



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

---

DISMISSED IN PART FOR LACK OF JURISDICTION,  
GRANTED IN PART:  
February 22, 2016

CBCA 5038, 5039

BRENT PACKER,

Appellant in CBCA 5038,

and

MYRNA PALASI,

Appellant in CBCA 5039,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

Brent Packer and Myrna Palasi, pro se, Olympia, WA.

Dorothy M. Guy, Jennifer M. Siegel, and Brandon Dell'Aglio, Office of the General Counsel, Social Security Administration, Baltimore, MD, counsel for Respondent.

Before Board Judges **KULLBERG**, **WALTERS**, and **LESTER**.

**LESTER**, Board Judge.

Pending before the Board is the appellants' motion for summary relief, through which the appellants, Dr. Brent Packer and Dr. Myrna Palasi, ask us to overturn the Social Security

Administration (SSA) contracting officer's decisions to terminate for cause their Blanket Purchase Agreements (BPAs) and associated call orders. Respondent, the SSA, has asked that we dismiss appellants' appeals for lack of jurisdiction or, in the alternative, grant summary relief in the SSA's favor and uphold the terminations for cause. For the reasons set forth below, we grant the SSA's motion to dismiss appellants' challenges to the termination of the BPAs for lack of jurisdiction, but we grant appellants' challenge to the terminations for cause of the related call orders.

### Statement of Facts

#### I. Award, and the Terms, of Blanket Purchase Agreements

On or about January 23, 2014, the SSA issued to Dr. Brent Packer a Blanket Purchase Agreement (BPA), number SS09-14-40004, through which the SSA could purchase medical consulting services for SSA Region Nine beginning from the date of the award through December 31, 2015. That same day, the SSA issued a virtually identical BPA, number SS09-14-40002, to Dr. Packer's wife, Dr. Myrna Palasi.

Under the BPAs, Dr. Packer and Dr. Palasi were expected to provide an "independent review of disability claims," "assess[ing] and document[ing] impairment severity in SSA disability claims based on the listing of impairments" in an SSA program manual. BPA § B-1.1. They were also to be available "to provide consultative services that are related to their area of specialization, but not directly related to any particular disability claim." *Id.*

The SSA expressly stated in each BPA that the BPA "does not obligate any funds" and "does not guarantee" any particular volume of purchases. BPA § C-12. Each BPA indicated that any "services to be furnished under this BPA shall be ordered by issuance of call orders," *id.* § C-19(a), all of which would be "subject to the terms and conditions of this BPA." *Id.* § C-19(b). It provided that the SSA "is obligated only to the extent of authorized call orders (also referred to as 'calls') placed under this agreement." *Id.* § C-12. Although there was no minimum purchase guarantee in the BPAs, the SSA contracting officer indicated in cover letters notifying Dr. Packer and Dr. Palasi of their awards that the BPAs, which were "being initially funded for a minimum amount only," would have maximum funding of no more than \$638,400 and \$634,400, respectively.

Section C-29 of the BPAs, titled "Conflict of Interest," required that, while serving as a contractor for the SSA, neither Dr. Packer nor Dr. Palasi enter into a contract to perform services for, or become an employee of, a state agency designated to carry out a disability or blindness determination function:

The contractor agrees to not acquire or maintain a contract to perform services for a State agency, or to be an Employee of a State agency which has been designated as to carry out the disability or blindness determination function (see Attachment 6) while serving as a contractor for SSA. "State agency" means that State agency which has been designated to carry out the disability or blindness determination function.

Appeal File (Packer), Exhibit 2 at 46; Appeal File (Palasi), Exhibit 2 at 46.

In Attachment 5 to the BPAs, the SSA made clear that it viewed work for a state agency on disability issues as an organizational conflict of interest that would preclude simultaneous work on disability claim reviews for the SSA. To that end, the contract required each contractor to certify, prior to award, whether he or she was employed by a state agency:

The purpose of this certification is to determine whether a conflict of interest exists with respect to the medical consultant services that the successful offeror will provide under any resultant contract with the [SSA].

....

Any individual who is interested in providing medical consultant services to the SSA . . . and who is currently employed by or under contract with a State agency, must certify that he/she will resign from his/her position with the State agency upon award of a contract with SSA. Individuals who certify that they are employed or under contract with a State agency will be required to submit notice of their resignation from the State agency prior to the actual award of the contract. Such resignation must be effective not later than the day prior to the effective date of the SSA contract.

BPA Attachment 5. Both Dr. Packer and Dr. Palasi executed the following certification before they were awarded their respective BPAs:

I . . . hereby certify that [I am] not currently employed or under contract with a State agency and will not seek such employment while either being considered for award of a contract (or subcontract) with SSA or, if a contract is awarded, at any time during the life of the contract.

Appeal File (Packer), Exhibit 2, Attachment 5; Appeal File (Palasi), Exhibit 2, Attachment 5.

Both BPAs contained contract clauses associated with contracts for commercial items pursuant to Part 12 of the Federal Acquisition Regulation (FAR). None of the parties disputes that the BPAs incorporate the contract clause at FAR 52.212-4, “Contract Terms and Conditions – Commercial Items” (48 CFR 52.212-4 (2014)), which includes a provision entitling the Government to terminate a contract for cause in certain circumstances. *See* FAR 52.212-4(m).

The BPAs further provided that, to the extent that Dr. Packer or Dr. Palasi decided that he or she no longer wanted to provide services under the BPA, he or she would notify the SSA in writing at least thirty days prior to canceling services:

In the event that the contractor decides to no longer provide services under this BPA, the contractor shall provide written notification to SSA at least 30 days prior to the cancellation of services.

BPA § C-20.

## II. The Contracting Officer’s Issuance of Call Orders

On March 6, 2014, the SSA contracting officer issued call orders, both identified as order number 0001, under each of the BPAs at issue here. Dr. Packer’s call order assigned him forty-four cases, with a value of \$3898, for the period of March 17, 2014, through February 28, 2015. Dr. Palasi’s order assigned her fifty cases, with a value of \$4280, for the same period. The SSA contracting officer ultimately modified call order number 0001 under each BPA to increase the total value of the call orders to \$38,040 (for Dr. Packer) and \$40,875 (for Dr. Palasi). Dr. Packer and Dr. Palasi completed performance under those call orders sometime before January 9, 2015.

Although the BPAs did not provide any minimum order guarantees, it is clear from the record that Dr. Packer and Dr. Palasi had anticipated that they would receive significantly more work through the SSA’s call orders, resulting in greater income levels, than call order number 0001 had provided. Further, despite numerous inquiries from Dr. Packer and Dr. Palasi, the SSA contracting officer did not issue a second set of call orders until approximately two months after they had completed work on call order number 0001, leaving them with no income for approximately two months.

On March 19, 2015, the SSA contracting officer issued a call order under each BPA, both identified as call order number 0002, assigning Dr. Packer 400 cases, with a value of \$29,530 (later increased to \$29,930), for the period from March 1, 2015, to February 28,

2016, and assigning Dr. Palasi 450 cases, with a total value of \$32,680 (later increased to \$33,580), for the same performance period. No other call orders were ever issued.

### III. Appellants' Employment by a State Agency

On or about July 21, 2015, the SSA contracting officer learned that Dr. Packer and Dr. Palasi had accepted positions with the California Disability Determination Services (CDDS) in Rancho Bernardo, effective August 3, 2015.

On July 24, 2015, the SSA contracting officer sent an email message to Dr. Packer, indicating that she had become aware of his impending employment with the CDDS and asked him if he planned on completing the cases covered by call order number 0002. Dr. Packer responded by email message on July 28, 2015, stating that he needed to transfer to a more stable position but asking if the agency was "waiving the contract provision about not working for both federal and state levels." The contracting officer did not respond to the email message, but a contracting officer representative (COR) asked to schedule a meeting to discuss Dr. Packer and Dr. Palasi's cases "and any concerns and/or questions you may have." No meeting was held.

On August 3 and 4, 2015, Dr. Palasi and Dr. Packer, respectively, reported to work at the CDDS. However, on August 6, 2015, Dr. Packer sent an email message to the SSA contracting officer, notifying her that he and Dr. Palasi had decided that they should decline the CDDS work and maintain their work for the SSA under the BPAs and call order number 0002. On August 9, 2015, Dr. Palasi and Dr. Packer resigned their positions with the CDDS, effective August 9 and 10, 2015, respectively, "to prevent non-compliance with the Federal BPA agreement." Dr. Packer immediately forwarded the CDDS resignation notice by email message to the SSA contracting officer. On August 12, 2015, Dr. Palasi also sent an email message to the SSA contracting officer, indicating that she understood that an SSA contracting office representative had contacted the CDDS about the appellants' situation, and asked the SSA contracting officer to let her know if there was any information that the appellants could provide. Dr. Packer and Dr. Palasi also made numerous inquiries to the SSA contracting officer and other SSA representatives over the course of the following few weeks, attempting to obtain work under call order number 0002. The SSA contracting officer did not respond to any of the email messages.

### IV. The Contracting Officer's Termination Decisions

By decisions dated September 16, 2015, the SSA contracting officer terminated for cause both BPAs, as well as "related Call Order Number 2" under both BPAs, invoking the termination provision contained in 48 CFR 52.212-4(m). The stated reason for the

termination was because each appellant had accepted employment with a state agency, in violation of the requirements of the BPAs and call order number 0002:

My decision to terminate for cause is because you accepted of [sic] employment with the California Disability Determination Services (DDS), Rancho Bernardo, located in San Diego, CA effective August 3, 2015; such employment is prohibited by the terms and conditions of your Blanket Purchase Agreement. You accepted the employment, while currently contracted with the [SSA] under Call Order Number 2 for the period of performance March 1, 2015 through February 28, 2016.

The termination notices stated that the terminations were retroactively effective as of August 3, 2015.

#### V. The Effect of the Terminations During Proceedings Before the Board

On October 22, 2015, both Dr. Packer and Dr. Palasi challenged the termination decisions by filing appeals with the Board. At the appellants' request, the Board consolidated the appeals.

During subsequent proceedings before the Board, Dr. Packer and Dr. Palasi complained that SSA representatives from other regions were informing them that, because of the termination for cause from SSA Region Nine, they would not be awarded BPAs in those other regions. Specifically, on December 11, 2015, Dr. Packer and Dr. Palasi were notified that they had been awarded BPAs to provide medical consulting services for SSA Region Four, but, subsequently, the SSA Region Four representative informed them that, "after further review of [their] past performance, mainly information gather[ed] from other regions," SSA Region Four would no longer be offering them the BPAs. Dr. Packer has represented that, in a telephone call with the SSA Region Four representative, he was informed that "the 'for cause' entry is now in file" and that "the [Civilian Board of Contract Appeals (CBCA)] appeal process is not considered relevant for the Award decision." Dr. Packer has further represented that he and Dr. Palasi have also applied for a BPA for SSA Region Two, but that, in a telephone conversation with an SSA representative for that region, he was informed that SSA Region Two is aware of the terminations for cause of the BPAs for SSA Region Nine, making it unlikely that he and Dr. Palasi could obtain BPAs for SSA Region Two.

## Discussion

### I. Standard of Review

In these appeals, Dr. Packer and Dr. Palasi are representing themselves. Generally, we give greater procedural latitude to appellants representing themselves pro se than we give to parties represented by attorneys. *I-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,552, *appeal dismissed*, No. 15-1623 (Fed. Cir. Jan. 28, 2016); *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,515, at 166,062. Accordingly, in these appeals, we have excused the appellants from filing a Statement of Uncontested Facts, which Board Rule 8(g)(2) requires accompany motions for summary relief, and other procedural requirements that Rule 8 imposes.<sup>1</sup> Further, given that the SSA contracting officer's termination decisions plainly identify the basis for these appeals, we have not required the filing of a formal complaint and an answer. "[T]his more lenient standard for interpreting pleadings," however, "does not change a pro se litigant's burden of proof or our weighing of the factual record." *I-A Construction*, 15-1 BCA at 175,552 (quoting *House of Joy Transitional Programs v. Social Security Administration*, CBCA 2535, 12-1 BCA ¶ 34,991, at 171,975).

The SSA has requested that we dismiss these appeals for lack of jurisdiction. In response to such a motion, appellants, even though appearing pro se, bear "the burden of establishing subject matter jurisdiction by a preponderance of the evidence." *Selrico Services, Inc. v. Department of Justice*, CBCA 3084, 13 BCA ¶ 35,268, at 173,132 (quoting *Ron Anderson Construction, Inc. v. Department of Veterans Affairs*, CBCA 1884, et al., 10-2 BCA ¶ 34,485, at 170,070). Typically, in considering a motion to dismiss for lack of jurisdiction, we look to the allegations contained in the complaint, construed favorably to the pleader, and we look beyond the complaint only if the respondent challenges the alleged jurisdictional facts. *Innovative (PHX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 12, et al., 07-2 BCA ¶ 33,685, at 166,758. Here, because we have not required the submission of a formal complaint, we have properly "looked to the documents submitted with the motions," and the documents contained in the appeal file and elsewhere in the record, "to evaluate the jurisdictional issues presented by these appeals." *Id.*; *see*

---

<sup>1</sup> We deny the SSA's request that we deem all of the allegations in its Statement of Uncontested Facts as admitted simply because the appellants did not file a responsive Statement of Genuine Issues (as required by Board Rule 8(g)(3)). Nevertheless, except for an allegation of law in the SSA's statement (alleging that the SSA contracting officer's retroactive termination decision was "effective"), the record makes clear that there is no genuine issue of material fact as to any of the SSA's identified uncontested facts.

*Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993) (“In establishing the predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings, including affidavits and deposition testimony.”).

Each party has requested that, to the extent that we do not dismiss these appeals for lack of jurisdiction, we grant summary relief in its favor. “Summary relief is appropriate where there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law.” *Gardner Zemke Co. v. Department of the Interior*, CBCA 1308, 09-1 BCA ¶ 34,081, at 168,500 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). “Although the onus is on the moving party to persuade us that it is entitled to summary relief, the movant may obtain summary relief, if the non-movant bears the burden of proof at trial, by demonstrating that there is an absence of evidence to support the non-moving party’s case.” *Id.* at 168,501. “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *A-Son’s Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089, at 176,206 (quoting *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

## II. The SSA’s Jurisdictional Challenge

### A. Jurisdiction To Consider The BPA Termination

The SSA argues that the Board lacks jurisdiction to entertain these consolidated appeals because they are not based upon a “contract.” Our jurisdiction to entertain contract claims by contractors against the Government, and by the Government against contractors, derives from, and is defined by, the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). *D.C. Cab & Taxi Dispatch, Inc.*, VABCA 5482, 98-1 BCA ¶ 29,720, at 147,365; *CardioMetrix*, DOT BCA 2571, et al., 94-1 BCA ¶ 26,269, at 130,698 (1993). The CDA “confers jurisdiction on the boards of contract appeals to adjudicate claims arising from express or implied contracts entered into by executive agencies for” any of four matters, one of which is “the procurement of services.” *BPI Management Inc. v. Department of Housing & Urban Development*, CBCA 1894, 10-2 BCA ¶ 34,495, at 170,142 (citing statutory provision now codified at 41 U.S.C. § 7102(a)). “The board’s jurisdiction under the CDA requires, at a minimum, a contract between an agency and another party.” *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058, 1061 (Fed. Cir. 2002).

“To be valid and enforceable, a contract must have both consideration to ensure mutuality of obligation . . . and sufficient definiteness so as to ‘provide a basis for

determining the existence of a breach and for giving an appropriate remedy.” *Ridge Runner*, 287 F.3d at 1061 (quoting *Ace–Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1332 (Fed. Cir. 2000)). “Consideration means that each party either assumes some duty which it does not otherwise have, or gives upon some legal right which it is not required to give up.” *CardioMetrix*, 94-1 BCA at 130,698.

Here, the BPAs that Dr. Packer and Dr. Palasi signed do not obligate the SSA ever to issue a single call order. As defined by FAR 13.303-1(a), a BPA “is a simplified method of filling anticipated repetitive needs for supplies or services by establishing ‘charge accounts’ with qualified sources of supply.” 48 CFR 13.303-1(a) (2014). “It is, in essence, a framework for future contracts, which come into being when orders are placed and accepted under it.” *Goldfine v. Social Security Administration*, CBCA 2549, 12-1 BCA ¶ 34,926, at 171,741; see *Modern Systems Technology Corp. v. United States*, 979 F.2d 200, 204 (Fed. Cir. 1992) (describing similar agreement as “a set of ground rules as it were, and no obligations are assumed by either party until orders are given by the Government and accepted by the contractor”). In such circumstances, these BPAs cannot be interpreted to create mutual obligations and, therefore, do not constitute enforceable contracts. Even if they purport to require Dr. Packer and Dr. Palasi to accept any call orders that the SSA actually issues, they do not create any mutuality of obligation because they expressly excuse the Government from ever having to issue a single call order: “to avoid an attack upon this type of contract for lack of mutuality of obligation (i. e., one party to the contract being obligated to perform while the other is not), the contract must obligate the Government to order a stated minimum quantity.” *Federal Electric Corp. v. United States*, 486 F.2d 1377, 1381 (Ct. Cl. 1973) (internal footnote omitted); see *Julian Freeman*, ASBCA 46675, 94-3 BCA ¶ 27,280, at 135,906 (“In general, a BPA is not considered to be a contract because it lacks mutuality of consideration.”).

The mere fact that the SSA included language in the BPA that expressly refers to it as a “contract” does not somehow eradicate the lack of mutuality or transform it into an enforceable agreement:

Appellant also argues that the BPA is a contract because specific provisions of the BPA refer to it as such. For example, . . . Optional Form 347 page 2 uses the words “*This contract* incorporates the following clauses . . . [.]” Presumably, the proper interpretation of such a provision is that any contracts that come into being pursuant to the BPA would contain such clauses. However, . . . , such an interpretation is unnecessary. Regardless of how this agreement is described, it is still not supported by mutual consideration and is, therefore, not a contract.

*Freeman*, 94-3 BCA at 135,907 (citations omitted; emphasis in original); see *Crown Laundry & Dry Cleaners, Inc. v. United States*, 29 Fed. Cl. 506, 515 (1993) (in characterizing an agreement, a tribunal “is not bound by the name or label given to” it).

Although the SSA has asked us to dismiss these appeals for lack of jurisdiction, the Board has, in the recent past, treated dismissal of an appeal arising under a BPA not as one for lack of jurisdiction, but as one for failure to state a claim. In *Muse Business Services, LLC v. Department of the Treasury*, CBCA 3537, 14-1 BCA ¶ 35,619, the Board, relying upon the Court of Appeals for the Federal Circuit’s decision in *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346 (Fed. Cir. 2011), held that, because the contractor had alleged the existence of a contract, the appeal should be dismissed for failure to state a claim. However, the Federal Circuit in *Crewzers Fire Crew Transport, Inc. v. United States*, 741 F.3d 1380 (Fed. Cir. 2014), recently recognized that a contractor’s failure to make a “nonfrivolous allegation” that a BPA creates mutual obligations is a jurisdictional defect that precludes a tribunal from entertaining the contractor’s challenge:

We hold that [the contractor] has failed to present a nonfrivolous allegation that the BPAs at issue here are binding contracts. These BPAs reflect illusory promises that do not impose obligations on either party. The [agency] is not required under the terms of the BPAs to place any orders with [the contractor]. Likewise, [the contractor] promised only to accept orders to the extent it is “willing and able[,]” and is thus perfectly free not to accept any orders at all. “It is axiomatic that a valid contract cannot be based upon the illusory promise of one party, much less illusory promises of both parties.” *Ridge Runner*, 287 F.3d at 1062 (citing Restatement (Second) of Contracts § 71(1)).

*Id.* at 1382-83; see *Zhengxing v. United States*, 71 Fed. Cl. 732, 738 (because “BPAs themselves are not contracts,” court lacks jurisdiction to entertain claims arising out of them), *aff’d*, 204 F. App’x 885 (Fed. Cir. 2006); *Tenderfoot Equipment Services, Inc. v. Department of Agriculture*, CBCA 1865, 10-2 BCA ¶ 34,527, at 170,267 (BPA “is not a contract subject to Board jurisdiction”).

Because the Federal Circuit’s decision in *Crewzers* post-dates its decision in *Engage Learning*, and because *Crewzers* directly addresses the jurisdictional status of challenges arising under BPAs, we follow it here. Dr. Packer and Dr. Palasi made no specific representation about mutuality of obligation in their filings with the Board, and the terms of the BPAs that the appellants provided to the Board clearly establish that the SSA had no obligation to issue any call orders or make any purchases. In such circumstances, it is clear that the appellants have not made a “nonfrivolous allegation” of mutuality of obligation

under the BPAs. Accordingly, dismissal of the appellants' challenge to the termination of their BPAs for lack of jurisdiction is proper.

B. Jurisdiction To Consider Termination of the Call Orders

In addition to purporting to terminate the appellants' BPAs for cause, the SSA contracting officer also terminated two call orders that she had previously issued to the appellants. Although the SSA has requested that we dismiss these appeals in their entirety for lack of jurisdiction, there is no basis for dismissing the appellants' challenges to the terminations of the call orders. When an authorized ordering official issues a call order under a BPA that the recipient agrees to perform, a contract comes into being. *Potomac Computers Limited, Inc.*, DOT BCA 2603, 94-1 BCA ¶ 26,304, at 130,844 (1993); *Ann Riley & Associates, Ltd.*, DOT BCA 2418, 93-3 BCA ¶ 25,963, at 129,121. "Each of the contracts that came into being as [appellants] accepted orders from the [SSA] and provided . . . services" were subject to the termination provision identified in the BPAs, meaning that the SSA could terminate the call orders for cause if circumstances warranted such an action. *Ann Riley*, 93-3 BCA at 129,123; see *CardioMetrix*, 94-1 BCA at 130,699. Accordingly, we have jurisdiction to entertain a challenge to the termination of the call orders. *Ann Riley*, 93-3 BCA at 129,123; see *Gulf Group General Enterprises Co. W.L.L. v. United States*, 114 Fed. Cl. 258, 363-64 (2013) (considering challenge to termination of BPA call order); *Concorde, Inc.*, ASBCA 53749, 03-1 BCA ¶ 32,113, at 158,783 (2002) ("we have jurisdiction to consider appellant's claims that arise under the orders placed pursuant to the BPA").

The SSA believes that these appeals only encompass the terminations of the BPAs and that Dr. Packer and Dr. Palasi have not challenged the call order terminations. The SSA's reading of the pro se appellants' filings is highly selective. As previously discussed, we read pro se pleadings more liberally than we might those prepared by counsel. *House of Joy Transitional Programs*, 12-1 BCA at 171,975. Although it is true that the appellants mention only the BPA terminations in some sentences in various filings, they clearly discuss and complain about the terminations of both the BPAs and call order number 0002 as a whole. In addition, they have challenged and attached to their notices of appeal the SSA contracting officer's September 16, 2015, decisions that purport to terminate not only the BPAs, but also call order number 0002 under each BPA. In such circumstances, the call order terminations are properly before us.

### III. The Validity of the Termination for Cause of Call Order Number 0002

#### A. The Commercial Item Termination Provision

Under the standard Default clause that is included in most fixed-price services contracts, the Government is entitled to terminate a contract for default if the contractor fails to perform services within the specified time, to make progress so as to endanger performance, or to “[p]erform any of the other provisions of this contract.” FAR 52.249-8(a)(1). To the extent that the contracting officer terminates the contract under the standard Default clause based upon the contractor’s failure to perform “other provisions of the contract,” the contracting officer must first provide the contractor with a cure notice providing the contractor with a minimum of ten days to cure the non-compliance. *Id.* 52.249-8(a)(2). Further, because a default termination is a “drastic sanction” that the Government should impose “only for good grounds,” *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969), tribunals require that the provision whose violation forms the basis for the termination constitute a “material requirement” of the contract:

To sustain a default for failure to perform other provisions of the contract, the Government must establish that the Contractor breached a material provision of the contract and that the Contractor has been given the opportunity to rectify or cure its breach.

*Brandywine Prosthetic-Orthotic Service, LLC*, VABCA 3441, 93-1 BCA ¶ 25,250, at 125,765; *see Composite Laminates, Inc. v. United States*, 27 Fed. Cl. 310, 317 (1992) (termination is proper “only when the ‘other provision’ is a material requirement of the contract”); *A-Greater New Jersey Movers, Inc.*, ASBCA 54745, 06-1 BCA ¶ 33,179, at 164,432 (“other provision” must be a material or significant requirement).

The call orders at issue here are subject not to the standard Default clause, but to the contract clause at FAR 52.212-4, “Contract Terms and Conditions – Commercial Items (Feb 2012).” Like the standard Default clause, the commercial item clause entitles the Government to terminate the call orders for cause if, among other things, the contractor fails to comply with any contract terms or conditions:

The Government may 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 assurance of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for

any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law.

48 CFR 52.212-4(m). Although the commercial item clause itself contains no other guidance explaining when termination for cause is appropriate, it is clear that, for the same reasons for requiring materiality when terminating under the standard Default clause, a termination based upon a failure to comply with “any contract terms and conditions” under the commercial item clause requires that those contract terms and conditions constitute material requirements of the contract. *See Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 413 (1947) (“an exaction of punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust”); *American Business Systems*, GSBCA 5140, et al., 80-2 BCA ¶ 14,461, at 71,292-93 (explaining rationale for requiring materiality of violated contract provisions to support a default termination).

In addition, although the commercial item termination provision, unlike the standard Default clause, does not expressly reference the need for the contracting officer to issue a cure notice before terminating a contractor for failure to comply with contract provisions, FAR 12.403 imposes that requirement:

The 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); *see Universal Shelters of America, Inc. v. United States*, 87 Fed. Cl. 127, 144 (2009) (“The FAR requires a contracting officer to send a cure notice to the contractor prior to terminating a [commercial item] contract for reasons other than late delivery.”); *Geo-Marine, Inc. v. General Services Administration*, GSBCA 16247, 05-2 BCA ¶ 33,048, at 163,829 (“Although the commercial item contract termination for cause clause does not mention sending a cure notice, the regulations which apply to commercial item contracts require the Government to send a cure notice before terminating for any reason other than late delivery.”). Although FAR 12.403(c)(1) “do[es] not require a set number of days for the cure period” (unlike the standard Default clause’s ten-day notice requirement), *see Geo-Marine*, 05-2 BCA at 163,829, the regulation makes clear that *some* cure notice is mandatory prior to termination. *See A-Greater New Jersey Movers*, 06-1 BCA at 164,432 (“The government was required, however, to give the contractor the opportunity to cure this type of a failure.”).

#### B. The SSA’s Exercise of the Termination Provision

“Under FAR 52.212-4(m), the termination for cause clause for commercial services contracts, the government initially has the burden of proving that the termination for cause

was valid.” *KSC-TRI Systems, USA, Inc.*, ASBCA 54638, 06-1 BCA ¶ 33,145, at 164,260 (2005). The SSA argues that it has satisfied that burden by showing that Dr. Packer and Dr. Palasi, by starting work for the CDDS, directly violated the conflict of interest provisions of clause C-29. Although it is clear that the SSA viewed compliance with those provisions as a material requirement of the call orders, we need not address the materiality issue here because, as the SSA acknowledges, it never issued a cure notice to Dr. Packer or Dr. Palasi before terminating their call orders for cause. In their briefing, Dr. Packer and Dr. Palasi argue that the SSA should have provided them with some level of notice and an opportunity to remedy any breach prior to termination. Appellants’ Response at 3 (Jan. 18, 2016). As previously discussed, FAR 12.403(c)(1) imposes that requirement upon commercial item contract terminations arising out of a failure to comply with contract terms. A contracting officer’s failure to issue the required cure notice and to provide an opportunity to cure invalidates the termination for cause. *See, e.g., Kisco Co. v. United States*, 610 F.2d 742, 751 (Ct. Cl. 1979); *Bailey Specialized Buildings, Inc. v. United States*, 404 F.2d 355, 363 (Ct. Cl. 1968); *River City Manufacturing & Distributing Co.*, AGBCA 92-157-1, et al., 93-2 BCA ¶ 25,881, at 128,750.

The SSA argues that a cure notice would have been futile because, when Dr. Packer and Dr. Palasi started working for the CDDS on August 3, 2015, they breached their call orders, which created a conflict of interest that they could not fix by quitting their employment with CDDS. In response, Dr. Packer and Dr. Palasi argue that the SSA’s position “would appear contrary to basic Contracts law” because their “quick resignations from [CDDS] employment (within days)” should have remedied any contract breach. Appellants’ Response at 1 (Feb. 1, 2016). We agree with the SSA that, if issuance of a cure notice would be futile (such as if, for example, a contractor repudiates a contract), issuance can be excused. *Geo-Marine*, 05-2 BCA at 163,831. The SSA, however, has not identified how issuance of a cure notice would have been futile here. “It is well established that the . . . cure notice requirement is intended to allow an errant contractor a time certain within which to correct the identified problems.” *Michael Chuprov dba Release Reforestation*, AGBCA 86-101-3, et al., 87-2 BCA ¶ 19,778, at 100,086; *see Brandywine*, 93-1 BCA at 125,766 (“cure notice requirement is intended to allow an errant contractor time certain in which to correct identified problems”). It is quite clear that, had the SSA contracting officer issued a cure notice, Dr. Packer and Dr. Palasi would have corrected the identified problem, ending their employment with the CDDS and returning to compliance with the conflict of interest provision applicable to call order number 0002. In fact, even without the cure notice, that is exactly what they did: on August 9, 2015, they notified the SSA contracting officer that they had terminated their relationship with the CDDS, which had begun less than a week earlier. They cured the violations. Once the appellants cured the violations, the SSA contracting officer had no basis for terminating the call orders for cause.

The SSA believes that, as soon as a contractor violates a material contract provision, the agency is immediately entitled to terminate its contract for cause under FAR 52.212-4(m). The SSA is wrong. There are, in fact, situations in which the FAR permits immediate termination of a contract as soon as the Government discovers a violation of the contract's terms: the "Covenant Against Contingent Fees" clause at FAR 52.203-5, as one example, permits the Government to annul a contract based upon a breach of that covenant without applying the procedures required by the standard termination clauses, and FAR 52.249-8(a)(1)(i), as another example, permits termination as soon as a contractor fails to deliver goods or services within the time specified by the contract, without prior issuance of a cure notice. But the FAR does *not* permit immediate termination following a contractor's violation of "other provisions" of a contract (under the standard Default clause, FAR 52.249-8(a)(1)(iii)) or of "any contract terms and conditions" (under the commercial item termination provision, FAR 52.212-4(m)). For those types of violations, the FAR expressly and clearly requires the Government to provide the contractor with a cure notice, and an opportunity to cure the defect, *before* termination. See FAR 52.249-8(a)(2) ("[t]he Government's right to terminate this contract" for failure to perform other provisions of the contract "may be exercised if the Contractor does not cure such failure within 10 days . . . after receipt of the [cure] notice"); FAR 12.403(c)(1) (entitling contractor to cure notice prior to termination for any reason "other than late delivery"). The SSA's position – that any violation of a material requirement in a contract automatically entitles the Government immediately to terminate that contract – would eliminate the cure notice requirements in FAR 52.249(a)(2) and 12.403(c)(1). We cannot interpret the FAR in such a way as to render its requirement for issuance of a cure notice pointless. See *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (interpretation of regulation is unreasonable if it would render portions of the regulation meaningless).

Dr. Packer and Dr. Palasi were entitled to an opportunity to cure before the SSA contracting officer terminated their call orders for cause. The contracting officer's failure to provide that opportunity renders the termination decisions invalid.<sup>2</sup>

---

<sup>2</sup> Even if the terminations for cause were otherwise valid, the SSA contracting officer's attempt to identify a retroactive effective date in the termination notices would not be. In her September 16, 2015, decisions, the SSA contracting officer indicated that the BPAs and call orders were terminated "effective August 3, 2015." We are aware of no authority that would permit a contracting officer to impose a retroactively effective default termination in this manner. See *Olbeter Enterprises, Inc. v. United States Postal Service*, PSBCA 6543, slip op. at 9 (Jan. 12, 2016) (agency cannot "invoke a retroactive termination because the contract remained in force until either party terminated the contract under the

(continued...)

#### IV. The Remedy

“If it is determined that the Government improperly terminated [a commercial item] contract for default, such termination shall be deemed a termination for convenience.” FAR 52.212-4(m). Pursuant to FAR 52.212-4(l), Dr. Packer and Dr. Palasi are entitled to payment of “a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges [they] can demonstrate to the satisfaction of the Government using [their] standard record keeping system, have resulted from the termination.” Because Dr. Packer and Dr. Palasi have not submitted a request for convenience termination costs to the SSA, we lack jurisdiction to entertain a monetary award at this time, *see I-A Construction*, 15-1 BCA at 175,563-64, but the appellants are entitled to approach the agency about their entitlement to those costs.

Dr. Packer and Dr. Palasi have requested that the Board order the SSA to reinstate the BPAs and call order number 0002. We lack authority to do so, at least “absent a contractual provision providing such a remedy.” *Gordon Rae McCoy*, AGBCA 76-178, 78-1 BCA ¶ 12,959, at 63,180; *see Caparra Motor Service, Inc.*, GSBCA 4376, 75-2 BCA ¶ 11,518, at 54,957-58; *Southwestern Cooperative Educational Laboratory*, LBCA 74-BCA-101, 75-1 ¶ BCA 11,309, at 53,903. Here, there is no such contractual provision.

The appellants also complain that, during the pendency of these appeals, other SSA regions have declined, and are continuing to decline, to award them new BPAs because of SSA Region Nine’s termination for cause. Dr. Packer informs us that he discovered the public listing of the Region Nine terminations for cause through a search of FedConnect, an Internet-based federal procurement website. We lack jurisdiction to offer any relief for what amounts to a protest of the SSA’s failure to award appellants new BPAs, as we have no authority to entertain bid protests. *Navigant SatoTravel v. General Services Administration*, CBCA 449-R, 09-2 BCA ¶ 34,207, at 169,108. Nevertheless, we presume that the information listing that Dr. Packer found on FedConnect was from the SSA’s reporting of the appellants’ terminations for cause, pursuant to FAR 12.403(c)(4) and 42.1503(h), to the Contractor Performance Assessment Reporting System (CPARS). We further presume that, in light of the Board’s decision here, the SSA will swiftly comply with FAR 12.403(c)(4)’s requirement that, upon conversion of a termination for cause to a termination for

---

<sup>2</sup>(...continued)

termination clause in the contract” (citing *Marilyn Laney*, PSBCA 6847, 14-1 BCA ¶ 35,562, at 174,252)).

convenience, the contracting officer will “ensure that a notice of the conversion . . . is reported” in CPARS.<sup>3</sup>

Decision

For the foregoing reasons, we dismiss for lack of jurisdiction the appellants’ challenge to the SSA contracting officer’s terminations of their BPAs. We sustain the appellants’ challenge to the contracting officer’s termination for cause of call order number 0002 under each BPA and convert both of those call order terminations to terminations for the convenience of the Government.

---

HAROLD D. LESTER, JR.  
Board Judge

We concur:

---

H. CHUCK KULLBERG  
Board Judge

---

RICHARD C. WALTERS  
Board Judge

---

<sup>3</sup> Further, although we lack jurisdiction to entertain the BPA claims, we trust that the SSA understands that it cannot treat the BPAs as contracts for purposes of CPARS reporting while, at the same time, successfully arguing before the Board that BPAs are not contracts at all. *See, e.g., BearingPoint, Inc. v. United States*, 77 Fed. Cl. 189, 195 (2007) (treating default terminations as “legal nullities” where they were “jurisdictionally invalid”); *United Partition Systems, Inc. v. United States*, 59 Fed. Cl. 627, 637 (2004) (“When a contracting officer goes beyond the scope of his authority and issues a final decision that is jurisdictionally invalid, such a decision is treated as a legal nullity and, accordingly, does not affect a contractor’s rights or obligations.”); *Ann Riley*, 93-3 BCA at 129,120 (“to the extent that the termination was directed towards the contract as executed, it cannot stand because there was no contract to terminate”). Because the terminations for cause of the BPAs are “legal nullities,” *BearingPoint*, 77 Fed. Cl. at 195, we presume that the SSA will rectify the listing of any legal nullities that might have made their way onto CPARS.