UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED: October 27, 2020

CBCA 6841

MIDLAND LANGUAGE CENTER,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Tatjana Markovic, President of Midland Language Center, St. Louis, MO, appearing for Appellant.

Mary A. Mitchell and Laetitia Coleman, Office of General Counsel, Department of Veterans Affairs, Houston, TX, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **ZISCHKAU**, and **CHADWICK**.

CHADWICK, Board Judge.

While we understand its importance to the parties, our decision in this case calls to mind the expression "a long road to a small house." Midland Language Center (MLC) and the Department of Veterans Affairs (VA) disagree about how to interpret a contract for sign language interpreter services. The contract expired, however, after the parties agreed to submit this appeal on the record without a hearing. As a result, we decline on prudential grounds to decide whose interpretation is correct. To reach that point, however, we first consider and reject a jurisdictional objection raised by VA.

Facts

We find the following facts based on the record evidence. VA awarded the contract to MLC in October 2016. When this appeal was filed in June 2020, MLC was performing a third option year. The schedule of prices stated that MLC would provide American Sign Language (ASL) translation "for hearing-impaired employees in accordance with the SOW [statement of work]." As pertinent here, the statement of work identified ten ordering locations associated with the Michael E. DeBakey Veterans Affairs Medical Center in Houston, Texas, and provided, "Contractor shall be able to provide an ASL interpreter to the requested location within a **two (2) hour** notice. If an interpreter is not available and cannot provide services in person, an ASL interpreter may provide services telephonically." The SOW further stated, "The contractor will determine within a reasonable time, normally within one (1) hour of the request for services, whether or not an interpreter can fulfill the request for assignment."

On January 6, 2020, at approximately 11:46 a.m., an ordering facility emailed MLC a request for "onsite ASL interpreter services only" at 2:00 p.m. the following day. The email stated, "**We are requesting an interpreter be present in person for this appointment**. Our facility is not equipped for telephonic interpreting." At approximately 1:05 p.m., MLC's president replied by email, "Our system notified me of non-availability for tomorrow. If there is any update I will let you know by the end of the business day today." MLC now argues that it advised the ordering location in the email "that MLC onsite Interpreting was not available due to [an] unforeseeable change in schedule and that the Telephonic Interpreters are available for this assignment and 24/7 as per contract section B6(1)(b)," but that is not, in fact, what the email said. We quoted the email in full above.

MLC did not provide an update that day. Appeal file exhibit 13 shows that VA ordered ASL translation services from a different vendor for the appointment on January 7. On January 8, the VA contracting officer issued a contract discrepancy report (CDR) stating that MLC "failed to provide required services," which "subjects the Contractor to the default provision of th[e] agreement."[1] The report described the problem as follows:

> Government requested services in advance of 24 hours providing contractor ample time for onsite interpreter services. The government request was not immediate or required the contractor to provide services within the two hours or utilize the alternate method to provide services telephonically. Contractor must not misinterpret the two hour response notice per Section SOW 1(b) as

[1] In its brief, VA calls this document a "deficiency report," but the title of the form is "Discrepancy Report."

> the permanent alternate method to provide services. The two hour response notice is for government urgent or immediate request and should not be utilized or interpreted as an alternative method for each request within 24 hours.

A week later, on January 15, MLC sent the contracting officer a two-page letter with the subject line, "DISPUTE: unsubstantiated contract discrepancy report." The letter read in pertinent part:

> DISPUTE DESCRIPTION: Midland Language Center, dba, here within demands a correction of contract discrepancy report as the contract allows for 1) scheduling on site and 2) scheduling over the phone[.]
>
> The Contractor has met contract requirements as they have indicated no availability on site due to change in schedule and VA providing an unclear location (see below) and there cannot be a contract discrepancy issued. The contractor has met 100 percent coverage per contract requirements.

With respect to the "change in schedule," MLC alleged in the letter that VA "rescheduled" the January 7 appointment to January 13. We find that this was not the case. The January 13 appointment, while apparently for the same patient, was at a different facility.

On March 12, 2020, the contracting officer issued a four-page "final decision" with the header, "RE: Your Claim dated January 15, 2020." Despite styling this letter as a final decision, the contracting officer concluded that MLC "failed to submit a proper claim" because MLC's dispute letter "did not include a request for a dollar amount nor did MLC request interpretation of any contract term or condition." The contracting officer added, "MLC's request to have the CDR rescinded is **DENIED**."

MLC filed this appeal in June 2020. The notice of appeal said in part, "Midland Language Center is **not** bound by contract to provide only onsite interpreters. We are bound to provide either **onsite or over the phone services**. Midland Language Center provides 100 percent coverage with their onsite and over the phone interpreting systems." The presiding judge waived the requirements of a complaint and answer. The parties agreed to submit the appeal on the record under Board Rule 19 (48 CFR 6101.19 (2019)) and they filed briefs. On September 30, 2020, the day before MLC filed its Rule 19 brief, the contract expired after VA did not exercise the option for the fourth option year.[2]

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[2] Both parties advised us in supplemental filings in October 2020 that VA did not exercise the option.

Discussion

We first address whether the dispute about the discrepancy report is properly before us on appeal. VA argues that we lack jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 7101–7109 (2018), because "MLC requested the rescission of a CDR and nothing more. That is not a remedy available to MLC at this Board nor is such a request, standing alone, sufficient to trigger the jurisdiction of this Board." In response, MLC argues, somewhat against interest, "The dispute is not about a financial claim or any other claim." MLC's jurisdictional argument was not signed by a lawyer and is not entirely clear to us, but it seems to be that we have jurisdiction based on "an action taken by the VA Medical Center Houston against the Contractor/Appellant" in the contracting officer's decision.[3]

We find that MLC presented a dispute about the meaning of the contract in a nonmonetary claim. *See Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1268–71 (Fed. Cir. 1999); *Kiewit-Turner, a Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 14-1 BCA ¶ 35,705. Although, as noted above, we do not accept all of MLC's factual allegations in its claim letter, that letter shows that MLC was arguing, at least in part, that the discrepancy report was unwarranted because "the contract allows for 1) scheduling on site and 2) scheduling over the phone," so "there cannot be a contract discrepancy issued" merely because MLC "indicated no availability on site." The contracting officer noted in his decision that he understood that "MLC demands a correction of [the] contract discrepancy report as the contract allows for 1) scheduling on site and 2) scheduling over the phone." MLC then made the crux of the contractual dispute clearer in its notice of appeal, asserting, "Midland Language Center is **not** bound by contract to provide only onsite interpreters."

All along, MLC has sought, at least in part, "as matter of right," an "interpretation of contract terms" that would nullify the discrepancy report—i.e., MLC has asserted a nonmonetary claim. 48 CFR 2.101 (2019) ("claim" definition); *see H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1564–65 (Fed. Cir. 1995) (applying the regulatory definition of "claim"). VA denied the nonmonetary claim, giving rise to jurisdiction at the Board. *E.g.*, *Garrett v. General Electric Co.*, 987 F.2d 747, 749–50 (Fed. Cir. 1993); *Maryland Enterprise, L.L.C. v. United States*, 91 Fed. Cl. 511, 522–23 (2010).

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[3] The Board is more generous in construing arguments by nonlawyer representatives than those by lawyers. *E.g.*, *ITS Group Corp v. Department of Agriculture*, CBCA 6621, 20-1 BCA ¶ 37,602. In any event, we must evaluate our subject matter jurisdiction without deference to the parties' positions. *See Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986).

Under *Securiforce International America, LLC v. United States*, 879 F.3d 1354 (Fed. Cir. 2018), we must confirm that MLC's claim is not actually an uncertified or unquantified monetary claim that is only styled as nonmonetary, over which we would lack jurisdiction. *Id*. at 1360; *Duke University v. Department of Health & Human Services*, CBCA 5992, 18-1 BCA ¶ 37,023. We are satisfied that it is not. No one suggests, and we see no evidence, that MLC has lost money as a result of the negative report for which it could demand relief.

The stumbling block for MLC is *Alliant Techsystems*. That decision teaches that, upon finding jurisdiction over a non-money claim, we are "free," before addressing the claim, to consider prudential concerns, "including whether the claim involves a live dispute between the parties, whether a declaration will resolve that dispute, and whether the legal remedies available to the parties would be adequate to protect the parties' interests." 178 F.3d at 1271; *see also Kiewit- Turner*, 14-1 BCA ¶ 35,705 ("*Alliant* has set forth three criteria for a court or board to consider . . . ."). Here, the dispute presented in the claim is not "live."[4] The contract has ended. The same dispute cannot recur in the same way. The disagreement might still be relevant if VA makes reference to it in the Contractor Performance Assessment Reporting System (CPARS), but neither party says that has happened, and we will not speculate that it will happen. *See DynCorp International, LLC*, ASBCA 62227, 2020 WL 5880267 (Aug. 28, 2020); *see also CompuCraft, Inc. v. General Services Administration*, CBCA 5516, 17-1 BCA ¶ 36,662 ("[T]he Board may review [a] claim that [CPARS] ratings . . . were arbitrary and capricious."). VA argues that the case is "moot," but we are not prepared to find that "events have completely and irrevocably eradicated" the interpretive disagreement underlying the claim. *RMTC Systems*, GSBCA 8732-P, 87-1 BCA ¶ 19,557 (1986), *quoted in Avue Technologies Corp. v. Agency for Global Media*, CBCA 6752, 20-1 BCA ¶ 37,639. Instead, we simply find that prudence counsels us not to resolve the claim.

Decision

The appeal is **DISMISSED** on prudential grounds with no decision on the merits.

Kyle Chadwick

KYLE CHADWICK
Board Judge

[4] Both parties addressed this issue in supplemental filings in October 2020.

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge