UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION;
MOTION TO DIRECT RESPONDENT TO ISSUE
FINAL DECISIONS BY A SPECIFIC DEADLINE DENIED:
July 29, 2022

CBCA 7392

4K GLOBAL-ACC JOINT VENTURE, LLC,

Appellant,

v.

DEPARTMENT OF LABOR,

Respondent.

Karl Dix, Jr., Lochlin B. Samples, Jonathan R. Mayo, and Gesuè A. Staltari of Smith, Currie & Hancock LLP, Atlanta, GA, counsel for Appellant.

José Otero, Jonathan I. Pomerance, Joshua L. Caplan, C. Cleveland Fairchild, and Christopher L. Sanders, Office of the Solicitor, Department of Labor, Washington, DC, counsel for Respondent.

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

LESTER, Board Judge.

In a notice of appeal filed May 4, 2022, appellant, 4K Global-ACC Joint Venture, LLC (4KG-ACC), asserted that it was appealing "the Contracting Officer's government claim under the Contract Disputes Act [(CDA), 41 U.S.C. §§ 7101-7109 (2018),] regarding alleged default termination damages incurred by the [Department of Labor (DOL)]" under contract no. 1630DC-17-0024 (the contract). DOL has filed a motion seeking to dismiss the appeal for lack of jurisdiction, arguing that the letter from the contracting officer upon which

4KG-ACC is relying, issued March 23, 2022, was not a "final decision" from which 4KG-ACC could appeal. For the reasons set forth below, we grant DOL's motion.

4KG-ACC has asked that, if the Board dismisses this appeal, it preclude DOL from issuing a series of piecemeal "final decisions" asserting Government claims under the terminated contract and direct DOL to issue any and all "final decisions" associated with the March 23 letter by a date certain in July 2022. Because the Board lacks authority to control the timing of the Government's issuance of final decisions asserting Government claims, we deny 4KG-ACC's request.

Background

The Contracting Officer's March 23, 2022, Claim Letter

Accompanying 4KG-ACC's May 4, 2022, notice of appeal was a letter from the DOL contracting officer to 4KG-ACC's managing members dated March 23, 2022, which 4KG-ACC contends constitutes an appealable final decision under section 7103(a)(3) of the CDA (41 U.S.C. § 7103(a)(3)). The letter reads in its entirety as follows:

> Re: Government Claim for Default Termination Damages
> Under Contract No. 1030DC-17-C-0024
> Construction of the Atlanta Job Corps Center – Project 1046
>
> Dear Mr. McKnight and Ms. Sapp:
>
> In accordance with the [CDA], 41 U.S.C. Chap. 71, Federal Acquisition Regulation (FAR) 33.206, and the terms of the above-referenced Contract, the United States Government, acting through [DOL], hereby asserts a claim against [4KG-ACC] in the amount of **$5,552,959.51**.
>
> This amount represents damages the Government has incurred *to date* as a result of the Joint Venture's default of the above-referenced Contract. . . . The Government's damages include:

Attch.	Nature of work performed	DOL Contract No.	Paid to Date
A	Designer of Record (TAG) review of Project specifications and plans following 12/6/19	DOL-ETA-16-C-0062	$2,475,509.31

B	Spectrum Mgt., LLC (site caretaker security and maintenance) following 12/6/19	1630DC-20-P-00005	$1,792,355.58
C	Harbor Enterprises, LLC (site caretaker security and maintenance) following 12/6/19	1630AE-21-C-0003	$1,285,094.62
		Total	$5,552,959.51

In support of these damages, we are providing the attached contracts and invoices, as well as accompanying agency payment summaries.

Note that DOL expects to incur significant additional damages as a result of the Joint Venture's default. DOL will assert additional claims as those future costs are incurred and identified. DOL expects that a contract for the completion of the Project will be awarded in the future. At that time, DOL expects additional obligation of funds, far in excess of the funds that remained unspent on the Contract at the time of the termination. Such excess procurement costs will be the subject of future Government claims against the Joint Venture.

DOL requests that you provide any facts, documentation, or argument that you believe is relevant to this Government claim, and that you do so within 30 days of your receipt of this letter. DOL will consider your response before issuing its final decision.

Thank you for your attention to this matter. Please contact me, DOL Procurement José Otero . . . , or DOL attorney Jonathan Pomerance . . . with any questions on this matter.

The letter did not contain any statement of 4KG-ACC's appeal rights under the CDA.

The Contracting Officer's June 3, 2022, Letter

On June 3, 2022, a month after this appeal was filed, the DOL contracting officer issued another letter to 4KG-ACC, this one titled "Contracting Officer's Final Decision on Portion of Government Claim for Damages Following Default Termination of Contract

1630DC-17-C-0024 Construction of Atlanta Job Corps Center." In that letter, the contracting officer indicated as follows:

> On March 23, 2022, [DOL] asserted a Government Claim against 4KG-ACC Joint Venture, LLC ("the JV") under Contract 1630DC-17-C-0024. The Government Claim is for $5,552,959.51 in damages incurred by DOJ due to the JV's default of the Contract. In the Claim letter, I requested the JV respond to the Government Claim. I indicated DOL would issue a final decision after your response was received and considered. On April 22, 2022, counsel for the JV provided the JV's response to the Government Claim.
>
> I am hereby providing DOL's final decision with respect to a *portion* of the Government Claim. Specifically, I am now deciding the portion of the Government Claim related to the costs of site security, site protection and site maintenance. DOL seeks such damages in the amount of $3,077,450.20 (this is the total amount paid by DOL under two separate site caretaker contracts: $1,792,355.58 paid to Spectrum Management LLC (Spectrum) and an additional $1,285,094.62 paid to Harbor Enterprises, LLC (Harbor)). In the Claim letter of March 23, 2022, I provide information and documents supporting these costs, including copies of the relevant contracts and invoices.

Based upon DOL's alleged entitlement to the amounts associated with site security, site protection, and site maintenance originally identified in the March 23, 2022, letter (collectively, the "caretaker costs"), the contracting officer stated that she "hereby issue[s] this final decision" demanding that 4KG-ACC pay within thirty days "the amount of $3,077,450.20, as a *portion* of damages related to the JV's default of the Contract." At the end of the final decision, the contracting officer identified 4KG-ACC's appeal rights under the CDA, inclusive of the right to appeal the decision to the Board. The contracting officer also indicated that "[t]he other portion of the [March 23, 2022] Government Claim, related to services provided by the Designer of Record, is still under review by DOL" and that "[a] separate final decision on that portion of the Claim will be issued in the near future."

4KG-ACC has not filed an appeal of the contracting officer's June 3 final decision.

DOL's June 3, 2022, Motion to Dismiss and 4KG-ACC's Response

The same day that the DOL contracting officer issued her June 3, 2022, final decision, DOL filed a motion to dismiss this appeal, asserting that the March 23, 2022, letter upon which this appeal is based is not a "final decision" under the CDA giving rise to a right to appeal. DOL referenced the final decision issued earlier that day and argued that, if 4KG-ACC wanted to challenge that decision, it would need to file a new appeal. Further,

DOL argued that the remaining portion of the damages identified in the March 23, 2022, letter but not addressed in the June 3, 2022, final decision would not be ripe for appeal until the contracting officer issues an actual final decision on that portion of the Government's claim.

In response, 4KG-ACC, citing precedent from the Court of Appeals for the Federal Circuit, argued that it is entitled to initiate an appeal based upon the March 23 letter. It indicated that, for its own protection, it still intends to file an appeal from the June 3 decision, but it asked that the Board direct DOL to issue any and all additional "decisions" relating to the Government's claim by a date certain in July 2022, with the goal of precluding piecemeal adjudications. It asserted that "[t]his aim is especially important given the DOL's stated intention to lodge additional damages claims against [4KG-ACC], albeit without any indication of when the DOL might do so."

Discussion

DOL's Motion to Dismiss

"[T]he linchpin for appealing claims under the [CDA] is the contracting officer's 'decision,'" and "[n]o appeal . . . to the agency board of contract appeals . . . may be taken without such a 'decision.'" *Paragon Energy Co. v. United States*, 645 F.2d 966, 967 (Ct. Cl. 1981). That rule applies whether the claim at issue is a contractor claim or a Government claim. *Computer Network Systems, Inc. v. General Services Administration*, GSBCA 11368, 93-1 BCA ¶ 25,260, at 125,825 (1992); 41 U.S.C. § 7103(a)(3).

The "decision" on appeal here is the contracting officer's letter dated March 23, 2022. That letter is titled "Government Claim for Default Termination Damages." In the letter's first paragraph, the contracting officer states that she is "assert[ing] a claim against [4KG-ACC] in the amount of **$5,552,959.51**" and that "[t]his amount represents damages the Government has incurred *to date* as a result of the Joint Venture's default." Towards the end of the letter, however, the contracting officer gives 4KG-ACC the opportunity to "provide any facts, documentation, or argument that [it] believe[s] is relevant to this Government claim" and states that "DOL will consider [4KG-ACC's] response before issuing its final decision."

The FAR defines a "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain." FAR 2.101 (48 CFR 2.101 (2021)). Even though the contracting officer here expressly asserted a Government claim in a sum certain, DOL tells us that the final statement in the March 23 letter indicating that the contracting officer would consider information that 4KG-ACC might submit "before issuing [DOL's] final decision" places a qualification on

the contracting officer's earlier statements and renders any appeal of the Government claim premature.

On its face, DOL's argument appears somewhat at odds with the Federal Circuit's decision in *Placeway Construction Co. v. United States*, 920 F.2d 903 (Fed. Cir. 1990). There, the appellate court reviewed a letter in which a contracting officer found the contractor "liable because of delayed performance and effectively ruled that damages would be the contract balance, $297,226.12, subject to revision if he concluded that different damages were due at some indeterminate time in the future." *Id.* at 907. The Federal Circuit held that the contracting officer's determination that the contractor was liable and identification of a sum certain that the contractor should pay outweighed any suggestion in the letter that the contracting officer might revise that number at some future date:

> [W]e conclude that the [contracting officer (CO)] effectively made a final decision on the government claim. It was undisputed that Placeway had completed performance of the contract. Moreover, the contract price for the work completed was undisputed and was due upon completion of work. Although the CO may have implied that the amount of the claimed set off would be redetermined in the future, the CO effectively granted the government's claim in the amount of $297,057.12 when he declined to pay Placeway the balance due on the contract. That the CO might decide Placeway owed more or less at a later time does not affect the finality of the decision made granting the government a sum certain, $297,057.12.

Id. at 906. The Federal Circuit noted that, "[e]ven if the CO's letter is construed as merely a statement that he is investigating the government's claim to decide liability," similar to what DOL is arguing here, "we find no authority for [the contracting officer] effectively to award fixed damages prematurely and speculatively, *i.e.*, prior to liability being established and a quantum being ascertained." *Id.* at 907 n.2. It also found that "[t]he decision is no less final because it failed to include boilerplate language" – that is, the notice of appeal rights – "usually present for the protection of the contractor." *Id.* at 907. Accordingly, the appellate court found that the letter was sufficiently final to allow the contractor to challenge it and that the trial court possessed jurisdiction to consider that challenge.

Yet, subsequent to *Placeway*, the Federal Circuit issued a decision in *Sharman Co. v. United States*, 2 F.3d 1564 (Fed. Cir. 1993), *overruled in part on other grounds*, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (en banc), that at least one court (*Volmar Construction, Inc. v. United States*, 32 Fed. Cl. 746, 754 (1995)) has found inconsistent with *Placeway*. In *Sharman*, the Government sent a letter to the contractor seeking repayment of progress payments in the amount of $2,066,696.36, which it characterized as a "notice of demand for payment of contract debt," and notified the

contractor that, if it disputed the amount sought, it could submit a proposal for deferment of collection. *Id.* at 1567. The contractor challenged the notice in a suit filed with the Court of Federal Claims, but the Federal Circuit held that the invitation in the notice allowing the contractor to submit a proposal for deferring or eliminating the identified debt, coupled with the nature of a notice and demand for payment, rendered the notice insufficiently "final" to constitute an appealable final decision:

> On its face, this letter simply states that it is a "notice and demand for payment"; it does not contain the customary designation "final decision." The text of the September letter also makes clear that it is not a final decision because it specifically invites Sharman to submit a proposal for deferment of collection "if immediate payment is not practicable or if the amount is disputed." As the Claims Court itself acknowledged, such notices are "tentative determinations issued to invite contractor comment rather than as final decisions." The September letter, therefore, is not a final decision.

Id. at 1570 (citations omitted). The *Sharman* Court determined that its prior decision in *Placeway* was distinguishable because, even though the contracting officer's letter in *Placeway* stated that the amount demanded was subject to possible reduction, it did not invite negotiation in the same manner as the notice in *Sharman*:

> [I]n *Placeway Construction Corporation v. United States*, 920 F.2d 903 (Fed. Cir. 1990), a contracting officer's decision was held to be final despite a statement in the decisional letter that the amount could be revised at a later date, because the decision was for the set amount of the contract balance although it was subject to possible reduction depending on subsequent facts. This case is distinguishable from *Placeway*, however, because here the contracting officer's September letter actually invited negotiation of the amount demanded and therefore was not final.

Id. at 1571 n.9.

Like the court in *Volmar Construction*, we find it somewhat difficult to "resolve the [seeming] inconsistency between the rule announced in *Placeway* and those set forth in *Sharman*." *Volmar Construction*, 32 Fed. Cl. at 754; *see id.* at 755 (comparing "the relaxed final decision standard enunciated in *Placeway*" with the stricter standard in *Sharman*). We must be guided, though, by the manner in which the Federal Circuit in *Sharman* distinguished the situation there from the situation in *Placeway*, finding that, where "the contracting officer's . . . letter actually invited negotiation of the amount demanded," as it did in *Sharman*, the demand for payment "therefore was not final." *Sharman*, 2 F.3d at 1571 n.9. Looking at the contents of the notice at issue in *Sharman*, it is clear that the "invitation"

to "negotiate" was implicit in the context of the notice rather than a broadly explicit request for negotiations.

Specifically, the demand for payment at issue in *Sharman* was part of an established process, set forth in FAR Part 32.6, that ultimately (unless the parties reach agreement on the asserted debt) leads to the issuance of an appealable contracting officer's final decision. *See Sharman Co. v. United States*, 24 Cl. Ct. 763, 765 (1991) (quoting language from demand letter that mirrors FAR 32.604(b)(5)(i) language), *rev'd in part*, 2 F.3d 1564 (Fed. Cir. 1993). FAR 32.603 and .604 identify a process through which the contracting officer determines that a contractor owes a contract debt to the United States and then issues a demand for payment advising the contractor "[t]o contact the contracting officer if the contractor believes the debt is invalid or the amount is incorrect." FAR 32.604(b)(5)(i). If "[t]he contracting officer and the contractor are unable to reach agreement on the existence or amount of a debt in a timely manner," the contracting officer then issues a final decision that is appealable to the Board. *Id.* 32.605(a)(1). Accordingly, the "demand letter gives the contractor notice of the potential claim and an opportunity to respond. If warranted, the [contracting officer's] appealable claim decision [then] follows." *Bean Horizon-Weeks Marine (JV)*, ENG BCA 6398, 99-1 BCA ¶ 30,134, at 149,060 (1998). In light of the demand for payment's role in the established FAR Part 32.6 process, the demand for payment letter in *Sharman* was considered distinct and separate from the appealable final decision that was supposed to come later.

In this case, the DOL contracting officer did not expressly indicate in her letter that she was following the FAR Part 32.6 process in asserting DOL's claim. In fact, she instead referenced FAR 33.206, "Initiation of a claim," which refers to the contracting officer's obligation to issue a written decision on any Government claim initiated against a contractor. Nevertheless, the paragraph in the March 23 letter inviting 4KG-ACC to submit "any facts, documentation, or argument that [4KG-ACC] believe[s] is relevant to this Government claim" is similar to the language required for FAR 32.604 demand notices, and the letter makes clear that the DOL contracting office intended to issue a "final decision" after receiving 4KG-ACC's response.[1] That language indicates that the March 23 letter was a "tentative determination[] issued to invite contractor comment rather than . . . [a] final decision[]." *Sharman*, 2 F.3d at 1570; *see Crippen & Graen Corp. v. United States*, 18 Cl.

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[1] That statement is consistent with DOL's representations in a notice that DOL filed on March 31, 2022, in a related case (CBCA 6683, et al.) in which 4KG-ACC has challenged the validity of DOL's default termination. There, DOL informed the Board that it had asserted a Government claim against 4KG-ACC but "has not yet issued a contracting officer's final decision with respect to this Claim." The Government claim referenced in that March 31 notice is the same one that is at issue in this appeal.

Ct. 237, 240 (1989) (where "the [contracting officer's] letter invited the plaintiff to submit any facts concerning the dispute and specifically stated that '. . . a final decision will be issued in pursuit of an affirmative government claim,' [t]he clear intent of the letter was to allow the contracting officer to gather and consider all relevant information concerning the dispute in rendering a final decision.").

We recognize that the bulk of the contracting officer's March 23 letter makes clear that the contracting officer has already decided that 4KG-ACC is liable, has identified and documented the specific costs that she wants 4KG-ACC to pay, and is written in a manner that makes it sound like a decision. We can also understand 4KG-ACC's desire to speed the Government's excess reprocurement cost demands so that they may join a challenge to DOL's default termination decision that 4KG-ACC has already filed with and is pending before the Board. Nevertheless, one of the purposes of the CDA was to establish a mandatory administrative process that would "help to induce resolution of more contract disputes by negotiation *prior to* litigation" before the Board. S. Rep. No. 95-1111, at 1 (1978) (emphasis added), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5235. DOL's March 23 letter, despite some of its wording, is only an initial step in that process. Because the March 23 letter asked for input from 4KG-ACC consistent with the FAR Part 32.6 process, we must follow *Sharman* and find that the March 23 letter is not an appealable contracting officer's final decision. *See Sharman*, 2 F.3d at 1571 n.9.

4KG-ACC argues that, if the March 23 letter does not constitute an appealable final decision, the Board can still assume jurisdiction over this appeal by substituting the contracting officer's June 3, 2022, final decision in place of that March 23 Government claim letter. We disagree. This appeal was based solely on the March 23 letter. Further, jurisdiction is established at the time that a notice of appeal is filed, *Pros Cleaners v. Department of Homeland Security*, CBCA 5871, 17-1 BCA ¶ 36,904, at 179,807, and this appeal was already pending when the contracting officer issued the June 3 decision. To the extent that 4KG-ACC wants to appeal the June 3 final decision, it still has time to do so, but must file a new notice.

4KG-ACC's Request to Set a Definitive Date for Assertion of Claims

4KG-ACC has asked us that, if we dismiss this appeal for lack of jurisdiction, we require DOL to issue decisions asserting all Government claims for excess reprocurement costs under its terminated contract (or at least those arising out of the March 23 letter) by a date certain in July 2022. Yet, when jurisdiction is lacking, "the only function remaining to the [tribunal] is that of announcing the fact and dismissing the cause." *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). Even if we could consider 4KG-ACC's request, the FAR allows a contracting officer to "issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim, unless the contracting parties

agreed to a shorter time." FAR 33.206(b). 4KG-ACC has identified nothing that would provide the Board any authority to shorten or override that six-year statute of limitations.

In support of its position that the Board can direct the DOL contracting officer to issue a final decision on a Government claim by a date certain, 4KG-ACC cites to 41 U.S.C. § 7103(f)(4), which provides the Board authority to "direct a contracting officer to issue a decision in a specific period of time, as determined by the tribunal concerned, in the event of undue delay on the part of the contracting officer." Although 4KG-ACC argues that, under this section, we should be able to alter the Government's deadline for issuing a decision on a Government claim, it is clear reviewing section 7103 as a whole that subsection 7103(f) addresses the timing of final decisions on *contractor* claims. Under section 7103(f)(4), "the Board is authorized to alter a time extension that the contracting officer has granted himself [for deciding a contractor claim] and to allow a contractor to appeal on a 'deemed denial' basis if the contracting officer fails to issue a decision by the Board's revised deadline for a decision." *Hawk Contracting Group, LLC v. Department of Veterans Affairs*, CBCA 5527, 16-1 BCA ¶ 36,572, at 178,120. That statutory provision does not allow us to reduce the six-year statute of limitations that governs the Government's right to assert a *Government* claim under a contract or to find a decision on a Government claim "deemed asserted."

Decision

For the foregoing reasons, this appeal is **DISMISSED FOR LACK OF JURISDICTION**. 4KG-ACC's request that the Board set a deadline for the assertion of additional Government claims is **DENIED**.

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