



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS IN PART DENIED; MOTION
FOR ATTORNEY FEES DENIED: November 5, 2012

CBCA 2704

SIGMA SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Margaret A. Dillenburg of Law Offices of Margaret Dillenburg, PC, Potomac, MD; and Alexander J. Brittin of Brittin Law Group, P.L.L.C., McLean, VA, counsel for Appellant.

Linda Fallowfield and Rosamond Z. Xiang, Office of General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

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

DRUMMOND, Board Judge.

The Department of Housing and Urban Development (HUD) has filed a motion for partial judgment on the pleadings and moves to dismiss count 2¹ of the complaint for failure to state a claim upon which relief can be granted. Sigma Services, Inc. (Sigma) opposes

¹ For purposes of this ruling, count 2 refers to paragraph 21 of the complaint.

HUD's motion and moves the Board to grant its attorney fees and costs associated with responding to HUD's motion.

For the reasons stated below, we deny both motions.

Background

In 2009, HUD issued solicitation R-OPC-23447. The solicitation, *inter alia*, sought contractors to perform marketing and management (M&M) services on HUD properties located in Arizona, Nevada, and Idaho. Sigma alleges that the solicitation made clear that the HUD homes to be assigned to the contractors included properties referred to as new acquisition and transition properties. Sigma further alleges that its bid pricing was based on an assessment of services required for both types of properties, which were to be divided equally between the contractors. By Sigma's estimation, the transition properties were more profitable to work on because they required fewer services to be performed.

On June 1, 2010, HUD awarded contract C-OPC-23676 (contract) to Sigma and another contractor. The contract was an indefinite quantity fixed-unit rate contract. The contract term was one base year and four option years.

Section C.1.4 of the contract states:

On the ninety-first (91st) day after contract award, each Vendor will be assigned an equal number of the outstanding unsold inventory in the contract area from the M&M II Vendors.

....

After completion of the Transition Period, assignment of assets will be determined by the Vendor's performance evaluations as assessed by the Government Technical Representative (GTR), based on the procedures outlined in HUD's Quality Assurance Plan for M&M III.

Performance began on September 27, 2010. Although HUD rated Sigma's performance favorably, Sigma received fewer transition properties than the other contractor.

By letter dated June 7, 2011, Sigma submitted a certified claim to the contracting officer (CO) seeking \$656,214.91 in lost revenue and costs. The CO denied the claim and Sigma filed a timely appeal. Sigma subsequently filed a complaint, alleging that HUD breached the contract and its implied duty of good faith and fair dealing.

Discussion

HUD's Motion

In count 2 of the complaint Sigma alleges that HUD breached its implied duty of good faith and fair dealing by refusing to respond to Sigma's many requests for its contractual share of the transition properties. HUD contends that this count fails to state a claim upon which relief can be granted because Sigma has not alleged bad faith.

HUD's motion is akin to a 12(b) motion under the Federal Rules of Civil Procedure. To survive this motion, the complaint must allege facts, assumed as true, that would entitle Sigma to relief. *Arctic Slope Native Ass'n v. Department of Health & Human Services*, CBCA 294-ISDA, et al., 09-2 BCA ¶ 34,281, at 169,350 (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *CH2M Hill Hanford Group, Inc. v. Department of Energy*, CBCA 708, 08-2 BCA ¶ 33,871, at 167,666 (citing *Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002)).

The covenant of good faith and fair dealing is inherent in every contract. *Precision Pine & Timber, Inc. v. United States*, 696 F.3d 1344, 1365 (Fed. Cir. 2009). Government officials are presumed to exercise their duties in good faith. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002). Sigma contends that it only needs to allege that HUD acted with lack of good faith. We agree.

A claim that HUD breached the implied covenant of good faith does not require a showing of bad faith. *See Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005).

This is because a claim that the government breached the covenant of good faith and fair dealing is not the same as a claim that the government acted in bad faith. An allegation of breach of the covenant of good faith and fair dealing is an allegation that the party's contracting partner deprived it of the fruits of the contract . . . while bad faith is motivated by malice . . . and does not necessarily result in a deprivation of the fruits of the contract.

Rivera Agredano v. United States, 70 Fed. Cl. 564, 574 n.8 (2006) (citations omitted).

The covenant of good faith and fair dealing can be breached upon proving, *inter alia*, lack of diligence, negligence, or a failure to cooperate. *See Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988); *see also Peter Kiewit Sons' Co. v. United States*, 151 F. Supp. 726, 731 (Ct. Cl. 1957). In fact, one can violate the obligation of good faith through

“[s]ubterfuges and evasions . . . *even though the actor believes his conduct to be justified.*” Restatement (Second) of Contracts § 205(D) (1981) (emphasis added).

We find that the absence of an allegation of bad faith would not defeat Sigma’s claim in count 2. Accordingly, we reject HUD’s argument.

Attorney fees and costs

Sigma argues that it is entitled to attorney fees and costs associated with responding to HUD’s motion. HUD has not addressed Sigma’s request for attorney fees. Nevertheless, we note that Sigma’s request is premature. Claims for attorney fees and costs are considered under the Equal Access of Justice Act, 5 U.S.C. § 504 (2006). Applications for attorney fees and costs are made after Board decisions are final, in accordance with Rule 30 (48 CFR 6101.30 (2012)). *See TST Tallahassee, LLC v. Department of Veterans Affairs*, CBCA 1576, 11-1 BCA ¶ 34,672.

Procedural Matter

The parties are directed to file a status report by November 12, 2012, proposing a schedule for resolution of this proceeding.

Decision

HUD’s motion to dismiss in part is **DENIED**. Sigma’s motion for attorney fees is **DENIED**.

JEROME M. DRUMMOND
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

PATRICIA J. SHERIDAN
Board Judge