DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

ADVANTAGE HEALTHPLAN, INC.	)	
	)	CAB Nos. D-1239, D-1247
Under Contract No. POHC-2002-D-0002	)	

For the Appellant: Oliver Garcia, Esq., Michael K. Ross, Esq., Alison Van Horn, Esq., Aegis Law Group LLP. For the District: Kimberly M. Johnson, Esq., Carlos M. Sandoval, Esq., Office of the Attorney General.

Opinion By: Chief Administrative Judge Marc D. Loud, with Administrative Judge Monica C. Parchment, concurring.

OPINION

Filing ID #54334435

This is a consolidated dispute action brought by Advantage Healthplan, Inc. (Advantage or appellant) against the D.C. Office of Contracting and Procurement (District or appellee) regarding Contract No. POHC-2002-D-0002 for the provision of healthcare services to the District's Medicaid eligible population. In D-1239, the appellant alleges that the District breached the contract by exercising option year two for a period of less than one year. In D-1247, the appellant (i) contends that the District breached the contract by repudiating a duty to pay transition costs, and (ii) requests that the Board interpret two contract clauses pertaining to the performance of transition services, and the payment therefore (§§ G.13.2 and G.13.5). The District denies liability. The Board held a Rule 119 hearing on November 30 and December 5, 2012, during which two witnesses provided testimony. Upon review of the entire record herein, the Board dismisses appellant's claims. The Board lacks jurisdiction over cases D-1239 and D-1247 because the appellant did not submit claims to the contracting officer first before seeking Board redress. Assuming arguendo that jurisdiction were to attach in D-1239, the Board would nonetheless dismiss appellant's claims on the merits because it has failed to establish that the District breached the parties' option clause, or otherwise violated law. Finally, the Board concludes that the time period for appellant to present claims to the contracting officer herein has lapsed, and the appellant cannot now present claims nine years after the District's alleged improper conduct.

BACKGROUND

On August 1, 2002, Advantage entered into the subject contract with OCP "to provide healthcare services to [the District's] Medicaid eligible population enrolled in the District of Columbia Healthy Families Program." (Appellant's Hr'g Ex. 1, 19, § C.1.1.) The contract's base year period of performance was August 1, 2002, to July 31, 2003.[1] Under § F.1.1.1 of the

[1] The contract's initial period of performance was from the date of award (i.e., April 1, 2002) through October 31, 2002. (Appellant's Hr'g Ex. 1, § F.1.1, 139.) On May 3, 2002, however, the contract was modified to extend the

contract, the District had the right to extend the contract for up to an additional four years. (Appellant's Hr'g Ex. 1, § F.1.1.1, 139.) Under §§ G.13.2 and G.13.5 of the contract, the District was authorized to request transition services from appellant when the contract ended, and to reimburse the appellant for reasonable transition costs resulting from "transition operations." (Appellant's Hr'g Ex. 1, §§ G.13.2, G.13.5.) The two cases presently before the Board arise out of the above cited provisions. We address the background for each case separately below.

Appellant's Claim for Breach of the Contract Option Clauses (D-1239)

Appellant's first claim contends that the District breached §§ F.1.1.1 and F.1.2.1 of their contract by failing to extend option year two for a one-year term. According to the appellant, the cited provisions allowed the District to exercise options "only in increments of one year." Hr'g Tr. vol. 2, 467:1-468:22. In pertinent part, these provisions read as follows:

> F.1.1.1: The District may extend the terms [sic] of this contract by exercising up to four (4) one year options [sic] periods.
>
> F.1.2.1: The District may extend the term of this contract for a period of one (1) year or multiple successive fractions thereof, by written notice to the Contractor before the expiration date of the contract.

(Appellant's Hr'g Ex. 1, §§ F.1.1.1, F.1.2.1, 139.)

The key background facts pertaining to appellant's first claim are as follows. At the close of the contract's base period of performance, the District issued Modification No. 8, which extended the parties' contract for an additional one-year term, resulting in a contract expiration date of July 31, 2004.[2] (Appellant's Hr'g Ex. 7.) Eight months prior to July 31, 2004, however, the parties commenced efforts to extend their contract during option year two. Those efforts continued for several months, but did not result in a one-year extension. In lieu of a one-year extension, the District elected to extend option year two for a 31-day term through the issuance of Modification No. 13 on July 29, 2004.[3] (Appellant's Hr'g Ex. 32.) In pertinent part, the terms of Modification No. 13 provided the following:

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period of performance to 12 months from the date of award. (Appellant's Hr'g Ex. 2.) Following that, Modification No. 3, dated August 23, 2002, changed the contract's effective date to August 1, 2002. (Appellant's Hr'g Ex. 3.)

[2] The lead-up to Modification No. 8 started with execution of Modification No. 5, which exercised a four-day option period (extending the contract from August 1, 2003, through August 4, 2003). (Appellant's Hr'g Ex. 5.) The District then issued Modification No. 6 on August 4, 2003, which granted a four-day extension to August 8, 2003. (Appellant's Hr'g Ex. 6). Modification No. 8 extended the contract from August 8, 2003, to July 31, 2004.

[3] Modification No. 13 was signed by the District on July 29, 2004, but signed by Advantage on July 22, 2004. (Appellant's Hr'g Ex. 32.) Although Modification No. 13 lists the contracting officer as Esther M. Scarborough, John Soderberg signed it as contracting officer. At the time, Soderberg served as Chief Contracting Officer for Human Care & Services at OCP. Advantage's president testified that he believed that Soderberg had been "the acting chief of the section that Ms. Scarborough was in, the [CO] who was the chief of all the [COs] in that division." (Hr'g Tr. vol. 2, 530:7-18; Appellant's Hr'g Ex. 33.) The Board believes that both Scarborough and

> 1. THE DISTRICT HEREBY EXERCISES ITS OPTION TO RENEW THIS CONTRACT IN ACCORDANCE TO SECTION F1.2.1. TERM OF CONTRACT FOR THE PERIOD AUGUST 1, 2004 THROUGH AUGUST 31, 2004. THE CONTINUATION OF THIS CONTRACT FOR THE REMAINDER OF OPTION YEAR 2 IS SUBJECT TO CITY COUNCIL'S APPROVAL AND THE AVAILABILITY OF FUNDS. TOTAL PRICE FOR THIS OPTION PERIOD IS $829,676.09.

(Appellant's Hr'g Ex. 32).

From the appellant's vantage point, the District's exercise of a 31-day option was surprising. (*See generally*, Hr'g Tr. vol. 2, 531:4-10; 530:22-531:3.) Throughout the extended negotiation period leading up to Modification 13, the appellant believed that the District would exercise a one-year option. (*Id.*) Appellant's belief in that regard was premised upon a number of actions taken by the parties' which appellant construed as mutual attempts to secure an additional one-year term. These actions included:

- The District's contracting officer, contracting officer's technical representative (COTR) and several other District officials began negotiations with Advantage in "either November or early December 2003" to negotiate capitation rates for a full year term of option period two. (Hr'g Tr. vol. 2, 496:16-497:3; 497:4-498:14.) Advantage's president testified that during these negotiations, the parties never discussed basing the rates on a period shorter than one year. (Hr'g Tr. vol. 2, 503:21-504:2.)

- Advantage submitted its pricing proposal for option year two "in April or early May of 2004." (Hr'g Tr. vol. 2, 499:2-11; Appellant's Hr'g Ex. 11.) The proposal included pricing for a 12 month period. (*Id*.) Appellant's president believed the parties' agreed to a $9,956,113.12 option year two price at a meeting held May 17, 2004, between Advantage and user agency representatives, including the COTR. (Hr'g Tr. vol. 2, 502:8-18.) The District's contracting officer also executed a Determination and Finding on July 14, 2004, which deemed Advantage's $9,956,113.12 one-year price "fair and reasonable." (Appellant's Hr'g Ex. 20.)

- The contracting officer allegedly told appellant sometime in June 2004 "that the contract would be renewed for the full option year two" if Advantage paid $495,000 in overdue District arena and franchise taxes.[4] (Hr'g Tr. vol. 2, 508:7-10.)

Soderbergh served as contracting officers herein, and notes that their status in such capacity is not disputed by either party.

[4] The appellant's president testified that sometime in June 2004 "[Advantage] received […] a notification from Ms. Scarborough that the Office of Tax and Revenue had reported to [OCP] that Advantage was not in good standing, with respect to its tax obligations in the District." (Hr'g Tr. vol. 2, 505:5-11.) Later, the Office of Tax and Revenue told Advantage that it would be required to "pay all taxes, interest, and penalties that were related to" those years in

- The contracting officer spoke with the Advantage president after the District received the tax payments (i.e., July 9, 2004), and allegedly assured him that "she was going to quickly complete her paperwork [for the option year two extension] and sign off on it, and move it forward in accordance with the process at the [OCP]." (Hr'g Tr. vol. 2, 511:10-512:6.) The Advantage president also testified that the contracting officer told him that after the OCP review was complete, the contract extension package would be "moving to the Executive Office of the Mayor." (Hr'g Tr. vol. 2, 513:20-22.)

- The Advantage president testified that during the week of July 11, 2004, the contracting officer "completed the paperwork, signed off on it, confirmed to me that she had, and […] delivered the Contract amendment" for Advantage's signature. (Hr'g Tr. vol. 2, 512:7-19.) Appellant's president testified that the contracting officer also "confirmed" that funds were available for the extension of the contract. (Appellant's Hr'g Ex. 27; Hr'g Tr. vol. 2, 514:14-22.)

- Correspondence initiated by staff in the executive branch, and communicated to city council staff on July 16, 2004, noted that Advantage's proposed option had received legal sufficiency review, and was "in the final stages of executive approval prior to transmittal to the Council." (Appellant's Hr'g Ex. 22; Hr'g Tr. vol. 2, 516:7-517:22.)

The above efforts notwithstanding, the record indicates that the District's commitment to a one-year term may not have been as firm as the appellant believed. One day before the appellant's President signed Modification No. 13, he received an ominous July 21, 2004, email from "L. Darnell Lee," a staff assistant to the COTR. (Appellant's Hr'g Ex. 23; Hr'g Tr. vol. 2, 519:17-520:3.) Although the email itself contained no text, an attachment thereto titled "Medical Assistance Administration, Office of Managed Care, Contingency Transition Plan for Advantage Healthplan, Inc., July 21-31, 2004", provided a work plan and timeline for transferring all of Advantage's enrollees to the District's three other Managed Care Organizations (MCOs). (*Id.*) When Advantage's president brought Lee's email/attachment to the attention of the COTR, she allegedly stated "that [Lee's email] was a mistake, that the [District] intended to renew Advantage's Medicaid managed care contract for the full option year two, 12 months, and that she would apologize [and] confirm the error of that email." (Hr'g Tr. vol. 2, 520:16-521:3; 522:14-21.)

The very next day, however, Advantage received the contracting officer's aforementioned Modification No. 13, which, as noted, extended appellant's contract for a 31-day term. (Appellant's Hr'g Ex. 32; Hr'g Tr. vol. 2, 524:20-525:3.) Confusingly, on July 22, Advantage also received the COTR's apology email, which included her statement that "MAA [the user agency] intends to exercise the option on all four [MCOs] pending the approval of the City Council." (Appellant's Hr'g Ex. 24.) The appellant signed the 31-day option on July 22, 2004. (Appellant's Hr'g Ex. 32.)

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which Advantage had not filed franchise and arena tax returns—a total of approximately $495,000.00. (Hr'g Tr. vol. 2, 506:10-507:2.)

Despite signing Modification No. 13, Advantage's president spent the next several days trying unsuccessfully to get various city officials to explain why its contract extension was not for a one-year term. For example, Advantage contacted the office of a city councilman stating that the City Administrator was "intentionally holding up [Advantage's] Medicaid Managed Care Contract approval", and requesting the councilman's help in securing an opportunity for Advantage to present its position "in person and promptly" regarding the appropriate term for the contract option. (Appellant's Hr'g Ex. 27.) In addition, the Advantage president sent an email to District Medicaid Director Robert Maruca on July 26, 2004, to "urgently request" a meeting regarding the status of the "one-year option". (Appellant's Hr'g Ex. 30.) The email notes that the Advantage President had been "receiving conflicting reports about the approval process for the one-year option exercise". (*Id*.)

Neither effort resulted in a change in the District's decision to limit Advantage's extension to 31 days.[5] In fact, the contracting officer followed the parties' 31-day term extension with an August 5, 2004, letter stating as follows:

> The District of Columbia hereby serves notice informing you that the option on your contract will not be exercised. Your contract will expire on August 31, 2004. This notification is in accordance with Section F., CONTRACT TERM and Paragraph F.1.2, OPTION TO EXTEND THE TERM OF THE CONTRACT. The District of Columbia directs Advantage Healthplan, Inc. to cease performing any contract services beyond August 31, 2004.

(Appellant's Hr'g Ex. 33.)

Appellant's first claim is set against the above backdrop. On August 19, 2004, Advantage "appealed" from the District's August 5 non-renewal notification.[6] The appellant's Notice of Appeal stated the following:

> Advantage Healthplan Inc. ("Advantage"), through undersigned counsel, hereby appeals the Contracting Officer's Final Decision denying its claim for interpretation of the terms of the Contract and a decision that a one full year extension of Contract No. POHC-2002-D-0002 between Advantage and the District exists. This appeal is timely. This letter constitutes Advantage's Notice of Appeal."

(D-1239, Notice of Appeal, Aug. 18, 2004.) A seven-count complaint filed by Advantage thereafter pleaded claims for "Breach of Contract By Failure to Submit the Fully Executed

[5] Neither the city councilman, nor the District Medicaid Director were able to modify the District's decision to limit the extension to a 31-day term. (Appellant's Hr'g Exs. 27, 30.)

[6] The appellant sent the District a letter on August 16, 2004, requesting that it reissue the August 5 letter as a contracting officer's final decision. (Appellant's Hr'g Ex. 34). The District declined to so characterize its August 5 non-renewal notice. (Appellant's Hr'g Ex. 35.)

Modification to the City Council for Approval," "Breach of Contract By Failing To Issue Modifications Extending the Contract on a Month-by-Month Basis," "Breach of Contract—Anticipatory Repudiation," "Breach of Contract—Breach of the Implied Duty of Good Faith and Fair Dealing," "Equitable Estoppel Against the District," and "Promissory Estoppel Against the District." (D-1239, Compl., Aug. 19, 2004, ¶¶ 27-59.) We discuss *infra* the Board's conclusions regarding appellant's first claim.

Appellant's Claim that the District Owes Transition Services Costs (D-1247)

Appellant's second claim is best understood against the backdrop of several contract provisions addressing the issue of transition services following contract expiration. In pertinent part, the parties' contract contained the following transition services provisions:

> G.13 Continuity of Services
>
> G.13.1 The Contractor recognizes that the services provided under this contract are vital to the District of Columbia and shall be continued without interruption and that, upon contract expiration or termination, a successor, either the District Government or another contractor, at the District's option, may continue to provide these services. To the end, the Contractor agrees to:
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> > G.13.1.1 Furnish phase-out, phase-in (transition) training; and
> > G.14.1.2 Exercise its best efforts and cooperation to effect an orderly and efficient transition to a successor.
>
> G.13.2 The Contractor shall, upon the Contracting Officer's written notice, furnish transition services for up to one hundred twenty (120) days after the contract expires and negotiate in good faith a plan with a successor that identifies the nature and extent of transition services required.
>
> G.13.5 If authorized in writing by the Contracting Officer, the Contractor shall be reimbursed for all reasonable transition costs (i.e., costs incurred within the agreed period after contract expiration/termination that result from transition operations) specified under this contract.

(Appellant's Hr'g Ex. 1, 156.) On August 20, 2004, the District sent appellant a "Notice of Close-Out" which directed it to complete a number of tasks "no later than" August 27, 2004. In pertinent part, the close-out notice directed appellant to do the following:

1. Submit unpaid invoices for services provided through August 31, 2004 to [the Department of Health];
2. Deliver any property belonging to the [District] to [the COTR] no later than 30 days after receipt of this letter.

3. Provide the user agency with detailed enrollee information including, but not limited to, "pregnant women and their provider," "members in mental health and substance abuse treatment," "members with elective procedures pending," "members hospitalized and the name of the facility," and "members receiving dialysis."

(*Id.*) The notice also informed Advantage that "the District reserves the right to have recipients case files transferred to their successor MCO's", but placed no limitation period on how long Advantage was to maintain its readiness to transmit the files. *(Id.)*

The appellant recognized instantly that the District's close-out notice was ostensibly an authorization for transition *work* as provided in contract § G.13.2, without the concomitant authorization for transition *payment* as authorized in contract § G.13.5. (Appellant's Hr'g Ex. 37.) In fact, the District's August 20 close-out notice included very specific language stating that "the District Government cannot reimburse Advantage Healthplan, Inc, [sic] for any costs or cost obligations incurred after August 31, 2004." (Appellant's Hr'g Ex. 36.)

In an effort to clarify what appellant perceived as a directive to work without pay, it sent an August 23, 2004, letter to the CO providing in pertinent part:

> [y]our failure to authorize payment pursuant to the contract for any or all those [transition] services contravenes the stated intent of the Contract at Article G.13.5 . . . Advantage expects that there will be a number of activities which will occur of necessity after August 31, 2004 and over which Advantage has no control but which it is expected to perform . . . [including] receipt and transmission or processing of claims from providers for services provided Advantage enrollees pursuant to the contract during its effectiveness. . .

(Appellant's Hr'g Ex. 37.) The letter requested that the District advise Advantage "immediately" regarding the issues of payment authorization and claims processing. There is no assertion of a monetary claim in the August 23 letter. Moreover, at the time that the August 23 letter was written, the parties' contract had not yet expired and the appellant had not incurred *any* transition costs. In its post-hearing brief, the appellant contends that the above referenced August 23 letter is its "claim" in D-1247 for purposes of Board jurisdiction. (Appellant's Reply Br. 25.)

The parties met on August 27, 2004, to address the concerns raised in Advantage's August 23 letter, but were unable to resolve the issues. (Appellant's Hr'g Exs. 38, 39.) During the meeting, the appellant also appears to have learned for the first time that the District did not view the August 20 close-out letter as a request for transition services. (Appellant's Hr'g Ex. 39.) The appellant also contends that the District stated that "if Advantage performed any service after August 31, 2004, it could not reasonably expect reimbursement . . . [and that] "a claim" would have to be submitted to the Board for resolution. (*Id.*) The appellant prepared meeting notes reflecting its understanding of the August 27 meeting as noted above, and sent them to the CO in the form of a letter addressed to her attention. (*Id.*)

The CO responded to appellant's August 27 meeting notes with its own August 31, 2004, letter that essentially set forth the District's position that "it did not expect Advantage Healthplan, Inc., (AHI) to perform any services after 11:59 P.M., August 31, 2004." (Appellant's Hr'g Ex. 40.) Confusingly, however, the CO's letter also stated that "[w]hile Advantage's obligation to provide services to its members expires at 11:59 pm [sic] on August 31, 2004, *under Contract Clause G.13.2, Advantage is to provide any information upon request to effect the orderly transition of its members care, up to 120 days*" (emphasis added). The District's August 31 letter also stated that Advantage "is responsible for paying any and all claims for services that [its] members received up to 11:59 PM [sic] August 31, 2004." (*Id*.).

Concerned about the "conflicts and potential conflicts" in the District's August 31 letter (and the August 20 close-out letter preceding it), the appellant sent a written letter to the CO again on September 9, 2004, requesting "clarification as soon as possible". (Appellant's Hr'g Ex. 42.) Appellant's letter states its understanding of the District's August 20 and August 31 letters as follows:

> Based on all of the above, we understand the OCP Contracting Officer to have directed Advantage NOT to provide any services (including processing and payment of claims) under the Contract after August 31, 2004 (August 20 letter, paragraph 1) and to submit all unpaid invoices for services (including claims) to the Department of Health. If this is not the intent and direction of the Contracting Officer, Advantage needs to know exactly what it is you are directing it to do. Advantage also awaits your request for additional information to effect an orderly transition of its former Medicaid members' care—i.e., other post-August 31 services.

(*Id.*) Appellant's letter also advised that while it was "fully capable both administratively and financially to perform claim processing and payment", that "historically" some providers "have taken six months or longer to file claims for payment." (*Id*.)

In a September 21, 2004, reply letter, the District reiterated its statement to appellant that "you are obliged to pay all valid claims for services provided to the policyholders or former policyholders of Advantage incurred prior to September 1, 2004, and to do so in a manner that is in compliance with the Prompt Pay Act and all other applicable District of Columbia laws and regulations." (Appellant's Hr'g Ex. 43.) This was followed by two final written requests from the appellant that the District clarify whether the appellant was to pay provider claims for services received by enrollees prior to September 1, 2004. (D-1247, Compl., Sept. 20, 2004, Ex. 12; Appellant's Hr'g Ex. 44.) The first such request was in the form of a September 27, 2004, email from appellant's counsel to the District's counsel. (D-1247, Compl., Ex. 12.) The second request was a September 29, 2004, letter from appellant's president addressed to the CO. (Appellant's Hr'g Ex. 44.)

Both requests also suggested obtaining an "advisory" or "non-binding" Board opinion on the issue of appellant's duty to continue payment of provider claims after contract expiration. (D-1247, Compl., Ex. 12; Appellant's Hr'g Ex. 44.) The September 27 email suggested an "appearance before the Board for an "advisory", non-binding meeting, so we can get guidance on

a probable outcome and act now to have a smoother closeout on these issues, at least." (D-1247, Compl., Ex. 12.) The September 29 letter stated that:

> [Advantage's attorney] suggested that OCP agree to a meeting with Advantage at the District of Columbia Contract Appeals Board (DCCAB) during which the issues concerning processing and payment of provider claims would be presented and an opinion given by the DCCAB member who participates in the discussion. This process would be in the nature of a mediation.

(Appellant's Hr'g Ex. 44.) The September 29 letter also warned that appellant "will understand [the CO's] August 20, 2004 [sic] directives are her Final Decision in order that Advantage can bring the matter to the DCCAB under the disputes process", if the District failed to clarify whether Advantage was to pay provider claims under the contract's transition services clause. (*Id*. at 4.) The District did not respond to either of the appellant's final two written requests.

On October 18, 2004, the appellant filed a Notice of Appeal to our Board stating therein that District's August 20 and August 27 letters were contracting officer final decisions "interpreting certain terms of the Contract regarding continuity of services and Advantage's duty to provide termination services after August 31, 2004."[7] (AF 1, Notice of Appeal.) Advantage filed a three-count complaint with its appeal notice alleging one count for Breach of Contract by Anticipatory Repudiation, and two counts requesting that the Board "interpret" §§ G.13.2 and G.13.5 of the parties' contract. (D-1247, Compl., ¶¶ 31-58.)

Appellant's latter counts appear to have requested that the Board issue a ruling stating that the appellant's duty to perform transition services only arises if the CO concurrently requests such services in writing *and* authorizes payment therefore pursuant to contract §§ G.13.2 and G.13.5. (D-1247, Comp., ¶ 56.) The appellant's "interpretation" counts also asked the Board to interpret whether the scope of transition services is determined at contract expiration, whether transition services were part of Advantage's original proposal, and whether the District must specifically state the exact transition period (not to exceed 120 days). (*Id*. ¶ 51.)

There is no indication in our record that the appellant ever submitted a claim to the contracting officer herein for breach of contract by anticipatory repudiation. Since filing its original complaint herein, the appellant has abandoned its two counts for contract interpretation. (*See* Hr'g Tr. vol. 2, 484:1-13 ("in the passage of time and [sic] events have mooted Counts 2 and 3, so, only Count 1 of 1247 remains"). The appellant's post hearing briefs also do not address the two contract interpretation counts.

On February 21, 2005, the appellant submitted a claim to the contracting officer requesting $664,175.73 in transition close-out costs. (Appellant's Hr'g Ex. 47.) These costs

[7] The appellant's notice of appeal mistakenly describes one of the District's "final decisions" as being dated August 27, 2004. (D-1247, Notice of Appeal, Oct. 18, 2004.) The record does not include any District correspondence dated August 27, 2004. The Board is satisfied that appellant was actually referring to the District's August 31, 2004, letter.

were submitted to the contracting officer several months after Advantage filed its D-1247 complaint with the Board. The District acknowledged receipt of appellant's $664,175.73 claim on March 7, 2005. (Appellant's Hr'g Ex. 48.). There is no indication in our record that Advantage ever appealed the contracting officer's denial (actual or deemed) of the February 21 claim to the Board.[8] Thus, the Board's review herein is limited to the issues raised in Appellant's August 18, 2004, Notice of Appeal (and complaint), and its October 18, 2004, Notice of Appeal (and complaint).

DISCUSSION

At all times applicable to the instant dispute, the Board exercised jurisdiction over contractor claims against the District pursuant to D.C. CODE § 2-309.03(a)(2) (2001).[9] Under that section, the Board's jurisdiction over contractor claims is limited to "[a]ny appeal by a contractor from a final decision by the contracting officer on a claim by a contractor, when the claim arises under or relates to a contract." (*Id.)* Further, all contractor claims against the District arising under or relating to a contract must be written and submitted to the contracting officer for a decision. D.C. CODE § 2-308.05(a). The Board lacks jurisdiction over a claim that has not been filed initially with the contracting officer. *Keystone Plus Constr. Corp.*, CAB No. D-1358, 2012 WL 554443 (Jan. 27, 2012); *Friends of Carter Barron Foundation of the Performing Arts*, CAB No. D-1421, 2011 WL 7428966 (Nov. 15, 2011).

The recitation of facts stated in the "Background," "Discussion," and "Conclusion" sections constitutes the Board's findings of fact in accord with D.C. Mun. Regs. tit. 27, § 214.2 (2002). Additionally, rulings on questions of law and mixed questions of fact and law are set forth throughout our decision. We address the issues raised in D-1239 first, and then turn to those raised in D-1247.

I. The Appellant's Claims in D-1239

There are several issues presented in D-1239. The first issue is whether the Board has jurisdiction over appellant's August 19, 2004, appeal. Assuming arguendo that the Board has jurisdiction in D-1239, the additional issues presented by the case are (i) whether the District's failure to exercise option year two for a full year was arbitrary and capricious, and/or the result of bad faith, (ii) whether the District is obligated under §§ F.1.1.1 and F.1.2.1 of the contract to exercise options in one-year only increments, (iii) whether the District is equitably estopped from denying the exercise of option year two for a one-year term, and/or whether the doctrine of promissory estoppel applies, and (iv) whether the District's refusal to seek city council approval of a one-year option term violated Modification No. 13.

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[8] Our record does not include a contracting officer final decision on the February 21 claim, however, Advantage's president testified that he thought the District denied the claim at some point in 2005. (Hr'g Tr. vol. 3, 731:19-734:19, Dec. 5, 2012.)

[9] Effective April 8, 2011, the Board exercises jurisdiction over contractor claims pursuant to D.C. CODE § 2-360.03(a)(2) (2011). Throughout our decision, the Board will reference the former procurement statute.

We conclude that the Board lacks jurisdiction over the claims asserted by appellant in D-1239. Moreover, we would dismiss appellant's claims even if the Board had jurisdiction because the appellant has not established that the District breached the parties' contract or otherwise violated procurement law by extending their contract for a 31-day term through Modification No. 13.

A. The Board Lacks Jurisdiction Over Appellant's D-1239 Claims

We have searched the D-1239 record extensively for any claims that appellant may have submitted to contracting officers Soderbergh or Scarborough herein, and find nothing. The Board cannot exercise jurisdiction over a claim unless it is first presented to a contracting officer, and then made the subject of an actual or deemed denial. In this case, neither the appellant's Notice of Appeal, nor its six-count complaint were preceded by actual written claims to the CO. (*See* D-1239 Compl., ¶¶ 27-59.)

The appellant has erroneously identified two writings which it contends were "claims": an August 16 letter to the CO asking it to insert "final decision" language into the District's August 5 non-renewal notice, and appellant's lawsuit filed in D.C. Superior Court on August 11, 2004, seeking a temporary restraining order and injunctive relief. These purported jurisdictional grounds appear in appellant's August 19, 2004, complaint as follows:

> John Soderberg, Chief Contracting Officer, Human Care & Services, Office of Contracting and Procurement, sent Advantage a letter on August 5, 2004, which letter constituted an anticipatory repudiation and breach of the July 29, 2004 extension of the Advantage Contract for the year August 1, 2004-July 31, 2005. Advantage's August 11, 2004 pleadings in The Superior Court for the District of Columbia detailed Advantage's dispute of the District's breach and set forth Advantage's position that a final and unequivocal exercise of Option Year 2 was accomplished, and that a one-year contract extension was in force. These pleadings were served on the General Counsel for the District of Columbia Office of Contracting and Procurement for whom Mr. Soderberg works. Counsel for Advantage sent a letter to John Soderberg restating Advantage's position that it disputes the August 5, 2004 letter from Mr. Soderberg on August 16, 2004. The pleadings and letter constituted a "claim" (*i.e.*, a written demand or assertion seeking, as a matter of right, the adjustment and/or interpretation of the terms of the Contract or other relief arising under or relating to the Contract under 27 D.C.M.R. § 3899).

(D-1239, Compl., ¶ 4.) We do not find any other jurisdictional averments pleaded or argued by appellant herein. The two writings referenced in Advantage's complaint do not constitute claims. The "August 11, 2004" Superior Court pleadings were not directed to the contracting officer for a decision as required by former D.C. Code §2-308.05(a). Rather, they were pleadings filed with the D.C. Superior Court seeking a temporary restraining order and injunctive relief. (*See* D-1239, Compl., Ex. 8 (Opp. by the District of Columbia Appellees to Emergency Mot. for Inj. Pending Appeal) at 15.)

Further, the "August 16, 2004," letter is also not a "claim". The letter's sole request is that the contracting officer "either reissue your letter of August 5 [declining a one-year option] with language that states it is a final decision" or "issue a new letter that adopts the position taken in your August 5 letter and that contains language that it is a final decision". (Appellant's Hr'g Ex. 34, ¶ 2.) The August 16 letter has a singular focus on getting the contracting officer to insert the required "final decision" language into its correspondence so that the appellant could immediately submit claims *directly to the Board.*[10] Moreover, there was no further attempt on appellant's part in this letter to submit the breach of contract, equitable estoppel, promissory estoppel, and other counts to the contracting officer for an actual final decision on these allegations, although those same claims were explicitly submitted to the Board only a few days later in the D-1239 complaint. (D-1239, Compl. ¶¶ 27-59.) Thus, we cannot conclude on this record that appellant submitted claims to the contracting officer before seeking redress from the Board. Under these circumstances, we are left with no other conclusion but that the Board lacks jurisdiction in the matter of D-1239.

Notwithstanding our conclusion, the Board will address several arguments asserted in appellant's post hearing briefs that address the D-1239 case on the merits. Given the extended duration that D-1239 has been pending before the Board, we deem it appropriate to address appellant's contentions directly. By doing so, we clarify that even absent the jurisdictional bar, the appellant has not established a basis for entitlement in this matter. As we explain more fully below, appellant's contentions that (i) the District's failure to exercise option year two for a full year was arbitrary and capricious, and/or the result of bad faith, (ii) the District is obligated under §§ F.1.1.1 and F.1.2.1 of the contract to exercise options in one-year only increments, (iii) the District is equitably estopped from denying the exercise of option year two for a one-year term, and/or is liable under the doctrine of promissory estoppel, and (iv) the District's refusal to seek city council approval of a one-year option term violated Modification No. 13, are all devoid of merit.

B. The District Did Not Act Arbitrarily and Capriciously in Refusing to Present Option Year Two to the City Council.

Appellant's first contention is that the District acted arbitrarily and capriciously by not sending a one-year option renewal to the City Council.[11] (Appellant's Post Hr'g Br. 28-32.) In this regard, the appellant argues that because "[t]he District officials and agencies best suited to assess the District's need for continued Medicaid services…[and] recommended extending the Contract for Option Year 2", the city administrator's failure to submit the option to the city council was arbitrary and capricious. (*Id.*, 29 (citing Appellant's Hr'g Exs. 21, 24); Hr'g Tr. vol.

[10] Indeed, in this regard, the appellant seemed to acknowledge that this letter was not issued as a CO final decision that could be directly appealed to the Board.

[11] At all times material to the instant dispute, the D.C. Code provided that "[n]o contract involving expenditures in excess of $1,000,000 during a 12-month period may be made unless the Mayor submits the contract to the Council for its approval and the Council approves the contract (in accordance with criteria established by act of the Council)." D.C. Code § 1-204.51(b)(1).

1, 57:1-10; 58:10-15; 61:1-62:15; 71:13-73:6.) The appellant concludes that "because the record demonstrates an absence of any reasonable, contract-related basis for the decision" not to renew for one year, the District's exercise of the 31-day option "was an abuse of discretion." (Appellant's Post Hr'g Br. 32.)

We note at the outset that the District has a unilateral right, but not a duty, to extend a contract term through the exercise of an option. *In re Am. Flag Constr., Inc.*, CAB No. D-1135, 50 D.C. Reg. 7441, 7443 (July 25, 2002) (finding that the District did not abuse its discretion in declining to exercise an option to extend the contract term, despite giving preliminary notice to the contractor of its intention to do so); *Good Food Svcs., Inc.*, CAB No. P-0494, 44 D.C. Reg. 6846, 6847-48 (July 8, 1997) (finding that the District did not have an obligation to exercise an option, rather than issuing a new solicitation, even though the District had provided preliminary notice of its intent to exercise the option); D.C. Mun. Regs. tit. 27, § 2099.1 (2002) (defining an "option" as a "unilateral right in a contract under which, for a specified time, the District *may* elect to purchase additional quantities or services called for by the contract, or *may* elect to extend the term of the contract" (emphasis added)).

And while, generally speaking, the failure to exercise a contract option does not give rise to a breach of contract action, *LaSalle Partners v. United States*, 48 Fed. Cl. 797, 806 (Fed. Cl. 2001), a contractor may have a claim if the government's non-exercise of the option is based on bad faith or is so arbitrary and capricious as to constitute an abuse of discretion. *AFR & Assocs., Inc. v. Dep't of Hous. and Urban Dev.*, CBCA 946, 09-2 BCA ¶ 34,226 (2009); *Greenlee Constr., Inc. v. Gen. Servs. Admin.*, CBCA 416, 07-1 BCA ¶ 33,514 (2007); *Quality Envtl. Sys., Inc.*, ASBCA No. 22178, 87-3 BCA ¶ 20,060; *see also Innovative (PBX) Tel. Servs., Inc. v. Dept. of Veterans Affairs*, CBCA 44, 08-1 BCA ¶ 33,854 (2008) (citations omitted). In determining whether the government's non-exercise of an option is actionable, the Board will consider factors such as: (1) evidence of subjective bad faith on the part of the government official, (2) whether there is a reasonable, contract-related basis for the official's decision, (3) the amount of discretion given to the official, and (4) whether the official violated an applicable statute or regulation. *AFR Assocs.*, 09-2 BCA ¶ 34226.

It is well-settled that public officials are generally presumed to act in good faith in the performance of their duties. *Unfoldment, Inc.*, CAB No. D-1062, 2013 WL 3573981 at *5 (Mar. 14, 2013) (citations omitted). Proof of a public official's bad faith requires a showing of some specific intent to injure the appellant. *C&E Servs., Inc.*, CAB No. P-0874, 2011 WL 7402965 (May 19, 2011); *Goel Servs., Inc.*, CAB No. P-0862, 2010 WL 5776589 (Sept. 24, 2010). The burden with respect to proving bad faith is on the appellant, and clear and convincing evidence is required to rebut the presumption of governmental good faith. *C&E*, CAB No. P-0874; *Goel*, CAB No. P-0862; *Kora and Williams Corp.*, CAB No. D-839, 41 D.C. Reg. 3954, 4120 (Mar. 7, 1994). Clear and convincing evidence is "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is highly probable." *Sword & Shield Enter. Sec., Inc. v. Gen. Servs. Admin.*, CBCA 2118, 12-1 BCA ¶ 34,922 (2011) (citations omitted); *Innovative (PBX) Tel. Servs.*, 08-1 BCA ¶ 33,854. The burden to establish that a government official acted in an arbitrary and capricious manner is also on the appellant, and it must be shown by a preponderance of the evidence. D.C. Mun. Regs. tit. 27, § 120.1 (2002).

In this case, the appellant has not established that the District's failure to submit a full year option to the city council was based on either bad faith, or arbitrary and capricious conduct. The appellant's evidence is largely a recitation of (i) the parties' pre-Modification No. 13 negotiation efforts, (ii) hearsay testimony that a competing MCO chief executive knew in advance that Advantage would not have its contract renewed,[12]and (iii) local media stories critical of the District's practice of permitting the city council to review contracts exceeding $1 million dollars. (Appellant's Post Hr'g Br. 29, 32 n.6.)

The above evidence does not satisfy the appellant's burden of establishing bad faith, or arbitrary and capricious conduct. There is no indication from appellant's anecdotal evidence, for example, that the District (through the city administrator) acted with a specific intent to injure Advantage. Further, the preponderance of the evidence does not establish that the District's non-exercise of a one-year option was arbitrary and capricious. In particular, our record contains evidence *submitted by the appellant*, which establishes that the District may have had "a reasonable, contract-related basis" for its refusal to renew the parties' contract for a full option year two.

Specifically, the appellant has on two occasions entered into our record an August 16, 2004, affidavit executed by District Medicaid Director Robert Maruca.[13] In the affidavit, Maruca states that "I recommended to the Office of Contracts and Procurement (OCP) that it not exercise the option to renew the contract with Advantage Health Plan, Inc [sic] after August 31, 2004." (D-1239, Compl., ¶ 24, Ex. 8.) Maruca's affidavit goes on to state that Advantage (allegedly) fell below the standard in 16 of 24 performance standards related to MCO quality improvement programs as measured by the District's quality review organization, Delmarva Foundation for Medical Care, Inc. (*Id*., ¶¶ 5-9.) Thus, it appears that the record does in fact suggest a "reasonable, contract-related basis" for the city administrator's refusal to submit Advantage's contract to the city council.[14] Accordingly, we conclude that the District did not act in bad faith,

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[12] Advantage's president testified that on July 28, 2004, he received a phone call from "Jeffrey Thompson", a person described by appellant as the owner of a competing managed care organization. (Hr'g Tr. vol. 2, 537:15-538:15.) During the conversation, Thompson is alleged to have offered to purchase Advantage. (*Id*.) When the appellant responded that he had been assured of Advantage's contract renewal, Thompson allegedly replied, "you're mistaken, your contract will not be renewed." (*Id*.) Even if the conversation occurred exactly as testified to by the appellant, there is no evidence, clear and convincing or otherwise, that the District acted in an unlawful or improper manner herein. The city administrator testified generally that he did not recall reviewing appellant's contract, and that his decision not to approve a contract extension was not based on Thompson. (Hr'g Tr. vol. 2, 568:8-572:2; 581:15-20.) As we discuss *infra* at p. 14, the District's non-renewal appears to have been motivated by alleged performance issues related to Advantage.

[13] The appellant first entered the affidavit into our record on as an attachment to the complaint in D-1239. (Appellant's Compl., ¶ 24, Ex. 8.) The appellant next entered the affidavit into our record on July 12, 2011, as an attachment to Appellant's Motion For Leave to File The Amended Complaint. (Appellant's Mot. for Leave to File the Amend. Compl., Proposed Amend. Compl., Ex. 8, July 12, 2011.)

[14] The Board need not conclude that Maruca's affidavit accurately described Advantage's performance issues. What is pertinent here is that the independently performed Delmarva evaluation provided the District with a reasonable, contract-related basis for non-renewal. Maruca did not testify at trial.

or arbitrarily and capriciously when it refused to send a full year option to the city council for approval.

C. The Contract Allows the District to Exercise Partial Year Options

Appellant's second contention is that the District breached the parties' contract by failing to exercise option year two for a full one-year period. (Appellant's Post Hr'g Br. 33-36.) Essentially, the appellant argues that the District's 31 day extension through Modification No. 13 was a breach of contract because, "the Contract refers only to *one-year* option periods, saying nothing at all about one-month option periods." (Appellant's Post Hr'g Br. 33 (citing Appellant's Hr'g Ex. 1, § F.1.1.1) (emphasis original); *see also* Hr'g Tr. vol. 2, 467:8-468:22.) This misguided argument derives its fuel from certain language in § F.1.1.1 which states that "[t]he District may extend the terms of this contract by exercising up to four (4) one year options [sic] periods." Appellant has focused on the words, "one-year options [sic] periods" in § F.1.1.1, and construed them to bind the District to exercising one-year only options. This argument is completely devoid of merit.

The general rule is that where a contract is not ambiguous, the wording of the contract controls its meaning and resort cannot be had to extraneous circumstances or subjective interpretations to determine such meaning. *GranTurk Equipment, Co.,* CAB No. P-0884, 2012 WL 4753864 (June 5, 2012); *Heller Elec. Co.,* CAB No. D-939, 41 D.C. Reg. 3717, 3723 (Nov. 17, 1993). Moreover, "it is an elementary rule of contract interpretation that all parts of a contract must be read together and harmonized if at all possible." *Appeal of W.M. Schlosser,* CAB Nos. D-823, D-824, 40 D.C. Reg. 4719, 4726 (Nov. 18, 1992) (citing *Jamsar, Inc. v. United States*, 442 F.2d 930 (Ct. Cl. 1971)). Similarly, "[t]he Board must read the language of a particular contractual provision in the context of the entire agreement, and construe the contract so as not to render portions of it meaningless." *In re Urban Svcs. Sys. Corp.,* CAB No. D-0901, 48 D.C. Reg. 1518, 1521 (Apr. 18, 2000). Finally, if a contract "contains general and specific provisions which are in any respect inconsistent, the provisions directed to a particular matter controls over the provision which is general in its terms." *Id.* (citations omitted).

Upon application of the foregoing legal principles to the instant case, it is clear to the Board that the option at issue did not obligate the District to exercise option year two for a one-year term. First, the plain meaning of § F.1.1.1 is that the total term of the parties' Medicaid contract cannot not exceed five years (i.e., the base year plus up to four one year option periods). Thus, there is nothing ambiguous in the wording of § F.1.1.1. Further, there is no language in § F.1.1.1 which suggests that the duration of each option must be one-year. Moreover, the parties' very specifically authorized partial year options in § F.1.2.1, which provides that "[t]he District may extend the term of this contract for a period of one (1) year *or* multiple successive fractions thereof" (emphasis added). (Appellant's Hr'g Ex. 1, § F.1.2.1.) Thus, the specific provision in § F.1.2.1 authorizing the District to exercise "multiple successive fractions" of an option year controls in our analysis over the general provision in § F.1.1.1 allowing the District "up to four (4) one year options". Therefore, we conclude that §§ F.1.1.1 and F.1.2.1 of the parties' contract

do not obligate the District to exercise options in one-year only increments. Accordingly, the District did not breach the contract by exercising Modification No. 13 for a 31-day term.

D. Neither Equitable Estoppel Nor Promissory Estoppel Apply

Appellant's third contention is that the District "is estopped from disavowing the exercise of Option Year 2, because it falsely represented to Advantage on multiple occasions that Option Year 2 would be and was being exercised." (Appellant's Post Hr'g Br. 36-39.) In this regard, appellant argues that because Advantage's president "called Ms. Scarborough, Mr. Maruca, and Ms. Holt specifically seeking reassurance" that the contract was being renewed for option year two, that "there can be no question that [these individuals] intended [Advantage's president] to rely on their assurances" that the contract would be renewed. (Appellant's Post Hr'g Br. 37.) Appellant also contends that the District is liable under the theory of promissory estoppel because it made "multiple promises" to Advantage which were relied upon. (Appellant's Post Hr'g Br., 38.) We have reviewed appellant's contentions and conclude that neither equitable nor promissory estoppel is applicable in this case.

A party raising equitable estoppel must show that he changed his position prejudicially in reasonable reliance on false representations of material facts which the party to be estopped made with knowledge of the true facts and the intent to induce others to act. *Protest of TMG, Inc.*, CAB No. P-0467, 44 D.C. Reg. 6814, 6819 (Mar. 13, 1997) (citing *Cassidy v. Owen*, 533 A.2d 253, 255 (D.C. 1987). In addition, "a person making or seeking to make a contract with a municipal corporation is charged or imputed with knowledge of the scope of the agency's authority and the limitations on the agency's authority to contract." *Id.* at 6819-20, (citing *Coffin v. District of Columbia*, 320 A.2d 301, 303 (D.C. 1974). Finally, "[t]he doctrine of equitable estoppel, if applicable against the government at all, may be invoked only where there is a showing of some type of affirmative misconduct by a government agent." *In re Second Genesis, Inc.*, CAB No. D-1100, 48 D.C. Reg. 1480, 1491 (Feb. 4, 2000) (*citing Gropp v. D.C. Board of Dentistry*, 606 A.2d 1010, 1016 (D.C. 1992); *Schweiker v. Hansen*, 450 U.S. 785, 788-790 (1981); *Robinson v. Smith*, 683 A.2d 481, 492-3 (D.C. 1996)).

In this case, the doctrine of equitable estoppel does not apply. The evidence does not establish that Advantage's reliance on District representations of a one-year option exercise were reasonable. First, Advantage is imputed with knowing the limitation imposed by law on any District agent's authority to award a contract exceeding $1 million dollars without prior city council approval. D.C. Code § 1-204.51(b)(1). The pertinent provision requiring city council approval provide as follows: "No contract involving expenditures in excess of $1,000,000 during a 12-month period may be made unless the Mayor submits the contract to the Council for its approval and the Council approves the contract (in accordance with criteria established by act of the Council)." *Id.*

Second, the appellant in this case was made expressly aware by the language in Modification No. 13 that the city council exercised authority over any further extensions of the parties' contract. Advantage's president signed Block 15B of Modification No. 13, which expressly provides that "[c]ontinuation of this contract for the remainder of option year 2 is

subject to *city council's* approval and availability of funds" (emphasis added). (Appellant's Hr'g Ex. 26.) Accordingly, we conclude that any reliance that appellant had on District contracting and program staff was not reasonable, and that the District is not estopped from denying the existence of a one-year option exercise herein.[15]

The appellant also asserts a claim for promissory estoppel. (Appellant's Post Hr'g Br. 37.) Promissory estoppel is a cause of action sounding in equity. *See e.g.*, *Embarcadero Ctr., Ltd.*, GSBCA 8526, 89-1 BCA ¶ 21,362 (1988). We have noted previously that the "Board is not a tribunal of general jurisdiction, but possesses only the jurisdiction granted to it by the Procurement Practices Act." *Claim of the Chief Procurement Officer*, CAB No. D-1182, 50 D.C. Reg. 7465, 7466 (Nov. 29, 2002). The Board does not possess authority to hear claims in equity. *Id*. Thus, we dismiss appellant's claim for promissory estoppel for lack of jurisdiction.

E. The District's Refusal to Seek City Council Approval of a One-Year Option Did Not Breach Modification No. 13

Finally, the appellant contends that Modification No. 13 exercised a full one-year option subject only to the condition of city council approval. (Appellant's Post Hr'g Br. 39.) Based on its construction of Modification No. 13, the appellant contends that a breach occurred when the District refused to transmit a subsequent option for the balance of one-year to the council for approval. As appellant asserts in its post hearing brief, "the District cannot escape its contractual obligation in Modification 13–extending the Contract for a month *and the remainder of the year*– by preventing Council review" (emphasis added). (*Id*. 41.) In other words, the appellant argues that Modification No. 13 exercised a one-year term, subject only to the condition precedent that the District submit the balance of the year 2 option to the council in a subsequent modification. (*Id.*) Appellant argues, therefore, that the District cannot use its failure to perform the condition precedent as a bar to liability. (*Id.*) This argument is completely devoid of merit.

The plain language of Modification No. 13 commits the District to a 31-day term. The full text of the modification reads as follows:

> The contract referenced in block 10A is modified as follows:
>
> 1. The District hereby exercises its option to renew this contract in accordance to Section F.1.2.1, Term of Contract for the period of August 1, 2004 through August 31, 2004. The continuation of this contract for the remainder of option year 2 is subject to City Council approval and availability of funds. Total price for this option period is $829,676.09.

[15] We also conclude that none of the District officials alleged to have promised a one-year extension were authorized to do so. Neither Holt, Maruca, Scarborough, nor any other District officials were authorized to approve contracts exceeding $1 million dollars. D.C. Code §1-204.51(b)(1). This authority was held by the city council acting in its official capacity.

> 2. A list of rates increase [sic] for the trend effective from contract period August 1, 2004 through August 31, 2004 is listed on page 2 of this modification.
>
> All other contract terms and conditions remain unchanged[.]

(Appellant's Hr'g Ex. 32.) We do not construe the language "the continuation of this contract for the remainder of option year 2 is subject to City Council approval and availability of funds" as a condition precedent to a binding obligation to execute a one-year term. The term could not be more plainly stated in the modification. The modification identifies the term as "August 1, 2004 through August 31, 2004." As the modification notes, "the *remainder* of option year 2 is subject to city council approval and availability of funds" (emphasis added). There is nothing in the referenced language that obligates the District to a one-year term. Thus we conclude that the District did not breach Modification No. 13 by refusing to submit the balance of option year 2 to the council following its execution of Modification No. 13.[16]

II. The Appellant's Claims in D-1247

As regards D-1247, the first issue is whether the Board has jurisdiction over the claims noticed in appellant's October 18, 2004, notice of appeal. Assuming arguendo that the Board has jurisdiction, the additional issues presented by the case are (i) whether the appellant is entitled to recover damages from the District under the theory of an alleged anticipatory repudiation of the obligation to pay transition costs under contract §§ G.13.2 and G.13.5. We have reviewed the record herein fully and conclude that (i) the appellant did not submit a claim to the contracting officer for anticipatory repudiation. As a result, the Board does not have jurisdiction over the matters raised in D-1247, and they are dismissed.

A. The Board Lacks Jurisdiction In D-1247

As noted herein, appellant's sole remaining D-1247 claim is for breach of contract by anticipatory repudiation.[17] We have reviewed the entire D-1247 record herein, including the appellant's purported August 23 "claim" letter, the District's August 20 and August 31 purported "final decision" letters, the appellant's appeal notice, and the appellant's complaint. Upon review of the above, we conclude that the appellant did not submit a claim to the contracting officer for breach of contract by anticipatory repudiation. As a result, the Board lacks jurisdiction to review this matter, and it is dismissed.

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[16] Because Modification No. 13 is not ambiguous as to the option term being exercised, we reject extrinsic evidence that appellant contends establishes the option term. *GranTurk Equipment, Co., supra; Heller Elec. Co., supra.* Thus, we give no weight to appellant's testimony that he understood Modification No. 13 as "an exercise of the full 12 months of option year two." (Hr'g Tr. vol. 2, 527:18-22; 531:12-19; Hr'g Tr. vol. 3, 713:19-717:12.) Similarly, we give no weight to appellant's testimony that District staff, and "the staffs of two Council members, one being the chair [had…] consistently said that it was a full option year two 12-month option exercise, and there were explanations of how that was being accomplished." (Hr'g Tr. vol. 2, 531:4-10; 530:22-531:3.)

[17] We noted *at p. 9* herein that the appellant is no longer pursuing its claims for contract interpretation.

We have noted previously that *new* claims not presented to the contracting officer but advanced for the first time on appeal are beyond Board jurisdiction. *See, e.g., Keystone*, CAB No. D-1358 (citations omitted). A "new claim" has been defined as one that does not arise from the "same set of operative facts" as the claim submitted to the contracting officer. *See J. Cooper & Associates, Inc. v. United States*, 47 Fed. Cl. 280, 285 (2000) (citations omitted). Courts have construed the "same set of operative facts" language to mean that the claim submitted to the contracting officer must provide "adequate notice of the basis and amount" of the claim later submitted to a board or court. *Keystone*, CAB No. D-1358; *J. Cooper & Associates, Inc*. at 285-286; *Hawkins and Powers Aviation, Inc. v. U.S.*, 46 Fed. Cl. 238, 243 (2000).

In this matter, the appellant contends that its "claim" for purposes of Board jurisdiction was an August 23, 2004, letter sent to the CO. (Appellant's Reply Br. 25.) We have reviewed the August 23 letter and conclude that appellant's anticipatory repudiation claim is not within "the same set of operative facts" as the matters raised in the letter. Specifically, we conclude that the August 23 letter did not give the District "adequate notice of the basis and amount" of the $175,000 repudiation claim alleged in appellant's October 18, 2004, complaint. (*See* D-1247, Compl., ¶ 32.)

As we have noted, appellant's very clearly stated purpose in sending its August 23 letter was to *alert* the CO that no transition services would be performed absent a clear written payment directive tendered to the appellant pursuant to § G.13.5. In other words, the appellant's August 23 letter was submitted to the CO to secure a written payment authorization. It appears to the Board further that appellant's letter was also to prevent the compulsory use of its labor by District officials, and to request dialogue with the District that might lead to execution of a written payment directive. There is nothing in the letter which suggests that appellant was seeking a decision on a monetized breach claim.

In fact, a September 2004 written communication from appellant to the District underscores its interest in obtaining clarity with respect to the District's issuance of a written pay directive. As we have noted herein, appellant's September 27, 2004 email suggested an appearance before the Board for an "advisory" non-binding meeting on transition and close-out issues. (D-1247, Compl., Ex. 12.) The email does not suggest that appellant was seeking damages from the District nor provide "adequate notice" that a $175,000 damages claim would be filed with the Board within three weeks.

Finally, we note that the Board lacks jurisdiction over appellant's claim for $664,175.73 in transition costs. (Appellant's Post Hr'g Br. 45; Appellant's Hr'g Ex. 47.) According to the record, the appellant filed a claim with the contracting officer on February 21, 2005, seeking $664,175.73 in transition costs. However, the appellant never filed an appeal with the Board of the contracting officer's denial (actual or deemed) of the claim. Accordingly, we dismiss appellant's assertion of a $664,175.73 claim due to lack of jurisdiction.

Thus we conclude that the Board lacks jurisdiction over the matters asserted by appellant in D-1247. We also conclude that it would not be reasonable for the appellant to file such a claim with the CO nine years after the alleged dispute occurred.

CONCLUSION

For the reasons stated above, we dismiss appellant's claims in D-1239 and D-1247 for lack of jurisdiction. We also conclude that it would not be reasonable for the appellant to file claims in the above matters nine years after the alleged disputes occurred. Accordingly, cases D-1239 and D-1247 are dismissed with prejudice.

SO ORDERED.

Date: October 4, 2013

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

CONCURRING:

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

Electronic Service to:

Oliver Garcia, Esq.
Michael K. Ross, Esq.
Alison Van Horn, Esq.
Aegis Law Group LLP
801 Pennsylvania Avenue, N.W.
Suite 740
Washington, D.C. 20004

Kimberly M. Johnson, Esq.
Carlos M. Sandoval, Esq.
Office of the Attorney General
441 4th St., N.W.
6th Floor South
Washington, D.C. 20001