UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR PARTIAL DISMISSAL GRANTED:
December 9, 2016

CBCA 5510

PRIMESTAR CONSTRUCTION,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Lori C. Gray of Law Office of Lori Chambers-Gray, P.C., Houston, TX, counsel for Appellant.

Rina Martinez and Janice Yun, Office of Chief Counsel, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **LESTER**, and **O'ROURKE**.

LESTER, Board Judge.

Respondent, the Department of Homeland Security (DHS), asks the Board to dismiss for lack of jurisdiction that portion of this appeal through which appellant, Primestar Construction (Primestar), seeks an affirmative monetary recovery. DHS asserts that Primestar has never submitted a claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), seeking payment of the requested monies and that Primestar cannot use DHS's default termination decision as a jurisdictional basis for seeking monetary relief. For the reasons set forth below, we grant DHS's motion.

Background

On September 30, 2014, DHS, acting through the Federal Emergency Management Agency (FEMA), awarded a contract, contract no. HSFE06-14-C-0060, to Primestar for the replacement of an elevator at the FEMA Region IV Federal Regional Center. Appeal File, Exhibit 3 at 2, 5.

On July 14, 2016, the FEMA contracting officer issued a decision terminating the contract for default, pursuant to the Default clause at Federal Acquisition Regulation (FAR) 52.249-10 (48 CFR 52.249-10 (2014)). Exhibit 49 at 1. In the termination decision, the contracting officer asserted that Primestar had failed to complete thirty percent of the work required under the contract, she listed the specific alleged failures in Primestar's work, and she found that the failure to perform was inexcusable. She asserted that, following an earlier cure notice, Primestar had not corrected deficiencies under the schedule that Primestar had proposed and that, in response to a show cause notice, Primestar had not provided adequate justification to establish that its failure to perform was due to causes beyond its control. In addition to terminating Primestar's right to proceed further with work under the contract, she informed Primestar that "the required items/services will be purchased against your account, and you will be held liable for any excess costs," but no excess costs were assessed in the termination decision. *Id.* at 4.

On October 12, 2016, Primestar filed a notice of appeal with the Board. In that notice, Primestar disputed that it had failed to complete the required work, and it asserted that, to the extent that any work was not performed, it "was because the work was not within the scope of the original contract; and/or could not be done due to unforeseen and existing site conditions." As its requested relief, Primestar asked that the contracting officer's wrongful termination decision be rescinded. It also represented that "[t]he final payment due to the contractor is $73,000 and has not been paid by the contracting officer to the contractor. The contractor seeks release of this final payment plus all incidental expenses incurred; the total amount is not yet fully determined."

On November 1, 2016, FEMA filed a motion to dismiss for lack of jurisdiction that part of the appeal requesting money. FEMA argued that the contracting officer's decision terminating Primestar's contract did not cover money damages and that Primestar had not submitted a claim conforming to the requirements of the CDA seeking payment of the requested money.

In a complaint that Primestar subsequently filed on November 14, 2016, Primestar reaffirmed that it was seeking money damages through this appeal, although it slightly altered the amount being sought. Primestar alleged in its complaint that it had completed substantial

performance of the contract before FEMA terminated the contract for default. It asserted that it was entitled to a final payment of $64,000, attaching to its complaint a copy of an unsigned Standard Form (SF) 1034, Public Voucher for Purchases and Services Other Than Personal, dated November 9, 2015, seeking payment of that amount from FEMA. Primestar also alleged that it had subcontracted with another entity, ThyssenKrupp Elevator Corporation (ThyssenKrupp), to perform warranty work under the contract, but that FEMA had brought in a third-party contractor to perform that work, which Primestar alleged breached the warranty agreement and effectively voided the warranty, entitling ThyssenKrupp to damages of $11,000 for work performed under the voided warranty. In its request for relief in the complaint, Primestar sought payment of $64,000 for itself and $11,000 for ThyssenKrupp in addition to seeking rescission of the contracting officer's termination decision:

> The final [one-third] payment due to contractor Primestar Construction is $64,000.00 . . . and to date has not been paid by the contracting officer to the contractor. On July 16, 2016, when the Contracting Officer issued the notice of termination, the [project] was complete and the amount was due.
>
> Primestar Construction seeks the release of this final payment of $64,000 plus all incidental expenses incurred; including additionally the $11,000 sought by Thyssen Krupp[] for breach of the warranty agreement. Primestar also seeks the rescission of the contracting officer's wrongful termination decision.

Complaint ¶ 10.

Subsequently, on November 29, 2016, Primestar responded to FEMA's motion for partial dismissal. It argued that the default termination "was in response to [Primestar's] demand(s) for final 1/3 payment in the amount of $64,000, directed to the Contracting Officer pre-appeal on November 9, 2015; requested on Public Voucher for Purchases and Services Other than Personal form." Appellant's Response at 2. Its monetary claim, it argued, "arises from the final decision by the contracting officer to withhold 30% of the contract due to default," and the termination decision "resulted in the denial of the final 1/3 payment due to Appellant." *Id.* In addition, Primestar indicated that, on November 3, 2016, it had provided the contracting officer with a claim in the amount of "$64,000 plus any retainage and/or interest due in accordance with the contract," *id.*, and it provided the Board with a copy of that claim. *Id.* Exhibit D. Accordingly, Primestar argued, the Board possesses jurisdiction over its monetary request.

Discussion

I. Standard of Review

When considering a motion to dismiss an appeal, or a portion thereof, for lack of subject matter jurisdiction, the Board "accepts as true the undisputed allegations in the complaint and draws all reasonable inferences in favor of the [appellant]." *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, 14-1 BCA ¶ 35,758, at 174,969. "[W]hen a question of the tribunal's jurisdiction is raised, 'either by a party or by the [Board] on its own motion, the [Board] may inquire, by affidavits or otherwise, into the facts as they exist.'" *Id.* (quoting *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947)). The party invoking the Board's jurisdiction – here, Primestar – bears the burden of establishing jurisdiction by a preponderance of the evidence. *See id.*

II. Jurisdiction To Entertain Primestar's Monetary Requests

It is well-established that the Board possesses jurisdiction to entertain a timely challenge to a contracting officer's decision terminating a contract for default. *See, e.g.*, *Malone v. United States*, 849 F.2d 1441, 1444-45 (Fed. Cir. 1988); *Brent Packer v. Social Security Administration*, CBCA 5038, 16-1 BCA ¶ 36,260, at 176,898. There is no question here that Primestar timely filed its appeal with the Board within ninety days of its receipt of the FEMA contracting officer's termination decision. *See* 41 U.S.C. § 7104(a) (defining time limit for appeal). That we can consider Primestar's timely-filed challenge to the default termination, however, does not somehow permit us to entertain associated monetary claims that the contractor never submitted to the contracting officer for decision.

The Board has previously identified the requirements that a contractor must satisfy if it wishes to pursue a request for affirmative monetary relief from the Government:

> Before the Board can exercise jurisdiction over a contractor's request for monetary damages, the contractor must have submitted a written claim to the contracting officer for a decision. *Shaw Environmental, Inc. v. Department of Homeland Security*, CBCA 2177, et al., 13 BCA ¶ 35,188, at 172,667 (2012) (citing 41 U.S.C. §§ 7103(a), 7105(e)(1)(A)). There are three basic requirements for a valid CDA monetary claim: "(1) the contractor must submit the demand in writing to the contracting officer, (2) the contractor must submit the demand as a matter of right, and (3) the demand must include a sum certain." *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995). "The CDA also requires that a claim indicate to the contracting officer that the contractor is requesting a final decision," although this request need not be

> explicit. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010).

1-A Construction & Fire, LLP v. Department of Agriculture, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,563, *appeal dismissed*, No. 15-1623 (Fed. Cir. Jan. 28, 2016).

Unless it has previously submitted a claim to the contracting officer seeking monetary relief, a contractor cannot piggyback a request for monetary damages onto a contracting officer's termination decision. A default termination is a Government claim, for which the Government bears the burden of proof. *Bass Transportation Services, LLC v. Department of Veterans Affairs*, CBCA 4995, 16-1 BCA ¶ 36,464, at 177,687; *Aurora, LLC v. Department of State*, CBCA 2872, 16-1 BCA ¶ 36,198, at 176,648 (2015) (citing *Malone*, 849 F.2d at 1443, & *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764-65 (Fed. Cir. 1987)). "[T]he only relief available under an appeal of a default termination is the conversion of the default termination to one for the convenience of the Government." *Aurora*, 16-1 BCA at 176,648. There is no legal basis for allowing a contractor to take that government claim and somehow morph it into a contractor claim, even though no contractor claim was never previously presented to the contracting officer. *Id.*; *see Armour of America v. United States*, 69 Fed. Cl. 587, 592 (2006) (jurisdiction to entertain challenge to default termination did not extend to contractor's monetary requests, where contractor had not submitted money claims to the contracting officer for decision); *Claude E. Atkins Enterprises, Inc. v. United States*, 15 Cl. Ct. 644, 646-47 (1988) (same); *1-A Construction*, 15-1 BCA at 175,563-64 (same).

When the FHA filed its motion for partial dismissal on November 1, 2016, Primestar had not submitted a claim to the contracting officer seeking a monetary payment. Contrary to Primestar's suggestion, its submission in November 2015 of a request for final payment on a SF 1034 voucher did not meet the requirements of a claim. *See Reflectone, Inc. v. United States*, 60 F.3d 1572, 1577 (Fed. Cir. 1995) (routine request for payment, such as an invoice for regular payment under a contract, is not a claim); *EBS/PPG Contracting v. Department of Justice*, CBCA 1295, 09-2 BCA ¶ 34,208, at 169,111-12 (claim must expressly or implicitly request contracting officer's decision). Further, Primestar's assertion that the contracting officer terminated its contract in response to its request for that final payment does not somehow incorporate its monetary claim into the Government's termination claim or change the necessity that Primestar submit its own claim for the requested monetary payment.

III. Primestar's Newly Submitted Claim

In its response to FEMA's motion for partial dismissal, Primestar indicated that it recently submitted a claim to the contracting officer on its $64,000 final payment request. Accompanying its response was a copy of that claim letter, dated November 3, 2016. Primestar suggests that, because it has now submitted a monetary claim, the Board now possesses jurisdiction to entertain its monetary requests.

As an initial matter, Primestar's November 3, 2016, claim document only addresses Primestar's request for the $64,000 final payment. In its complaint, Primestar also sought to recover an additional $11,000 upon behalf of its subcontractor, ThyssenKrupp, arising out of an alleged breach of a warranty agreement. Because the $11,000 warranty breach claim is not encompassed within the November 3, 2016, monetary claim, we could not consider the request for payment of $11,000 in any appeal of a decision on the November 3, 2016, claim. To the extent that Primestar wishes to pursue an $11,000 claim on ThyssenKrupp's behalf, it would have to submit that claim to the contracting officer for a decision.

In any event, any appeal relating to the November 3, 2016, claim is premature. As discussed above, submission of a proper claim is a jurisdictional prerequisite to maintaining a CDA appeal before the Board. *1-A Construction*, 15-1 BCA at 175,563. Once a claim is submitted, however, the contracting officer must have an opportunity to respond to it before judicial review can commence. Under the CDA, "[a] contracting officer shall issue a decision on any submitted claim of $100,000 or less within 60 days from the contracting officer's receipt of a written request from the contractor that a decision be rendered within that period." 41 U.S.C. § 7103(f)(1). "Until there is a decision on [the contractor's] claim, or the date for issuance passes, [the contractor] cannot maintain an appeal with the Board or a suit at the Court of Federal Claims on its claim." *Hawk Contracting Group, LLC v. Department of Veterans Affairs*, CBCA 5527, slip op. at 3 (Dec. 2, 2016); *see Sipco Services & Marine Inc. v. United States*, 30 Fed. Cl. 478, 484 (1994) (before contractor can commence action on its claim, "there must be either a decision by the contracting officer or a failure to decide within the applicable time period"). An appeal filed before there is a contracting officer's decision (either written or through a deemed denial after the statutory deadline has passed) is premature, *Fire Security Systems, Inc. v. General Services Administration*, GSBCA 12350, 93-3 BCA ¶ 26,047, at 129,487, and we lack jurisdiction to entertain it. *1-A Construction*, 15-1 BCA at 175,564. When an appeal is prematurely filed, the Board should dismiss it, allowing the contractor to refile after there is a written contracting officer's decision or a deemed denial. *Fire Security*, 93-3 BCA at 129,487; *The L. Roseman Corp.*, GSBCA 4265, 75-1 BCA ¶ 11,107, at 52,861.

It is true that, assuming the contractor has actually submitted a claim to the contracting officer, a premature appeal to the Board can ripen into maturity if the premature appeal is still pending when the contracting officer actually issues a decision or when the contracting officer's deadline for issuing the decision expires. *TRW, Inc.*, ASBCA 51172, et al., 99-2 BCA ¶ 30,407, at 150,332. In such a circumstance, "no useful purpose would be served by dismissing the appeal as premature and requiring appellant to refile." *R.W. Electronics Corp.*, ASBCA 46592, et al., 95-1 BCA ¶ 27,327, at 136,212 (1994).[1] Here, though, the sixty-day deadline for the contracting officer's decision has *not* passed, meaning that the appeal here remains premature, and we currently lack jurisdiction to entertain it. "[W]here the [tribunal] has no jurisdiction, it has no power to do anything but strike the case from its docket, the matter being *coram non judice*." *Johns-Manville Corp. v. United States*, 893 F.2d 324, 327 (Fed. Cir. 1989). Further, the notice of appeal that Primestar filed encompassed the only claim that existed at that time: the contracting officer's termination decision. Jurisdiction is typically established at the time that a notice of appeal is filed, *1-A Construction*, 15-1 BCA at 175,563, so this appeal could not encompass a claim that had not yet been submitted to the contracting officer when the appeal was filed. If and when Primestar decides to file an appeal of the contracting officer's decision on (or deemed denial of) its new November 3, 2016, claim, it can file a new notice of appeal that makes clear that it has elected to proceed before the Board in adjudicating that claim, and, if warranted, the Board can consolidate that appeal with this appeal pursuant to Board Rule 2(d) (48 CFR 6101.2(d)).

Decision

For the foregoing reasons, the Government's motion to dismiss the portion of Primestar's appeal seeking affirmative monetary relief is granted. The only matter that is properly before us in this appeal is Primestar's challenge to the Government's default

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[1] The situation is different at the Court of Federal Claims. The Attorney General assumes authority over a claim at the moment that it becomes the subject to a suit filed in federal court, and the contracting officer is divested of authority to entertain it pursuant to 28 U.S.C. §§ 516-520. Accordingly, for jurisdictional purposes, a prematurely filed suit under the CDA cannot ripen into a mature claim while it remains pending at the court. *Sharman Co. v. United States*, 2 F.3d 1564, 1571-72 (Fed. Cir. 1993), *overruled on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995); *Sipco Services*, 30 Fed. Cl. at 485. In appeals before the Board, the named agency, rather than the Department of Justice, retains responsibility for the claim, so that the contracting officer is not similarly divested of his or her authority to resolve it.

termination. Primestar's request for affirmative monetary recovery is **DISMISSED FOR LACK OF JURISDICTION**.

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HAROLD D. LESTER, JR.
Board Judge

We concur:

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JERI KAYLENE SOMERS
Board Judge

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KATHLEEN J. O'ROURKE
Board Judge