



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: July 19, 2023

CBCA 7722

PRIMARY RATE,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Respondent.

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

Ryan Lambrecht, Office of the General Counsel, Department of Commerce, Washington, DC, counsel for Respondent.

Before Board Judges **SHERIDAN**, **LESTER**, and **RUSSELL**.

SHERIDAN, Board Judge.

Respondent, the Department of Commerce, filed a motion to dismiss this appeal for lack of jurisdiction after the contracting officer withdrew the final decision. Appellant, Primary Rate, indicated it did not object to dismissal but requested the appeal be dismissed without prejudice. Appellant asserts that it did not file an initial claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), but rather requested the re-evaluation of rejected items. The withdrawal of the final decision rendered the appeal moot, and there are no remaining disputes before the Board within its jurisdiction to decide. For the reasons outlined herein, we dismiss the appeal for lack of jurisdiction.

Background

Respondent awarded appellant a contract to service thirty direct-current servo motors (DC motors). DC motors are critical to the functionality of next generation radar (NEXRAD), which is an essential component in data analysis that assists in forecasting weather and issuing weather-related warnings. This equipment is used by the National Weather Service (NWS) and is subject to quality testing in accordance with agency standards.

NWS inspected the motors, accepted twelve, and rejected eighteen. On December 28, 2022, appellant's attorney wrote to the contracting officer, complaining that the eighteen motors were improperly rejected and asking that the contracting officer "re-evaluate the acceptability" of the rejected motors.

The contracting officer responded to the request for re-evaluation on March 14, 2023, by issuing a final decision. Appellant timely appealed the decision to the Board on March 28, 2023, to "protect its rights."

On reading the notice of appeal, which indicated that Primary Rate did not intend to submit a claim to the contracting officer, the Board issued an order instructing the parties to discuss the best way to remedy what appeared to be a jurisdictional issue and inform the Board of the route they had decided to take, by either "withdrawing the contracting officer's final decision or submitting a response to the motion to dismiss." On April 3, 2023, respondent filed a notice of withdrawal of the contracting officer's final decision, which respondent asserted rendered the appeal moot. This notice also included a request for dismissal. Appellant did not object to respondent's motion to dismiss but requested that the appeal be dismissed without prejudice.

Discussion

The Board's jurisdiction to entertain contract disputes arises from the CDA. *Rashid El Malik v. Department of Veterans Affairs*, CBCA 6600, 20-1 BCA ¶ 37,536, at 182,275. Appellant's notice of appeal contained a motion to dismiss without prejudice for lack of jurisdiction. In the appeal, appellant explained that its submission to the contracting officer was merely a "request" for re-evaluation of the eighteen rejected motors – not a claim.

The Federal Acquisition Regulation (FAR) defines "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, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 CFR 2.101 (2021). Interpreting the CDA and the FAR, the Court of Appeals for the Federal Circuit has established that, for jurisdictional

purposes, a CDA claim exists for a non-routine contract adjustment if there is: (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc). A review of documents in the record indicates the absence of an initial claim. Thus, a final decision was issued before the matter was ripe as a claim.

Though the parties may have requested varied dispositions of this case, the Board's course of action is to dismiss the appeal for lack of jurisdiction, rather than to dismiss it without prejudice. *Khalil Bughio v. Agency for Global Media*, CBCA 6929, 21-1 BCA ¶ 37,865, at 183,865. "Any dismissal for lack of jurisdiction is, by necessity, without prejudice," as "[w]ithout jurisdiction, we lack the ability to render a merits determination and therefore 'cannot presume to dismiss the complaint,' or the appeal, 'with prejudice.'" *SRA International, Inc. v. Department of State*, CBCA 6563, et al., 20-1 BCA ¶ 37,543, at 182,314 n.1 (quoting *Scott Aviation v. United States*, 953 F.2d 1377, 1378 (Fed. Cir. 1992)).

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge

We concur:

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge