

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access)
to Justice Act --)
)
SAWADI Corporation) ASBCA No. 52973
)
Under Contract No. DACW31-99-D-0015)

APPEARANCE FOR THE APPELLANT: Mr. David A. Anderson, PE
Vice President

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
Terri A. Davis, Esq.
Acting District Counsel
Carl Jeffrey Lorenz, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Baltimore

OPINION BY ADMINISTRATIVE JUDGE REED
ON GOVERNMENT MOTION TO DISMISS

The administrative adjudication by the Board underlying this Equal Access to Justice Act (EAJA) application was an appeal to the Corps of Engineers Board of Contract Appeals, docketed as ENG BCA No. 6529, under the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-13 (CDA). When the ENG BCA was merged into the Armed Services Board of Contract Appeals on 12 July 2000, the appeal was redocketed as ASBCA No. 52973. In the underlying CDA appeal, SAWADI Corporation (SAWADI or applicant) elected the Board's accelerated procedure under Board Rule 12.3.¹

The parties submitted to the Board a "Settlement Stipulation," signed for appellant on 2 August 2000, and for the Government on 10 August 2000, by which the parties agreed, among other things, that the claim underlying ASBCA No. 52973 had been settled, that the Government would pay a specified sum of money, and that the appeal could be dismissed. Accordingly, by Dismissal Order (15 August 2000), the Board dismissed the appeal "with prejudice subject to reinstatement only in the event the settlement is not consummated." According to a certified mail receipt in the Board's files, SAWADI received its copy of the Dismissal Order on 17 August 2000.

¹ Rules 12.3 under ENG BCA and ASBCA rules are substantially identical.

SAWADI submitted an application under the EAJA by letter dated 12 October 2000, mailed on 16 October 2000 (60 days after receipt of the Board's Dismissal Order), and received by the Board on 18 October 2000. The Board initially questioned the timeliness of the application by letter to both parties. Subsequently, the Government submitted a "Motion *Ne Recipiatur* or in the Alternative Motion for Summary Judgment." The motion is for dismissal for lack of jurisdiction based on the alleged late EAJA application. In various alternatives, the Government seeks summary judgment based on averred release and discharge, asserted deficiencies in the content of the EAJA application, and/or an alleged lack of recoverable expenses.

Applicant contends that the underlying CDA appeal was not finally disposed of until the parties' settlement was finalized by payment of the settlement amount by the Government on 20 September 2000. Applicant construes its settlement agreement with the Government to mean "that the settlement would not be finalized until payment was made." Applicant similarly interprets the Board's Dismissal Order, by its reference to the settlement being "consummated." Therefore, reasons SAWADI, its EAJA application was timely as measured from 20 September 2000.

DECISION

The EAJA, at 5 U.S.C. § 504(a)(2), requires that an applicant file its application for attorneys fees and other expenses "within thirty days of a final disposition in the adversary adjudication." The 30-day period, a jurisdictional prerequisite, begins to run when the adjudicative decision has become final and may not be appealed. *J.M.T. Mach. Co. v. United States*, 826 F.2d 1042, 1047-48 (Fed. Cir. 1987); *U.S. Gen., Inc.*, ASBCA No. 48528, 98-2 BCA ¶ 29,867 at 147,783. The Board's EAJA Interim Procedures, ¶ 6, provide that an application may be filed not later than 30 days after the disposition of the CDA appeal has become final and no longer appealable. Final disposition by the Board of the CDA appeal occurred as to applicant when SAWADI received the Board's Dismissal Order, not when the parties settled the claim underlying the appeal, when the Government paid the amount agreed in the settlement, or when applicant received that payment. *Ideal Elec. Sec. Co.*, ASBCA No. 49547, 99-1 BCA ¶ 30,228 at 149,544.

SAWADI argues that the Board left the door open by its reference in the Dismissal Order to the settlement being "consummated." Applicant contends in its responses that an unreasonable time passed after issuance of the Dismissal Order and before SAWADI's receipt of the payment due under the settlement agreement between the parties. However, the applicant, as appellant under the CDA appeal, did not seek the Board's intervention in the settlement consummation process or to obtain satisfaction of the terms of the settlement agreement between the parties. SAWADI did not request that the Board reinstate the appeal.

Whether the settlement agreement was performed timely is not before us. The Board's Dismissal Order dismissed the CDA appeal with prejudice based on the parties' settlement. Thereafter, the Board took no further action as nothing remained for adjudication or for appeal to higher judicial authority. The Dismissal Order was the Board's final action in the CDA appeal. The Board retained, but did not employ, the discretion to reinstate the appeal if the settlement agreement was not performed. The only reasonable construction or interpretation of the Board's Dismissal Order is that it was final.

Accordingly, the EAJA application would have been timely if filed on or before 30 days after SAWADI's receipt of the Board's Dismissal Order, that is, not later than 18 September 2000.² Therefore, the application, mailed on 16 October 2000, 60 days after receipt by applicant of the Dismissal Order, was not timely filed and must be dismissed. The Board lacks the jurisdiction either to consider the application or to extend the time within which the application might be filed. Given our lack of jurisdiction, we do not decide the Government's alternative theories in the motion addressing the merits of the application.

Dated: 6 September 2001

STEVEN L. REED
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

² Thirty days after SAWADI received the Board's Dismissal Order on 17 August 2000, was Saturday, 16 September 2000, a day on which the Board was closed. The next business day was Monday, 18 September 2000.

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals on an application for fees and other expenses incurred in connection with ASBCA No. 52973, Appeal of SAWADI Corporation, rendered in accordance with 5 U.S.C. § 504.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals