UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION:
April 6, 2018

CBCA 5992

DUKE UNIVERSITY,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Frederick Robinson of Norton Rose Fulbright US LLP, Washington, DC; and Caroline M. Mew of Perkins Coie LLP, Washington, DC, counsel for Appellant.

Tami S. Hagberg, Office of the General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

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

LESTER, Board Judge.

Appellant, Duke University (Duke), filed an appeal of a contracting officer's decision on what Duke referred to as a "non-monetary claim" that it had submitted to the National Institute of Allergy and Infectious Diseases (NIAID) within the Department of Health and Human Services' National Institutes of Health. Duke does not include in its claim a request

for a monetary payment in a sum certain. In light of the Court of Appeals for the Federal Circuit's recent decision in *Securiforce International America, LLC v. United States*, 879 F.3d 1354 (Fed. Cir. 2018), which addressed tribunals' jurisdiction to entertain certain disputes involving nonmonetary claims, the Board asked the parties to address the extent to which the Board possesses jurisdiction to entertain Duke's claim. Subsequently, the parties filed a joint motion to dismiss this appeal without prejudice to its merits, although without expressly requesting that we dismiss the appeal for lack of jurisdiction. However, they ask that, in dismissing without prejudice, we rule that the "reinstatement" provisions of Board Rule 12(d), 48 CFR 6101.12(d) (2017), do not apply so that, if Duke submits a monetary claim to NIAID, Duke will retain the right to file suit in the Court of Federal Claims.

Duke has already incurred costs that it will not be reimbursed under NIAID's interpretation of the contract, and it is clear that Duke's current claim is, in reality, a monetary claim that does not identify a sum certain that Duke will seek to recover. We lack jurisdiction to entertain Duke's appeal.

Background

On August 1, 2017, Duke submitted a letter to the NIAID contracting officer, requesting a decision regarding a dispute arising under contract no. HHSN272201300017I (the Vaccine and Treatment Evaluation Units (VTEU) contract) and three associated task orders (nos. 8, 13, and 17) awarded in 2015 and 2016. In its letter, Duke challenged NIAID's interpretation of some of the VTEU contract provisions and requested a contracting officer's decision on its interpretation question. NIAID had interpreted the contract provisions to preclude Duke's full recovery of its facilities and administrative (F&A) costs, limiting recovery of F&A costs on the subcontracted portions of work under the three subject task orders. Duke neither included a request for money in its letter nor identified the amount of previously unpaid costs to which it believed it was entitled, even though the information in the record indicates that Duke had already incurred some F&A costs that were not being reimbursed at that point in time. Instead of requesting money, Duke requested that the NIAID contracting officer revisit her interpretation of the VTEU contract provisions and Duke's entitlement to full F&A cost recovery.

The NIAID contracting officer issued a decision on October 11, 2017 (which Duke received on October 18, 2017), in which she explained her interpretation of the VTEU contract provisions and concluded "that the F&A costs applied to the subcontracted portions of the [statement of work] represent excessive pass-through charges per [Federal Acquisition Regulation (FAR)] Clause 52.215-23 and are unallowable per FAR Section 31.203(i)." She found "that Duke has not demonstrated value added for the subcontracted work under Task Orders 8, 13, and 17" sufficient to justify use of a different method of calculating an

appropriate F&A cost recovery, and she detailed the factual reasons that she believed supported her finding. At the end of the decision, the contracting officer notified Duke of its right to appeal the decision within ninety days to the Board or within twelve months to the Court of Federal Claims, using the language contained in FAR 33.211(a)(4)(v) (48 CFR 33.211(a)(4)(v)).

On January 8, 2018, Duke appealed the contracting officer's decision to the Board, describing the basis of its appeal as follows:

> The dispute involves the denial by NIAID of full recovery of indirect (F&A) costs . . . to Duke on the three task orders under the VTEU contract referenced above. Specifically, NIAID has denied Duke F&A cost recovery on certain subcontract costs under these task orders, ostensibly on the grounds that Duke's F&A costs on the subcontracted portions of the subject task orders constitute excessive pass-through charges. *See* FAR 52.215-23. Duke disputes NIAID's interpretation of this provision of the contract. In its claim letter, Duke also argued that NIAID may be limiting Duke's F&A cost recovery based on an improper determination that certain subcontractors are acting as "subrecipients" rather than "contractors." *See* 2 C.F.R. § 200.330; 45 C.F.R. § 75.351. In her Final Decision, the Contracting Officer found that Duke has not demonstrated value added for the subcontracted work under Task Orders 8, 13, and 17 referenced above. In her Final Decision, the Contracting Officer states that "NIAID has determined that the F&A costs applied to the subcontracted portions of the SOW represent excessive pass-through charges per FAR Clause 52.215-23 and are unallowable per FAR Section 31.203(1)."

Duke, in its notice of appeal, represented that it was "seek[ing] a declaratory judgment regarding the parties' rights and obligations on a disputed contract interpretation."

Nine days after Duke filed its notice of appeal, the Federal Circuit issued its decision in *Securiforce*, discussing jurisdictional issues associated with nonmonetary claims under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). Subsequently, the Board, in an order asking for the parties' input into setting an initial schedule of proceedings in this appeal, requested that, among other things, the parties address whether and the extent to which the rationale underlying the Federal Circuit's decision in *Securiforce* applied to the claim presented here.

On March 5, 2018, the parties filed a joint motion to dismiss this appeal. They represent in the motion that they "wish to avoid protracted litigation over jurisdictional issues in this appeal" and that, following discussions between the parties, Duke has stipulated to

withdraw its claim letter to NIAID dated August 1, 2017. NIAID has stipulated to rescind the contracting officer's decision dated October 11, 2017, as moot. The parties have also stipulated to dismissal of this appeal without prejudice to the merits of the dispute, as well as without prejudice to Duke's right to submit a new claim to the NIAID contracting officer relating to recovery of F&A costs. They further stipulate that Duke "is not estopped or precluded from raising any issues or arguments in any new claim" and that NIAID "is not estopped or precluded from raising any issues or arguments in its Final Decision or from filing counterclaims arising out of the Contract or any task orders issued pursuant to the Contract." They also stipulated and agreed to the following:

> [B]ecause the August 1, 2017, claim letter and October 11, 2017, Final Decision have been withdrawn and rescinded, there will be no need to reinstate this appeal[,] and the 180-calendar day deadline to reinstate this appeal pursuant to CBCA Rule 12(d) . . . is not applicable here. The parties stipulate and agree that if Duke submits a new claim to NIAID and that claim is denied in whole or in part in a Final Decision by the NIAID Contracting Officer, Duke will be able to appeal that Final Decision to either this Board or the Court of Federal Claims pursuant to the Contract Disputes Act, 41 U.S.C. § 7104, and without regard to the 180-day deadline for reinstatement set out in CBCA Rule 12(d).

In light of these stipulations, the parties ask the Board to dismiss this appeal without prejudice to its merits; order that the "'reinstatement' and 180-calendar-day requirement of CBCA Rule 12(d) does not apply here"; order that, if Duke submits a new claim that the NIAID contracting officer denies, Duke can pursue that appeal either before the Board or in the Court of Federal Claims (meaning that Duke has not made an election to proceed before the Board) and without regard to the 180-calendar day limitation of CBCA Rule 12(d); and, if the Board determines that the 180-day reinstatement period of Rule 12(d) applies, order NIAID to issue a decision on any claim that Duke submits within sixty days of receipt or refrain from notifying Duke of the time within which a decision will be issued so that Duke can timely appeal from a deemed denial.

Discussion

The Board's jurisdiction to entertain contract disputes derives from the CDA. *Veterans Contracting Group, Inc. v. Department of Veterans Affairs*, CBCA 5927, et al., 18-1 BCA ¶ 36,936, at 179,950 (2017). When a contractor has a dispute regarding the payment of money from the Government under a contract, the contractor, as a prerequisite to review by the Board, must have submitted a written claim to the relevant agency's contracting officer seeking payment, as a matter of right, of an amount to which it believes

itself entitled, stated in a sum certain, and requesting a decision of the contracting officer. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc); *Richter Developments, Ltd. v. General Services Administration*, CBCA 5119, 16-1 BCA ¶ 36,306, at 177,038. Absent such a submission, and a certification if the requested payment exceeds $100,000, the Board lacks jurisdiction to entertain the claim, even if the contracting officer has issued a decision on it. *Richter Developments*, 16-1 BCA at 177,038.

Not every CDA claim that the Board reviews has to be one involving the payment of money. The FAR defines a "claim" as including "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, . . . the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 CFR 2.101. The contractor need not submit a monetary claim to have its dispute over interpretation resolved, even if a decision may ultimately affect monetary amounts that the contractor may eventually receive. *Medical Development International Ltd. v. Department of Justice*, DOT BCA 4547, 06-2 BCA ¶ 33,405, at 165,627-29. The Federal Circuit has held that tribunals are not jurisdictionally barred from reviewing claims prior to completion of performance in which a contractor does not seek monetary relief "simply because the contractor could convert the claims to monetary claims by doing the requested work and seeking compensation afterwards." *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1270 (Fed. Cir. 1999). It rejected the argument that a nonmonetary dispute is outside the court's jurisdiction simply because the contractor has not completed performance on the contract. It held that, if a contractor does not want to perform work that the Government is demanding (pursuant to, for example, an improperly exercised option), the contractor can seek review through a nonmonetary claim in which the contractor asks for a judgment finding that the Government's contract interpretation is incorrect. *Id.* at 1269-70. That is, the contractor does not necessarily have to perform the work and then seek monetary relief. *Id.*

In its January 17, 2018, decision in *Securiforce*, however, the Federal Circuit decided, in a situation in which a contractor had already incurred costs as a result of the Government's allegedly incorrect action under the contract, that the contractor could not dress its monetary claim as a nonmonetary contract interpretation issue when the true purpose of the claim was to provide for a monetary award to the contractor:

> While contractors may in some circumstances properly seek only declaratory relief without stating a sum certain, they may not circumvent the general rule requiring a sum certain by reframing monetary claims as nonmonetary. In a related context, we have been careful to recognize this distinction. The Administrative Procedure Act ("APA") provides a cause of action for nonmonetary claims against the government, 5 U.S.C. § 702, so long as "there is no other adequate remedy in a court," *id.* § 704. The Tucker Act, however,

> provides exclusive jurisdiction in the Claims Court for monetary claims exceeding $10,000. *See* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1). The question in many of our prior cases, then, has been whether a given claim is properly classified as monetary or nonmonetary. We and other courts of appeals have consistently held that litigants may not avoid the Claims Court's exclusive jurisdiction by dressing up monetary claims in other courts as requests for nonmonetary, declaratory relief under the APA. *Doe v. United States*, 372 F.3d 1308, 1313 (Fed. Cir. 2004) (collecting cases).
>
> In making this determination, "we customarily look to the substance of the pleadings rather than their form." *Brazos Elec. Power Coop., Inc. v. United States*, 144 F.3d 784, 787 (Fed. Cir. 1998). If "the only significant consequence" of the declaratory relief sought "would be that [the plaintiff] would obtain monetary damages from the federal government," the claim is in essence a monetary one. *Id.* We see no reason to depart from this principle here, when determining whether a claim is monetary or nonmonetary for purposes of CDA jurisdiction.

Securiforce, 879 F.3d at 1360-62. The Federal Circuit held that, if a claim, "although styled as one for declaratory relief, would – if granted – yield only one significant consequence," which would be to "entitle [the contractor] to recover money damages from the government," the claim could only be pursued as a monetary claim, stated in a sum certain. *Id.* at 1360-61; *see Kellogg Brown & Root Services, Inc. v. United States*, 115 Fed. Cl. 168, 184 (2014) (dismissing suit for lack of jurisdiction where, through a ruling on its nonmonetary contract interpretation claim, the contractor was in reality seeking money damages that it had already incurred); *Thomas Creek Lumber & Log Co.*, IBCA 4020-1999, 00-2 BCA ¶ 31,077, at 151,435 ("If a claim purports to seek nonmonetary relief, but nonetheless is based upon breach of contract, then money damages are the appropriate remedy and they must be alleged and the claim certified, if required."); *McDonnell Douglas Corp.*, ASBCA 50592, 97-2 BCA ¶ 29,199, at 145,292 ("We have refused to grant declaratory relief where we found the real issue was money.").

Here, Duke has already incurred costs associated with its contract interpretation dispute, and it could have quantified those costs and stated them in a sum certain in a claim to the contracting officer. Unlike the contractor in *Alliant*, Duke is not asking us to allow it to stop performing work or to preclude it from incurring additional costs in the future based upon its interpretation of the contract. Instead, it is asking the Board to interpret the VTEU contract in a manner that will permit full F&A cost recovery, rather than the more limited F&A cost recovery that NIAID currently permits. A ruling in Duke's favor would not result in Duke avoiding costs, but instead would be used only to entitle Duke to monetary relief in

a separate proceeding. In such circumstances, it is clear that Duke has an uncertified and unquantified monetary claim. We must dismiss Duke's claim for lack of jurisdiction.

We recognize that the parties have requested dismissal on a basis other than a lack of jurisdiction. They asked that the Board, without addressing the jurisdictional issue, dismiss this appeal without prejudice, allow Duke to submit a monetary claim to the NIAID contracting officer, and provide Duke with the right to challenge a decision on that claim in the Court of Federal Claims if Duke were to elect not to return to the Board. If we could consider that request, there potentially could be issues, including the applicability of the Election Doctrine,[1] that might complicate or interfere with our ability to satisfy all of the parties' stated goals. *See, e.g.*, *Palafox Street Associates, L.P. v. United States*, 114 Fed. Cl. 773, 784 (2014) (discussing effect of the Election Doctrine on a suit filed after the parties had jointly agreed to the voluntary dismissal of a prior appeal before the Board involving the same claim). "Without jurisdiction," though, we "cannot proceed at all in any cause," *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998)), meaning that we cannot entertain the parties' request for dismissal without prejudice. Jurisdiction is "a threshold matter" to be decided, "spring[ing] from the nature and limits of the judicial power of the United States," and it "is inflexible and without exception." *Steel Co.*, 523 U.S. at 94-95. Once we are aware that we lack jurisdiction to entertain an appeal, we have "no other recourse but to dispose of the case by dismiss[ing]" it based upon the jurisdictional defect. *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); *see Primestar Construction v. Department of Homeland Security*, CBCA 5510, 17-1 BCA ¶ 36,612, at 178,330 (2016) (lack of jurisdiction leaves the tribunal "no power to do anything but strike the case from its docket, the matter being *coram non judice*" (quoting *Johns-Manville Corp. v. United States*, 893 F.2d 324, 327 (Fed. Cir. 1989)). In light of *Securiforce*, the jurisdictional defect here is obvious, and we cannot ignore it.[2]

---

[1] Once a contractor makes a knowing election to file an appeal with a board of contract appeals rather than to initiate a suit in the Court of Federal Claims, the contractor is precluded, under the so-called Election Doctrine, "from pursuing [the] claim [at issue in the appeal] in the alternate forum." *National Neighbors, Inc. v. United States*, 839 F.2d 1539, 1542 (Fed. Cir. 1988). "The Election Doctrine does not apply, however, if the forum originally selected lacked subject matter jurisdiction over the appeal." *Bonneville Associates v. United States*, 43 F.3d 649, 653 (Fed. Cir. 1994).

[2] Although the parties have requested that we suspend Board Rule 12(d), which, in certain circumstances, converts a dismissal without prejudice into one with prejudice if the parties do not return to the Board within 180 days after dismissal, Rule 12(d) is inapplicable

Decision

For the foregoing reasons, this appeal is **DISMISSED FOR LACK OF JURISDICTION**.

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

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

to dismissals for lack of jurisdiction. *Diamante Contractors, Inc. v. Department of the Interior*, CBCA 2017, 11-1 BCA ¶ 34,679, at 170,822.