually, months later (in September 2017), the USFS actually effectuated a T-for-C, but WTM made a point at the hearing of this matter that it was not basing its monetary claim on that T-for-C, and WTM did not reference that T-for-C in its claim. In such circumstances, unable to look to the September 2017 T-for-C that the USFS actually issued, we could find no basis for reallocating WTM's fixed costs or awarding WTM the bulk of the costs that it was claiming. Plainly, given its success, the USFS was substantially justified in defending against the claim that was the main focus of WTM's appeal. We also denied WTM's claims relating to the agency's alleged mismeasurement of acreage worked, mismeasurement of acreage originally available, delays caused by abnormally bad weather, and consulting fees, and we dismissed WTM's complaint about its interim report in the Contractor Performance Assessment Reporting System (CPARS) for lack of jurisdiction.

The only part of WTM's appeal upon which we granted relief was on its complaint about blocked access to a road in late April and early May 2017, over which the parties had a factual disagreement. In our merits decision, we found it more likely than not, based upon a preponderance of the evidence, that WTM had been affected by blocked access to a service road and awarded WTM $4008.32 for damage resulting from that blocked access. Nevertheless, WTM's evidence and explanation in support of this claim were less than crystal clear, and we found resolution of this claim in WTM's favor a close call. In light of that factual confusion, coupled with the firm belief of a USFS witness who had worked on-site and had extensive knowledge of the mastication area that there was no blocked access road, we find substantial justification in the USFS's defense of this claim.

In our original decision, we also denied, for lack of jurisdiction, the USFS's setoff request for what essentially amounted to reprocurement costs, costs that the USFS has not yet quantified and has not yet incurred. WTM focuses mostly on this setoff request in its

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relevant in determining substantial justification. Because the EAJA itself defines which parties are eligible for EAJA fee awards, [a tribunal] may not consider whether a party who otherwise meets the statutory threshold 'needs' fees in order to litigate." *United States v. 515 Granby, LLC*, 736 F.3d 309, 317 (4th Cir. 2013).

EAJA petition, making it sound as though that issue was central to WTM's case development. Yet, that setoff request, although raised as an affirmative defense in the USFS's answer to WTM's complaint, was not mentioned in the parties' pre-hearing briefing, did not play a significant (if any) part in the discovery that became a part of the record and that the Board reviewed, and was barely touched upon at the hearing. It should have been obvious from the outset that, without a contracting officer's decision asserting entitlement to reprocurement costs, the Board lacked jurisdiction to entertain any such request, *see Sharman Co. v. United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993); 41 U.S.C. § 7103(a)(4), and WTM easily could have asked, but did not ask, us to dismiss that setoff request at an early stage of proceedings.

WTM cannot properly focus an EAJA request on an issue that was tangential to its litigation and on which it spent little, if any, time. The majority of tribunals have "reject[ed] the view that *any* unreasonable position taken by the government in the course of litigation automatically opens the door to an EAJA fee award." *Roanoke River Basin Association v. Hudson*, 991 F.2d 132, 139 (4th Cir. 1993); *see CEMS, Inc. v. United States*, 65 Fed. Cl. 473, 478 (2005) ("This court . . . approaches the plaintiff's entitlement to EAJA fees by reviewing the government's overall position, without requiring that each and every government position be substantially justified."). Whether "an unreasonable stance taken on a single issue . . . undermine[s] the substantial justification of the government's position . . . can be answered only by looking to the stance's effect on the entire civil action." *Roanoke River Basin*, 991 F.2d at 139; *see Equal Employment Opportunity Commission v. Memphis Health Center, Inc.*, No. 11-6426, et al., 526 F. App'x 607, 615 (6th Cir. 2013) ("Upon determining that the position of the government was justified as to the age discrimination claim but not the retaliation claim, the court should have determined what impact that dichotomy had on the government's case as a whole."). Here, considering the USFS's litigation position and conduct as a whole, we do not find that the USFS's assertion of this little-referenced affirmative defense undermines the overall substantial justification of its litigation position.

Decision

For the foregoing reasons, WTM's EAJA application is **DENIED**.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge