



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION TO DISMISS COUNT I
FOR LACK OF JURISDICTION DENIED: August 27, 2025

CBCA 8034

ALL PHASE SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Lawrence J. Sklute of Sklute & Associates, Potomac, MD, counsel for Appellant.

Jennifer L. Hedge, Office of General Counsel, Department of Veterans Affairs, Pittsburgh, PA, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **SHERIDAN**, and **SULLIVAN**.

SULLIVAN, Board Judge.

All Phase Services, Inc. (APS) appealed the termination for default of its contract with the Department of Veterans Affairs (VA). In its initial complaint, APS alleged, in part, that its bid contained an unidentified mistake and the contract should be rescinded because the contracting officer failed to discharge his duty to verify the bid that APS submitted. VA moved to dismiss for lack of jurisdiction or, in the alternative, for summary judgment on this allegation. In response to this motion, APS agreed with VA that the Board lacked jurisdiction and sought to withdraw this allegation. For the following reasons, we determine that the Board possesses jurisdiction over APS's allegation. We will allow APS to determine whether it would like to withdraw the allegation or respond to VA's motion for summary judgment before deciding VA's alternative motion.

Background

In August 2020, VA issued a solicitation for the replacement of roofs at the Buffalo VA Medical Center. Appellant's Statement of Genuine Issues ¶ 1; Exhibit 5 at 1.¹ APS submitted a bid for \$4,832,103. Appellant's Statement of Genuine Issues ¶¶ 3, 5. After bid opening in September 2020, the contracting officer asked APS to verify its bid. Appellant's Statement of Genuine Issues ¶ 6; Exhibit 171. In the verification request, the contracting officer notified APS that it should either "request permission to correct the bid [in accordance with] FAR 14.407-2 or FAR 14.407-3 [or] request permission to withdraw the bid" if APS believed its bid contained a mistake. *Id.* APS's bid was \$138,159.32, less than the independent government estimate obtained by the VA prior to the issuance of the solicitation. Appellant's Statement of Genuine Issues ¶ 10; Exhibit 170. APS's bid was fifty-five and seventy-five percent lower than the second and third lowest offers. Appellant's Statement of Genuine Issues ¶ 6; Exhibit 129.

An employee of APS replied to the contracting officer's request and verified APS's bid. Appellant's Statement of Genuine Issues ¶ 8; Exhibit 172 at 3. Because of ambiguity regarding APS's present responsibility and the employee's authority to represent APS in contractual matters, the contracting officer contacted APS again to ensure that the bid was verified by someone authorized to do so. Appellant's Statement of Genuine Issues ¶ 9; Exhibit 173. Before APS responded to the second request for verification, APS requested the abstract of bids. Appellant's Statement of Genuine Issues ¶ 6; Exhibit 258. The contracting officer denied the request for the abstract. *Id.* The chief executive officer of APS then "reverifi[ed] the bid." Appellant's Statement of Genuine Issues ¶ 9; Exhibit 175 at 2. Following APS's re-verification of its bid, APS was awarded the contract at its bid price. Appellant's Statement of Genuine Issues ¶ 20; Exhibit 6.

In Count I of its initial complaint, APS alleged that the contracting officer had constructive knowledge that APS's bid contained a mistake based upon the difference between APS's bid and the second and third higher bids. Complaint ¶ 95. APS further alleged that the contracting officer violated his regulatory duty when he accepted the bid despite this knowledge, and, based upon this violation, APS's contract should be rescinded. *Id.* ¶¶ 95, 96. APS did not allege the nature of its mistake. Pursuant to the schedule of proceedings established by the Board, VA filed a motion to dismiss Count I of APS's

¹ Although APS did not respond substantively to VA's motion to dismiss, it did provide a statement of genuine issues in response to VA's statement of undisputed material facts.

complaint for lack of jurisdiction or, in the alternative, for summary judgment.² In its response to this motion APS agreed that the Board lacked jurisdiction and stated that it withdrew its allegation. The Board construed APS's response to be a motion to amend its complaint and held that motion in abeyance pending a determination regarding jurisdiction because the withdrawal could be with prejudice. Order at 2 (July 15, 2025).

Discussion

The Board Possesses Jurisdiction to Consider APS's Mistake-in-Bid Allegation

VA moves to dismiss Count I for lack of jurisdiction because APS did not present its allegations in a claim submitted to the contracting officer. Respondent's Motion for Summary Judgment at 11-12. In its cross-motion, APS agreed that the Board lacked jurisdiction. Appellant's Cross Motion for Summary Judgment at 42.

Although not cited by VA, VA appears to rely upon *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010), as the basis for its motion. In *Maropakis*, the Court of Appeals for the Federal Circuit held that a contractor's defense of a time extension to the Government's claim for liquidated damages was jurisdictionally barred because the defense was not first brought to the contracting officer as a claim. *Id.* at 1327-28. However, the holding in *Maropakis* has been limited in subsequent decisions to require that a contractor present a defense as a claim only when the contractor is seeking monetary payment or adjustment of contract terms. *Securiforce International America, LLC v. United States*, 879 F.3d 1354, 1362 (Fed. Cir. 2018) (citing *Laguna Construction Co. v. Carter*, 828 F.3d 1364, 1369 (Fed. Cir. 2016)), *abrogated on other grounds by ECC International Constructors, LLC v. Secretary of Army*, 79 F.4th 1364 (Fed. Cir. 2023). Here, APS seeks rescission of the contract, which is a distinct remedy from contract modification or monetary damages. *See Dow Chemical Co. v. United States*, 226 F.3d 1334, 1345 (Fed. Cir. 2000) (“[R]escission is essentially an equitable remedy, [and] it will not ordinarily be invoked where money damages—in this case damages for breach of contract—will adequately compensate a party to the contract.”); 29 Samuel Williston & Richard A. Lord, *Williston on Contracts* § 73:15 (4th ed. 2025) (differentiating rescission and modification as contract remedies). Because APS is not seeking a monetary remedy or adjustment of contract terms, the Board need not require APS to submit a valid claim to the contracting officer to have jurisdiction to consider APS's defense to the termination for default. The Board has jurisdiction to decide the first count in APS's original complaint.

² In its motion, VA also sought summary judgment on the merits of the default termination. The Board's decision on this portion of VA's motion is set forth in the decision on the parties' cross-motions for summary judgment that will be issued separately.

APS Shall Decide Whether It Will Withdraw the Allegation or Respond to the Substance of VA's Motion

APS, in its response to VA's motion for summary judgment, sought to withdraw allegations related to Count I of the revised amended complaint and did not respond to VA's alternative motion for summary judgment. Since the Board has jurisdiction to consider the allegation, the withdrawal would be with prejudice unless the parties jointly request dismissal without prejudice. *See* Board Rule 12(b)(1) and (2) (48 CFR 6010.12(b)(1) and (2) (2024)) ("Dismissal is with prejudice unless a Board order or other applicable law provides otherwise."); *see also Deuterium Corp. v. United States*, 21 Cl. Ct. 132, 134-35 (1990) ("Dismissal with prejudice is particularly appropriate where plaintiff moves to withdraw during the pendency of a summary judgment motion filed by defendant."). Or APS may brief the merits of VA's motion for summary judgment.

To prevail on its mistake-in-bid allegation, APS must first "prove that the error is of the type that may be compensable" and then prove "that the contracting officer knew or should have known of the mistake at the time the bid was accepted." *RAK Contractors, LLC v. Department of Agriculture*, CBCA 4011, 15-1 BCA ¶ 35,934, at 175,618. An error of judgment is not a compensable error. *Bromley Contracting Co. v. United States*, 794 F.2d 669, 671-72 (Fed. Cir. 1986); *see Liebherr Crane Corp. v. United States*, 810 F.2d 1153, 1158 (Fed. Cir. 1987) ("It is well established that an erroneous bid based, like this one, upon a mistake in judgment does not entitle the contractor to reformation of its contract."); 48 CFR 14.407-4. This test has been characterized as requiring the contractor to establish that (1) a mistake occurred; (2) the mistake was a clear-cut clerical or mathematical error or misreading of the specifications and not a judgment error; (3) prior to award the agency knew or should have known that a mistake had been made; (4) an agency request for bid verification was inadequate; and (5) proof of the intended bid was established. *Daniels Building Company v. Department of Veterans Affairs*, CBCA 6891, 24-1 BCA ¶ 38,493, at 187,105; *Transco Contracting Co.*, ASBCA 47289, 96-1 BCA ¶ 28,090, at 140,222 (1995).

While APS focused upon the actions taken by the contracting officer to verify the bid, APS failed to allege in its complaint what the mistake that it committed was.³ APS's focus upon the disparity between its bid and the other submitted bids suggests that APS would

³ It is too late for APS to amend its complaint again. Discovery has closed, and the hearing in this appeal will begin on October 20, 2025. *See Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539, at 178,004 (motion to amend pleadings may be denied as prejudicial when the request to amend is made just before a trial proceeding).

assert that it made an error in judgment in its pricing. We caution that, without more, APS will be unable to make a case for mistake-in-bid.

Decision

VA's motion to dismiss for lack of jurisdiction is **DENIED**. APS will advise the Board no later than September 3, 2025, whether it still seeks to withdraw the mistake-in-bid allegation from its original complaint or would like to respond to the substance of VA's motion for summary judgment. If it chooses to respond, its response shall be filed on September 8, 2025.

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge

We concur:

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge