



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: January 25, 2017

CBCA 3060

ENERGX, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Karen Aldridge Crawford, Jason I. Epstein, and Stacy Taylor of Nelson Mullins Riley & Scarborough LLP, Columbia SC, counsel for Appellant.

Colin D. Colverson and Kristopher D. Muse, Office of Chief Counsel, Department of Energy, Oak Ridge, TN, counsel for Respondent.

Before Board Judges **GOODMAN**, **DRUMMOND**, and **CHADWICK**.

CHADWICK, Board Judge.

EnergX, LLC filed this appeal in November 2012 from “the Department of Energy’s rejection” of a value engineering change proposal (VECP) under an existing contract. In its notice of appeal and subsequent complaint, EnergX alleged that the agency (DOE) had constructively accepted the VECP, entitling EnergX to “at least \$68,711,000,” based on projected savings to DOE from implementing the proposal. After DOE pointed out that EnergX had submitted no certified claim to the contracting officer, EnergX sent the contracting officer a certified demand letter in December 2012, with notice to the Board. That letter was not a “claim” in accordance with 48 CFR 2.101 (2012), however, because it sought “at least \$68,711,000.00, to be adjusted according to actual savings,” which is not a sum certain. *See ARI University Heights LP v. General Services Administration*, CBCA 4660, 15-1 BCA ¶ 36,085, at 176,187. The contracting officer denied this demand in February 2013. EnergX did not file a second appeal.

DOE answered the complaint in this appeal in March 2013. DOE later filed a motion for summary relief, which the Board did not resolve. In June 2014, the then-presiding judge stayed the appeal indefinitely at EnergX's request. The parties then filed only status reports until January 2017, when we sua sponte ordered EnergX to show cause why we should not dismiss the appeal for lack of jurisdiction in the absence of a contracting officer's decision on a certified claim "preceding the filing of the appeal." See 41 U.S.C. § 7104(a) (2012); *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004) ("Swanson's appeal was not authorized . . . because it was not an appeal from a contracting officer's final decision on a claim that Swanson had submitted."); *Stobil Enterprise v. Department of Veterans Affairs*, CBCA 5246, 16-1 BCA ¶ 36,478, at 177,740, *motion for reconsideration denied* (Nov. 16, 2016).

In response to the show-cause order, EnergX asks the Board to "take note of" a scheduling order issued in December 2012. That order stated in relevant part, "The parties have filed a joint motion to suspend these proceedings pending the issuance of a contracting officer's final decision, to be issued no later than February 10, 2013, and to modify the . . . scheduling order That motion is GRANTED." EnergX states that the order "followed several oral arguments and telephonic conferences" concerning "the Parties' positions related to jurisdiction." The single-judge scheduling order did not address our jurisdiction and has no bearing on it. Jurisdiction must be "established at the time that a notice of appeal is filed." *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); see *Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567, 570 (2004). The lack of a claim cannot be cured later. *Stobil*, 16-1 BCA at 177,741. "When jurisdiction is lacking, we cannot proceed to decide a case. Our only function is to announce the lack of jurisdiction and dismiss the case." *Monster Government Solutions, Inc. v. Department of Homeland Security*, DOT BCA 4532, 06-2 BCA ¶ 33,312, at 165,155 (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998)).

Decision

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

KYLE CHADWICK
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

JEROME M. DRUMMOND
Board Judge