

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
CME Group, Inc. ) ASBCA No. 57446  
)  
Under Contract No. FA8650-09-C-6034 )

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APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.  
Air Force Chief Trial Attorney  
Sharon A. Jenks, Esq.  
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Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE CLARKE ON THE GOVERNMENT'S  
MOTION TO DISMISS FOR LACK OF JURISDICTION

The Air Force filed a motion to dismiss for lack of jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. Appellant has opposed the motion. We grant the motion and dismiss the appeal without prejudice.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 1 September 2009 the Air Force awarded CME Group, Inc. (CME) cost-plus-fixed-fee Contract No. FA8650-09-C-6034 to conduct research entitled "A Gene Sequence and Data Analysis Platform for High-Threat Pathogens." The estimated cost was \$7,337,000 with fixed-fee of \$514,000 for a total of \$7,851,000. At award the contract was incrementally funded with \$1,058,000 obligated on the contract. The incremental funding was estimated to fund performance through 18 August 2010. (R4, tab 1 at 1-3) The contract was funded by the Defense Threat Reduction Agency (DTRA) (*id.* at 9). The contract incorporated by reference FAR 52.232-22, LIMITATION OF FUNDS (APR 1984), and FAR 52.249-6, TERMINATION (COST-REIMBURSEMENT) (MAY 2004) (*id.* at 13).

2. By Modification No. P00001, dated 7 October 2009, the Air Force added \$196,193 in incremental funding, for a total of \$1,254,193, estimated to fund performance through 18 October 2010 (R4, tab 1, Mod. No. P00001 at 1-3<sup>1</sup>).

3. By Modification No. P00003, dated 26 April 2010, the Air Force added \$1,100,000 in incremental funding, for a total of \$2,354,193, estimated to fund performance through 18 October 2010 (R4, tab 1, Mod. No. P00003 at 2).

4. On 23 August 2010, DTRA sent the contracting officer an e-mail with attached 20 August 2010 letter stating that CME's contract would not be funded beyond 15 October 2010 (R4, tab 2).

5. On 3 September 2010, the contracting officer e-mailed CME a letter, "SUBJECT: Request for Proposal for Deletion of Work; Contract FA8650-09-C-6034," notifying CME that its contract would not be further funded, directing it to end technical efforts immediately, and prepare for the removal of Government-Furnished Property (GFP) (R4, tab 3).

6. CME responded to the 3 September 2010 letter on 7 September 2010. CME complained that the Air Force did not comply with FAR 52.249-6, TERMINATION (COST-REIMBURSEMENT), complained that the Air Force had recently encouraged CME to "add personnel, facilities and capability in anticipation of the continuation of this work," and requested that a terminating contracting officer be appointed. (R4, tab 4)

7. The contracting officer responded to CME's 7 September 2010 letter by letter on 8 September 2010. The contracting officer reiterated her request for a "credit cost proposal" for the deleted work and a GFP inventory. (R4, tab 5) CME responded requesting, among other things, that the contracting officer terminate its contract for convenience (R4, tab 6). The contracting officer terminated Contract No. FA8650-09-C-6034 for convenience by letter dated 16 September 2010 (R4, tab 7), letter dated 28 September 2010 (R4, tab 10) and Modification No. P00005, dated 6 December 2010 (R4, tab 1, Mod. No. P00005).<sup>2</sup>

8. CME did not submit a termination settlement claim to the contracting officer prior to the docketing of this appeal.

9. CME sent a notice of appeal from the 16 September 2010 termination to the Board on 1 December 2010. The Board docketed the appeal as ASBCA No. 57446 on 6 December 2010.

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<sup>1</sup> The pages in R4, tab 1 that includes both the basic contract and modifications are not sequentially numbered.

<sup>2</sup> It is unclear from the record why there were three termination actions.

## DECISION

### Contentions of the Parties

The Air Force moves to dismiss for lack of jurisdiction under the CDA because CME did not submit a claim of any kind to the contracting officer challenging the termination for convenience. CME does not disagree with the Air Force's assertion that CME did not submit a claim to the contracting officer before it filed its notice of appeal. In its Supplemental Response to Respondent's Motion to Dismiss, CME quotes from its 31 January 2011 complaint, "[a]ppellant is preparing an official claim for its actual and consequential damages, which it will submit to the contracting officer as required by...the Federal Circuit's recent decision of *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010)" (app. supp. resp. ¶ 5). CME then stated that it submitted its "official claim" to the contracting officer on 31 March 2011 (app. supp. resp. ¶ 6). According to the Air Force's Reply to Appellant's Response and Supplemental Response to Respondent's Motion to Dismiss, CME submitted its "official claim" to the contracting officer on 1 April 2011 (gov't resp. at 2). In its Response to Respondent's Motion to Dismiss, dated 1 April 2011, CME argues that since it had submitted its "official claim" after the Air Force filed its motion to dismiss, the motion was "moot."

### Discussion

CME was awarded an incrementally funded cost-plus-fixed-fee contract for certain research work (SOF ¶ 1). The incremental funding was increased to fund performance through 18 October 2010 (SOF ¶¶ 2, 3). The Air Force decided not to further increase the incremental funding (SOF ¶ 4). CME was informed of the decision not to add additional incremental funding to its contract on 3 September 2010 (SOF ¶ 5). CME was told to cease performance, prepare for the removal of GFP and to submit a "credit cost" proposal. CME asked that its contract be terminated for convenience and the contracting officer did so on 16 September 2010. (SOF ¶¶ 6, 7) CME did not submit a termination settlement claim to the contracting officer prior to filing a notice of appeal with the Board on 1 December 2010. CME's appeal was docketed by the Board as ASBCA No. 57446. (SOF ¶¶ 8, 9)

CME has cited no case precedent for its argument that the Air Force motion was mooted by CME's submission of its "official claim" in support of jurisdiction. In its Supplemental Response to Respondent's Motion to Dismiss, CME cited numerous cases for the proposition that bad faith terminations for convenience may constitute a breach of contract (app. supp. resp. ¶¶ 10, 11). CME cites other cases for the proposition that the Board has authority to issue "declaratory relief" (app. supp. resp. ¶ 12). None of these cases address the fundamental question of jurisdiction.

The case law under the CDA is clear. Absent a claim submitted to the contracting officer, the Board has no jurisdiction over CME's challenge to the termination for convenience. A termination for convenience is not a government claim. *Operational Service Corp.*, ASBCA No. 37059 *et al.*, 93-3 BCA ¶ 26,190 at 130,374 (We conclude that the termination for convenience itself does not constitute a contracting officer's decision.); *Larry G. Pyle*, ASBCA No. 41155, 90-3 BCA ¶ 23,252 at 116,668 ("Moreover, the mere termination of the contract pursuant to the 'termination for convenience' clause was not a decision concerning a claim from appellant, nor was it a decision asserting a Government claim against appellant."); and *Advanced Precision Industries, Inc.*, ASBCA No. 39735, 90-3 BCA ¶ 23,087 at 116,940 ("The Government's modification [converting a termination for default to a termination for convenience] was not a decision concerning a claim from appellant nor was it a claim against appellant. Without such a claim and ensuing decision, the Board is without jurisdiction."); *Armentrout Construction, Inc.*, ASBCA No. 29118, 84-2 BCA ¶ 17,263 at 85,962 ("Appellant's argument that the termination [for convenience] notice was the contracting officer's decision from which a proper appeal could be taken fails in two respects. First, the notice of 12 September 1983 did not decide a claim nor did it state a claim against appellant"). Simply put, a termination for convenience is not analogous to a termination for default that is considered a government claim. The Board declines CME's invitation to stray from this long standing precedent. CME's argument that the Air Force's motion is "moot" is rejected.

For the reasons stated above, CME's appeal is dismissed without prejudice for lack of jurisdiction.

Dated: 23 June 2011



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CRAIG S. CLARKE  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur



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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 57446, Appeal of CME Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals