UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED: March 6, 2012

CBCA 2686

BANNUM, INC.,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Joseph A. Camardo, Jr., of Camardo Law Firm, P.C., Auburn, NY, counsel for Appellant.

William D. Robinson, Christine M. Ciccotti, and Seth M. Bogin, Office of General Counsel, Federal Bureau of Prisons, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **GOODMAN**, and **WALTERS**.

WALTERS, Board Judge.

Respondent, the Department of Justice, Bureau of Prisons (BOP), moves to dismiss this appeal, arguing that appellant's claim was time barred by the six-year statute of limitations set forth in the Contract Disputes Act (CDA), 41 U.S.C.A. 7103(a)(4)(A) (West Supp. 2011). Appellant, Bannum, Inc. (Bannum), opposes this motion. For the reasons explained below, the Board grants the motion.

Background

The instant appeal, filed December 30, 2011, involves contract no. J200c-533, a BOP contract awarded to Bannum in 2001 for the provision of comprehensive sanctions center services for male and female federal offenders in Orlando, Florida. Bannum claims damages

that it allegedly sustained by reason of improper actions of a BOP employee, Ms. Callie Farr, who had been assigned as the contracting officer's technical representative (COTR). As COTR, Ms. Farr had responsibilities, on behalf of the BOP contracting officer, for the administration and oversight of the contract and for inspection of Bannum's work. To perform the contract, Bannum had entered into a lease with Christian Prison Ministries, Inc. (CPM) for the use of certain property and facilities.

The claim that gave rise to the instant appeal was submitted to the BOP contracting officer in August 2011. In that claim, Bannum alleged that Ms. Farr, "almost from the inception of the contract," "engaged in a course of conduct to rid Bannum of its Government contract and drive Bannum out of Orlando." More specifically, Bannum alleged:

> Ms. Farr communicated directly with CPM, and forced Bannum to make improvements to the leased premises. Ms. Farr performed an unreasonable amount of inspections of Bannum's facility. Ms. Farr's numerous inspections of Bannum's facility were overzealous, causing Bannum to expend substantial amounts of time and effort in defending itself and making further improvements to the facility. Many of the accusations and charges that Ms. Farr made turned out to be frivolous, but only after Bannum incurred tremendous amounts of time and effort investigating and responding to her charges. Ms. Farr's conduct even rose to the level of managing the day-to-day affairs of Bannum, such as getting involved in the hiring and firing of Bannum employees, and directed Bannum's operation of the center in direct conflict with Bannum's directions. Ms. Farr directed [Bannum] employees to report to her and not to Bannum. Ms. Farr caused many Bannum staff members to quit, making Bannum's performance of its contract extremely difficult and expensive. Ms. Farr's actions impacted, changed, disrupted, and delayed Bannum's performance of the subject contract, resulting in Bannum incurring additional costs over and above the scope of the subject contract.

These instances of alleged misconduct by Ms. Farr appear to have occurred from some time in 2002 through November 2004 and were the subject of a lengthy, detailed grievance ultimately lodged by Bannum's corporate counsel with BOP on December 9, 2004 (further supplemented later in December 2004 and in January 2005), and of a BOP Office of Internal Affairs (OIA) investigation that was completed in March 2006. After Ms. Farr resigned from her position in November 2005, Bannum relates, it received from BOP, for the very first time since contract inception, a "no-deficiency" monitoring report, thus purportedly underscoring for Bannum the unfairness of Ms. Farr's previous inspections. For some unexplained reason, Bannum did not file a claim with the BOP contracting officer under the CDA at that stage, though it was clearly aware that Ms. Farr had engaged in what

it considered to have been inappropriate activities that had impacted it adversely in its performance of the contract.

Bannum and CPM, throughout the course of contract performance, were at odds about how the property was maintained, and, in January 2008, some time after the contract was completed,[1] CPM filed suit against Bannum in Florida state court, seeking damages from Bannum for the condition of CPM's property and facilities. Bannum filed a cross-claim against CPM and a third party complaint against Ms. Farr, in her individual capacity, alleging that she had tortiously interfered with Bannum's contractual relationship with CPM. In this regard, as related in the grievances Bannum lodged with BOP, Ms. Farr purportedly had improper direct contacts with Bannum's landlord, CPM, with the aim of subverting Bannum's presence at the Orlando facility. Bannum thus appears to have had knowledge of these direct contacts between Ms. Farr and CPM as of December 2004, when its grievances were submitted. In any event, in 2008, when the state lawsuit was filed, the United States Attorney's office opted to defend Ms. Farr and, in June 2009, had the case removed to the United States District Court for the Middle District of Florida, Orlando Division (case no. 6:09-cv-989-Orl-28GJK).

As part of its discovery in the district court case, Bannum, on June 23, 2010, was provided a copy of the BOP OIA investigation file, which, according to Bannum, "contained numerous admissions regarding the actions of Ms. Farr." A settlement agreement was subsequently entered into in the district court case. The settlement agreement recites, *inter alia*, that "the United States of America, Federal Bureau of Prisons is aware that Bannum will be filing a Claim with respect to Contract No. J200c-533, and has agreed to give the claim prompt consideration." Under the agreement, it was expressly understood and agreed that Bannum would submit a "Claim for Equitable Adjustment" to BOP "with respect to actions and inactions by the Government, including but not limited to mis-inspections and over-inspections, which Bannum considers to be changes to the contract, costing Bannum additional time and effort," that Bannum would "prosecute its Claim diligently and in good faith," that it would provide CPM with "reasonable updates . . . upon request," and that it would "remit to CPM 15% of any recovery it receives against the BPO, United States, or Farr."

Under the settlement agreement, CPM, in turn, agreed to provide Bannum "with all information and documentation requested with respect to the Claim that Bannum will be submitting and any subsequent litigation regarding said Claim" and would "assist Bannum

[1] Respondent indicates that, with the exercise of all options, the contract would expire on July 9, 2006. Neither party addresses whether all options were exercised.

in good faith with support and testimony (if necessary) with respect to its claim, including but not limited to CPM's communications and interactions with the BOP." Under the agreement, Bannum, as third party plaintiff, stipulated to "dismiss its claims against Third Party Defendant without prejudice."

In terms of any litigation of disputes relating to the settlement agreement and its enforcement, the agreement itself provides as follows:

> 8. The parties agree that all actions or proceedings arising in connection with this Agreement shall be tried and litigated exclusively in the United States District Court, Middle District of Florida. This choice of venue is intended by the parties to be mandatory and not permissive in nature, and to preclude the possibility of litgation between the parties with respect to, or arising out of, this Agreement in any jurisdiction other than the United States District Court, Middle District of Florida.
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> 10. Should any action be brought by one of the Parties to enforce any provision of this Agreement, the non-prevailing party to such action shall reimburse the prevailing party for all reasonable attorneys' fees and court costs and other expenses incurred by the prevailing party in said action to enforce.

The agreement (copies of which have been furnished to the Board by both BOP and Bannum) expressly identifies as "Parties" to the settlement not only CPM, Bannum (as defendant and third party plaintiff), and Ms. Farr (as third party defendant), but "the United States of America, Federal Bureau of Prisons ('BOP')." The agreement is executed by the Assistant United States Attorney twice – once, on October 5, 2011, for Ms. Farr, and earlier, on August 11, 2011, for the "U.S. Department of Justice." The instant claim was submitted by Bannum to the BOP contracting officer on August 12, 2011. By letter dated October 5, 2011, the Assistant United States Attorney forwarded to counsel for Bannum and CPM copies of the fully executed settlement agreement, informing them: "The Bureau [BOP] recently contacted me to advise that it is processing Bannum's request [i.e., August 12, 2011, claim] for equitable adjustment." By letter to Bannum dated October 6, 2011, the contracting officer issued a final decision on the claim, denying it as untimely under the CDA, having been submitted more than "six years after its accrual." Bannum filed its appeal from that decision with the Board on December 30, 2011.

Discussion

The CDA requires that "each claim by a contractor against the Federal Government relating to a contract . . . be submitted within 6 years after the accrual of the claim." 41 U.S.C. 7103(a)(4)(a). The Federal Acquisition Regulation (FAR) defines claim "accrual" as "the date when all events, that fix the alleged liability of . . . the Government . . . and permit assertion of the claim, were known or should have been known." 48 CFR 33.201 (2004). The FAR provides further clarification: "For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred." *Id*.; *Cindy Karp v. General Services Administration*, CBCA 1931 (Jan. 4, 2012); *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,063.

Here, the "events" that would fix the alleged liability, i.e., the acts or omissions of BOP's Ms. Farr, all had transpired as of December 2004.[2] The August 2011 claim, as respondent notes, was submitted beyond the six year timeframe contemplated under the CDA. The contractor's timely submission of a claim to the contracting officer is a condition precedent to the exercise of Board jurisdiction under the CDA, but is subject to equitable tolling. *Arctic Slope Native Association, Ltd. v. Sebelius*, 583 F.3d 785, 793 (Fed. Cir. 2009). The time bar is a limitation on the statutory waiver of immunity of the United States to an action under the CDA.[3] As such, this Board, absent circumstances that would give rise to equitable tolling,[4] cannot take it upon itself to "extend the waiver beyond that which

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[2] Although Ms. Farr did not resign until November 2005, respondent, in its motion, noted that Bannum has never contended that it was harmed by an act or omission of Ms. Farr after November 2004, and Bannum's response to the motion failed to correct this impression or provide further information about any subsequent acts or omissions on her part.

[3] The time bar does not prevent an agency from entertaining and resolving amicably what it deems to be a meritorious, albeit untimely, claim, but merely precludes subjecting the agency to an action before a board of contract appeals or the United States Court of Federal Claims under the CDA should it choose to reject the claim.

[4] The present case does not involve equitable tolling that could extend the CDA's statutory time bar. *See Arctic Slope Native Association, Ltd. v. Department of Health and Human Services*, CBCA 1953(190-ISDA)-REM, et al., 11-2 BCA ¶ 34,778. Bannum does argue that it was "required" to pursue a grievance procedure, perhaps implying that it had to complete such a procedure before initiating a claim under the CDA, i.e., that somehow the grievance procedure would serve to toll the statutory limitation. This argument fails, however. The BOP Program Statement Bannum cites as creating an "obligation" on a contractor to file a grievance against a BOP employee (Program Statement 3420.09,

Congress intended." *See United States v. Kubrick*, 444 U.S. 111, 117-18 (1979). In short, Bannum's untimely claim cannot properly serve as the basis for an appeal before this Board.

Struggling to avoid the dismissal respondent is seeking, Bannum posits that its claim is not only one for constructive change arising out of the alleged overinspections by Ms. Farr, but also a claim for contract breaches, some of which significantly post-dated 2004. Bannum submits a claim "supplement" (and accompanying CDA claim certification) along with its response, in which it details its breach-related arguments. In particular, Bannum would characterize as a contractual breach an alleged BOP failure to make known to Bannum the results of its OIA investigation, which had been completed in 2006. Bannum also places great emphasis on BOP's issuance of a "no deficiency" monitoring report after November 2005, implying that the August 2011 claim was timely, because the report issuance somehow constituted an important "event" that would fix liability. Finally, Bannum urges that the settlement agreement for the district court case should be viewed as a modification to its BOP contract and that BOP's failure to address Bannum's claim on the merits thus amounted to a very recent breach of the BOP contract and one that falls well within the CDA time limitation for claim submission.

Bannum's arguments are unavailing. Regardless of whether Bannum may have gained additional information from BOP's internal investigation that would bolster a claim under the contract, the Board cannot see where the salient operative facts underlying Bannum's claim, those that purportedly would "fix liability," were not known to Bannum well in advance of its receipt of the OIA investigation file. Likewise, although the issuance of a "no deficiency" monitoring report would be relevant to and potentially supportive of Bannum's contentions that Ms. Farr's previous findings of deficiencies were baseless, that issuance was not itself an "event" that would "fix liability."

An alleged breach of a settlement agreement is not a matter cognizable by a board of contract appeals under the CDA, since the CDA is only applicable to contracts for: "(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." *See* 41 U.S.C. 7102(a). Settlement agreements are not procurement contracts. The instant settlement agreement, contrary to Bannum's "position," was never a modification to Bannum's contract, and there is no indication that the parties intended that it be a modification to the contract. *See Inversa, S.A. v. Department*

"Standards of Employee Conduct") does nothing of the sort. As its title suggests, it is simply an internal directive that sets out standards of conduct for BOP employees.

of State,, GSBCA 16837-ST, 06-2 BCA ¶ 33,411, at 165,657. Indeed, the most that can be said of the settlement agreement is that it contemplated that the parties would address Bannum's claim to an equitable adjustment of the contract and that they ultimately might negotiate a contract modification to provide for such an adjustment. Moreover, as to litigation action to resolve a dispute concerning the settlement agreement or to enforce its terms, the parties to the settlement agreement quite clearly mandated that any such action would be within the exclusive purview of the United States District Court for the Middle District of Florida. Therefore, it would seem, any redress for an alleged breach of the settlement agreement would have to be sought in that venue.

Decision

Respondent's motion to dismiss is granted. The case is **DISMISSED**.

RICHARD C. WALTERS
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

ALLAN H. GOODMAN
Board Judge