



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

ORDER ON JURISDICTION: July 27, 2022

CBCA 7351

BRIGHTWOOD MANAGEMENT PARTNERS,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

S. Sadiq Gill of Durette, Arkema, Gerson & Gill PC, Richmond, VA, counsel for Appellant.

Krishon Gill-Edmond and Shawn Larson, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **SHERIDAN**, **GOODMAN**, and **DRUMMOND**.

SHERIDAN, Board Judge.

On May 27, 2022, the Board sua sponte issued an order to show cause asking the appellant, Brightwood Management Partners (Brightwood), to address what the Board, from its review of appellant's notice of appeal, viewed as a possible jurisdictional problem that would preclude the Board from entertaining the appeal. For the reasons set forth below, we find the Board has jurisdiction over Brightwood's claim.

Background

Brightwood was awarded a contract by the Department of Veteran Affairs (VA) to perform grounds maintenance and internments at the Hampton National Cemetery (HNC). The contract was a year-long engagement subject to several renewal year options. At the conclusion of the first year, the VA opted not to renew Brightwood's contract. Brightwood submitted a certified claim asking the VA contracting officer to find that the VA's decision not to exercise the option evidences bad faith and a breach of the Government's implied duty to carry out the contract reasonably and in good faith. Brightwood also asserted entitlement to \$941,260.39 in costs incurred prior to the VA's notice that it would not be exercising the option for the following year. The VA denied the claim, and Brightwood appealed to the Board.

Following a conference with the parties on May 25, 2022, the Board raised the issue of whether breach of contract allegations were included in Brightwood's claim to the contracting officer and asked appellant to show why the appeal should not be dismissed for failure to state a claim upon which relief can be granted.

Discussion

The Board derives its jurisdiction to entertain appeals involving contract disputes from the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018). Claims brought under the CDA must be submitted in writing to the contracting officer and include adequate notice of the basis for the claim. *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987). Accordingly, the question is whether Brightwood properly brought its bad faith and breach of the implied duty of good faith and fair dealing claim before the contracting officer.

“Implied in every contract is a duty of good faith and fair dealing in its performance and enforcement.” *Future Forest, LLC v. Department of Agriculture*, CBCA 5863, 20-1 BCA ¶ 37,565, at 182,397 (citing *Lakeshore Engineering Services, Inc. v. United States*, 748 F.3d 1341, 1349 (Fed. Cir. 2014); *Metcalf Construction Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014)). Encompassed within this implied duty is a duty to cooperate and not hinder the contractor's performance. *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377, at 177,350. The allegations contained within Brightwood's certified claim provide the Government with sufficient notice of the basis of Brightwood's breach of the implied duty of good faith and fair dealing claim:

- (1) That the Agency's handling and management of the Contract, including the decision by the agency not to exercise Option Years evidences “bad faith”

and a breach of the Agency's fundamental duty to carry out the Contract reasonably and in good faith which is implicit in all government Contracts. . . .

(2) The untenable, illegal actions of the Agency has caused Brightwood significant damages both in terms of additional, extraordinary expenses and costs to implement and perform under the Base Year of the Contract; but also damages in the form of capital costs expended by Brightwood to perform the full allotted term of the Contract. Brightwood has been deprived of that economic expectancy both by the bad faith and lack of fair dealing during the Contract Base Year as well as amortization of unrecoverable expenses based upon the bad faith and lack of fair dealing decision not to extend the Option Years of the Contract.

The factual recitation within the certified claim further alleges a lack of good faith on behalf of the VA and its agents. For the purposes of the Board's jurisdiction, we find that Brightwood sufficiently presented its breach of the duty of good faith and fair dealing claim to the contracting officer.

With regard to Brightwood's claim of bad faith, "[t]o prove bad faith by the Government, a contractor must establish, by clear and convincing evidence, that a government official acted with 'some specific intent to injure the [contractor].'" *CAE USA, Inc.*, 16-1 BCA at 177,349 (quoting *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002) (quoting *Kalvar Corp. v. United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976))). Bad faith is not a required element of every implied duty breach claim, but to the extent that any arguments that Brightwood is raising depend on a finding of actual bad faith, Brightwood would have to prove an intent by the agency to harm Brightwood to prevail. *See id.* This, too, is supported by allegations within the certified claim. Brightwood asserted that the cemetery director, acting on behalf of and with the authority of the VA, improperly and intentionally interfered with Brightwood's performance of the contract.

Decision

For the foregoing reasons, the Board has jurisdiction to consider Brightwood's appeal.

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

We concur:

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge