UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: June 1, 2007

CBCA 605, 606, 607

FRANK BONNER AND KEN ALPIN,

Appellants,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Donna U. Grodner and Charlotte C. McDaniel of Grodner and Associates, Baton Rouge, LA, counsel for Appellants.

Jean B. Hardin and Mary A. Mitchell, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **GILMORE**, **POLLACK**, and **SOMERS**.

SOMERS, Board Judge.

These appeals involve disputes between Frank Bonner and Ken Alpin (appellants or contractors) and the Federal Emergency Management Agency (FEMA or Government). These disputes arose from three separate contracts for mobile home trailer pads in Louisiana.[1] For the reasons that follow, we find that this Board does not possess jurisdiction over these appeals because appellants did not file claims with the contracting officer prior to pursuing their appeals.

[1] These appeals have not been consolidated. However, because the jurisdictional issue is the same for each appeal, we have addressed all three appeals in this decision.

Background

FEMA awarded three contracts to appellants for lease of temporary housing units located in Louisiana in support of the hurricane relief efforts resulting from Hurricanes Rita and Katrina in 2005. Contract HSFE-06-05-P-0090 (CBCA 605) required appellants to provide thirty mobile home lots, later revised to twenty-nine lots. Contract HSFE-06-P-0023 (CBCA 606) required appellants to provide seven lots. The third contract, contract HSFE-06-05-P-6293 (CBCA 607), as revised, required appellants to provide sixty-one lots. Each contract contained "Termination for Convenience" clauses pursuant to the Federal Acquisition Regulation (FAR), 48 CFR 52.249 (1996) (FAR 52.249). In accordance with these regulations, the contractors were required to "submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer," after receiving notice from the contracting officer of the Government's plan to terminate the contracts. FAR 52.249-2(e).

FEMA terminated each of these contracts for the convenience of the Government. The contracting officer advised the contractors that they must submit final invoices to the contracting officer if they believed that the Government owed payments under the lease agreements. Nevertheless, the appellants elected not to submit final invoices to the contracting officer. Instead, they appealed the action terminating the contracts to this Board and requested monetary and injunctive relief. Because the record before the Board does not contain any evidence that appellants submitted any claims to the contracting officer prior to filing the appeals, the Board ordered the parties to brief the issue of whether the Board possesses jurisdiction over the appeals. The parties submitted position papers in accordance with the Board's order.

Discussion

Jurisdiction is a matter over which the Board lacks discretion, as "jurisdiction is an absolute concept; it either exists or it does not." *Universal Canvas, Inc. v. Stone*, 975 F.2d 847, 850 (Fed. Cir. 1992). This Board's jurisdiction, if any, is derived from the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended. Jurisdiction may be challenged by the parties or by the Board on its own motion at any time, and, if jurisdiction is found to be lacking, the Board must dismiss the action. *Universal Canvas,* 975 F.2d at 850. In addition, when jurisdiction is challenged, the appellant bears the burden of establishing jurisdiction. *McNutt v. General Motors Acceptance Corp. of Indiana, Inc.*, 298 U.S. 178, 189 (1936); *United States v. Newport News Shipbuilding and Dry Dock Co.*, 933 F.2d 996, 999 (Fed. Cir. 1991); *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988).

In this framework, the strict limits of the CDA constitute "jurisdictional prerequisites to any appeal." *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004) (citing *Sharman Co. v. United States*, 2 F.3d 1564, 1569 n.6 (Fed. Cir. 1993)). Section 605 of the CDA expressly requires that "[a]ll claims by a contractor against the government. . . shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a); *see also England*, 353 F.3d at 1379. FAR 2.201 defines a claim as "a written demand or assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain. . . ." *See also Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc). The legislative history shows the purpose of requiring contractors to submit written claims is so "government representatives can readily examine and evaluate" contractor claims; otherwise "there is no sound basis for evaluation, negotiation, or legal claim settlement." *Newell Clothing Co.*, ASBCA 24482, 80-2 BCA ¶ 14,774, at 72,917-19 (citing H.R. Rep. No. 95-1118 (1978)).

In the case where a contract is terminated for the convenience of the Government, the contractor may submit a termination settlement proposal within one year from the effective date of termination. FAR 52.249-2(e). A settlement proposal is "a proposal for effecting settlement of a contract terminated in whole or in part, submitted by a contractor or subcontractor in the form, and supported by the data, required by this part." FAR 49.001. Under the FAR, a termination settlement proposal can be a valid claim, so long as it is submitted in writing to the contracting officer for a final decision within the time limits set forth in the FAR. *See Reflectone*, 60 F.3d at 1575.

In this case, the Government contends that appellants failed to file a termination settlement proposal, or, in fact, any written claim for monetary damages with the contracting officer prior to filing these appeals. In response, appellants state categorically that they have been in "constant contact with the contracting officer, Mr. Eddie Morris, during the entirety of this matter, and that during a hearing before a Louisiana state court in a related matter, Ms. Mary Mitchell, an attorney representing FEMA, attended each hearing and received copies of all documents from appellants' counsel." *See* Appellants' Memorandum In Support of Jurisdiction of the Board to Hear This Appeal at 1-2. In addition, appellants argue that the letter from the contracting officer terminating the contracts constitutes the contracting officer's final decision and that, in any event, an appeal to the contracting officer "would have been a vain and useless act because it was his determination to wrongfully terminate the contracts of Mr. Albin and Mr. Bonner," citing *J.E. Bernard & Co. v. United States*, 80 Cust. Ct. 111, 119 (1978). We address each of appellants' arguments in turn.

First, as we noted above, for appellants' submissions to be considered a proper CDA claim, they must include a written demand or assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain and a request for a final

decision. Appellants contend that their contacts with the contracting officer, combined with the court documents provided to counsel, fulfill the requirements for a CDA claim. The CDA is clear that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a). We find that appellants' contacts with the contracting officer and their state court submissions cannot be construed as a written claim for monetary damages under the CDA. Consequently, because the contractors failed to submit written claims to the contracting officer, the contracting officer's letters terminating the contracts cannot be construed as final decisions.

Second, appellants argue that the letter from the contracting officer terminating the contracts constitutes the contracting officer's final decision. This argument fails in two respects. First, the notices issued by the contracting officer terminating the contracts did not decide a claim nor did they state a claim against appellants. *See Armentrout Construction, Inc.*, ASBCA 29118, 84-2 BCA ¶ 17,263, at 85,962 (citing *R.G. Robbins Co.*, ASBCA 26521, 82-1 BCA ¶ 15,643). Second, appellants did not file any claims in writing on which the contracting officer could have issued a decision. The claims as first identified in the notices of appeal and later detailed in the complaints filed with the Board do not satisfy this requirement. *See* at 85,962-63 (citing *Fuel Storage Corp.*, ASBCA 26994, 83-1 BCA ¶ 16,418. Nor do the discussions with the contracting officer substitute for a claim "in writing" and a contracting officer's decision. *See* at 85,963. In sum, termination of a contract for the convenience of the Government is not in and of itself an appealable contracting officer decision within the terms of the CDA. *Larry G. Pyle*, ASBCA 41155, 90-3 BCA ¶ 23,252; *Baranof Mental Health Clinic*, ASBCA 33172, 87-1 BCA ¶ 19,346 (1986); *Naranjo Sales, Inc.*, ASBCA 32872, 86-3 BCA ¶ 19,214. If appellants submit settlement proposals and a dispute ensues, appellants may then take an appeal. *BVR, Inc.*, ASBCA No. 38758, 90-1 BCA ¶ 22,345 (1989).

Finally, appellants state that they did not submit termination proposals because submission of these proposals would have been "vain and useless" actions, and that the law does not require the performance of useless acts, citing *J.E. Bernard*. In *J.E. Bernard*, the plaintiff argued that it should not be required to comply with applicable customs regulations, because compliance would require the performance of useless acts. 80 Cust. Ct. at 119. The United States Customs Court rejected that argument, instead finding the importer had an obligation to comply with the statutorily mandated customs regulations. *Id.* We cannot discern why appellants have cited *J.E. Bernard*, as it clearly provides no support to appellants' arguments. Rather, it is consistent with our holding that the Board cannot exercise jurisdiction where appellants had an obligation to comply with CDA requirements prior to filing appeals with this Board.

Decision

The appeals are **DISMISSED** for **LACK OF JURISDICTION**.

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JERI KAYLENE SOMERS
Board Judge

We concur:

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BERYL S. GILMORE
Board Judge

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HOWARD A. POLLACK
Board Judge