

DISMISSAL WITHOUT PREJUDICE

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The Federal Rules of Civil Procedure (“FRCP”), which pertain to government actions brought in either the Court of Federal Claims (“COFC”), or the Boards of Contract Appeals (“BCA”), includes the following in Rule 12, Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing:

12 (b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;
- (3) improper venue;
- (4) insufficient process;
- (5) insufficient service of process;
- (6) failure to state a claim upon which relief can be granted; and
- (7) failure to join a party under [Rule 19](#).

Fed. R. Civ. Pro. 12.

Typically, in a government contracts case before the COFC or the BCA, the government may move to dismiss by filing a Rule 12(b) motion, citing one of these seven bases, and seeking dismissal of the case at hand. (You frequently see in the header of a BCA case “Dismissed for Lack of Jurisdiction.”) There are typically two ways that a tribunal may dismiss a case—either “with prejudice” or “without prejudice.”

Here is the difference, from *Black’s Law Dictionary*, 10th Ed. Thomson Reuters, 2014:

Dismissal with prejudice means “a dismissal barring the plaintiff from prosecuting any later lawsuit on the same claim.”

Dismissal without prejudice means “a dismissal that does not bar the plaintiff from refiling the lawsuit within the applicable limitations period.”

Clearly, it’s in the plaintiff’s interest to have a dismissal *without* prejudice.

AOC Connect, LLC v. Dept of the Interior, CBCA 8696 (April 28, 2026) involved an asserted claim that arose out of a stop work order by the Department of the Interior. The Board in its decision explained that AOC sought an equitable adjustment (payment) of \$458,619 as a result of the stop work order. However, the government filed a motion to dismiss on the grounds that AOC’s claim was not certified, and therefore the contracting officer could not render a final decision on it.

In considering the appeal and the government’s motion, the board first addressed the question of its jurisdiction under the Contract Disputes Act. The Board explained that “[E]ven though ‘the

parties may not, by stipulation, confer jurisdiction where none exists, or eliminate it where it does, ‘they may,...by stipulation agree to *facts* which in themselves constitute a basis for jurisdiction’ or which establish a lack thereof.” The parties agreed that an email was the written claim on which the appeal was based. (It should be noted that even though the Contracting Officer had issued an email responsive to AOC’s submission that stated it was not clear what AOC’s submission was for, the Government was “denying whatever the submission was for, as appropriate.”)

The Board examined the email, and concluded that it was not a proper claim on which the contracting officer could render a final decision for two reasons; (1) AOC did not explicitly or implicitly request a final decision in its claim and (2) AOC did not certify its claim of \$458,619. The Board noted that the fact that the contracting officer issued a final response denying the asserted claim did not create jurisdiction for the Board. The Contract Disputes Act denies a contracting officer the authority to issue a decision on a contractor’s request for money allegedly owed until a contract “claim” in writing has been properly issued to him or her for a decision. This claim was not certified and did not implicitly or explicitly ask for a final decision. Consequently, the Board concluded it had no jurisdiction to hear this appeal, and the appeal had to be dismissed for lack of jurisdiction.

However, the Board’s decision noted that “a dismissal for lack of [subject matter] jurisdiction is by definition without prejudice.” Further, the Board cited *Wheeler v. United States*, 11 F. 3d 156, 159-60, which held that dismissal for lack of subject matter jurisdiction” under Rule 12 “is never on the merits of the claim, but is always without prejudice.”

Takeaway. Because the dismissal was without prejudice, AOC can refile its claim with the Contracting Officer (provided it is within the 6-year statute of limitations), and must comply with the claim requirements in the Contract Disputes Act.

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