UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

ORDER DENYING RESPONDENT'S MOTION TO DISMISS:
October 23, 2018

CBCA 6198

EAGLE PEAK ROCK & PAVING, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Bennett J. Lee, and Stephen L. Pessagno of Varela, Lee, Metz & Guarino, LLP, San Francisco, CA; and David B. Wonderlick of Varela, Lee, Metz & Guarino, LLP, Tysons Corner, VA, counsel for Appellant.

Rayann L. Speakman, Western Federal Lands Highway Division, Federal Highway Administration, Department of Transportation, Vancouver, WA, counsel for Respondent.

Before Board Judges **KULLBERG**, **SULLIVAN**, and **RUSSELL**.

RUSSELL, Board Judge.

Appellant, Eagle Peak Rock and Paving, Inc. (Eagle Peak), filed this appeal of the Federal Highway Administration's (FHWA or agency) deemed denial of Eagle Peak's claim for termination for convenience costs. FHWA has moved to dismiss this appeal because the Board has not yet adjudicated the merits of the underlying termination for default. For the reasons set forth below, we deny FHWA's motion.

Background

Prior to the filing of this appeal, Eagle Peak filed two other cases with the Board – CBCA 5692, in which it challenges the FHWA's termination for default of the parties'

contract for construction work in Yellowstone National Park, and CBCA 5955, in which it seeks damages for alleged improper retainage of payments.

In support of its motion to dismiss this appeal, FHWA notes that Eagle Peak's appeal of the agency's termination for default (CBCA 5692) is pending and the relief requested therein has not been granted (specifically, converting the default termination to one for convenience). Thus, the agency asserts that any review of the merits of this appeal based on quantum for a termination for convenience is premature and, for this reason, the appeal should be dismissed.

Eagle Peak opposes the motion arguing that the Board acquired jurisdiction at the time of the contracting officer's deemed denial of Eagle Peak's claim. The company adds that, in filing its appeal, it is exercising "its right to pursue the most expeditious reversal" of the consequences of the termination. Eagle Peak requests that the Board deny FHWA's motion or, in the alternative, stay this appeal pending the conclusion of CBCA Nos. 5692 and 5955.

Discussion

FHWA does not argue that, pursuant to Board Rule 8(b), 48 CFR 6101.8(b), the Board lacks jurisdiction over the appeal nor does it argue that, pursuant to Board Rule 8(e), Eagle Peak's complaint fails to state a claim upon which relief may be granted. Instead, FHWA asserts that dismissal is warranted for the purpose of litigative efficiency, i.e., Eagle Peak's termination for default should be decided prior to the start of litigation on quantum. The agency's position is not without support. *See, e.g.*, *Aerosonic Corporation*, ASBCA 42696, 91-3 BCA ¶ 24,212, at 121,117-18.

However, the practice of dismissing as premature convenience claims prior to resolution of related default claims is not universal among tribunals. Indeed, a predecessor Board has taken a contrary position–specifically, allowing a challenge to a default termination (i.e., the entitlement claim) and a claim for termination for convenience settlement costs (i.e., the quantum claim) to proceed concurrently. *Fischer Imaging Corporation,* VABCA No. 6343, et al., 02-2 BCA ¶ 32,048, at 158,384; *Delfour, Inc.*, VABCA No. 3900, et al., 94-1 BCA ¶ 26,385, at 131,269. And one court has analogized the default/convenience termination claims to a traditional breach of contract/damages claim – concluding that "the [termination for convenience costs remedy] is a substitute for the damages component of a breach of contract action." *Boeing Company v. United States*, 31 Fed. Cl. 289, 296 (1994). Thus, a party may challenge the merits of a default termination and, at the same time, "plead that damages are presently due and owing" because of the termination. *Id*.

In this appeal, Eagle Peak is seeking relief for monetary damages due and owing (i.e., termination for convenience costs) in the event that its separate appeal challenging the termination for default is decided in its favor. We are inclined to agree with those tribunals holding that litigative efficiency is not a sufficient basis to dismiss this appeal. Neither the Board's Rules nor the Federal Rules of Civil Procedure contemplates dismissal on this basis. *See* Board Rule 8; Fed. R. Civ. P. 12(b). Further, any concern regarding potential litigative inefficiency in proceeding concurrently with entitlement and quantum claims can be readily addressed through case management of the two appeals.

Decision

For the foregoing reasons, we deny FHWA's motion to dismiss this appeal. FHWA must answer the complaint and file any documents pursuant to Board Rule 4 by no later than Friday, November 23, 2018.[1]

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

We concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

[1] In its *Motion to Extend Deadline* filed on August 22, 2018 which was granted, FHWA noted that if the Board denies the Government's Motion to Dismiss, "the Government will be able to put together a Rule 4 Appeal File relatively quickly due to the limited documents."