UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: October 30, 2017

CBCA 5869

MAGWOOD SERVICES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Carolyn E. Hansen, Stone Ridge, NY, counsel for Appellant.

Meaghan Q. LeClerc, Office of Regional Counsel, General Services Administration, Boston, MA, counsel for Respondent.

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

CHADWICK, Board Judge.

The Board ordered the appellant, Magwood Services, Inc. (Magwood), to show cause why we should not dismiss this appeal for lack of jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). The appellant and the respondent, General Services Administration (GSA), stated their positions on jurisdiction in response to the order. In arguing that we may adjudicate certain claims by Magwood for damages in this appeal, Magwood relies on communications between the parties that predated the filing of an earlier appeal by Magwood, CBCA 5588, regarding a termination for default. Although, as GSA notes, Magwood's own arguments raise facial issues of timeliness, we find that we lack jurisdiction for other reasons, namely: (1) Magwood did not present any damages claims to the GSA contracting officer in a CDA claim, and (2) to the extent that Magwood seeks to challenge the default termination, that dispute is already before us in CBCA 5588.

Background

On September 22, 2016, a GSA contracting officer emailed Magwood a notice terminating for default a construction contract that Magwood had been performing in Calais, Maine. The notice stated that it was "the final decision of the Contracting Officer" and advised Magwood of its appeal rights.

On November 9, 2016, Magwood emailed the contracting officer a four-page letter, with attachments. The letter began: "The Notice of Termination for Default Letter (dated 9/22/16) for [the contract] provided the terms for default. Please accept this formal request to amend this determination to reflect a Termination for Convenience. Detailed responses are provided below, and provide a description of the issues experienced during the contract period of performance, which require further consideration."

Magwood's November 9 letter had six subheadings, corresponding to events on the project. The sixth and final subheading, on page 3, was, "6–Overall Project/Magwood's Project Management Concerns." In four bulleted paragraphs under that subheading, Magwood complained about payment issues it allegedly experienced on the contract and itemized a total of $12,153.78 of invoiced "expenses" for which it said "reimbursement . . . ha[d] not been rendered." Magwood's letter concluded, "Thank you for your consideration, and we look forward to your timely response."

On December 12, 2016, the contracting officer wrote to Magwood by email, in full: "The Termination for Default letter that was sent on September 22, 2016 noted that this was the final decision of the Contracting Officer. As such, no request for appeal or reconsideration of this decision should be directed to me. The letter of September 22, 2016 outlines the options available for appeal of this decision, should you choose to do so."

One week later, on December 19, 2016 (eighty-eight days after receiving the termination notice), Magwood filed a notice of appeal in what is now CBCA 5588. On the Board's appeal form, Magwood said it was appealing from a contracting officer's decision dated "December 19, 2016," the same date as the notice of appeal. However, Magwood attached to its notice of appeal a copy of the September 22 notice of termination for default. In the box of the appeal form that asks the appellant to describe the relief sought, Magwood requested conversion of the termination for default to a termination for convenience, and $12,000 for the payment issues noted in Magwood's November 9 letter.

In February 2017, Magwood's president, who was then representing the company, filed with the Board a three-page letter styled as the "complaint" in CBCA 5588. This letter

borrowed some of the language of Magwood's November 2016 letter to the contracting officer, including the itemized expenses, but did not request any particular relief.

In August 2017, Magwood, now represented by counsel, filed in CBCA 5588, without seeking leave of the Board, a document titled, "Amendment to Notice of Appeal and Amendment to Complaint." In it, Magwood sought, among other things, to add claims alleging that "GSA breached" the contract and "discriminated against MAGWOOD and it[s] employees."

Magwood's August 2017 filing prompted a series of orders by the Board directing Magwood to identify in the record any claim to the GSA contracting officer, and contracting officer's decision thereon, that would give the Board jurisdiction under the CDA to award money damages, such as for breach or discrimination, in CBCA 5588.

One of Magwood's responses to those orders was to file the instant appeal, CBCA 5869, on October 2, 2017. Magwood's appeal form in this case states that Magwood is appealing from the contracting officer's December 12, 2016, email message—which Magwood calls a "decision," and which predated the notice of appeal by 294 days. Magwood states on the appeal form that it seeks the same relief as in CBCA 5588 plus additional damages, including "compensation" for lost business reputation and "appropriate remedies for the effects of discrimination" by GSA.

We ordered Magwood to show why an appeal filed here 294 days after the date of the contracting officer's decision alleged in the appeal notice "may be considered timely" under the CDA, and why we should consider its November 2016 letter a CDA claim for damages.

Discussion

Magwood's response to our order did not answer our questions. "The Board gains jurisdiction under the CDA only after a claim is presented to the contracting officer and is either decided or deemed denied, and the contractor files a timely appeal." *Bass Transportation Services, LLC v. Department of Veterans Affairs*, CBCA 4995, 16-1 BCA ¶ 36,464, at 177,687. An appeal to a board of contract appeals must be filed "within 90 days from the date of receipt of a contracting officer's decision." 41 U.S.C. § 7104(a); *see id.* § 7103(g). Magwood does not argue that its notice of this appeal (CBCA 5869) was timely, only that "the Notice of Appeal *that was docketed at CBCA 5588* was timely filed," and that the notice in CBCA 5588 "included the *claims* made in [Magwood's] November 9, 2016, letter to the contracting officer *appealing* various actions of the GSA" (emphasis added).

Magwood's own arguments thus suggest that this appeal is untimely, but our jurisdictional analysis cannot stop there, as we question Magwood's premise, in its notice of appeal, that the contracting officer's December 2016 email message, quoted above in full, should be read as a decision on a claim by Magwood for damages. GSA argues that the message "unequivocally is not" such a decision. On its face, the contracting officer's message merely advised Magwood that he would not reopen the September 2016 termination for default.

This means that, were we to find that Magwood's November 2016 letter to the contracting officer was a CDA claim for damages, one might plausibly argue that the contracting officer never decided that claim, and that Magwood was entitled to file this appeal from a "deemed" denial of the claim. *See* 41 U.S.C. § 7103(f)(5); *Fire-Security Systems, Inc. v. General Services Administration*, GSBCA 12175, 93-2 BCA ¶ 25,851.

We need not decide how to read the contracting officer's email message, however, as we agree with GSA's further argument that Magwood's November 2016 letter was not a CDA claim for money. *See* 48 CFR 2.101 (2015) ("'*Claim*' means a written demand or written assertion . . . 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."). We use "a common sense analysis to determine whether the contractor communicated [a] desire for a contracting officer's decision" on a demand for a sum certain. *Moss Card Consulting, Inc. v. General Services Administration*, CBCA 5193, 16-1 BCA ¶ 36,291, at 176,988. Common sense does not support reading Magwood's November 2016 letter as a claim.

Magwood styled its November 2016 letter as a "formal request" to "amend" the default termination to a convenience termination. This was, by its terms, a request for a nonmonetary action, i.e., rescission of a pending, nonmonetary *government* claim against Magwood. *See Malone v. United States*, 849 F.2d 1441, 1443-45 (Fed. Cir. 1988) (holding that a contractor may appeal a default termination, "a government claim," directly to a board of contract appeals, "absent a monetary claim by either party"); *Michael M. Grinberg*, DOT BCA 1543, 87-1 BCA ¶ 19,573. The expenses that Magwood itemized under subheading 6 on pages 3 and 4 were sums certain, but Magwood did not demand payment of them as a matter of right. *Cf. Ringgold v. Department of Agriculture*, CBCA 5259, 17-1 BCA ¶ 36,629, at 178,367 (finding that unrepresented contractor submitted CDA claim by asking contracting officer to "process" disputed invoice). Instead, Magwood cited the unpaid invoices as examples of "issues experienced" and "[p]roject [m]anagement [c]oncerns" that would justify "further consideration" of the default termination. Magwood then closed its letter with a request for a "timely response," not for prompt payment. We read this, in

context, as a request for a "response" to Magwood's "formal request" to convert the termination for default to a termination for convenience.

In sum, we would not expect a contracting officer reviewing Magwood's "formal request" for reconsideration of the default termination to have understood that Magwood was also presenting its own CDA claim calling for a final decision on the separate issue of whether the Government presently owed Magwood $12,153.78. Magwood did not explicitly or implicitly ask for a contracting officer's decision on its outstanding invoices, separate from overall relief from the default termination. We lack jurisdiction to award damages here in the absence of a monetary claim. *EnergX, LLC v. Department of Energy*, CBCA 3060, 17-1 BCA ¶ 36,633. Further, to the extent that Magwood once again seeks relief in this appeal (CBCA 5869) from the termination for default, this appeal is both duplicative of CBCA 5588 and untimely. *Bass*, 16-1 BCA at 177,687.

Decision

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

KYLE CHADWICK
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

JEROME M. DRUMMOND
Board Judge