

## **GOVERNMENT'S DILATORY PROCESSING OF CONVENIENCE TERMINATION SETTLEMENT PROPOSAL CREATES IMPASSE**

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When the Government issues a termination for convenience (“T/C”), the T/C termination clause states that “[a]fter termination, the Contractor shall submit a final termination settlement proposal [“TSP”] to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer.” FAR 52.249-2(e). The TSP must be submitted within one year of termination unless extended in writing by the contracting officer. A recent Board case concerns the time when a TSP converts to a Contract Disputes Act (“CDA”) claim. *AeroKool Aviation Corp.*, ASBCA No. 63637-PET, Oct. 18, 2023. The case concerns the Government’s motion to dismiss the case for lack of jurisdiction, where the Government argued that the parties had not reached an impasse and the proposals had not ripened into claims under the CDA.

On September 19, 2018 the Navy awarded AeroKool a contract for evaluation, repair and/or modification of turbine aircraft engines. On May 27, 2020, the government unilaterally executed a modification which fully terminated the contract for the government’s convenience. On May 25, 2021 AeroKool submitted its “Requests for Breach of Contract Damages and Termination Settlement Proposals.” The submittal contained a CDA certification signed by AeroKool.

Between May 25, 2021 and March 27, 2023, there occurred back-and-forth discussions between AeroKool, the Navy CO and the Termination Contracting Officer. On March 27, 2023 the government shifted its suspense date to issue its TSP offer to September 25, 2023. Then, on June 9, 2023, AeroKool filed a petition with the ASBCA seeking an order that the CO issue a final decision on its TSP and breach proposal claims, and it was this petition that the Navy sought to dismiss for lack of jurisdiction.

First, the Board found that the breach proposal was a separate CDA claim from the TSP, and warranted a response through a final CO decision.

Second, the Board noted that a TSP typically converts to a CDA claim only after negotiations reach an impasse, at a point when the contracting demands a final decision. Further, such impasse exists without either party taking a firm position in opposition to each other. “It can occur by the passage of time without resolution when one party evidences a desire to begin the disputes process.” The Board concluded that 29 months had elapsed since AeroKool submitted its TSP in May 2021. AeroKool indicated a desire to begin the disputes process on November 17, 2021 when it certified the TSP and requested a final decision. The Board concluded that “the government’s dilatory processing of AeroKool’s TSP rises to the level of impasse, and the Board had jurisdiction to hear AeroKool’s petition.

Finally, The Board denied the government’s motion to dismiss and directed the government to issue a contracting officer’s final decision on *both* AeroKool claims by December 1, 2023, if not resolved prior to that date.

Takeaway. First, be sure you submit your TSP within one year, or get a written extension from your CO. Second, Contractors should resist being transferred among different contracting officers. If you reach an impasse or are unhappy with the progress of the CO, state you are at an impasse, certify your TSP, and submit it as a CDA claim.

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