UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION:
June 24, 2022

CBCA 7419

RAJ K. PATEL,

Appellant,

v.

EXECUTIVE OFFICE OF THE PRESIDENT,

Respondent.

Raj K. Patel, pro se, Indianapolis, IN.

Robert R. Kiepura, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC; and Marina M. Kozmycz, Office of the General Counsel, Office of Administration, Executive Office of the President, Washington, DC, counsel for Respondent.

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

LESTER, Board Judge.

Appellant, Raj K. Patel, filed a notice of appeal in which he alleges that he entered into a contract (or a series of contracts) with the President of the United States and that, by using "a psycho-bio-tech stress weapon" in a manner that violates his rights under the United States Constitution, the Government has breached that contract. Because contracts entered into with the President, which would be administered by the Office of Administration within the Executive Office of the President (EOP), are not subject to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), we lack jurisdiction to entertain Mr. Patel's contract

claims. We also lack jurisdiction to entertain the various non-contractual tort and constitutional claims that Mr. Patel raises. Accordingly, we dismiss this appeal.

Background

In a declaration accompanying his notice of appeal, Mr. Patel alleges that he had agreed to "live under the use of the stress weapon" while allowing the United States to observe him and that, in exchange, "the United States would make sure nothing irreversible happens to [him] and that [he] would be monetarily paid, by the United States, of harm caused by the terroristic stress weapon." That contract is alleged to have been created through communications with President George W. Bush, acting in his official capacity, and then reaffirmed by Presidents Barack Obama, Donald J. Trump, and Joseph R. Biden through additional communications made through the website www.whitehouse.gov. The breach is alleged to have precluded Mr. Patel from reentering law school and to have caused other harm. Mr. Patel asserts that President Biden is the current contracting officer for the contract and that the "United States, Sovereign, . . . is the Defendant" in this action, although the notice of appeal, while mentioning the Federal Bureau of Investigation and the Department of Justice, appears to focus on either the President or the White House as the contracting party. Mr. Patel also seeks damages for a taking of his intellectual property, trespass, violation of his First Amendment right to free exercise of religion, and other constitutional violations.

Discussion

The Proper Respondent

Under the Board's rules, the proper respondent in an appeal is "the government agency whose decision, action, or inaction is the subject of an appeal, petition, or application," 48 CFR 6101.1(b) (2020), rather than the United States as a whole. Here, the contract, as alleged, was created by the President, acting in his official capacity. The Office of Administration within the EOP would administer any such contract. 42 Fed. Reg. 62,895 (Dec. 12, 1977). Accordingly, we designate the EOP as the respondent in this appeal, although the jurisdictional analysis herein applies equally to claims involving contracts with the President or the Office of the White House.[1]

[1] We decline Mr. Patel's request that we caption this appeal with "The Presidency," which is not a government agency, as the respondent.

Jurisdiction To Entertain Appellant's Contract Claims

The Board's jurisdiction to entertain contract claims is based upon, and is defined by, the CDA.[2] The CDA "applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28) made by an executive agency." 41 U.S.C. § 7102(a). The term "executive agency," as applied to the CDA, refers to the following entities:

> (A) an executive department as defined in section 101 of title 5;
> (B) a military department as defined in section 102 of title 5;
> (C) an independent establishment as defined in section 104 of title 5, except that the term does not include the Government Accountability Office; and
> (D) a wholly owned Government corporation as defined in section 9101(3) of title 31.

Id. § 7101(8).

The EOP and its Office of Administration clearly do not fall within subsections (A), (B), or (D) of the CDA's definition of an "executive agency." Section 101 of title 5 of the United States Code lists fifteen agencies within the Executive Branch that constitute "executive departments," none of which is the EOP or its Office of Administration. The list of military departments in 5 U.S.C. § 102 does not include the EOP or its Office of Administration, and they are not included in the list of wholly-owned Government corporations in 31 U.S.C. § 9101(3).

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[2] Appellant suggests that the Tucker Act, 28 U.S.C. § 1491, allows the Board to consider contract claims outside and beyond the context of the CDA, but the Tucker Act, which addresses the jurisdiction of the Court of Federal Claims, does not apply to the boards of contract appeals. *See United Technologies Corp., Pratt & Whitney Group, Government Engines & Space Propulsion*, ASBCA 46880, et al., 95-1 BCA ¶ 27,456, at 136,766 ("Boards of contract appeals have no Tucker Act jurisdiction."). Mr. Patel's further assertion that the Court of Federal Claims and the Board are both "Article I courts with concurrent jurisdiction to hear contract claims against the United States," Appellant's Response to Board Order (June 8, 2022) at 10, is also incorrect. The Board is not a court, *see* 41 U.S.C. § 7105(b), and, unlike the Court of Federal Claims, the Board's contract jurisdiction is limited to disputes arising under contracts subject to the CDA. *Id.* § 7105(e); *see Horse Capture Consultants, Inc.*, IBCA 4393-2002, 02-2 BCA ¶ 32,047, at 158,371.

Mr. Patel asserts that the White House falls within subsection (C) of the "executive agency" definition because it is an "independent establishment" under 5 U.S.C. § 104. Although the CDA does not define what the term "independent establishment" means, that term is defined in 5 U.S.C. § 104 as "(1) an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and (2) the Government Accountability Office." Applying that definition, the EOP argues that "the label 'independent establishment' suggests that Congress believed such an entity to be separate from and outside the direct control of the President." Respondent's Response to Board Order (June 17, 2022) at 6.

Whatever Congress meant to *include* in the definition of the term "independent establishment," the term's use in other statutes indicates that the term *excludes* the President, the White House, and the EOP's Office of Administration. In at least one statute (3 U.S.C. § 112), the terms "White House Office," the "Office of Administration" within the EOP, and "independent establishment of the executive branch" are listed separately, suggesting, consistent with the rationale of a decision of the United States Court of Appeals for the District of Columbia Circuit, that Congress views the White House Office and the EOP's Office of Administration as something distinct from an "independent establishment." *See Haddon v. Walters*, 43 F.3d 1488, 1490 (D.C. Cir. 1995) (Because "Congress distinguished the Executive Residence from the independent establishments, whatever they may be, suggests that Congress does not regard the Executive Residence to be an independent establishment, as it uses that term."); *see also* 42 U.S.C. § 13212(b)(3) (differentiating between an "independent establishment" and the EOP). Recently, the Comptroller General held in *Argus Secure Technology, LLC*, B-419422, et al., 2021 CPD ¶ 84 (Feb. 22, 2021), that the Office of Administration is *not* an independent establishment or an Executive agency for purposes of the bid protest provisions of the Competition in Contracting Act, 31 U.S.C. §§ 3551–3557. The rationale underlying the analyses by the Comptroller General and the District of Columbia Circuit, which we find persuasive, applies equally to the definition of an "independent establishment" under the CDA. *See also Downey v. White House*, No. DC-1221-17-0707-W-1, 2019 WL 4252291 (M.S.P.B. Sept. 6, 2019) (non-precedential) (holding that the EOP's Office of Administration is not an "independent establishment"). Because the EOP's Office of Administration is not an "independent establishment" to which the CDA applies, we do not possess jurisdiction to entertain Mr. Patel's contract claim against it or the President.

Even if the contract, as alleged, involved an executive agency to which the CDA applied, the contract that appellant describes would still not be one that the CDA encompasses. The CDA applies to contracts for "(1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair, or maintenance of real property; or (4) the disposal of personal property."

41 U.S.C. § 7102(a). "The scope of the Act thus is limited to express or implied contracts for the procurement of services and property and for the disposal of personal property. It does not cover all government contracts." *Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983). The United States Court of Appeals for the Federal Circuit has indicated that the type of "service" that Mr. Patel alleges he provided — allowing the Government to use a stress weapon on him and to observe its effects — is not the type of "service" to which the CDA applies, at least in part because it could not realistically be subject to an award through competitive bidding. *Institut Pasteur v. United States*, 814 F.2d 624, 626 (Fed. Cir. 1987); *see Bailey v. United States*, 46 Fed. Cl. 187, 210-12 (2000) (alleged contract to assist the Government in repatriating foreign assets from the contractor's own clients, which could not be competitively bid, did not involve the type of "service" to which the CDA would apply). Accordingly, even if the EOP's Office of Administration could be considered an executive agency under the CDA, we would lack jurisdiction to entertain a claim under the type of contract alleged.

The Government has informed us that Mr. Patel raised similar allegations to those raised here in a lawsuit previously filed with the Court of Federal Claims. That court dismissed Mr. Patel's lawsuit for lack of jurisdiction because the allegations were "clearly baseless" and "frivolous," and the Federal Circuit subsequently summarily affirmed that dismissal decision. *Patel v. United States*, No. 21-2004 (Fed. Cl. Nov. 5, 2021), *aff'd*, No. 2022-1131 (Fed. Cir. Feb. 11, 2022).[3] Because we lack jurisdiction on the grounds described above, we need not consider the extent to which the nature of Mr. Patel's contract allegations would preclude our jurisdiction over Mr. Patel's appeal and, further, whether the absence of

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[3] In footnote 5 of its response to the Board's order dated June 3, 2022, the EOP argues that, because Mr. Patel originally elected to file his dispute with the Court of Federal Claims, the "Election Doctrine" bars this appeal. "Once a contractor makes a binding election under the Election Doctrine to appeal the contracting officer's adverse decision to the appropriate board of contract appeals [or, instead, to the Court of Federal Claims], that election must stand and the contractor can no longer pursue its claim in the alternate forum." *Salt River PMIA-Maricopa Indian Community v. Department of Energy*, CBCA 1193, 09-2 BCA ¶ 34,246, at 169,246 (quoting *National Neighbors, Inc. v. United States*, 839 F.2d 1539, 1542 (Fed. Cir. 1988)). Nevertheless, "only if the chosen forum has jurisdiction over the proceeding can a contractor's choice to pursue its claim in that forum be a binding election." *National Neighbors*, 839 F.2d at 1543. Because the Court of Federal Claims dismissed Mr. Patel's suit for lack of jurisdiction, the Election Doctrine does not bar this appeal. For the same reason, we reject the EOP's argument that Mr. Patel's claim is barred by res judicata. *See Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1355 (Fed. Cir. 2011) ("[A] dismissal on the merits usually carries *res judicata* effect whereas a dismissal for lack of jurisdiction typically does not.").

a claim submitted in accordance with the requirements of the CDA would similarly bar jurisdiction.

Jurisdiction To Entertain Appellant's Non-Contractual Claims

In addition to allegations of breach of contract, Mr. Patel in his notice of appeal alleges a taking of his intellectual property rights, trespass, violation of his First Amendment right to free exercise of religion, and other constitutional violations. The Board lacks jurisdiction to entertain non-contractual tort and constitutional claims. *See Allred v. Department of Veterans Affairs*, CBCA 4952, 15-1 BCA ¶ 36,108, at 176,283 (no jurisdiction to entertain pure tort claims); *Data Enterprises of the Northwest v. General Services Administration*, GSBCA 15607, 04-1 BCA ¶ 32,539, at 160,928 (no jurisdiction over Fifth Amendment takings claims); *H.T. Engineers & Contractors, Inc.*, VABCA 2456, 86-3 BCA ¶ 19,321, at 97,718 (no jurisdiction over Fifth Amendment due process claims); *M&M Services, Inc.*, ASBCA 28712, 84-2 BCA ¶ 17,405, at 86,688 ("no jurisdiction to provide relief based solely on alleged violations of the Constitution").

Decision

Because appellant has not alleged any claims that fall within the Board's jurisdiction, the appeal is **DISMISSED FOR LACK OF JURISDICTION**.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge