UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED IN PART; DISMISSED IN PART FOR LACK OF JURISDICTION:
April 13, 2022

CBCA 7195, 7211

HEROES HIRE LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Jessica House, Chief Executive Officer of Heroes Hire LLC, Loganville, GA, appearing for Appellant.

Kathleen Ellis-Ramos, Office of General Counsel, Department of Veterans Affairs, Arlington, TX, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **LESTER**, and **KULLBERG**.

LESTER, Board Judge.

In these appeals,[1] appellant, Heroes Hire LLC (Heroes Hire), challenges a Department of Veterans Affairs (VA) contracting officer's decision terminating for cause Heroes Hire's contract for nursing services. The VA has filed a motion seeking summary judgment in its favor and asking the Board to uphold the termination. In response, Heroes Hire expresses

[1] Both CBCA 7195, which was filed on August 20, 2021, and CBCA 7211, which was filed on September 13, 2021, challenge the same contracting officer's decision, dated August 19, 2021, terminating the contract at issue for cause. We elected to consolidate the two appeals rather than require briefing on the necessity of the second appeal.

its disappointment in having been "taken advantage of by [the VA] and a 'third party'" – a lender to which Heroes Hire assigned its contract payments – that Heroes Hire alleges the VA should not have recognized as a valid assignee. Appellant's Response to Respondent's Summary Judgment Motion at 1. Although Heroes Hire argues that both the VA and the Board have failed to protect it against a predatory lender and that the VA should have paid contract proceeds directly to Heroes Hire despite the assignment, Heroes Hire ignores the precarious position into which it placed the VA by demanding direct payment after telling the VA incorrectly that the VA could ignore the assignment. It was Heroes Hire that entered into a contractual relationship with a lender that it now views as predatory, and it was Heroes Hire that signed an assignment of all contract proceeds to that lender.

When the VA, in response to Heroes Hire's and the lender's competing demands for direct payment, stated that it could not ignore the assignment, Heroes Hire improperly refused to perform any more work under the contract. Had the VA acquiesced in Heroes Hire's demand, the VA needlessly would have faced duplicative liability to Heroes Hire's lender, which had a vested interest in Heroes Hire's contract proceeds, and Heroes Hire's refusal to continue performance was a breach of its contract obligations. In such circumstances, the VA's termination of Heroes Hire's contract for cause was proper, and we deny Heroes Hire's challenge to that termination. We also dismiss for lack of jurisdiction Heroes Hire's monetary requests.

Statement of Uncontested Facts

The Contract

On April 21, 2021, the VA awarded contract no. 36C25221C0064 (the contract), a fixed-price contract in the amount of $184,320, to Heroes Hire for the provision of technical support, management, and labor to fulfill the need for Community Care Registered Nurse (RN) services at the Clement J. Zablocki Veterans Affairs Medical Center in Milwaukee, Wisconsin. The contract expressly stated that the immediate need for nursing services resulted from increased care needs because of the COVID-19 pandemic. The contract period of performance was from April 21 to September 30, 2021. Appeal File, Respondent's Exhibit 1 at 3.[2]

[2] Unless otherwise noted, all exhibits referenced in this decision are contained in the appeal file. We identify each exhibit as "Respondent's Exhibit" or "Appellant's Exhibit," referencing the party that filed it, to differentiate between duplicate exhibit numbers.

The contract required three RNs "to provide services [at the medical center] 8-hours per day, Monday through Friday," and indicated that "[o]vertime and work on a federal holiday may be requested." Respondent's Exhibit 1 at 3. The contract's price schedule identified three RNs by name who were to provide the RN services under the contract for a collective total of 2280 regular hours and 528 overtime and holiday hours. *Id.* at 4.

The "Contract Terms and Conditions – Commercial Items (Oct 2018)" clause from section 52.212-4 of the version of the Federal Acquisition Regulation (FAR) then in effect, 48 CFR 52.212-4 (2020) (FAR 52.212-4), was incorporated into the contract, and it provided that, if a dispute were to arise during contract performance, "[t]he Contractor shall proceed diligently with performance of this contract, pending final resolution of [the] dispute." Respondent's Exhibit 1 at 27 (quoting FAR 52.212-4(d)). The clause further provided that, if the contractor failed to perform the services required by the contract, it "shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence . . . ." *Id.* (quoting FAR 52.212-4(e)). The clause allowed the Government to "terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance." *Id.* at 30 (quoting FAR 52.212-4(m)).

Payment under the contract was to be made through the System for Award Management (SAM), and Heroes Hire was responsible for maintaining current, accurate, and complete data within SAM throughout contract performance. Respondent's Exhibit 1 at 33-34 (incorporating the clause at FAR 52.204-13 (Oct. 2018)). To the extent that the contractor assigned payments to a financial institution, the contractor was "not [to] change [its] name or address for [electronic funds transfer (EFT)] payments or manual payments, as appropriate, in SAM record to reflect an assignee for the purpose of assignment of claims." *Id.* at 35. Instead, "[a]ssignees [were to be] separately registered in SAM," with payment to be made to the assignee directly and in the assignee's name. *Id.*

Heroes Hire's Assignment of Payments

On April 23, 2021, Heroes Hire executed a document titled "Instrument of Assignment" in which it agreed to "assign to FACTORS SOUTHWEST, LLC [FSW] . . . as Assignee, all monies due or to become due under Contract Number: 36C25221C0064 dated April 21, 2021 and all delivery orders, task orders, or purchase orders issued thereunder issued by [the VA]." Respondent's Exhibit 9 at 80. By email on April 26, 2021, seemingly in conflict with the requirements of FAR 52.204-13, FSW directed Heroes Hire to enter FSW's banking information in the remittance portion of Heroes Hire's SAM account, which Heroes Hire did. Appellant's Exhibit 6; Answer ¶ 8.

FSW subsequently forwarded its assignment agreement with Heroes Hire to the VA contracting officer, requesting that the contracting officer "make all necessary changes to the contract so that payment remittance information . . . can be made effective as soon as possible." Respondent's Exhibit 9 at 78. The VA contracting officer received the assignment on May 11, 2021. *Id.*

The VA contracting officer did not immediately accept the assignment. By email dated May 21, 2021, the VA contracting officer questioned Heroes Hire about the necessity of an assignment given the relatively short duration of this contract. Respondent's Exhibit 12 at 94-95. Heroes Hire responded that, "[i]nitially, we thought we would need it, but at this time, we do not need an Assignment of Claims for this contract" and asked the contracting officer to "disregard this document." *Id.* at 94. The contracting officer then asked Heroes Hire to "send [her] something official from your company and the assignee withdrawing this request." *Id.* at 93. Heroes Hire responded on May 24, 2021, that it was "in the process of changing [its] assignment of claims to a different lender," that "[t]he lender will send out the new assignment of claims which could take a few weeks," and that Heroes Hire would "forward the Cancellation of Assignment of Claims once [it] ha[d] wrapped final details." *Id.* The VA contracting officer did not take action on the assignment following Heroes Hire's response.

On May 28, 2021, Heroes Hire asked about the payment status of its first invoice, which it said it needed approved that day so that it could make payroll. Appellant's Exhibit 7. The contracting officer responded that the invoice had been approved and paid on May 21, 2021. *Id.* It appears that, in light of the FSW banking information that Heroes Hire had entered into its SAM account, that money had gone into FSW's bank account. Later that day, Heroes Hire changed the remittance information in its SAM account to reflect a Heroes Hire bank account number. Appellant's Exhibit 8; Answer ¶ 9. As a result, when the VA made payment on the next Heroes Hire invoice through SAM on June 4, 2021, the money went directly to Heroes Hire. *Id.*

When FSW learned of the redirected June 4 payment, it challenged Heroes Hire's change in the SAM system as fraudulent and threatened legal action. Appellant's Exhibit 8; Respondent's Exhibit 16. Further, on June 10, 2021, FSW sent an email to the VA contracting officer complaining that it had not received the June 4 payment to which it claimed it was entitled:

> FSW would like to following [sic] up on the status of the Federal Assignment of Claims for Heroes Hire account. FSW Funding received a payment from the VA on 5/24/2021. We were informed today that there was a misdirected payment sent to the Heroes Hire account on 6/4/2021. Can you please help us with getting an update on this?

Respondent's Exhibit 15 at 107.

The contracting officer expressed surprise later that day that FSW had received the May 24 payment, given that she had never processed the original notice of payment assignment. Respondent's Exhibit 15 at 106. FSW then told the VA contracting officer that Heroes Hire had "borrowed money from [FSW] and has misdirected payment," that "[t]he Assignment of Claims was signed by [Heroes Hire] and is valid," and that FSW "will be pursuing [Heroes Hire] legally for breach of contract among other items." *Id.* It asked the contracting officer to "sign the original assignment documents and send back to FSW," representing itself as "the senior secured lender for Heroes Hire." *Id.* Heroes Hire submitted its own response to the VA contracting officer, telling the contracting officer to "please refrain from communicating with any persons affiliate[d] with FSW Funding. We are currently reporting them. You can call me if you have any questions." *Id.* at 105.

FSW again contacted the VA contracting officer on June 14, 2021, notifying her that, "[s]ince the paperwork was sent to you per the requirements of [FAR] 32.8, the Federal Assignments of Claims would be valid." Respondent's Exhibit 17 at 111. It again requested that "the VA honor the properly submitted Federal Assignment of Claims so that FSW can post such payments against funded invoices." *Id.* The contracting officer responded by email dated June 15, 2021, notifying FSW that all assignments had to be reviewed by VA legal counsel before they were processed and that she had initiated that contact. Respondent's Exhibit 18. FSW requested in response that "no further payment be made until this is resolved." *Id.*

Subsequently, the VA legal counsel indicated that the contracting officer had no choice but to recognize the assignment, although FSW needed to forward proper paperwork to implement it. FSW provided that documentation on June 22, 2021, and again requested confirmation "that going forward all payments will be sent to [FSW]." Respondent's Exhibit 28. In bilateral modification P00002, which both Heroes Hire and the VA executed on June 23, 2021, the VA recognized the assignment to FSW effective June 25, 2021, and agreed to make any future payments due or to become due to FSW. Respondent's Exhibit 31.

Performance After the Assignment

Early in the performance of the contract, one of the three RNs named in the contract became unavailable to continue working. Through bilateral modification P00001, dated June 21, 2021, the parties reduced that RN's hours under the contract to those that she had actually performed and agreed to a contract price reduction to reflect the elimination of the hours that she would not be working. Respondent's Exhibit 25. On July 1, 2021, the second of the three RNs identified in the contract failed to report to the medical center and, by

July 6, had reported that she would not return. Respondent's Exhibit 43. The VA agreed to pay for the time that the second RN had worked and to modify the contract to eliminate the hours listed that she had not. At this point, only one of the original three RN positions identified in the contract remained a part of the contract.

On July 9, 2021, FSW received payment from the VA on the outstanding invoice. Respondent's Exhibit 50. Heroes Hire immediately demanded that FSW execute and send a release of assignment letter, asserting that the payment fully satisfied Heroes Hire's debt to FSW. *Id.* FSW did not do so, contending that additional liability remained that precluded a release, a position that Heroes Hire disputed.

Unable to obtain FSW's signature on a release, Heroes Hire itself signed a "Release of Instrument of Assignment" on July 14, 2021, in which it identified its desire "to reestablish its rights to receive further payments eliminating FACTORS SOUTHWEST, LLC . . . as its Assignee." In the "release," Heroes Hire represented that "[n]o further assignment or reassignment is in effect" and that "[a]ll monies due to Assignee (FACTORS SOUTHWEST LLC) ha[ve] been satisfied by Assignor (HEROES HIRE LLC), under Contract Number: 36C25221C0064 as of July 9, 2021." The "release" then stated that "[a]ll delivery orders, task orders, or purchase orders issued thereunder by [the VA] will be released to Assignor (HEROES HIRE LLC), effective immediately." Although Heroes Hire's managing member signed the release, as did a notary, FSW did not.

Heroes Hire then provided its self-executed release to the VA contracting officer and stated in the forwarding email that "FSW is not required to sign a release that is requested by the Assignor for reestablishment of its rights due to a debt being paid in full," directing the contracting officer to "reference FAR 32.802 for any clarity." Respondent's Exhibit 52. The contracting officer responded that, although "[w]hat [Heroes Hire] provided satisfies the written notice of release," the VA still "need[ed] the release of assignment instrument from FSW" as required by FAR 32.802(c)(3). Appellant's Exhibit 3. She indicated that VA legal counsel had reported that "[o]nly the Assignee can release the Assignor from the assignment" and that Heroes Hire "cannot release itself." Respondent's Exhibit 53. She requested "the true copy of the release of assignment from FSW." *Id.*

On July 20, 2021, the only remaining RN who was still performing contract work represented to the VA that Heroes Hire had told her not to report for duty because of "invoicing issues." Respondent's Exhibit 55. She departed the medical center mid-shift on July 20 and did not return the following day or thereafter. *Id.* After the Branch Chief for the VA's Medical Sharing Contract Team inquired about her continued absence, Heroes Hire on July 26, 2021, reported that the VA had no justification for not accepting Heroes Hire's self-executed assignment release and that Heroes Hire would not allow the RN to return to the medical center until the VA accepted and acted upon that release. Respondent's Exhibit 56

at 310. A few days later, Heroes Hire requested appointment of a mediator "because your office is incorrect about the Release of Assignment of Claims," *id.* at 306, but did not resume the RN's nursing services.

The VA contracting officer contacted FSW on August 3, 2021, to ask about the status of obtaining a release from FSW, and FSW responded that it "can't sign the release at this time. [The assignment] is still effective." Respondent's Exhibit 57. FSW reiterated that position on August 9, 2021, asserting that "FSW will not release the assignment until the Heroes Hire obligation to FSW is paid in full." Respondent's Exhibit 59.

On August 19, 2021, the VA contracting officer issued a decision terminating Heroes Hire's contract for cause in accordance with the termination provision in FAR 52.212-4(m). In support, the contracting officer cited Heroes Hire's instruction to its employee on July 20, 2021, not to report to the medical center and Heroes Hire's intentional failure to provide any nursing services since that time, in violation of the terms of its contract. Respondent's Exhibit 61 at 352. In her decision, the VA contracting officer indicated that, according to the VA's records, Heroes Hire was entitled to payment of $3577.50 for services previously rendered and that, upon receipt of an invoice that Heroes Hire had not yet submitted, the VA would pay it. *Id.*

Activity During the Appeal

Heroes Hire timely appealed the termination decision to the Board and, in its notice of appeal, sought payment of $21,030 for nursing services provided for which it had not yet been paid, although there was no outstanding invoice or claim for that money. Because of the nature of the claim at issue and because of Heroes Hire's self-represented status, we elected to require the VA to file the complaint. In its answer, Heroes Hire alleged that the VA had "willfully and knowingly conspired with a third party predatory lender, [FSW], to prey on a Service Disabled Veteran Owned Small Business" and "did what they did to cover up their mistakes knowingly and willingly," which "damaged the reputation of Heroes Hire." Answer ¶ 1. It alleged that the VA failed to cooperate with Heroes Hire during contract performance by denying a request made in June 2021 to increase the invoice submission frequency of the contract and by failing to issue a cure notice prior to terminating the contract for cause. *Id.* ¶¶ 2, 15. Heroes Hire also stated that it "has reason to believe" that the VA terminated the contract "in an effort to directly hire" Heroes Hire's RN employee. *Id.* ¶ 3. It added an additional monetary request in its answer, asking, in addition to payment of $21,030 for nursing services rendered, for "[t]ermination cost in the sum of $100,000 to compensate for . . . total end of contract, pain and suffering of Contractor, and consent and release" of Heroes Hire's last RN. *Id.* ¶ 38.

Subsequently, Heroes Hire filed a motion for emergency relief, seeking immediate cancellation of the payment assignment to FSW and direct payment to Heroes Hire for unpaid nursing services rendered. By decision dated October 7, 2021, we denied that motion, holding that we lacked authority to grant the type of injunctive relief that Heroes Hire sought and lacked jurisdiction to consider Heroes Hire's monetary request. *See Heroes Hire, LLC v. Department of Veterans Affairs*, CBCA 7195, et al., 21-1 BCA ¶ 37,940.

Heroes Hire continued its efforts to obtain a signed release from FSW, while continuing to argue that Heroes Hire's own signature on a release was sufficient to eliminate the assignment. On November 17, 2021, as part of an arbitration between Heroes Hire and FSW, Heroes Hire delivered to FSW an executed general release encompassing any claims, known or unknown, that Heroes Hire had or might have had at the time of signing the release against FSW arising out of an earlier factoring and security agreement between those entities. Appellant's Exhibit 23 at 2. On December 20, 2021, the arbitrator, having found Heroes Hire's general release against FSW enforceable, directed FSW to release its liens and assignments against Heroes Hire. Appellant's Exhibit 29. On December 22, 2021, FSW provided the VA with a letter informing it that "FSW Funding no longer has an interest in the accounts receivable of Heroes Hire" and that "[a]ll future payments may be mailed as directed to Heroes Hire." Appellant's Exhibit 28. The VA recognized the release and, after Heroes Hire submitted an invoice for its remaining unbilled labor time and expenses, paid the invoice amount to Heroes Hire.

In November 2019, while Heroes Hire was in arbitration with FSW, the VA filed a motion for summary judgment on the validity of its termination decision. Heroes Hire, in its response to the motion filed February 28, 2022, did not present any specific evidence to the Board but asserted that it had been treated unfairly by the VA and that dismissal was not appropriate "since we have not been given a fair opportunity to present our case." Appellant's Response at 1.

Discussion

Standard of Review

Heroes Hire has elected to represent itself through one of its corporate officers, without an attorney, in this matter. Generally, we give greater procedural latitude to self-represented litigants than to parties represented by attorneys. *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913. We have done so here. "[T]his more lenient standard for interpreting pleadings," however, "does not change a [self-represented] litigant's burden of proof or our weighing of the factual record." *House of Joy Transitional Programs v. Social Security Administration*, CBCA 2535, 12-1 BCA ¶ 34,991.

"Resolving a dispute on a motion for summary [judgment] is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts." *Au'Authum Ki, Inc. v. Department of Energy*, CBCA 2505, 14-1 BCA ¶ 35,727. "The moving party bears the burden of demonstrating the absence of genuine issues of material fact," and "[a]ll justifiable inferences must be drawn in favor of the nonmovant." *Id.* Nevertheless, to preclude entry of summary judgment, "the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Navigant SatoTravel v. General Services Administration*, CBCA 449, 08-1 BCA ¶ 33,821 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The Validity of the VA's Termination Decision

"[A] government decision to terminate a contractor for [cause] is the assertion of a government claim against such contractor within the meaning of the [Contract Disputes Act, 41 U.S.C. §§ 7101–7109 (2018)]." *Johnson & Gordon Security, Inc. v. General Services Administration*, 857 F.2d 1435, 1437 (Fed. Cir. 1988). As such, the Government bears the initial burden of showing that the termination was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). Once the Government has satisfied its burden and default has been established, the burden shifts to the contractor to demonstrate that the causes of the default were excusable under the terms of the contract – that is, that they were beyond the contractor's control and not due to its own fault or negligence. *Emiabata v. United States*, 792 F. App'x 931, 937 (Fed. Cir. 2019). The contractor's burden includes "showing that the contracting officer acted in bad faith when he terminated the contract for default" if the contractor decides to take such a position. *Vanquish Worldwide, LLC v. United States*, 140 Fed. Cl. 460, 480 (2018).

"A clear violation of contract terms by the contractor supports a finding that a reasonable, contract-related basis for the termination exists." *Keeter Trading Co. v. United States*, 79 Fed. Cl. 243, 253 (2007). When the Government shows that a contractor with a service contract requiring daily performance of necessary services, like the contract at issue here, has failed to perform those services over the course of even a short period of time, it has established default:

> The Government is entitled to strict compliance with the provisions of its service contracts. Furthermore, a separate and distinct ground for default arises each and every time that a contractor fails to deliver services in accordance with the terms of the contract. Thus, there is literally a 'default' whenever there is less than 100 percent complete and on time performance of

> the service at the end of any given performance period. Since occasional failures to render perfect performance during each service performance is inherent in such contracts, a termination for default will be sustained only if the performance failure is more than *de minimis* and reasonably substantial.

Johnson Management Group CFC Inc., HUD BCA 97-C-109-C2, 99-2 BCA ¶ 30,520 (citations omitted). Here, the contract at issue expressly provided that the need for nursing services was a result of the COVID-19 pandemic, and Heroes Hire's failure to provide any nursing support beginning July 20, 2021, not only violated the terms of its contract, but placed the VA in the position of losing essential services at a medical center during a pandemic. The VA has established that Heroes Hire was in default and that the termination for cause was justifiable.

Since the VA has met its burden of establishing justification for the termination, the burden shifts to Heroes Hire to justify its failure to perform and its declaration to the VA that it would not resume nursing services until the VA released it from the payment assignment to FSW. Under the assignment, all monies for which Heroes Hire invoiced were being paid to the assignee, FSW. Heroes Hire's main defense to the termination is that the VA improperly refused to accept the self-executed "release" of the assignment that Heroes Hire provided and make payment directly to Heroes Hire. As explained above and in our prior decision in this matter dated October 7, 2021, FSW refused to sign it and, in fact, repeatedly told the VA contracting officer that it was unwilling to release Heroes Hire.

We rejected Heroes Hire's arguments regarding the assignment release in our October 7, 2021, decision. FAR 32.805(c)(3) provides that, "[i]f the *assignee* releases the contractor from an assignment of claims under a contract, the contractor, in order to establish a right to receive payment of the balance due under the contract, must file a written notice of release together with a true copy of the release of assignment instrument with the addressees noted in 32.802(e)." 48 CFR 32.805(c)(3) (emphasis added). Contrary to Heroes Hire's position, and as we discussed in detail in our October 7, 2021, decision, that provision requires a written release from the assignee and does not entitle the assignor to "self-release" the assignment on its own. Even without that FAR language, the security interest (if not a more extensive transfer of ownership rights) in contract proceeds that a payment assignment provides the assignee precludes the assignor from voiding the assignment without the express permission of the assignee:

> If the assignee owns or at least has a security interest in Heroes Hire's contract payments, how could Heroes Hire, which has forfeited or at least surrendered its ownership rights over contract payments, have any ability on its own to eliminate the assignee's security or ownership interest, without the permission of and without any written confirmation of release by the assignee? Heroes

> Hire's attempt to parse words in the FAR into individual components in a manner that would eliminate the need for an affirmative release by the assignee who owns the right to receive contract payments violates the purpose of a security interest and the concept of "ownership."

Heroes Hire.

In this case, not only did the VA receive a payment assignment notice that it was required to recognize, Heroes Hire executed a bilateral modification expressly acknowledging FSW's right to receive contract payments. Heroes Hire's assertions that the VA could simply void the assignment on Heroes Hire's say-so and modify the contract to eliminate the assignee's payment rights ignores the risk of duplicate liability that the VA would assume to the assignee were it to do what Heroes Hire demanded:

> A complete or partial assignment of the right to be paid the proceeds of the contract imposes an obligation on the promisor, once it has received notice of the assignment, to make payments under the contract in accordance with that assignment. The promisor can be held liable on that obligation to the assignee if the promisor makes payments to the assignor, rather than to the assignee in accordance with the terms of the assignment.

D&H Distributing Co. v. United States, 102 F.3d 542, 547 (Fed. Cir. 1996). Because the VA could not accept Heroes Hire's self-executed "release" of the assignment, the VA's refusal to act upon that "release" does not justify Heroes Hire's refusal to perform.

Heroes Hire has asserted that the termination is invalid because the VA failed to issue a ten-day cure notice before terminating the contract. FAR 12.403(c)(1) provides that, for commercial item contracts, "[t]he contracting officer shall send a cure notice prior to terminating a contract for a reason other than late delivery." 48 CFR 12.403(c)(1). Failure to provide a cure notice, when required, will invalidate a default termination. *Kisco Co. v. United States*, 610 F.2d 742, 750-51 (Ct. Cl. 1979); *Brent Packer v. Social Security Administration*, CBCA 5039, 16-1 BCA ¶ 36,260. Nevertheless, a cure notice is not necessary if the contractor has already failed to perform some services that were previously due, particularly where the contractor has announced its intention not to perform. *See, e.g.*, *Marble & Chance*, HUD BCA 85-908-C2, 87-1 BCA ¶ 19,337 (1986); *Machelor Maintenance & Supply Corp.*, ASBCA 7789, 1962 BCA ¶ 3411. The circumstances in *Johnson & Gordon Security, Inc.*, GSBCA 7804, 87-3 BCA ¶ 20,074, *aff'd sub nom. Johnson & Gordon Security, Inc. v. General Services Administration*, 857 F.2d 1435 (Fed. Cir. 1988), a case in which the General Services Board of Contract Appeals (in a decision affirmed by the Court of Appeals for the Federal Circuit) found no need for a cure notice, mirror those in this case:

> It is certain from the facts in this case that a ten day cure notice would have been a futile act on the part of the contracting officer. On January 15, 1985, the date [the contract] was terminated for default, [the contractor] had abandoned its post and was unable and unwilling to continue to perform as required by the contract. [The Government] did not order [the contractor] to leave the premises. Even though a ten day cure notice would have been required before [the Government] could have terminated for [the contractor's] failure to possess a license, the contracting officer never waived the basic contract requirement to provide guard services as of January 1, 1985, irrespective of [the contractor's] ability to obtain a license, a matter directly related to the contractor's responsibility. Under the Default clause [of the contract], termination may be effected without a cure notice if the contractor, as here, fails to provide required services.

Id. The lack of a cure notice does not invalidate the termination here.

The only other possible basis for Heroes Hire's challenge to the termination decision relates to allegations that Heroes Hire raised in its answer of a conspiracy by the VA and FSW to "prey" on Heroes Hire. Answer ¶ 1. Although a default termination that is accomplished for the purpose of ridding an agency of a particular contractor is arbitrary and capricious, *Darwin Construction Co. v. United States*, 811 F.2d 593, 596 (Fed. Cir. 1987), there is no evidence in this record to support any such finding. In other submissions and conferences with the Board, Heroes Hire clarified that the bad faith to which it refers was that the VA contracting officer, often without copying Heroes Hire, worked with FSW to perfect the notice of assignment and to obtain the proper form from FSW to allow the VA to implement the assignment. As we discussed in our October 7, 2021, decision, Heroes Hire has not presented any evidence that the VA contracting officer's actions were in any way improper, particularly in light of the precarious position in which the Government places itself if it receives but fails to comply with a payment assignment. Similarly, Heroes Hire has presented no evidence to support its assertion that the termination for cause was a pretext to "an effort to directly hire" Heroes Hire's RN employee. *See* Answer ¶ 3. In response to a summary judgment motion, the responding party cannot rely upon "mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken as true." *FastShip, LLC v. United States*, 892 F.3d 1298, 1307 (Fed. Cir. 2018) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The absence of any supporting evidence eliminates the need for us to address the

extent to which purported ill motives by the contracting officer could invalidate an otherwise justifiable termination decision.[3]

Although not raised by the parties in their briefing, we are aware of the Federal Circuit's recent decision in *JKB Solutions & Services, LLC v. United States*, 18 F.4th 704 (Fed. Cir. 2021), in which the Court held that the commercial items contract clause at FAR 52.212-4 "does not apply to service contracts," and found that the service contract at issue there was "not a commercial item contract." *Id.* at 710. The termination for cause provision upon which the VA relied in terminating this contract is a part of that clause, *see* FAR 52.212-4(m), and the contract at issue here is a commercial services contract. Despite the similarities of the contracts in this case and in *JKB Solutions*, we do not believe that the *JKB Solutions* decision affects the result in this case. First, Heroes Hire waived any argument challenging the inclusion of FAR 52.212-4 in its contract by not protesting its inclusion before contract award, *Whitaker Electronic Systems v. Dalton*, 124 F.3d 1443, 1446 (Fed. Cir. 1997); *E. Walters & Co. v. United States*, 576 F.2d 362, 367-68 (Ct. Cl. 1978), and by not raising in this appeal any challenge to the inclusion of the clause. *Frank v. Department of Transportation*, 35 F.3d 1554, 1559 (Fed. Cir. 1994). Second, the FAR provisions in effect when this contract was awarded defined a "commercial item" as including "services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices," FAR 2.101, and the nursing services at issue here clearly fall within that FAR definition of a "commercial item"; we can only presume that the service contract at issue in *JKB Solutions* involved services of a type that fell outside of the FAR definition.[4] Finally, even if for some reason the Commercial Items clause were to be stricken from this contract, a non-defaulting party has a common-law right to terminate a contract if the other party materially breaches it, even without a termination clause, meaning that the VA had a common-law right to terminate Heroes Hire's contract for default here. *David Kwok*, GSBCA 7933, 90-1 BCA ¶ 22,292 (1989); *see Bigda*

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[3] Heroes Hire also alleged that the VA failed to cooperate with it during contract performance by denying a request made in June 2021 to increase the invoice submission frequency. Answer ¶¶ 2, 15. In the circumstances of this case, such an allegation is irrelevant to whether Heroes Hire's later decision to preclude its RN employee from providing services at the medical center justified termination.

[4] One commentator has indicated, based upon a review of the oral argument in the Federal Circuit's *JKB Solutions* case, that "[t]he Government did not dispute for the purposes of summary judgment the contractor's assertion that the service procured was not commercial." Vernon J. Edwards, "Commercial Item: Confusion in Court," 35 Nash & Cibinic Rep. ¶ 72 (Dec. 2021). Here, neither party has argued that the nursing services at issue are anything but commercial.

v. Fischbach Corp., 898 F. Supp. 1004, 1011 (S.D.N.Y. 1995). Accordingly, the *JKB Solutions* decision has no effect on the result in this appeal.

Heroes Hire's Requests for Monetary Relief

In its notice of appeal filed August 20, 2021, Heroes Hire sought payment of $21,030 for nursing services that its employees had provided but for which Heroes Hire had not yet invoiced and the VA had not yet paid. In our decision dated October 7, 2021, which addressed a motion for emergency relief that Heroes Hire had filed, we discussed how, in addition to lacking injunctive power, we lacked jurisdiction to entertain the monetary request because Heroes Hire had not submitted a claim to the contracting officer seeking payment of that money. *Heroes Hire* (citing *Mayberry Enterprises, LLC v. Department of Energy*, CBCA 5961, 18-1 BCA ¶ 36,998; *Foxy Construction, LLC v. Department of Agriculture*, CBCA 5632, 17-1 BCA ¶ 36,687). Nevertheless, we did not affirmatively dismiss the request in that decision. It appears that this request may now be moot, given that, during the pendency of these appeals, Heroes Hire submitted an invoice and the VA has paid it. Even if it is not, we must dismiss the money request for lack of jurisdiction.[5]

In its answer, Heroes Hire added a request for payment of $100,000 to cover "[t]ermination cost . . . to compensate for . . . total end of contract, pain and suffering of Contractor, and consent and release" of Heroes Hire's last RN. Answer ¶ 38. Because Heroes Hire never submitted a claim to the VA contracting officer seeking that payment, we lack jurisdiction to entertain it, as well. *Foxy Construction*.

Decision

We are not unsympathetic to the situation in which Heroes Hire found itself, faced with a lender that would not sign a release of its payment assignment. That problem, though, was not caused by the VA, and Heroes Hire had no right to demand that the VA step into the middle of Heroes Hire's dispute with its lender and take actions that would have risked

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[5] We note that, on December 29, 2021, Heroes Hire submitted two new appeal file exhibits to the Board: one was a letter from Heroes Hire to the VA dated September 23, 2021, demanding payment of $19,059 for services previously rendered, and the other was an invoice from Heroes Hire for those services that, although dated September 22, 2021, appears to have been delivered to the VA on December 22, 2021. *See* Appellant's Exhibits 25, 26. Assuming that the letter dated September 23, 2021, was actually submitted to the contracting officer and could be considered a claim, Heroes Hire never filed an appeal with the Board following the "deemed denial" of that claim. Accordingly, we have no basis for assuming jurisdiction over it.

liability for the VA. Because Heroes Hire had no justifiable basis for refusing to continue work under its contract unless the VA agreed to ignore the payment assignment in which the lender held a security interest, we uphold the agency's termination of Heroes Hire's contract for cause. Heroes Hire's appeal challenging that termination is **DENIED**. Heroes Hire's monetary requests are **DISMISSED FOR LACK OF JURISDICTION**.

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