UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

REQUEST FOR CLARIFICATION GRANTED:
September 8, 2022

CBCA 6149, 6396, 7071, 7082, 7083, 7085

ALARES CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Douglas L. Patin and Lee-Ann C. Brown of Bradley Arant Boult Cummings LLP, Washington, DC, counsel for Appellant.

Jennifer L. Hedge, Office of General Counsel, Department of Veterans Affairs, Pittsburgh, PA; and Kathleen Ellis Ramos, Office of General Counsel, Department of Veterans Affairs, Batavia, NY, counsel for Respondent.

Before Board Judges **RUSSELL**, **DRUMMOND**, and **ZISCHKAU**.

DRUMMOND, Board Judge.

ORDER

These consolidated appeals arise from a contract between appellant, Alares Construction, Inc. (Alares), and respondent, the Department of Veterans Affairs (VA), for construction work at the VA's Medical Center Intensive Care Unit in Providence, Rhode Island. These appeals are currently scheduled for hearing in December 2022. Alares has requested clarification on whether Rule 68 of the Federal Rules of Civil Procedure (FRCP), which deals with offers of judgment, applies to proceedings before the Board. Alares tells

us that the VA has provided it with what the VA calls an "offer of judgment" and that, if Alares does not accept it, the VA expects to request an award of costs against Alares if, ultimately, the Board enters judgment in Alares' favor in an amount less than the amount of the offer of judgment. In its response to Alares' request for clarification, the VA asks that we confirm that FRCP 68 may be used by the Board in limiting attorney fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2018). Accordingly, we must decide here whether to apply FRCP 68 and, if so, in what context.

Under FRCP 68, "a party defending against a claim may serve on an opposing party" at least fourteen days before the date set for trial "an offer to allow judgment on specified terms, with the costs then accrued." FRCP 68(a). "If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred [by the offeror] after the offer was made." FRCP 68(d).

In its response to Alares' request for clarification, the VA indicated that it is seeking to use FRCP 68's offer of judgment rule to preclude an award of attorney fees under the EAJA against the VA if Alares is ultimately successful in obtaining a judgment in its favor. Under the EAJA, the Board may award costs "to a prevailing party other than the United States" in appropriate circumstances "unless the [Board] finds that the position of the agency was substantially justified or that special circumstances make an award unjust." *Id.* § 504(a). As recognized in the decisions that the VA cited in its response to Alares' request for clarification, in evaluating substantial justification, we can take into account settlement offers that the agency made during litigation, including where those settlement offers exceed the amount that the appellant was awarded. *See Dream Management, Inc. v. Department of Homeland Security*, CBCA 5739-C(5517), 17-1 BCA ¶ 36,916 (denying EAJA fees and costs after finding the agency's position was substantially justified because appellant rejected a favorable settlement offer and continued to pursue damages that were excessive, lacked support, and included dollar amounts for items not awarded by the Board); *McTeague Construction Co. v. General Services Administration*, GSBCA 15479-C(14765), 01-2 BCA ¶ 31,462, at 155,335, *motion for reconsideration denied*, 01-2 BCA ¶ 31,526 (denying recovery of attorney fees and costs incurred after appellant rejected a settlement offer). To the extent that the VA has offered Alares more than Alares ultimately obtains from the Board through continued litigation, the Board may take that fact into account in any request for an award under the EAJA that Alares (if otherwise eligible) might make.

The VA's response, however, did not address Alares' concern that the VA, under FRCP 68's cost-shifting provision, might seek an affirmative cost award against Alares if any judgment on the merits by the Board awards Alares less than the amount of the offer of judgment. For us to assess costs against an appellant, we must have statutory authorization to do so. *See Mountain Valley Lumber, Inc. v. Department of Agriculture*, CBCA 95, 07-2 BCA ¶ 33,611, at 166,447 ("A board of contract appeals is not a court . . . and therefore does

not have all the inherent authority of a federal court." (quoting *A&B Ltd. Partnership v. General Services Administration*, GSBCA 15208, 05-1 BCA ¶ 32,832, at 162,445 (2004))). To the extent that the VA might attempt to shift costs in that manner in the course of this litigation, the VA has not yet identified any statutory basis on which the Board could make an award of costs against an appellant.

Further, the EAJA allows for an award of costs and attorney fees to appellants in appropriate circumstances, but it does not contain any provision that would allow the Board to award costs to the Government. *See* 5 U.S.C. § 504(a) (allowing the Board to award costs "to a prevailing party other than the United States" in appropriate circumstances). Similarly, we see nothing in the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), that would authorize us to assess costs against an appellant.[1] Unless and until the VA identifies a statutory basis upon which we could shift the Government's costs to an appellant, we need not further address any argument that the VA could attempt to obtain a cost award from the Board against Alares.

Decision

The request for clarification is **GRANTED**. The Board will apply FRCP 68 as explained herein.

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

[1] In *Toombs & Co.*, ASBCA 34590, et al., 91-1 BCA ¶ 23,403, at 117,433 (1990), the Armed Services Board of Contract Appeals (ASBCA) found it unnecessary to decide whether the CDA authorized the boards of contract appeals to make an award of costs following an unaccepted offer of judgment. It held that, even if it did, the ASBCA would have to provide notice to parties through promulgation of a rule allowing for such cost awards before it could exercise that authority. We note that, like the ASBCA, the Board's Rules contain no provisions allowing the Board to make cost awards against appellants following unaccepted offers of judgment.

We concur:

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge