DON DWYER DEVELOPMENT CO.,	)	**AGBCA No. 2003-162-10**
	)	
Applicant	)	
	)	
Application for Attorneys'	)	
Fees and Expenses Under	)	
the Equal Access to Justice Act	)	
	)	
Representing the Applicant:	)	
	)	
Wesley R. Higbie, Esquire	)	
Law Offices of Wesley R. Higbie	)	
425 California Street, 19th Floor	)	
San Francisco, California 94105	)	
	)	
Representing the Government:	)	
	)	
James L. Rosen, Esquire	)	
Office of the General Counsel	)	
U. S. Department of Agriculture	)	
33 New Montgomery, 17th Floor	)	
San Francisco, California 94105-4511	)	

DECISION OF THE BOARD OF CONTRACT APPEALS

February 10, 2004

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge POLLACK. Separate concurring opinion by Administrative Judge VERGILIO.

This timely appeal is from a denial of an Application for Fees and Costs submitted to the Board on March 20, 2003 by the Applicant, Don Dwyer Development Co., of Forbestown, California. The Application is for fees and costs incurred in litigating the matter of Don Dwyer Development Co., AGBCA No. 2000-107-1, 02-2 BCA ¶ 31,980; Don Dwyer Development Co., AGBCA No. 2002-153-R, 03-1 BCA ¶ 32,104, recond. denied. The Application is made pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, as amended by Pub. L. No. 99-80, 99th Congress. In the

Board decision on Dwyer's appeal, the Board allowed Dwyer recovery, however, not at the full amount which it sought. Neither Dwyer nor the Forest Service (FS) appealed the Board decision. In late April 2003, the Board was advised by the FS that the parties had initiated settlement discussions. In May 2003, the FS filed a reply to Applicant's application, where the FS took the stance that its position was substantially justified and as such Applicant was not due recovery. The parties however continued discussions. On July 7, 2003, Applicant filed a reply to the FS opposition, as well as a supplemental declaration from Appellant counsel. The parties then requested additional time to continue discussions. By letter of September 15, 2003, the Board was notified by Applicant's counsel that the parties had reached an agreed settlement of all fees and costs in the Application matter and that therefore, Applicant was withdrawing Applicant's Application for Fees and Costs under the Equal Access to Justice Act. Based on that withdrawal, the matter is dismissed and nothing further should need be said.

However, notwithstanding the fact the parties have chosen to settle, that Applicant has submitted a letter withdrawing its Application in accord with that settlement, and that we have written a dismissal (the administrative process by which we remove a matter from our docket), our colleague has chosen to write a concurring opinion. This concurrence on a jointly requested dismissal is both inappropriate and unwarranted. It introduces legal issues which neither party has addressed nor inserted into this uncontested request. All the Board had been asked is to effectuate the parties' request to remove the matter from the Board's docket. We have not been asked for a legal opinion. Parties are free to settle a case as they see fit. The Board dismissal process is not a check on the substance or form of such settlements and should not be. How the parties choose to settle and what dollars they include is not for the Board to second guess nor is it appropriate for us to provide either party with legal advice on a matter which they have mutually agreed to resolve. The concurrence interposes itself where it does not belong. All we are doing here is dismissing an action that was placed before us.

This dismissal, even with the concurrence, removes the matter from our docket. Notwithstanding the concurrence, we see no impediment to settlement in this matter and to the extent that the concurrence indicates otherwise that is not the policy or view of the majority of this Board.

DECISION

The matter has been settled by the parties. Applicant has requested the withdrawal of its Application. The matter before us is dismissed.

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HOWARD A. POLLACK
Administrative Judge

Concurring:

ANNE W. WESTBROOK
Administrative Judge

Concurring opinion by Administrative Judge VERGILIO.

I concur with the majority that, based upon the applicant's request to withdraw its application, the matter should be dismissed. Lacking a viable application, the Board need not resolve the pending Government motion; there is nothing more for the Board to do.

I write separately so as to highlight the relevant regulations, and how the applicant and Government may be frustrated in effectuating the settlement. Departmental regulations (applicable to Equal Access to Justice Act (EAJA) requests; Board Rule 35) expressly recognize that the parties "may jointly file a statement of intent to negotiate a settlement," 7 CFR 1.195(b), and that the "applicant and agency counsel may agree on a proposed settlement of the award before final action on the application," 7 CFR 1.198 (2003) (emphasis added).[1] A proposed settlement, which is not a final settlement or resolution, does not diminish the requirement for the Board to act in accordance with the regulation so as to permit payment using Government funds. 7 CFR 1.199 to 1.201. In particular, the regulation specifies what a Board decision on an application shall include, 7 CFR 1.200 (Decision). Additionally, regulation dictates that an "applicant seeking payment of an award shall submit to the head of the agency administering the statute involved in the proceeding a copy of the final decision of the Department granting the award," 7 CFR 1.203 (Payment of award). The dismissal does not grant the award. With the withdrawal of the application and the dismissal of this matter, the basis for payment under the regulation does not exist.

JOSEPH A. VERGILIO
Administrative Judge

[1] The Board has not been asked to decide which version of the regulations (those in effect at the time of the litigation or those effective October 11, 2002, or a combination thereof) are applicable. For purposes of these comments, there is no substantive difference between the 2002 and 2003 printed versions of the CFR.

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