



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: November 17, 2017
(CORRECTED VERSION: Issued November 21, 2017)

CBCA 5638

J.R. MANNES GOVERNMENT SERVICES CORP.,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Jerry R. Mannes II, President of J.R. Mannes Government Services Corp., Holland, MI, appearing for Appellant.

Jack R. Cordes, Jr. and Brian F. Binney, Office of General Counsel, Federal Bureau of Investigation, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **DRUMMOND**, and **KULLBERG**.

SOMERS, Board Judge.

This case involves a claim of J.R. Mannes Government Services Corporation (J.R. Mannes or appellant) for anticipatory profits that would have been earned had the Department of Justice, Federal Bureau of Investigation (FBI or respondent) not terminated its contract for convenience. Respondent moves to dismiss the appeal for failure to state a claim, or, alternatively, for summary relief. Appellant opposed the motion and respondent filed a reply. Months later, appellant filed a document entitled "Appendix A to Opposition to Motion for Dismissal or in the Alternative for Summary Relief," which respondent has moved to strike because appellant failed to seek leave from the Board before filing the supplement. For the reasons stated below, we grant respondent's motion for summary relief and its motion to strike appellant's "Appendix A."

Background

The following factual allegations are taken from J.R. Mannes' complaint, supplemented with information from the contract to which J.R. Mannes repeatedly cites in its complaint.

On February 12, 2014, the FBI entered into a blanket purchase agreement (BPA) with J.R. Mannes to acquire administrative support services. The BPA incorporated by reference, among other things, Federal Acquisition Regulation (FAR) clauses 52.249-2, Termination for Convenience of the Government (Fixed Price); and 52.249-4, Termination for Convenience of the Government (Services) (Short Form). FAR 52.249-4 provides that:

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the Government shall be liable only for payment under the payment provisions of this contract for services rendered before the effective date of termination.

On September 24, 2015, the FBI issued task order DJF-15-1200-D-00002985 (task order or contract) under the BPA to J.R. Mannes. The task order required appellant to provide "administrative support services – executive writer" to the FBI for a base period of one year, beginning on September 29, 2015. The task order's statement of work called for J.R. Mannes to provide writing, editing, and analysis services on a full-time equivalent basis to support the executive management of the FBI's Operational Technology Division (OTD), and to "key personnel" meet minimum educational, security, and proficiency standards.

Upon contract award, J.R. Mannes informed the FBI that the candidate it had originally proposed to perform these services would need to be replaced with a new candidate. Ultimately, the FBI approved a replacement candidate, who started working at the FBI location in Quantico, Virginia, on or about November 9, 2015.

On December 8, 2015, by e-mail message, with a copy to appellant, the contracting officer's representative (COR) counseled appellant's employee for failing to get to work on time. In response, on December 15, 2015, appellant informed the COR that it had discussed performance requirements with its employee and stated in an e-mail message that "you should see an improvement from here on out." Despite this discussion, the record indicates attendance and performance problems continued. For example, an e-mail message from an FBI contract specialist to appellant detailed concerns with the employee's routine tardiness, lack of initiative, problems learning new tasks and managing multiple tasks, failure to

provide a finished product, lack of proficiency in Microsoft Word, and her excessive use of her government computer for personal matters.

On February 2, 2016, appellant advised the COR via e-mail message that it would discuss any remaining performance concerns with the employee. Less than a week later, on February 8, 2016, appellant's employee arrived late for work yet again. At that time, the FBI requested resumes for a potential replacement candidate, and on February 9, 2016, FBI personnel again discussed the employee's performance issues with J.R. Mannes. The FBI representatives stated that they would give the employee one month to improve, after which time the FBI and J.R. Mannes would discuss the situation again.

Despite repeated warnings, the employee arrived late for work on February 11, 18, and 23. On February 23, 2016, the COR and a contracting specialist spoke to appellant and the employee about her continued lateness and performance issues. Finally, when the employee arrived late again on February 29, and submitted an unacceptable work product on March 1, 2016, the FBI terminated appellant's employee's access to FBI facilities, escorted her from the building, and notified appellant of the need for a replacement.

Appellant proposed several potential replacement candidates; however, the FBI determined that they failed to meet the requirements and rejected the proposed replacements. On April 18, 2016, FBI's contracting officer terminated the task order for convenience in accordance with FAR 52.249-2 and FAR 52.249-4, citing the ongoing performance issues and noting that the Government had decided to accomplish the previously contracted-out tasks with a government employee.

On August 5, 2016, appellant filed a claim for anticipatory profits in the amount of \$62,777.45, alleging that the Government had improperly terminated the task order. The FBI's contracting officer denied the claim on November 16, 2016. This appeal followed.

Discussion

The FBI moves to dismiss J.R. Mannes' appeal for failure to state a claim, or, in the alternative, for summary relief. In considering whether the appeal should be dismissed for failure to state a claim, "we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *Kiewit-Turner, a Joint Venture, v. Department of Veterans Affairs*, CBCA 3450, 14-1 BCA ¶ 35,705, at 174,847 (citations omitted). "Dismissal for failure to state a claim should not be granted unless it appears beyond doubt that the appellant cannot prove any set of facts in support of its claim that would entitle it to relief." *Id.* (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

As to the motion for summary relief, we must determine whether the moving party has demonstrated “the absence of a genuine issue of material fact,” and is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *SBBI, Inc. v. International Boundary & Water Commission*, CBCA 4994, 17-1 BCA ¶ 36,722, at 178,813; *see also Crown Operations International, Ltd. v. Solutia Inc.*, 289 F.3d 1367, 1375 (Fed. Cir. 2002) (opposing party cannot rest on mere allegations to establish a genuine issue of material fact but must present actual evidence); 48 CFR 6101.8(g)(3)(2016)(Rule 8(g)(3)). We find that because appellant has failed to establish that a disputed material fact exists, the Government is entitled to judgment as a matter of law.

Generally, the contracting officer has extremely broad discretion to terminate a contract for convenience.

[T]he contracting officer may terminate a contract for convenience without cause whenever it is determined to be in the Government’s best interest. . . . *Corners & Edges, Inc. v. Department of Health & Human Services*, CBCA 693 et al., 08-2 BCA ¶ 33,961, at 168,022 (“[t]he termination for convenience clause grants the contracting officer exceptional authority.”) A termination for convenience will only be a breach of contract if “the tribunal finds that the termination was motivated by bad faith or constituted an abuse of discretion, or that the Government entered into the contract with no intention of fulfilling its promises.” *Greenlee Construction, Inc. v. General Services Administration*, CBCA 415, et al., 07-2 BCA ¶ 33,619, at 166,510. “In the absence of bad faith or a clear abuse of discretion, the contracting officer’s election to terminate for the government’s convenience is conclusive.” *T&M Distributors, Inc. v. United States*, 185 F.3d 1279, 1283 (Fed. Cir. 1999).

Universal Home Health & Industrial Supplies, Inc. v. Department of Veterans Affairs, CBCA 4012, et al., 16-1 BCA ¶ 36,370, at 177,284-85. Appellant bears a heavy burden to show that the contracting officer terminated the contract in bad faith. *Krygoski Construction Co. v. United States*, 94 F.3d 1537, 1541 (Fed. Cir. 1996). Absent evidence that the contracting officer acted in bad faith or abused her discretion, appellant’s remedies are limited to recovering the costs of performance up through the date of termination. *Universal*, 16-1 BCA at 177,285 (citing *Carol S. Best*, HUD BCA 82-693-C17, 85-1 BCA ¶ 17,712, at 88,397 (1984)). “A contractor may not recover anticipatory profits or consequential damages when a contract has been properly terminated for convenience.” *Id.* (citing *Arbor III Realty Co.*, HUD BCA 96-C-114-C5, 98-1 BCA ¶ 29,344, at 145,901 (1997)).

Here, appellant alleges that the Government improperly terminated the contract for convenience and, in particular, suggests, through assertions presented in its complaint, that

the Government used performance concerns as a pretext to terminate the contract and to get a better deal by bringing the work in-house. Additionally, appellant contends that the FBI failed to comply with an unidentified requirement to perform an analysis under OMB Circular A-76 before terminating the task order.

We find that appellant has failed to identify any specific conduct on the part of the FBI that illustrates bad faith or establishes that the Government's stated reason for termination – poor performance – is untrue. To 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].” *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)). Appellant has not alleged such intent. Nor has appellant shown “a breach of the implied duty of good faith and fair dealing by proving lack of diligence, negligence, or a failure to cooperate.” *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377, at 177,349 (quoting *TigerSwan, Inc. v. United States*, 110 Fed. Cl. 336, 345-46 (2013)); *Corners & Edges, Inc.*, 08-2 BCA at 168,022 (contracting officer did not act in bad faith by terminating a contract for convenience to bring the work to an in-house group consisting of contractors and employees). The fact that the Government rejected other candidates because they failed to meet the contract qualifications does not evidence a breach of the requirement of good faith and fair dealing. *Cf. Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 829 (Fed. Cir. 2010) (holding that an affirmative bait-and-switch action “specifically designed to reappropriate the benefits the other party expected to obtain from the transaction, thereby abrogating [that party's] obligations under the contract,” breaches the contract).

As to appellant's assertion that the Government must conduct an analysis under OMB Circular A-76 prior to bringing the work “in-house”, OMB Circular A-76 specifically provides that noncompliance with its terms does not create a basis to challenge agency action or inaction, with exceptions not relevant here. OMB Circular A-76 (2003), ¶ 5.g.; *accord MORI Associates, Inc. v. United States*, 102 Fed. Cl. 503, 527 (Fed. Cl. 2011) (finding that a protest cannot be premised on failure to conduct a competition under OMB Circular A-76). Thus, appellant cannot rely on OMB Circular A-76 to challenge the Government's termination for convenience here.

We conclude that appellant has failed to establish a genuine issue of material fact sufficient to defeat the motion for summary relief. Appellant points to only allegations, not actual evidence. Consequently, we find as a matter of law that the Government properly terminated appellant's contract for convenience.

Motion to Strike Appellant's Subsequent Submission

On May 12, 2017, we issued an order requiring appellant to respond to the Government's motion to dismiss for failure to state a claim, or, in the alternative, for summary relief. Appellant submitted its opposition on May 30, 2017, and discovery closed on June 1, 2017. In compliance with the Board's order, respondent filed a reply brief on June 15, 2017. On September 27, 2017, without contacting respondent's counsel, or seeking leave of the Board, appellant inexplicably filed a document identified as "Appendix A to Opposition to Motion for Dismissal or in the Alternative for Summary Relief." The document appears to be a mixture of facts and legal argument, unsupported by affidavits, documentary evidence, or, really, anything whatsoever.

Respondent moved to strike "Appendix A," noting that the Board has granted motions to strike in similar situations. *See Ocwen Loan Servicing, LLC v. Department of Veterans Affairs*, CBCA 1073, 09-1 BCA ¶ 34,102 (granting appellant's motion to strike the Government's late response to a Board order regarding discovery); *Thorco, Inc.*, AGBCA 2001-136-1, 03-1 BCA ¶ 32,164 (granting a motion to strike a supplemental declaration by the contracting officer when the declaration was submitted after the record closed).

In light of appellant's failure to seek leave from the Board to submit its appendix after the deadlines set forth in the Board's order, we grant respondent's motion to strike the document.

Decision

For the foregoing reasons, respondent's motion for summary relief and motion to strike appellant's last submission are granted. The appeal is hereby **DENIED**.

JERI K. SOMERS
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

H. CHUCK KULLBERG
Board Judge