UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: July 6, 2016

CBCA 4995

BASS TRANSPORTATION SERVICES, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Le'Mon J. Bass, III and LaMar Bass, co-owners of Bass Transportation Services, LLC, Belleville, IL, appearing for Appellant.

Neil S. Deol, Office of Regional Counsel, Department of Veterans Affairs, Decatur, GA, counsel for Respondent.

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

CHADWICK, Board Judge.

Bass Transportation Services, LLC (Bass or appellant), provided van transportation to patients of a Department of Veterans Affairs (VA or respondent) medical facility in the St. Louis, Missouri, area. VA terminated Bass's contract for cause in August 2014. In March 2015, Bass submitted a certified claim to the contracting officer for "damages" totaling $1,490,193.62 "[a]s a result of VA's termination and breach." The contracting officer denied the claim in June 2015. Bass filed a timely appeal from that decision.

Although VA has now converted the termination to one for the convenience of the Government, we must dismiss this appeal for lack of jurisdiction, because the underlying claim necessarily questioned the validity of the termination for cause, which was no longer reviewable by us when Bass filed the appeal. We cannot entertain an appeal of VA's latest contract action unless and until Bass submits a new claim and it is decided or deemed denied.

Background

The facts bearing on jurisdiction can be briefly stated. VA awarded van transportation contract VA255-P-1771 to Bass in May 2011. Appeal File, Exhibit 2. VA exercised options to continue the contract into 2014, Appeal File, Exhibit 3, but it terminated the contract for cause after disputes arose about Bass's performance obligations. Appeal File, Exhibits 7-11. The VA contracting officer mailed Bass a notice terminating the contract in its entirety for cause on August 29, 2014, but the letter was returned by the Postal Service, then resent and received by Bass in early October 2014. Complaint, Exhibit F; Appeal File, Exhibit 14. The notice said, among other things, that it "constitute[d] a final decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause." Complaint, Exhibit F at 2. The contract's Disputes clause, Appeal File, Exhibit 2 at 40, incorporated by reference Federal Acquisition Regulation (FAR) clause 52.233-1 (48 CFR 52.233-1 (2009)), which stated that a contracting officer's decision was final unless the contractor appealed or filed suit under the Contract Disputes Act (CDA), now codified at 41 U.S.C. §§ 7101-7109 (2012).[1]

On March 27, 2015, Bass submitted to the contracting officer, through outside counsel, a five-page certified claim alleging that "VA's Termination for Cause was a breach of contract . . . and Bass is entitled to be awarded damages it incurred as a result of said breach." Appeal File, Exhibit 16 at 3 (respondent's corrected copy, filed April 4, 2016). Bass sought $1,090,616.50 in "lost profits for the remaining [unperformed] 104 weeks of the Contract"; $278,527.25 that Bass alleged it would have "recouped to cover [startup] costs during the remaining 104 weeks of the Contract"; and $121,049.87 for "contractual obligations that Bass has and will continue to incur during the remaining 104 weeks of the Contract," including financing costs, mortgage interest, taxes, and insurance. *Id*. at 4. The claim did not ask VA to convert the termination for cause to a termination for the convenience of the Government, or ask for other relief from the termination decision itself.

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[1] The CDA was recodified without substantive change after the contract was awarded, by Public Law No. 111-350, 124 Stat. 367 (2011).

A successor VA contracting officer issued a nine-page decision denying the claim on June 30, 2015. Appeal File, Exhibit 16. After summarizing the contract, the history of the dispute, and the claim, the contracting officer stated that "[t]he contract was properly terminated for cause as a result of the Bass [sic] failure to perform," and that "[g]iven the propriety of the Government's termination for cause, Bass is entitled to no measure of damages" under the FAR. *Id*. at 6. The contracting officer added that "[e]ven if this case was to be treated as a termination for the Government's convenience, which it isn't, Bass would not be entitled to its requested anticipatory profits," but, "[r]egardless . . . , no damages are due Bass given that its contract was terminated for cause . . . . Bass's claim is denied in its entirety." *Id*. at 7. The decision concluded with the standard statement that under the CDA, Bass could appeal the decision to a board of contract appeals or file suit in the United States Court of Federal Claims. *Id*. at 8-9.

Bass filed a notice of appeal from the June 30 decision on September 23, 2015, and filed a complaint in December 2015, seeking the same damages as in its claim. In March 2016, following discovery, the parties agreed to submit the appeal for decision on the record without a hearing under Board Rule 19 (48 CFR 6101.19 (2013)). In the Rule 19 briefing, Bass requested the same damages as in its claim and complaint, or "[i]n the alternative, [that the] Board reverse and remand this case back to the Contracting Officer for a new decision based on the points expressed in this appeal." Appellant's Initial Brief at 9.

In its initial brief, VA urged us to deny the appeal. But VA attached to its response, filed on April 14, 2016, an unsigned decision of the contracting officer, dated the same day, "convert[ing] the Termination for Cause of contract VA255-P-1771 to a Termination for Convenience under [FAR] clause 52.212-4(l)." Respondent's Response, Exhibit 1. VA also attached an unsigned affidavit of the contracting officer explaining how he had arrived at an "appropriate settlement amount" for termination for convenience costs (which we need not state, but was more than $100,000), based on an uncertified schedule of costs that Bass submitted during the appeal. *Id*., Exhibit 2. VA argued that the appeal was now moot, but that, if we disagreed and determined that the issue of the amount of termination for convenience costs was properly before us, Bass could be entitled to an equitable adjustment in the contract price. *Id*. at 2-4.

In a teleconference with the Board on June 21, 2016, counsel for VA confirmed that the contracting officer had converted the termination to one for convenience and had offered the indicated amount in settlement. Bass's representatives said they had rejected the offer.[2]

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[2] The appeal was subsequently transferred to the undersigned board judge.

Discussion

The Board's jurisdiction derives from the CDA, 41 U.S.C. §§ 7101-7109. "[T]he strict limits of the CDA" constitute "jurisdictional prerequisites to any appeal." *England v. Swanson Group, Inc*., 353 F.3d 1375, 1379 (Fed. Cir. 2004). Jurisdiction must be "established at the time that a notice of appeal is filed." *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,564, *appeal dismissed*, No. 15-1623 (Fed. Cir. Jan. 28, 2016). The Board gains jurisdiction under the CDA only after a claim is presented to the contracting officer and is either decided or deemed denied, and the contractor files a timely appeal. *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982); *C-Shore International, Inc. v. Department of Agriculture*, CBCA 1696, 10-1 BCA ¶ 34,379, at 169,741.

Termination of a contract for cause (or default) is a government claim. *Malone v. United States*, 849 F.2d 1441, 1443-44, *modified on other grounds*, 857 F.2d 787 (Fed. Cir. 1988)*; JR Services, LLC v. Department of Veterans Affairs*, CBCA 4826, 16-1 BCA ¶ 36,238, at 176,808. Upon receiving a contracting officer's decision asserting a government claim, a contractor has ninety days to appeal to the appropriate board of contract appeals, or twelve months to file suit in the Court of Federal Claims, or else the decision becomes "final and conclusive and . . . not subject to review by any forum, tribunal, or Government agency." 41 U.S.C. §§ 7103(g), 7104; *see Bob L. Walker v. Department of Agriculture*, CBCA 4735, 15-1 BCA ¶ 36,179; *Total Engineering, Inc. v. United States*, 120 Fed. Cl. 10, 14 (2015).

The CDA does not allow us to consider Bass's appeal. The time for Bass to appeal the termination of the contract for cause to this Board expired in January 2015, ninety days after Bass received the termination notice.[3] Bass appealed in September 2015, from the contracting officer's decision issued in June 2015, denying Bass's March 2015 certified claim. While this appeal was timely on its face, the claim underlying the appeal could be granted only by *overturning* the termination for cause—which was no longer reviewable by us when Bass filed the appeal. Bass's claim sought profits and costs that Bass alleged it would have recovered in the unperformed years of the contract. Those theories of relief necessarily implied that the termination for cause was wrongful. Yet Bass did not timely appeal the termination, nor did Bass's claim ask the contracting officer to reconsider or withdraw the unappealed termination decision.

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[3] The notice adequately advised Bass of its appeal rights. *See* FAR 49.402-3(g)(7) (notice of termination for cause "shall" state that it "constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause").

The Armed Services Board of Contract Appeals (ASBCA) faced a similar situation in *Military Aircraft Parts*, ASBCA 60139, 2016 WL 3353870 (June 3, 2016) (*MAP*). We find the ASBCA's reasoning in *MAP*, while not binding on us, persuasive. In *MAP*, the Defense Logistics Agency had terminated three delivery orders for cause in April 2013. MAP submitted a claim in April 2015 "for breach of contract damages consisting of anticipatory profit," the alleged breach being the terminations for cause. When the contracting officer refused to act on the claim, MAP appealed from a deemed denial. The ASBCA dismissed the appeal for lack of jurisdiction, finding that MAP's claim was an "implicit challenge" to the terminations for cause, which MAP had not timely appealed. *Id*., slip op. at 9. The ASBCA explained that it saw "no way to give appropriate force and effect to" the CDA provision on the finality of contracting officer's decisions, 41 U.S.C. § 7103(g), "except by declining to review contractor claims *to the extent* that they expressly or implicitly challenge final decisions that were not timely appealed." *Id.* The ASBCA distinguished cases arising under the *Fulford* doctrine, *id*. at 7-8,[4] as well as cases in which contractors had pursued claims "independent of [an] unappealed default termination." *Id*. at 9 (citing *Roxco, Ltd. v. United States*, 60 Fed. Cl. 39, 44 (2004); *C.H. Hyperbarics, Inc.*, ASBCA 49375, et al., 04-1 BCA ¶ 32,568; *Gramercy Machine Corp.*, ASBCA 18188, 74-2 BCA ¶ 10,706).

Here, as in *MAP*, the appellant's claim is not independent of the unappealed termination decision, but arises from it. A tribunal could award the breach damages that Bass seeks (if at all)[5] only by finding that VA should not have terminated the contract for cause—an issue that the CDA places beyond our review, as it was the crux of a government claim that was not appealed and is final. Like the ASBCA, we recognize "some tension between the CDA's general provisions regarding review of decisions on contractor claims," which might appear to give us jurisdiction of this timely appeal, and the CDA's "provisions regarding the finality of contracting officers' final decisions, 41 U.S.C. § 7103(g)." *MAP*, slip op. at 9. But we conclude, as the ASBCA did, that the statute bars review of claims that in effect challenge unappealed contracting officer's decisions.

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[4] Under the rule originated in *Fulford Manufacturing Co.*, ASBCA 2143, et al., 1955 WL 808 (May 20, 1955), a contractor may challenge the validity of a default termination, after the initial appeal period, in a timely appeal from a government claim for excess reprocurement costs. *See C-Shore International, Inc. v. Department of Agriculture*, CBCA 1697, 10-1 BCA ¶ 34,380, at 169,745. That is not this case.

[5] The remedy provided under the contract, Appeal File, Exhibit 2 at 44, for an improper termination for cause is conversion to a termination for convenience, not breach damages. *See Packer v. Social Security Administration*., CBCA 5038, et al., 16-1 BCA ¶ 36,260, at 176,901.

This appeal has three facts that *MAP* did not, none of which affects our jurisdiction. First, unlike in *MAP*, the contracting officer here issued a decision on the contractor's claim, which Bass appealed. A contracting officer's expression of willingness to consider new arguments, or to reconsider old ones, after issuing a decision can toll or restart the appeal period. In *Guardian Angels Medical Service Dogs, Inc. v. United States*, 809 F.3d 1244 (Fed. Cir. 2016), for example, more than six months after terminating the contract for default, the contracting officer asked the contractor for documentation to support its recent claim that the termination should be converted to a termination for convenience, and promised to "proceed with a review of the material and provide a response" upon receiving the documentation. *Id.* at 1246. The Court held that this invitation "'served to keep the matter open,' . . . and vitiated the finality of [the] original default termination notice." *Id*. at 1250 (quoting *Roscoe-Ajax Construction Co. v. United States*, 458 F.2d 55, 63 (Ct. Cl. 1972) (finding contracting officer's denial of contractor's claim not final where contracting officer offered to "discuss and consider the problem further")); *see also Devi Plaza, LLC v. Department of Agriculture*, CBCA 1239, 09-1 BCA ¶ 34,033, at 168,338 (2008) (finding contracting officer's decision on contractor's claim not final because contracting officer "indicated that he was willing to continue a meaningful and productive dialogue" about the claim). But the VA contracting officer did not suggest in 2015 that the termination for cause was not final. He addressed Bass's breach claim on its merits and concluded that Bass, not VA, breached the contract. His June 2015 decision stated several times that the prior contracting officer had properly terminated the contract for cause. Those statements formed part of the rationale for denying Bass's claim and did not suggest that the second contracting officer had issued a new termination decision. While the contracting officer who decided Bass's claim could have written less about the termination for cause, we do not wish to discourage contracting officers from fully explaining their decisions to contractors, and we see nothing in the June 2015 decision to indicate that he reopened the termination decision. *See Educators Associates, Inc. v. United States*, 41 Fed. Cl. 811, 813-15 (1998).

Second, unlike *MAP*, this appeal was filed less than twelve months after the contractor received the termination notice, when Bass could still have filed suit in the Court of Federal Claims. This fact is immaterial to the Board's jurisdiction because *we* could no longer review the termination decision at that time.

Third, during this appeal, the contracting officer issued a new decision converting the termination to one for convenience. But that decision (made in connection with an offer of termination costs exceeding $100,000) was not a decision on either a government claim or a certified termination cost proposal, *see* 41 U.S.C. § 7103(b), and, more importantly, it did not change the fact that we lacked jurisdiction when the appeal was filed. If Bass intends to pursue termination costs or damages under the contract in litigation, it must, among other

things, submit a new claim. *See id*. § 7103(a); *Frank Bonner v. Department of Homeland Security*, CBCA 605, et al., 07-2 BCA ¶ 33,592, at 166,387.

Finally, we note that VA did not question our CDA jurisdiction. After initially asking us to deny the appeal, VA argued that the appeal became moot when the contracting officer converted the termination to one for convenience. Respondent's Response at 2-4.[6] One could argue, as VA at least implicitly did at first, that the problem when the appeal was filed was not our jurisdiction but something more like claim preclusion—that is, that we could have reached the merits but would have been constrained by the unappealed termination decision to rule that the termination for cause was not a breach. *Cf. Navigant SatoTravel v. General Services Administration*, CBCA 449, 10-1 BCA ¶ 34,462 (denying appellant's motion for summary relief on the ground that appellant raised a previously decided entitlement issue in the quantum phase). We think it is clear, however, that the CDA does not authorize review of claims of this nature at all. 41 U.S.C. § 7103(g); *cf. Wood & Co. v. Department of the Treasury*, GSBCA 12534-TD, 94-1 BCA ¶ 26,445, at 131,573-74 (1993) (holding that allowing contractor to submit essentially the same claim twice and appeal the second denial was "clearly not the result Congress intended when it wrote the [ninety-day] limitation into the [CDA]"). The only claim we had before us when this appeal was filed was a challenge to the unappealed termination for cause, styled as a breach claim.

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

KYLE CHADWICK
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

JONATHAN D. ZISCHKAU
Board Judge

[6] We do not find that the conversion necessarily mooted Bass's breach claim.