



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

COUNTERCLAIM DISMISSED FOR LACK OF JURISDICTION:
August 16, 2024

CBCA 7569

KMK CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Dannel C. Duddy of Harman, Claytor, Corrigan, & Wellman, P.C., Richmond, VA;
and James E. Krause of James E. Krause, P.A., Jacksonville, FL, counsel for Appellant.

Laetitia C. Coleman, Office of General Counsel, Department of Veterans Affairs,
Arlington, TX, counsel for Respondent.

Before Board Judges **LESTER**, **ZISCHKAU**, and **SULLIVAN**.

LESTER, Board Judge.

In this appeal, KMK Construction, Inc. (KMK) challenges a government claim demanding that KMK pay damages to the Department of Veterans Affairs (VA). This decision addresses a counterclaim that KMK included in a pleading filed with the Board.

Background

KMK was performing a contract (contract no. 36C24620C0023) for construction services associated with Cancer Center #652-316 at the H.H. McGuire Veterans Affairs Medical Center in Richmond, Virginia. During performance, a severe storm that passed

through Richmond flooded the 1F Mental Health courtyard at the hospital. The VA contracting officer issued a decision on August 9, 2022, demanding that KMK reimburse the VA \$275,644.97 for “financial damage that the Government experienced as a direct result of KMK’s negligence for blocking the storm drainpipe that handles stormwater collect in the manhole in the 1F courtyard and causing delays” to contract performance. Appeal File, Exhibit 52 at 2450. KMK appealed that decision to the Board on November 4, 2022, and the Clerk docketed it as CBCA 7569.

Because the claim at issue is a government claim seeking monetary relief from the contractor, the parties requested, and the Board subsequently directed, that the VA file the complaint. In the answer that KMK filed to the VA’s complaint on February 16, 2023, KMK responded to the VA’s allegations but then added what it titled “KMK’s Countercomplaint Against [the VA’s] Complaint,” which it and the VA now describe as a counterclaim. KMK alleged that it “has incurred both monetary and delay damages on this Project due to Government actions arising out of or related to the above Complaint” and “is currently preparing a request for equitable adjustment [(REA)] to address these damages and will provide a Certified Claim to the Contracting Officer when completed.” Answer ¶ 28. KMK also alleged that it had “encountered numerous issues with the Government’s Plans and Specifications that have caused construction delays, interferences or hindrances,” *id.* ¶ 36; that “the government-provided Engineering plans were so obviously incorrect that KMK engaged an outside engineering firm to review the engineering plans,” *id.* ¶ 37; that it “has encountered several preexisting undisclosed underground obstructions and differing site conditions that were not identified on the Government’s Plans and Specifications,” *id.* ¶ 38; and that, throughout performance, the VA had “continuously failed to respond timely” to requests for information, which “delayed, hindered and interfered with KMK’s work.” *Id.* ¶¶ 42-43. In its pleading, however, KMK did not quantify the amount of its claim (or claims) against the VA.

Twelve days after KMK filed its answer, the parties jointly requested that the Board suspend proceedings in this appeal to allow time for KMK to submit claims and for the VA contracting officer to review them. The parties did not at that time ask the Board to address any concerns about KMK’s counterclaim. Proceedings remain suspended until January 8, 2024, when, after conferring with the parties, the Board issued an order scheduling proceedings, including discovery, even though the parties were continuing their discussions, outside the context of this appeal, about KMK’s claims and/or REAs. On July 11, 2024, the parties requested another suspension of proceedings to allow them to focus on settlement discussions, and the parties notified the Board on August 5, 2024, that they were finalizing a settlement agreement.

On August 14, 2024, however, the parties notified the Board that KMK’s inclusion in its answer of the counterclaim was causing problems and confusion as they drafted the

settlement agreement. KMK wants the Board to dismiss the counterclaim without prejudice, while the VA wants the entire appeal dismissed with prejudice but with an agreement between the parties that KMK will not be barred from continuing to pursue its current REA or from submitting additional claims or REAs, except for those that pertain to the water damage issue. At the parties' request, the Board conducted a status conference with the parties during which they requested that the Board clarify the status of KMK's counterclaim.

Discussion

To the extent that the "countercomplaint" that KMK included in its answer constitutes a counterclaim, the Board plainly lacks jurisdiction to entertain it.

"The Board has no counterclaim practice such as exists in [United States] District Court practice," and "[t]here are no mandatory or permissive counterclaims." *Diversified Marine Tech, Inc.*, DOT BCA 2455, et al., 93-1 BCA ¶ 25,264, at 125,840 (1992). That is because "[t]he Board's jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 [(2018)], 'is limited to hearing and deciding appeals by contractors of decisions issued by contracting officers on claims' by or against particular agencies of the Federal Government." *Mustafa Khamosh Group v. Department of State*, CBCA 5447, 17-1 BCA ¶ 36,581, at 178,187 (2016) (quoting *AMEC Construction Management, Inc. v. General Services Administration*, CBCA 389, et al., 07-1 BCA ¶ 33,505, at 166,039); see *Holly Corp.*, ASBCA 24975, 80-2 BCA ¶ 14,675, at 72,380-82 (discussing reasons that the CDA, which requires an affirmative appeal of each contracting officer's decision, generally does not permit counterclaims). The term "claim" means "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 CFR 2.101 (2023). The CDA provides that "[e]ach claim by a contractor against the Federal Government relating to a contract shall be in writing" and "shall be submitted to the contracting officer for a decision." 41 U.S.C. § 7103(a)(1), (2).

For the Board to have jurisdiction over a contractor's demand for a money payment, the contractor must have previously presented a claim to the contracting officer, and "there must be . . . a contracting officer's final decision on that claim." *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996). Here, KMK's appeal relates to a contracting officer's decision asserting a government claim. When KMK filed its "countercomplaint," it had not submitted its own claim to the contracting officer seeking payment of money that it thinks that it is owed, obtained a contracting officer's decision on such a claim, or filed a notice of appeal of such a decision. A contractor cannot piggyback an affirmative monetary request that has not been the subject of a claim and a contracting officer's final decision onto its appeal of a government claim against it. See *LGT Corp.*, ASBCA 44066, 94-2 BCA ¶ 26,607, at 132,372-73 (dismissing, in an appeal of a

decision asserting a government claim, appellant's monetary counterclaim asserted in the answer to the Government's complaint); *Phoenix Petroleum Co.*, ASBCA 42763, et al., 94-1 BCA ¶ 26,461, at 131,668 (1993) ("The inclusion of a monetary claim in [a pleading] as a 'counterclaim' is not sufficient to confer jurisdiction on the Board."). We lack jurisdiction to entertain KMK's monetary requests.

We agree with the VA that, in the circumstances here, it should not have been that difficult for the parties, as part of their settlement agreement, to carve out KMK's monetary claims in a way that would maintain KMK's right to pursue them. Nevertheless, we also agree with KMK that, now that we are aware of the jurisdictional defect in its counterclaim, we cannot dismiss that counterclaim with prejudice. *MINACT, Inc. v. Department of Labor*, CBCA 7575, 23-1 BCA ¶ 38,243, at 185,701 (2022); *Shonto Governing Board of Education, Inc. v. Department of the Interior*, CBCA 6043-ISDA, 18-1 BCA ¶ 37,038, at 180,319-20. "Once we are aware that we lack jurisdiction to entertain [part of] an appeal, we have 'no other recourse but to dispose of [that part of the appeal] by dismiss[ing]' it based upon the jurisdictional defect," a dismissal that is, by its nature, without prejudice. *Duke University v. Department of Health & Human Services*, CBCA 5992, 18-1 BCA ¶ 37,023, at 180,291 (quoting *Rex Systems Inc. v. United States*, No. 92-411C, 1993 WL 13726058, at *3 (Fed. Cl. Dec. 13, 1993), *appeal dismissed*, 41 F.3d 1517 (Fed. Cir. 1994) (table)).

Decision

For the foregoing reasons, KMK's counterclaim is **DISMISSED FOR LACK OF JURISDICTION**.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge