

BOARDS LACK JURISDICTION OVER REAL PROPERTY DISPUTES

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The Civilian Board of Contract Appeals recently dismissed a claim on a default termination of a Department of State contract for construction and lease of residential housing for embassy personnel in the Dominican Republic. The contract also included an option whereby State could purchase the property. *U.S. Overseas Housing, LLC v. Department of State*, CBCA 6606, March 20, 2020.

The Board examined the contract, and the disagreement over the purchase price. The Contract Disputes Act (“CDA”) confers jurisdiction to the board “to decide any appeal from a decision of a contracting officer...relative to a contract made by that agency. 41 U.S.C. § 7105. However, the CDA limits the Board’s jurisdiction to agency contracts made for the following four purposes:

- (1) The procurement of property other than real property in being;
- (2) The procurement of services;
- (3) The procurement of construction, alteration, repair or maintenance of real property; or
- (4) The disposal of personal property

After construction began, the Government requested 19 changes and upgrades, and even though there were additional costs associated therewith, Overseas Housing planned to recover these costs over the course of the lease. However, during the lease pendency, the State Department notified the contractor that it planned to exercise its option to purchase. In response to this notice, the contractor disputed the purchase price—but State insisted that the contract alone would set the purchase price. Because of this disagreement, and the contractor’s failure to work with State to close on the purchase, the contracting officer default terminated the contract, and Overseas Housing appealed the termination to the Board, seeking to have the Board require the parties to negotiate a price before State could exercise any right to purchase the property.

The Board analyzed the issue as follows. Procurement in the CDA is acquisition by purchase, lease or barter for the direct benefit of the federal government. Conveyance of a pre-existing interest is a contract for “procurement of ... real property within the meaning of 41 U.S.C. § 7102(a)(1). *Bonneville Assoc. v. United States*, 43 F. 3d 649 (Fed Cir. 1994). In considering the contract, the Board noted that disputes arising under construction and lease contracts are within the board’s CDA jurisdiction. However, the contract at issue included an option to purchase the property and the dispute revolved around the purchase price of the property. The price for the purchase goes to the procurement of real estate, which the Board lacks jurisdiction to decide. Accordingly, the Board dismissed the case for lack of jurisdiction.

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