



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION GRANTED IN PART: April 25, 2012

CBCA 2686-R

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 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.

Appellant, Bannum, Inc. (Bannum), has timely moved the Board to reconsider the decision it issued dismissing Bannum's appeal for lack of jurisdiction. *See Bannum, Inc. v. Department of Justice*, CBCA 2686, 12-1 BCA ¶ 34,963. That decision involved Bannum's August 11, 2011, claim for constructive change to a contract with the Bureau of Prisons (BOP) for comprehensive sanctions center services for male and female federal offenders in Orlando, Florida, based on alleged overinspection and interference by the agency and, in particular, by the contracting officer's representative (COR). We concluded that the 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), because all of the alleged acts or omissions had transpired by November 2004, i.e., they pre-dated the August 11, 2011, claim by more than six years.

In its motion for reconsideration, Bannum contends that the Board erred in determining that Bannum had not alleged acts or omissions of the COR beyond November 2004 and that its claim survived the CDA time bar, because the COR's acts and omissions continued after that date up until her November 2005 relocation from the Orlando area. In its response, BOP, in turn, argues that all events fixing liability had already occurred and that "any other events" beyond November 2004 and until the COR's relocation in 2005 were "merely a part of already fixed liability." *See* 48 CFR 33.201 (2004). Bannum, the agency urges, "sat on its rights" and should not be permitted to proceed before this Board.

In our decision, we noted that Bannum had failed to identify specific COR acts or omissions beyond November 2004, when it was confronted by BOP's motion to dismiss and the agency's contention that all such acts had ceased by that date. Bannum's response to the motion to dismiss merely alleged that the COR "wreaked havoc with Bannum all the way up until November, 2005," when she relocated and, in this regard, made general reference to its claim. In support of its motion for reconsideration, Bannum now points specifically to paragraph 33 of its claim for equitable adjustment (which had been included as an attachment to the BOP motion to dismiss) and to the listing therein (among nearly seven pages of items beginning in 2001) of activity in 2005 as indications of agency acts or omissions during that time frame that could have caused Bannum to incur extra expense, as claimed. The limited notations of agency actions that would fall within six years prior to Bannum's August 11, 2011, claim submission include the following, all relating to a BOP monitoring inspection at the Orlando facility from September 29 through October 1, 2005:

Date	Description
9/29/2005-10/1/2005	BOP on site for monitoring
10/13/2005	Review/analysis of Full Monitoring Report (Sept. 29-Oct. 1, 2005) – 2 deficiencies & several comments
11/15/2005	Prepare Response to Sept. 29-Oct. 1, 2005 Full Monitoring
11/28/2005	Review Receipt of Response to Sept. 29-Oct. 1, 2005 Full Monitoring – response addressed all deficiencies, comments, and recommendations – 1 deficiency removed – 1 deficiency will remain

In addition, Bannum points to paragraph 34 of its claim. That paragraph alleges that “Bannum incurred 1 extra man-year per year” of home office personnel effort and related travel and other costs for the period “October, 2001 through November, 2005, for a total of 4 man-years, or approximately 8000 extra man-hours, attempting to rectify the BOP’s attack on the Orlando facility.” The paragraph goes on to price the additional costs for those 8000 man-hours at \$322,182.36. Arguably, were Bannum to establish entitlement to relief, a small portion of the 8000 man-hours and of that sum could be attributable to BOP acts or omissions during the time frame between August 11, 2005, and November 28, 2005 – that is, to those few items that fall within six years of Bannum’s CDA claim submission. To that limited extent, the Board was mistaken in dismissing Bannum’s appeal, and Bannum should be permitted to proceed with that portion of its claim.

Although Bannum’s claim addresses a “whole chain of events” over the length of the contract, each individual act by the COR potentially could have given rise to a separate claim for compensable constructive contract change and/or breach. The agency’s notion that, as of late 2004, there was already “fixed liability” for those agency acts that might later occur during these few months in 2005 is incorrect. It is recognized that the start of claim “accrual” for purposes of imposing the CDA’s six-year statutory bar does not require the incurrence of all injury or damages arising from a change or breach, *see Cardinal Maintenance Service, Inc.*, ASBCA 56885, 11-1 BCA ¶ 34,616 (2010), and cases cited therein. Nevertheless, the change or breach must at least occur before liability can fix. *See Gray Personnel, Inc.*, ASBCA 54652, 06-2 BCA ¶ 33,378, at 165,476.

Decision

Appellant’s motion for reconsideration is **GRANTED IN PART**. The appeal hereby is reinstated to the extent Bannum has claimed relief for agency acts or omissions post-dating August 11, 2005.

RICHARD C. WALTERS
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

ALLAN H. GOODMAN
Board Judge