UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON AUGUST 14, 2023

COUNTERCLAIM DISMISSED: August 3, 2023

CBCA 7670

F.H. CANN & ASSOCIATES, INC.,

Appellant,

v.

DEPARTMENT OF EDUCATION,

Respondent.

James C. Fontana and L. James D'Agostino of Fontana Law Group, PLLC, Tysons, VA; and David R. Warner and Heather R. Mims of Warner PLLC, Reston, VA, counsel for Appellant.

Paula Hughes and Marta M. Rajchel, Office of the General Counsel, Department of Education, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **GOODMAN**, and **ZISCHKAU**.

GOODMAN, Board Judge.

Appellant, F.H. Cann & Associates, Inc., has moved to dismiss the counterclaim of unjust enrichment asserted by respondent, the Department of Education, in its answer. We dismiss the counterclaim.

Background

In 2014, respondent awarded to appellant a contract for twelve private collection agency (PCA) services, with respect to federal student loan borrowers over numerous federal student loan programs, with a contract period of performance of ten years—a five-year base period commencing September 30, 2014, and a single five-year option period commencing October 1, 2019, and scheduled to end on September 29, 2024. As a result of the COVID-19 pandemic, Congress enacted the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Public Law No. 116-136, on March 27, 2020, which imposed a moratorium on federal student loan repayments and involuntary collections until September 30, 2020 (moratorium). As a result of the moratorium, appellant alleges that its performance of the contract was impacted adversely, including by respondent's directives to stop certain work and perform other work not required by the contract. Complaint ¶¶ 1-34.

On December 22, 2020, appellant submitted to the contracting officer a request for equitable adjustment (REA), which was revised on March 15, 2021, seeking compensation for the costs of the alleged adverse impact. In response, respondent offered a settlement amount which appellant declined. By letter dated November 30, 2021, respondent terminated the contract for convenience, which respondent alleges was a partial termination for convenience. Appellant alleges that it continued to perform work under the contract as directed by respondent. On April 1, 2022, appellant submitted to the contracting officer a termination settlement proposal (TSP), which incorporated the REA as well as termination-related amounts. The TSP requested amounts associated with and caused by the termination. On September 19, 2022, appellant submitted to the contracting officer a request for a contracting officer's final decision (claim), which incorporated the TSP and attachments, including the REA and its attachments. On December 21, 2022, respondent's contracting officer issued a final decision (COFD), denying the claim for the most part but finding appellant entitled to a small portion of the amount sought. Complaint ¶¶ 35-49.

Appellant appealed the COFD to this Board on February 8, 2023, and filed its complaint on March 3, 2023. Respondent's answer, filed on April 10, 2023, contained two references to "unjust enrichment." First, respondent's answer detailed the information in the COFD as to appellant's performance of the contract and revenue after the enactment of the CARES Act, including an alleged spike in revenue as the result of the moratorium, and concluded that appellant "has been fully compensated for work performed under the Contract, and to provide additional compensation for costs [appellant] claims[1] to have

[1] Presumably this does not include the amount which the COFD calculated was due appellant.

incurred as a result of Force Majeure would result in the *unjust enrichment* of [appellant]." Answer at 21-22 (emphasis added). Also, on the last page of the answer, under the heading "Counterclaims," respondent has listed "10. Unjust Enrichment," with no further explanation.[2] *Id.* at 47.

Appellant filed a motion to dismiss the counterclaim, alleging that respondent had not issued an appealable final decision containing a government claim against appellant for unjust enrichment nor had respondent alleged any facts supporting a claim for unjust enrichment. Appellant's Motion to Dismiss Counterclaim at 1-2.

In respondent's opposition to appellant's motion, respondent reiterated the information that it detailed in its answer and that the contracting officer considered in determining an offer of payment to appellant, as stated in the COFD, which respondent alleges supports its counterclaim for unjust enrichment. Respondent summarized its position as follows:

> [T]he elements for *unjust enrichment* are as follows: Respondent providing something of value to Appellant, Respondent acknowledging, accepting, and benefitting from what was provided, and the inequities that would occur for Respondent to continue to enjoy that benefit without compensation. Respondent alleges the following facts in support of its counterclaim of unjust enrichment.
>
> > Respondent provided Appellant increased income at a reduced effort as quoted in the Final Decision.
> >
> > Respondent acknowledged and agreed to the benefit through continued performance under the contract.
> >
> > *It would be inequitable to compensate Appellant for its claimed damages under the CARES Act while also allowing the Appellant to enjoy the benefits of the law.*

Respondent's Opposition to Appellant's Motion to Dismiss at 2-3 (emphasis added).

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[2] This followed a list of nine "Affirmative Defenses," numbered 1-9. Answer at 46-47.

Discussion

The information and allegations in the COFD and respondent's answer upon which respondent relies to establish its counterclaim of unjust enrichment are a recitation of reasons why respondent believes appellant has been adequately compensated under the contract and would only be due the additional amount offered in the COFD. The information and allegations do not state that appellant *has been* unjustly enriched. Rather, respondent in its answer and opposition to appellant's motion to dismiss the counterclaim opines that appellant *would be* unjustly enriched *if* its claim were to be granted above the amount offered in the final decision. Such contingent statements with regard to an event that has not occurred do not support or establish a government claim for unjust enrichment.

Respondent may continue to assert the information and allegations stated in the COFD and the answer as affirmative defenses to appellant's claim but not as a counterclaim for unjust enrichment.[3]

Decision

The counterclaim for unjust enrichment is **DISMISSED**.

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

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[3] Even if it were determined to be a valid counterclaim for unjust enrichment, the Board does not have jurisdiction to decide it. The Contract Disputes Act (CDA) grants boards of contract appeals jurisdiction over claims arising from "any express or implied contract" made by an executive agency to procure property, services, or construction, and to dispose of property. 41 U.S.C. § 7102(a) (2018). "The CDA does not grant the contract appeals boards jurisdiction over claims arising from 'implied-in-law' contracts. As 'an equitable doctrine applied to those situations where the rights and liabilities of the parties are not defined in a valid contract,' a claim for unjust enrichment arises from an 'implied-in-law' contract." *Flux Resources, LLC v. Department of Energy*, CBCA 6208, 19-1 BCA ¶ 37,338, at 181,589 (citations omitted); *see also John Douglas Burke v. Department of Health & Human Services*, CBCA 7492, 23-1 BCA ¶ 38,304, at 185,976. Therefore, the Board does not have jurisdiction over claims for unjust enrichment.

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge