UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION AS MOOT:
June 30, 2020

CBCA 6752, 6753, 6754

AVUE TECHNOLOGIES CORPORATION,

Appellant,

v.

AGENCY FOR GLOBAL MEDIA,

Respondent.

Frederick W. Claybrook, Jr., of Claybrook LLC, Washington, DC, counsel for Appellant.

Maryellen Righi and James McLaren, Office of General Counsel, United States Agency for Global Media, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **KULLBERG**, and **LESTER**.

LESTER, Board Judge.

Respondent, the United States Agency for Global Media (USAGM), has filed a motion seeking to dismiss these consolidated appeals for lack of jurisdiction. The appeals arise out of three separate USAGM contracting officer final decisions, one of which terminated Avue's contract for cause, one of which sought excess reprocurement costs, and one of which demanded repayment of monies previously paid for work that Avue allegedly did not perform after it was deleted from the contract. Recently, however, the USAGM

contracting officer withdrew all of his decisions and also converted the termination for cause to a termination for convenience. Although appellant, Avue Technologies Corporation (Avue), has questioned whether the withdrawals are sufficiently unequivocal to preclude the parties' disputes from being resurrected, we find each of the disputes underlying these appeals to be moot and dismiss the appeals for lack of jurisdiction.

Background

On December 21, 2018, USAGM awarded a contract to Avue for web-based human capital management (HCM) services, which included commercial payroll processing services, to support the agency's title 5 federal employee workforce and approximately six-hundred personal services contractors (PSCs). On July 26, 2019, USAGM terminated the portion of the contract for convenience intended to support the federal employee workforce, but indicated that Avue should continue its PSC work.

Following the partial termination for convenience, Avue and USAGM could not agree on a price for the portion of the contract work that remained. By final decision dated January 29, 2020, the USAGM contracting officer unilaterally reduced the firm-fixed price of the contract's Contract Line Item Numbers (CLINs) 1000 and 1001 (a CLIN that covered both the federal employee workforce and PSCs) from $920,395.30 to $544,567.22 and, based upon that price reduction, demanded repayment of $375,828.80 for services that Avue allegedly had not provided, but for which USAGM had previously paid, under CLINs 1000 and 1001.[1] A unilateral contract modification reflecting the contract's newly redetermined price for CLINs 1000 and 1001 accompanied the final decision.

The next day, by final decision dated January 30, 2020, the contracting officer terminated Avue's contract in its entirety for cause in accordance with the "Contract's Terms and Conditions–Commercial Items" clause at Federal Acquisition Regulation (FAR) 52.212-4(m) (48 CFR 52.212-4(m) (2018)), based upon Avue's alleged failure to deliver a fully implemented web-based HCM application by a December 26, 2019, due date. Subsequently, by final decision dated February 24, 2020, the contracting officer assessed $165,453.09 in excess reprocurement costs against Avue allegedly incurred as a result of Avue's deficient performance, subsequent default, and termination.

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[1] The final decision also indicated that the contracting officer was unilaterally reducing the firm-fixed prices of several later option-year CLINs that the contract would have allowed USAGM to exercise, but, given that (as discussed below) the contracting officer terminated the contract before the second year of performance would have begun and never exercised any options, those reductions are now irrelevant to these appeals.

On March 3, 2020, Avue timely appealed those three final decisions to the Board, and the Board consolidated the three appeals.

On June 18, 2020, the USAGM contracting officer issued three letters to Avue, each of which was titled "Notice of Withdrawal of Contracting Officer's Final Decision." In each decision, the contracting officer represented that he was withdrawing each of the three final decisions discussed above and that USAGM "no longer wishes to pursue these matters." In addition, the contracting officer issued a unilateral modification to the contract dated June 18, 2020, converting the termination for cause issued on January 30, 2020, to a termination for convenience. The contract modification also restored the CLIN 1000/1001 pricing back to its original amount of $920,395.30.

USAGM then filed a motion with the Board requesting dismissal of the three appeals for lack of jurisdiction because the final decisions on which they are based are no longer in effect. Responding to the motion, Avue indicated that it does not oppose USAGM's motion to dismiss so long as "Respondent's withdrawal of the appealed final decisions is 'unequivocal,' as Respondent represents." Nevertheless, Avue asks that, in its order dismissing these appeals as moot, "the Board make clear that Respondent is bound by its reversals of position and that it may not reinstate its prior final decisions and, in particular, may not take the position that the termination for cause was appropriate."

Decision

The linchpin for appealing claims under the CDA, and a prerequisite for the Board's jurisdiction, is a contracting officer's decision. *American Geotech, Inc.*, AGBCA 2000-162-1, 01-1 BCA ¶ 31,257; *Industrial Consultants, Inc.*, VABCA 3249, 91-3 BCA ¶ 24,326. So long as a contractor timely appeals a contracting officer's decision asserting a government claim to the Board, the Board has jurisdiction to entertain the contractor's appeal. 41 U.S.C. § 7104(a) (2018). Further, typically, "jurisdiction is determined at the time the suit is filed and, after vesting, cannot be ousted by subsequent events, including action by the parties." *F. Alderete General Contractors, Inc. v. United States*, 715 F.2d 1476, 1480 (Fed. Cir. 1983).

Nevertheless, there are exceptions to the time-of-filing jurisdictional rule, one of which is mootness. "A case is moot where it can be said with assurance that there is no reasonable expectation that the alleged violation will recur and interim relief or events have completely and irrevocably eradicated the alleged violation." *RMTC Systems*, GSBCA 8732-P, 87-1 BCA ¶ 19,557 (1986). The mootness doctrine implicates subject matter jurisdiction, which requires the existence of an active case or controversy "at the outset and at all later stages" of a case. *Ford Motor Co. v. United States*, 688 F.3d 1319, 1324 (Fed.

Cir. 2012). "It has long been settled that a [tribunal] has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). "For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the [tribunal] to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed" as moot. *Id.* (quoting *Mills*, 159 U.S. at 653).

Once our jurisdiction has been established through a timely appeal, it is not the subsequent withdrawal of the contracting officer's final decision that moots the action, but the elimination of the *dispute* between the parties that is embodied within that final decision. *See AT&T Corp.*, GSBCA 13931-TD, 98-2 BCA ¶ 29,897 (the contracting officer's act of withdrawing a decision, "in and of itself, does not necessarily deprive us of our jurisdiction"); *Security Services, Inc.*, GSBCA 11052, 92-1 BCA ¶ 24,704 (1991) ("[E]ven though the final decision has been withdrawn by the contracting officer, the dispute remains."); *Pace Corp.*, ASBCA 5689, 1959 WL 669 (Aug. 18, 1959) (dismissing appeal as moot where "there is no longer in existence either a present dispute or a decision of the contracting officer"). Boards "have long viewed with disfavor efforts to oust the Board of jurisdiction once properly lodged by the expedient of 'rescinding' a final decision from which an appeal has been duly filed." *Fairfield Scientific Corp.*, ASBCA 21151, 78-1 BCA ¶ 13,082, *aff'd on reconsideration*, 78-2 BCA ¶ 13,429, *aff'd in part, rev'd in part on other grounds*, 611 F.2d 854 (Ct. Cl. 1979). "[O]nce jurisdiction . . . is properly vested in the Board by a timely appeal, . . . the Board's jurisdiction may not be divested [merely] by the expedient of rescission and withdrawal of the final decision." *Thomas J. Murray, Jr.*, GSBCA 6869, 84-1 BCA ¶ 17,081 (1983); *see Synex, Inc.*, AGBCA 97-162-1, 97-2 BCA ¶ 29,277; *Triad Microsystems, Inc.*, ASBCA 48763, 96-1 BCA ¶ 28,078; *World Computer Systems, Inc.*, DOT BCA 2802, 95-1 BCA ¶ 27,399.

Plainly, though, there are situations in which a contracting officer's withdrawal of a decision asserting a government claim will render an appeal academic and, therefore, moot. If the Government takes action that effectively resolves the dispute between the parties and, as part of that resolution, withdraws the Government's claim, there is nothing left for the Board to decide, and dismissal of the appeal as moot is appropriate. *See, e.g.*, *White Buffalo Construction, Inc. v. United States*, 546 F. App'x 952, 955 (Fed. Cir. 2013); *Care One EMS, LLC v. Department of Veterans Affairs*, CBCA 3170, 15-1 BCA ¶ 36,160; *Lasmer Industries, Inc.*, ASBCA 56411, 09-1 BCA ¶ 34,115; *Michael Slater*, GSBCA 7813, 86-3 BCA ¶ 19,272; *Denver L. Copas*, GSBCA 5256, 1979 WL 2817 (Aug. 30, 1979). Similarly, if the parties mutually agree, following the contracting officer's withdrawal of a decision asserting a government claim, that they do not wish to pursue an appeal any further, it indicates the absence of a ripe dispute between the parties that, again, warrants dismissal of the appeal as

moot. *See, e.g., Ramah Navajo School Board, Inc. v. Department of Interior*, CBCA 5753-ISDA, 17-1 BCA ¶ 36,897; *Matrix Business Solutions, Inc. v. Department of Homeland Security*, CBCA 3090, 2013 WL 996102 (Jan. 9, 2013); *Synex, Inc.*, AGBCA 97-162-1, 97-2 BCA ¶ 29,277.

Because not every withdrawal of a contracting officer's decision involving a government claim renders the parties' dispute moot, we must be careful, if an objection or concern is raised, to ensure that the contracting officer's "purported withdrawal and reconsideration of that decision was [not simply] a sham intended to divest the Board of jurisdiction." *Air, Inc.*, GSBCA 7687, et al., 1985 WL 17107 (Nov. 5, 1985). If the Government, simply by withdrawing a decision asserting a government claim, could divest the Board of jurisdiction, it would permit the Government to engage in gamesmanship whenever it perceived that the litigation was not going its way. *Zisken Corp.*, ASBCA 10083, 66-2 BCA ¶ 5798; *see Security Services, Inc.*, GSBCA 11052, 92-1 BCA ¶ 24,704 (1991) (retaining jurisdiction where the contracting officer, in the same letter in which he withdrew the final decision, demanded payment of the amount of the now-withdrawn claim).

Looking at each of the three decisions on appeal here, it is clear that USAGM has taken action not only to withdraw the contracting officer's final decisions, but to eliminate the disputes between the parties underlying the final decisions in a manner that either precludes the disputes from recurring or leaves no reasonable expectation that, at least in their present form, the disputes will recur:

1. With regard to the decision terminating Avue's contract for cause, the contracting officer has not only withdrawn the decision, but issued a contract modification effectuating that decision and converting the termination for cause to one for convenience. Now that it is converted, the decision is irrevocable, as the contracting officer has no power retroactively to restore the default termination. *Roged, Inc.*, ASBCA 20702, 76-2 BCA ¶ 12,018. Further, the only relief that we could grant in that appeal is the same relief that the contracting officer has voluntarily granted. Accordingly, a contracting officer's conversion action moots the appeal of the original default termination. *See, e.g., White Buffalo Construction*, 546 F. App'x at 955; *Universal Home Health & Industrial Supplies, Inc. v. Department of Veterans Affairs*, CBCA 4012, 16-1 BCA ¶ 36,370; *Care One EMS, LLC v. Department of Veterans Affairs*, CBCA 3170, 15-1 BCA ¶ 36,160.

2. With regard to the decision assessing excess reprocurement costs, "[e]xcess reprocurement costs are not recoverable following a convenience termination." *Woolery Timber Management Inc. v. Department of Agriculture*, CBCA 6031, 19-1 BCA ¶ 37,245

Since USAGM has both withdrawn its decision assessing excess reprocurement costs and irrevocably converted the termination for cause to a convenience termination, Avue's appeal of the decision assessing excess reprocurement costs is clearly moot.

3. With regard to the decision demanding repayment of $375,828.80, the contracting officer, in addition to withdrawing the final decision demanding payment, reinstated the prior CLIN 1000/1001 dollar amount through a unilateral modification to the contract and represents that the agency no longer wishes to pursue this matter. We recognize, in light of Avue's concern that USAGM's withdrawal may not be sufficiently "unequivocal" to eliminate the possibility of any future resurrection of this dispute, that USAGM and Avue have still not agreed on how to handle the agency's earlier deletion of federal employee workforce HCM work from this contract, which was why the contracting officer issued his unilateral price reduction decision in the first place, and that the issue potentially could recur if and when Avue submits a convenience termination settlement proposal. Nevertheless, there is no current monetary demand by USAGM that we can review, and the withdrawal does not appear to be an attempt merely to remove the Board's involvement in a continuing dispute. Boards have dismissed appeals for lack of jurisdiction as moot based upon representations by the Government that it has "no intention of issuing another [final decision] disallowing the costs," *Combat Support Associates*, ASBCA 58945, 16-1 BCA ¶ 36,288, or "do[es] not intend to reinstitute a demand letter for this non-conforming material." *Lasmer Industries, Inc.*, ASBCA 56411, 09-1 BCA ¶ 34,115. Relying upon the good faith presumption attributable to government officials, *Croman Corp. v. United States*, 724 F.3d 1357, 1364 (Fed. Cir. 2013), and recognizing that resolution of the issue, if it were ever to be resurrected, is better handled as part of the convenience termination settlement process and would not be barred from challenge through a future appeal, we find that the repayment demand is also currently moot.

Decision

Because the matters in dispute in CBCA 6752, 6753, and 6754 are now moot, the appeals are **DISMISSED FOR LACK OF JURISDICTION AS MOOT**.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge