

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DISMISSED FOR LACK OF JURISDICTION:
May 13, 2004

GSBCA 16385-C(15535)

AIRPORT BUILDING ASSOCIATES,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

David R. Nachman of Brown & Nachman, L.L.C., Kansas City, MO, counsel for Applicant.

Catherine Crow, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **HYATT**.

NEILL, Board Judge.

Respondent has moved that we dismiss this case for lack of jurisdiction. In the alternative, counsel asks that we stay proceedings in this case until the period for seeking review of the affirmance of the Board's decision in GSBCA 15535 has expired.

Government counsel states that the application for costs and fees currently before us has been filed prematurely. Counsel further points out that Board Rule 135(b), which governs the timing for submission of such applications, requires submission only after final disposition in the underlying appeal. Under this rule, when a Board decision has been appealed, as in this case, final disposition does not occur until after the time for petitioning the Supreme Court for certiorari has expired. Counsel for Airport Building Associates (ABA) opposes the motion on the ground that it is inconceivable that the Government will successfully petition the Supreme Court for certiorari.

On its face, Board Rule 135(b) does not expressly forbid the filing of a petition for costs and fees prior to final disposition in the underlying appeal. Rather, it sets out the time

beyond which petitions cannot be timely filed, namely, "no later than 30 calendar days after final disposition in the underlying appeal." Rule 135(b), 48 CFR 6101.35(b)(2003). Actual language in the Equal Access to Justice Act (EAJA), however, makes it clear that the petition must be filed within the thirty days following final disposition.

The Act states in pertinent part:

(a)(2) A party seeking an award of fees and other expenses shall, within 30 days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section

5 U.S.C. § 504(a)(2) (2000) (emphasis added).

With regard to this issue of precisely when an application for costs and fees under EAJA should be submitted, we have previously written:

The thirty-day period for filing an application for fees under EAJA is jurisdictional; it cannot be waived by the Board or the parties. J.M.T. Machine Co. v. United States, 826 F.2d 1042, 1047 (Fed. Cir. 1987); Dole v. Phoenix Roofing, Inc., 922 F.2d 1202, 1206 (5th Cir. 1991). Moreover, an application filed before the "final disposition" has been held to be premature, Mohamed, GSBCA 9547, 89-2 BCA ¶ 21,885, *aff'd*, 925 F.2d 1478 (Fed. Cir. 1991) (table); one filed more than thirty days after the final disposition will be deemed "untimely." J.M.T. Machine Co., 826 F.2d at 1048.

Griffin Services, Inc. v. General Services Administration, GSBCA 11735-C(11171), 94-2 BCA ¶ 26,624, at 118,752 (1993).

The period for submitting to the Supreme Court a petition for a writ of certiorari is ninety days after entry of judgment. Sup. Ct. R. 13.1. In this case, therefore, if no petition is filed, final disposition of the underlying appeal will occur with the expiration of the ninety-day period immediately following March 5, 2004, the day on which the Court of Appeals affirmed the Board's decision in favor of ABA. It is at that point in time, then, that the thirty-day period for filing an EAJA petition will begin. Counsel may re-file simply by advising the Board and opposing counsel in writing that he is doing so. The notice should incorporate by reference the materials previously submitted in this case. The Board will then transfer these materials to the case file for the re-submission.

The Government shall file its comments on the re-submission within ten days of notice that the petition has been re-filed. This should provide counsel with sufficient time to prepare a response, since an advance copy of the petition has already been provided and counsel will presumably know well in advance of the expiration of the ninety-day period whether the Department of Justice plans to seek a writ of certiorari.

Decision

The Government's motion to dismiss is **GRANTED**. This case is dismissed for lack of jurisdiction. Given the conclusion reached in this decision, we do not reach respondent's motion in the alternative for a stay of proceedings.

We concur:

EDWIN B. NEILL
Board Judge

STEPHEN M. DANIELS
Board Judge
Board Judge

CATHERINE B. HYATT