UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED IN PART FOR LACK OF JURISDICTION:
March 13, 2018

CBCA 5961

MAYBERRY ENTERPRISES, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

A.J. Green and Michael R. Johnson of Ray Quinney & Nebeker P.C., Salt Lake City, UT, counsel for Appellant.

J. Ben Summerhays and Thomas M. Cordova, Office of General Counsel, Western Area Power Administration, Department of Energy, Lakewood, CO, counsel for Respondent.

Before Board Judges **HYATT**, **LESTER**, and **O'ROURKE**.

LESTER, Board Judge.

Although respondent, the Western Area Power Administration (WAPA) (acting through the Department of Energy), does not contest our jurisdiction to entertain a challenge to a contracting officer's decision terminating a contract for default, WAPA asks us to dismiss the affirmative monetary claims (which collectively total more than $500,000) that appellant, Mayberry Enterprises, LLC (Mayberry), has included in this appeal. WAPA

argues that, because the claim letter that Mayberry originally submitted demanding payment of these monies, dated July 7, 2017, was not certified, the Board lacks jurisdiction to entertain Mayberry's money claims. We grant WAPA's motion in part, dismissing any monetary claims in excess of $100,000 that were not certified, but deny WAPA's request to the extent that there are individual and segregable claims included in the July 7 claim letter of less than $100,000.

Background

I. Mayberry's Contract Award and Claim Letter

On May 27, 2016, WAPA awarded contract no. DE-WA0003012 to Mayberry for the construction of a storage building and concrete pavement in Fort Peck, Montana.

On July 7, 2017, Mayberry submitted a claim letter to the WAPA contracting officer, a copy of which is contained in Exhibit 117 of the appeal file, in which Mayberry divided monetary requests into four categories, using the following headings: "Suspension of Work and [Resulting] Government Delay(s) of Work," "Government Delays of the Work and Late Payment Related to Concrete Acceptance," "Request to Remove Modification (0003) and Trade Days for Work Complete," and "Request to Release Retainage." The monetary amounts sought for the first three categories were identified in an attachment to the letter titled "Claim Schedule of Values," which indicated that Mayberry was seeking a total of $87,990.24 for those three categories: $85,004.05 for the "Suspension of Work" issues, $2986.19 for the "Late Payment" issues, and no money but thirty-five non-compensable (and excusable) days for the "Modification (0003)" issue. Accompanying the letter was also an invoice, no. 16003-7, dated June 30, 2017, seeking the requested $87,990.24 payment for those three categories.

Although not mentioned in either the "Claim Schedule of Values" attachment or invoice no. 16003-7, the fourth category of money that Mayberry was requesting – the "Request to Release Retainage" issue – was addressed in the claim letter letter itself, which demanded the release of $41,000 in retained funds, calculated as follows: (1) $27,000 that WAPA had withheld on February 28, 2017, because Mayberry had not submitted an updated construction schedule, and (2) $14,000 that WAPA had withheld to address outstanding Mayberry payroll items.

Among the various supporting materials attached to the letter was an additional invoice, no. 16003-6 (dated June 30, 2017), that, as far as we can tell, is not referenced anywhere in the actual claim letter. That invoice requested payment of $400,905.35 under the contract for mobilization and preparatory work; miscellaneous site work; gravel surfacing

at the pole yard; the design and pouring of a concrete floor and foundation; the pouring of a concrete apron for a storage building; providing concrete slabs, maintenance, and a pole yard; designing and providing a metal building; miscellaneous electrical work; asphalt paving and surfacing; and peninsula and grade riser removal. The period of performance identified in that invoice was June 7, 2016, to June 16, 2017, and the amount requested in the invoice appears to be the cost that Mayberry incurred during the identified period for that work.

The claim letter did not contain the certification required by section 7103(b)(1) of the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), for claims in excess of $100,000. The WAPA contracting officer has never issued a decision in response to the July 7 claim letter.

II. Default Termination

The contracting officer issued a decision terminating that contract for default on September 8, 2017. Mayberry has not subsequently submitted any kind of termination settlement proposal or claim to the WAPA contracting officer seeking monies associated with the termination.

III. Mayberry's Appeal

On December 7, 2017, Mayberry filed a notice of appeal of the contracting officer's decision terminating its contract for default. WAPA does not challenge the Board's jurisdiction to entertain Mayberry's timely challenge to the termination.

In its notice of appeal, Mayberry also challenged the contracting officer's "deemed denial" of Mayberry's July 7 claim letter, asserting that the amount in dispute was, as Mayberry reported it, "approximately $529,895.59."

Mayberry filed its complaint in this appeal on January 12, 2018. In one section of its complaint, under the heading "Dispute Regarding Notice of Termination: Approval of Building Design," Mayberry, in challenging the contracting officer's termination notice, alleged that the impossibility of satisfying the original building design specifications affected its ability to perform. It further requested that, in addition to overturning the termination, the Board should award Mayberry a total of $494,215.75 for work performed trying to meet those specifications and as damages associated with the improper contract termination resulting from the impossibility:

27. Mayberry has completed work in the amount of $400,905.35 on the Project for which it has not been paid as set for[th] in Invoice No. [16003-6], dated June 30, 2017 and sent to WAPA on July 7, 2017.

28. WAPA is currently withholding retainage in the amount of $41,000.

29. Based on the foregoing, Mayberry is entitled to $494,215.75[1] for work completed plus damages in an amount to be determined at hearing, but in no event less than overhead and other expenses incurred on the Project from March 4, 2017 through the date of termination, expected profit on the remainder of the work contemplated by the Contract plus consequential damages that have resulted from the improper Notice of Termination including all damages available under the Contract and applicable law.

In paragraphs 30 through 72 of Mayberry's complaint, titled "Dispute Regarding Denial of Mayberry's July 7, 2017 Request for Equitable Adjustment," Mayberry detailed its entitlement to compensation and price adjustments arising out of a suspension of work and WAPA-caused delays during contract performance (totaling $85,004.05), late payments for concrete paving and other work invoiced at the same time (in an amount not defined in the complaint, but not less than $4922.86), and work performed pursuant to contract modification 003 (totaling $52,310.40). It then requested, in paragraphs 73 to 76 of its complaint, release of a total of $41,000 that WAPA had retained – $27,000 allegedly withheld because Mayberry did not submit an updated construction schedule, and $14,000 allegedly withheld because of outstanding payroll items.

In the prayer for relief of its complaint, however, Mayberry appeared to limit its monetary request in a manner that disregards portions of its complaint. Specifically, in paragraphs 77, 78, and 79 of its complaint, Mayberry asked that the Board reverse the termination decision, order WAPA to pay $494,215.75 for work completed (including damages) and for consequential damages resulting from the termination notice, and order payment of $87,990.24 "plus damages in an amount to be determined at hearing" on Mayberry's letter of July 7, 2017. The prayer for relief does not address Mayberry's request in paragraphs 73 to 76 of the complaint for release of $27,000 and $14,000 in retainages.

---

[1] We cannot correlate the $494,215.75 figure in paragraph 29 of the complaint with the dollar figures in paragraphs 27 and 28 – the combined total in paragraphs 27 and 28 does not equal the figure in paragraph 29. Given our resolution of the jurisdictional issues, we need not try to surmise how the paragraph 29 figure was calculated.

IV. WAPA's Motion to Dismiss

On January 12, 2018, WAPA requested that the Board dismiss all of Mayberry's monetary requests for lack of jurisdiction. It argued that "the various requested amounts" in Mayberry's claim letter of July 7, 2017, "were, when aggregated, in excess of the relevant $100,000 threshold identified in the CDA" for requiring certification. Respondent's Motion to Dismiss at 4. Because the July 7 letter was not certified, it was, according to WAPA, a legal nullity.

Mayberry responded to that motion on February 12, 2018, challenging WAPA's interpretation of its July 7 claim letter. It argued that, although it attached two invoices (no. 16003-6 for $400,905.35 and no. 16003-7 for $87,990.24) to its July 7 letter, "the only request for equitable adjustment that could have required a certification pursuant to 41 U.S.C. § 7103(b), was set forth in invoice 16003-7 and was for an amount of $87,990.[24]." Appellant's Response at 2. It is unclear from Mayberry's submission whether it believes that, although it attached invoice 16003-6 to its July 7 letter, the $400,905.35 request was not encompassed within Mayberry's asserted claims because Mayberry did not reference it in the actual claim letter or, instead, it is arguing that it is not required to certify a monetary request seeking damages associated with an improper default termination. Mayberry's response did not mention the request for release of retainages set forth in its July 7 letter and paragraphs 73 to 76 of its complaint.

Although we provided WAPA with an opportunity to file a reply brief, WAPA elected not to do so.

Discussion

I. Standard of Review

"When considering a motion to dismiss an appeal, or a portion thereof, for lack of subject matter jurisdiction, the Board 'accepts as true the undisputed allegations in the complaint and draws all reasonable inferences in favor of the [appellant].'" *Primestar Construction v. Department of Homeland Security*, CBCA 5510, 17-1 BCA ¶ 36,612, at 178,329 (2016) (quoting *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, 14-1 BCA ¶ 35,758, at 174,969). Nevertheless, in evaluating jurisdiction, "the [tribunal] may inquire, by affidavits or otherwise, into the facts as they [actually] exist." *Land v. Dollar*, 330 U.S. 731, 739 n.4 (1947). "The party invoking the Board's jurisdiction" – here, Mayberry – "bears the burden of establishing it by a preponderance of the evidence." *McAllen Hospitals*, 14-1 BCA at 174,969.

II. The Segregability of Claims Within Mayberry's Claim Letter

The necessity of a properly submitted "claim" to the Board's jurisdiction in appeals arising under the CDA is well-established:

> The Board's jurisdiction to entertain contract disputes derives from the [CDA]. As a prerequisite to review by the Board of a contractor's demand for money from the Federal Government, the contractor must have submitted a "claim" to an agency contracting officer. [41 U.S.C.] §§ 7103, 7104(a). The CDA does not define the term "claim." *Todd Construction, L.P. v. United States*, 656 F.3d 1306, 1311 (Fed. Cir. 2011). In the absence of a such a definition in the CDA itself, we rely upon the [Federal Acquisition Regulation's (FAR's)] definition of the term "claim" in applying the CDA's requirements. *Id.* The FAR defines a "claim" as "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." 48 CFR 2.101 [(2016)].

Foxy Construction, LLC v. Department of Agriculture, CBCA 5632, 17-1 BCA ¶ 36,687, at 178,626.

It is also well-established that, "if the amount of a [monetary] claim exceeds $100,000, the contractor must have certified the claim in the form required by 41 U.S.C. § 7103(b)(1), and [that] any uncertified request for payment in excess of $100,000 'is not a claim under [the CDA] until certified as required by the statute.'" *Foxy Construction*, 17-1 BCA at 178,626 (quoting 48 CFR 2.101). The certification requirement is a jurisdictional prerequisite to any appeal under the CDA of a claim in excess of $100,000. *McAllen Hospitals*, 14-1 BCA at 174,969. Although a defective certification may be corrected, "a complete failure to certify" may not. *Id.*; *see K Satellite v. Department of Agriculture*, CBCA 14, 07-1 BCA ¶ 33,547, at 166,154.

WAPA argues that, because Mayberry seeks to recover more than $100,000 through its July 7 claim letter, Mayberry was required to certify the entire letter, which Mayberry did not do. WAPA interprets the July 7 letter as requesting $87,990.24 for various suspension and delay costs, plus $400,905.35 in costs associated with extra work involved in attempting to meet impossible design specifications and with the default termination resulting from its inability to meet them. In addition to those costs, the claim letter includes Mayberry's request for the release of retainages totaling $41,000. Collectively, then, Mayberry included in its letter, as interpreted by WAPA, monetary requests totaling more than $500,000. Although Mayberry appears to dispute WAPA's interpretation and may believe that its $400,905.35 invoice is not actually a part of the July 7 letter, even Mayberry has to

acknowledge that, if we add its $87,990.24 cost request to its $41,000 release of retainage request, its claim letter exceeds the $100,000 certification threshold.

Had Mayberry submitted its request for $87,990.24 in unpaid costs in one claim letter and its request for release of the $41,000 retainage in another, there clearly would be no need to certify either of those two claims. When "areas of dispute" under a single contract "involve different substantive matters," there is no requirement that the contractor combine those substantive matters into a single claim letter. *B.D. Click Co.*, ASBCA 25609, 81-2 BCA ¶ 15,394, at 76,264; *see Allied Repair Service, Inc.*, ASBCA 26619, 82-1 BCA ¶ 15,785, at 78,161 (where "each claim item" submitted in separate claim letters "present[s] an independent dispute, not intertwined with the merits of any of the other requests for equitable adjustment, . . . the certification requirement attaches only to each individual claim that exceeds" the certification dollar threshold). Accordingly, we do not aggregate separate claims submitted in separate claim letters for purposes of determining whether certification was necessary.

By the same logic, a contractor cannot divide, fragment, or "split" a single unitary claim into separate claim letters, each below the certification threshold, to avoid certification requirements. *Warchol Construction Co. v. United States*, 2 Cl. Ct. 384, 388-91 (1983); *B.D. Click*, 81-2 BCA at 76,264. "The test of whether claims are separate or really one unitary claim is 'whether or not the claims are based on a common or related set of operative facts. If the [tribunal] will have to review the same or related evidence to make its decision, then only one claim exists.'" *Lake Shore, Inc.*, ASBCA 42577, et al., 91-3 BCA ¶ 24,075, at 120,522 (quoting *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)); *see Todd Pacific Shipyards Corp.*, DOT BCA 2023, 89-3 BCA ¶ 21,920, at 110,297 (multiple claims that arise out of a common set of operative facts "are treated as one for purposes of certification"). As a result, if a contractor attempts to segregate a single unitary claim into separate claim letters to avoid the certification requirement, we would lack jurisdiction to entertain an appeal based upon those letters if the certification requirement had not been satisfied.

Here, we face the converse of an effort to "split" a unitary claim. As the record makes clear, Mayberry's July 7 claim letter contains several different "claims" that arise from different and unrelated problems that allegedly arose during contract performance. Mayberry's $400,905.35 request relating to its efforts to comply with allegedly impossible design specifications, which it contends resulted in its default termination, is based upon a separate set of operative facts than its $87,990.24 claims for delays caused by a variety of problems during performance (outside the context of its impossibility issue). Separate from these claims is Mayberry's $41,000 retainage release request, which involves a missing or delayed construction schedule update and payroll issues. Although Mayberry elected to

include all of these claims (or at least the $87,990.24 delay cost claims and the $41,000 retainage matter) in a single letter, there is no reason that the three sets of claims could not have been submitted in separate claim letters.

In *Placeway Construction Corp. v. United States*, 920 F.2d 903 (Fed. Cir. 1990), the Court of Appeals for the Federal Circuit directed tribunals to be wary of automatically applying claim certification requirements to a single claim letter containing multiple claims that did not all arise out of the same operative facts. In *Placeway*, the contractor had submitted to the contracting officer a single letter in which it demanded payment of various amounts based upon different events that had occurred during contract performance. The demands included a request for payment of the remaining balance of its contract price, totaling $297,226.12; thirty-one specified contract price adjustments for additional work, at least some of which were for less than the certification threshold that then existed (including a requested $20,647.28 adjustment for a constructive change order for additional partitions at second floor stairwells and an unrelated $36,566 change for additional washing machine piping caused by defective specifications); and various adjustments for extended overhead totaling $119,585.91 (without delineating specific amounts within that calculation applicable to specific and separate contract events). The trial court dismissed the entirety of the contractor's action for lack of jurisdiction based upon the absence of a certification for the claim letter, finding that "it is the claim presented to the contracting officer that is determinative of certification requirements, not the format or claim fragmentation set forth in the complaint to" the tribunal. *Placeway Construction Corp. v. United States*, 18 Cl. Ct. 159, 166 (1989). The trial court held that, because the various requests for payment arising under the contract "were presented to the [contracting officer]" in a single document "as a unitary claim," albeit one "comprised of individual items, it should have been, under the circumstances, certified." *Id.*

The Federal Circuit disagreed and reversed the trial court, holding that, "[t]o determine whether two or more separate claims, or only a fragmented single claim, exists, the [tribunal] must assess whether or not the claims are based on a common or related set of operative facts." *Placeway*, 920 F.2d at 907. "If the [tribunal] will have to review the same or related evidence to make its decision," the Federal Circuit held, "then only one claim exists." *Id.* The court emphasized that it is not "the *form* of the submission that determines whether the claim is unitary." *Id.* at 908. Just as a contractor cannot be allowed "to subvert the certification requirement by artificially fragmenting a single claim into separate 'claims,' each seeking" less than the dollar threshold for certification, certification is not required simply because multiple claims, each of which is individually below the certification dollar threshold, were included in a single claim letter to the contracting officer that, collectively, seeks recovery above that threshold. *Id.* at 907-08. The Federal Circuit held that "[i]t is not established that only one claim exists merely because [the contractor's] letter to the

[contracting officer] listed all of the adjustments with a totaled sum requested at the bottom of the page." *Id.* at 908. Instead, the Federal Circuit held, the tribunal "should have determined whether one or more claims existed, regardless of the form in which they were presented to the [contracting officer]; [it] should have decided this question based on whether all claims presented to the [contracting officer in the singular document] arose from a common or related set of operative facts." *Id.*; *see Government Business Services Group, LLC*, ASBCA 53920, 03-1 BCA ¶ 32,202, at 159,171-72 (single letter seeking in excess of $100,000, based upon six different claims set forth in the letter each of which was for less than $100,000, did not have to be certified); *EL-O Electric Co.*, VABCA 3590-93, 93-2 BCA ¶ 25,599, at 127,448-49 (1992) (finding jurisdiction to entertain four claims, which individually fell below but collectively exceeded the CDA certification threshold, that were collectively submitted to the contracting officer in a single letter); *Xplo Corp.*, DOT CAB 1242, 86-2 BCA ¶ 18,867, at 95,143 (claim for $45,012.55 did not have to be certified, even though it was submitted to the contracting officer in a claim letter with eight other independent claims totaling more than $1.6 million); *G.S. & L. Mechanical & Construction, Inc.*, DOT CAB 1640, 85-3 BCA ¶ 18,383, at 92,206 (no certification was required where "appellant merely utilized a single letter as the vehicle to formally submit to the contracting officer several requests for additional compensation which . . . were entirely independent and which were each for less than" the CDA certification threshold); *Phillips Construction Co.*, ASBCA 27055, 83-2 BCA ¶ 16,618, at 82,659 ("[a]n aggregate claim for over $50,000 [now $100,000] is not required to be certified where each claim item is less than [the certification dollar threshold] and is an independent dispute not intertwined in the merits of any of the other claim items").

Here, Mayberry's requests for payment of $400,905.35 (if it is considered a part of the claim submission), $87,990.24, and $41,000 all involve different events that allegedly occurred during contract performance and are based upon different sets of operative facts. For that reason, we must look to the dollar amount of each segregable claim within the July 7 letter to determine whether certification of that claim is necessary, rather than at the total dollar amount claimed. Below, we consider whether certification was necessary for each of these claims.

III. Mayberry's $400,905.35 Request

Plainly, the amount of Mayberry's $400,905.35 claim associated with the impossibility of design specifications that resulted in the default termination exceeds the $100,000 certification threshold. Mayberry, however, does not concede that certification of this claim was required. In fact, Mayberry appears to believe that it was not even required to include this monetary request in a claim letter, much less certify it, because it is associated with the default termination that Mayberry is challenging in this appeal. That belief is incorrect.

"Before the Board can exercise jurisdiction over a contractor's request for monetary damages, the contractor must have submitted a written claim to the contracting officer" demanding payment of a sum certain as a matter of right and requesting a decision from the contracting officer. *Primestar Construction*, 17-1 BCA at 178,329 (quoting *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)). The mere fact that the Board possesses jurisdiction to "consider [a contractor's] timely-filed challenge to [a] default termination . . . does not somehow permit us to entertain associated monetary claims that the contractor never submitted to the contracting officer for decision." *Id.* "Unless it has previously submitted a claim to the contracting officer seeking monetary relief, a contractor cannot piggyback a request for monetary damages onto a contracting officer's termination decision." *Id.*; *see Aurora, LLC v. Department of State*, CBCA 2872, 16-1 BCA ¶ 36,198, at 176,648 (2015) ("Until [appellant] submits a written claim for monetary damages to the contracting officer for decision, and appeals an unfavorable decision, we lack jurisdiction to entertain its monetary demand."); *Care One EMS, LLC v. Department of Veterans Affairs*, CBCA 3170, 15-1 BCA ¶ 36,160, at 176,464 (dismissing monetary requests in appeal of challenge to default termination where appellant had submitted neither a termination settlement proposal nor a claim).

It is unclear whether Mayberry is arguing that its July 7 claim letter did not, as a "claim," encompass its $400,905.35 monetary request or, instead, that such a request need not be certified because of its tie to the default termination. Either way, we lack jurisdiction to entertain this claim. If the $400,905.35 claim was never submitted to the contracting officer for decision, we lack jurisdiction to entertain it. If the claim was submitted, but was never certified, we similarly lack jurisdiction to entertain it. That claim is dismissed.[2]

IV. Mayberry's $87,990.24 Request

We possess jurisdiction to entertain that portion of Mayberry's July 7 claim letter requesting $87,990.24 for various delays caused by WAPA's suspension of work and the other matters set forth in invoice 16003-7. That figure obviously falls below the $100,000

[2] Because we lack jurisdiction to entertain Mayberry's $400,905.35 claim, we similarly cannot entertain the increased amount of $494,215.75 associated with that claim, as identified in paragraph 29 of Mayberry's complaint. To the extent that Mayberry has included in its complaint costs incurred because of the termination of its contract, which post-dates its July 7 letter, we lack jurisdiction to entertain those costs for the same reasons set forth above. Because we plainly lack jurisdiction over this claim, we need not attempt to identify the bases underlying the differing dollar amounts that Mayberry has requested.

certification threshold, and the changes and delays alleged are separate and distinct from the impossibility issues raised in its $400,905.35 claim. We are confused, however, by Mayberry's description of what it is seeking in its complaint as costs caused by the alleged changes and delays. In paragraphs 30 through 72 of its complaint, Mayberry identifies costs in excess of the $87,990.24 figure in its claim letter, but, in the complaint's prayer for relief, appears to request only $87,990.24, despite its earlier allegations about costs incurred. In appropriate circumstances, a contractor can increase the amount of a previously submitted claim during an appeal before the Board so long as the increased amounts are not based upon new issues arising out of different operative facts than the claim submitted to the contracting officer. *Strawberry Hill, LLC v. General Services Administration*, CBCA 5149, 16-1 BCA ¶ 36,561, at 178,065; *see Diversified Marine Tech, Inc.*, DOT BCA 2455, et al., 93-2 BCA ¶ 25,719, at 127,957 ("adjustments in the claimed amount, not changing the substance of the claim, do not result in the creation of a new claim which must be resubmitted to the contracting officer"). We direct Mayberry to define for the Board and for WAPA the exact amount that it is seeking through this changes and delays claim and, if it is seeking more than $87,990.24, to identify the basis of that increase.

V. Mayberry's $41,000 Retainage Release Request

It is unclear from Mayberry's notice of appeal whether it is appealing the $41,000 retainage release request identified in its July 7 claim letter. Mayberry did not include in the prayer for relief of its complaint the $41,000 retainage release request identified in its July 7 claim letter, and it did not mention it in its response to WAPA's motion to dismiss, but Mayberry detailed that retainage release demand in paragraphs 73 to 76 of its complaint. To the extent that Mayberry is appealing that portion of the July 7 letter seeking release of the $41,000 retainage here, the Board would possess jurisdiction to entertain it because Mayberry submitted it as a claim to the WAPA contracting officer, which is now deemed denied. *See L.K. Maintenance*, DOT BCA 1560, et al., 87-1 BCA ¶ 19,578, at 99,013 (request for release of retainage is a claim that must be submitted to the contracting officer). To eliminate confusion about this issue, we direct Mayberry to notify the Board whether it is pursuing its $41,000 claim for release of retainage in this appeal or, instead, has abandoned this claim.

Decision

For the foregoing reasons, we grant WAPA's motion to dismiss Mayberry's monetary claims in part. Mayberry's claim for $400,909.35, as set forth in its notice of appeal, and for any associated costs identified in paragraphs 27 through 29 of its complaint, is **DISMISSED FOR LACK OF JURISDICTION**. WAPA's motion to dismiss Mayberry's monetary claims of $87,990.24 for various delay costs and of $41,000 for release of retainage is denied. WAPA's motion does not challenge our jurisdiction to entertain Mayberry's

challenge to the contracting officer's default termination decision, and that challenge remains a part of this appeal.

No later than **March 28, 2018**, Mayberry shall file a notice with the Board specifically identifying (1) whether it has increased the amount of the delay costs identified in invoice 16003-7 beyond the $87,990.24 figure identified in its July 7 claim letter and, if so, the basis for that increase, and (2) whether it is pursuing release of the $41,000 retainages in this appeal.

HAROLD D. LESTER, JR.
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

KATHLEEN J. O'ROURKE
Board Judge