



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 1, 2023

CBCA 7351

BRIGHTWOOD MANAGEMENT PARTNERS,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

S. Sadiq Gill of Durette, Arkema, Gerson & Gill P.C., 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 **GOODMAN**, **DRUMMOND**, and **SHERIDAN**.

SHERIDAN, Board Judge.

After the first year of contract performance by Brightwood Management Partners, LLC (Brightwood), the Department of Veterans Affairs (VA) decided not to exercise the contract's first option period. Brightwood timely submitted a certified claim for damages of \$941,260.39. In its claim, Brightwood, alleging bad faith and a breach of the covenant of good faith and fair dealing, seeks to recover lost profits and unrecoverable overhead (such as accelerated equipment expenditures, labor costs necessary to meet the base year requirements, and capital financing) that it alleges were incurred when the VA declined to exercise the options. Following a hearing, we deny Brightwood's appeal.

Background

On October 1, 2020, the VA awarded contract 36C78621D0021 to Brightwood. The contract was for grounds maintenance and internments at Hampton National Cemetery (the cemetery). The initial base term of the contract was one year. The contract also included Federal Acquisition Regulation clause 52.217-9, Option to Extend the Term of the Contract, which allows for up to four one-year option periods. 48 CFR 52.217-9 (2020).

Brightwood began performance on the grounds of the cemetery in October 2020. Early in the contract, funding delays were experienced because of congressional budget issues and the fact that the VA was operating under a continuing resolution. Throughout this time, Brightwood continued to perform, even though payments from the VA were sometimes late. Also during this period, the cemetery was experiencing changes in leadership and went through a series of acting directors in the final months of 2020. Michael Faust became the permanent director of the cemetery on April 12, 2021. As the cemetery director, Mr. Faust worked alongside the contracting officer representatives, Paul Zagaruyka and James Jacobs, to administer the contract.

Within days of becoming the director, Mr. Faust raised a series of negative observations relating to the care and aesthetics of the cemetery. Mr. Faust then did a walk-through of the grounds of the cemetery with Brightwood's owner, Vernon Lee. During this walk-through, as well as in a series of follow-up communications from both Mr. Faust and Mr. Jacobs, Brightwood was notified of specific performance concerns involving maintenance of the cemetery grounds, including headstone cleaning, mowing, equipment storage, and improper burial setup. Messrs. Faust and Jacobs emphasized the importance of completing corrective action by Memorial Day 2021 because the cemetery would see a large influx of families and guests.

When these concerns were not resolved, Messrs. Jacobs and Zagaruyka issued the first contract discrepancy report (CDR) on May 21, 2021. In the subsequent weeks, two additional CDRs were issued on May 24 and June 24, 2021, related to Brightwood's performance issues at the cemetery.

On July 28, 2021, Mr. Jacobs certified to Mr. Zagaruyka that Brightwood had not performed in a satisfactory manner and that the VA did not wish to exercise the contract's first option. Brightwood was notified of this decision on July 29, 2021.

Brightwood timely submitted a certified claim on September 15, 2021. In its claim, Brightwood asserted that the VA had acted in bad faith and breached the covenant of good faith and fair dealing by not exercising the option. Brightwood argued that it was denied its economic expectancy under the contract while also having to accelerate its costs to perform

for the base year without the opportunity to amortize the costs over the option years. Brightwood asserted that its performance issues primarily stemmed from difficulty communicating and working with the VA.

In its claim, Brightwood further contended that Mr. Faust did not want to continue working with it and was seeking a new contractor during Brightwood's base period. Brightwood alleged that Mr. Faust entertained other landscape contractors before Brightwood's contract was completed, intending to award the subsequent contract to the new contractor. During the hearing, Brightwood presented testimony by its employees that Mr. Faust took these contractors around the cemetery by golf cart to survey the facility in order to prepare a bid. A former employee, Colleen Fuller, claimed that Mr. Faust made comments to the staff that any contractor would be better than Brightwood and suggested that he fired the contractor at the cemetery at which he previously worked due to poor performance.

Discussion

I. Bad Faith

The law regarding the Government's non-exercise of contract options is well-established. *Attenuation Environmental Company v. Nuclear Regulatory Commission*, CBCA 4920, et al., 16-1 BCA ¶ 36,521, at 177,917. Options are made to benefit the Government, and absent express terms in the contract limiting the Government's discretion, contractors do not have a right to relief if the Government fails to exercise an option. *Id.*; see *Government Systems Advisors, Inc. v. United States*, 847 F.2d 811, 813 (Fed. Cir. 1988).

Brightwood's allegations of bad faith are anchored in its unfounded belief that Mr. Faust was out to get Brightwood because he had another contractor that he wanted to use for the cemetery.¹ The Board has held that one way to overcome the Government's decision not to exercise an option is for a contractor to demonstrate that the decision was made in bad faith or was so arbitrary or capricious as to constitute an abuse of discretion. See, e.g., *Blackstone Consulting Inc. v. General Services Administration*, CBCA 718, 09-1 BCA ¶ 34,103, at 168,636; *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,062; *Sword & Shield Enterprise Security, Inc. v. General Services Administration*, CBCA 2118, 12-1 BCA ¶ 34,922, at 171,725 (2011). The proof must be "almost irrefragable" and is usually "equated with evidence of some specific intent to injure the plaintiff." *Sword & Shield*, 12-1 BCA at 171,725.

¹ Throughout this litigation, Brightwood has raised allegations both of bad faith and lack of good faith and fair dealing (often conflating the two). Here, we address each in turn.

Brightwood has not demonstrated that the VA evidenced bad faith by not exercising the contract's options. Brightwood had a history of performance issues, as evidenced by the three CDRs issued by Messrs. Jacobs and Zagaruyka. These reports give specific details of Brightwood's performance shortfalls. Photos included in the record support the VA's determination that Brightwood was performing poorly. Brightwood alleges that the reports are a result of Mr. Faust's hostility towards them, but the record reflects that the problems began before Mr. Faust was hired. The full picture of the poor performance became evident in the Spring after Mr. Faust was permanently in place as the cemetery director.

The testimony presented at hearing relating to Mr. Faust taking perceived prospective contractors on tours of the cemetery was convoluted and did not establish that what Brightwood claims actually took place. Ms. Fuller's testimony was not compelling. The VA is not required, as Brightwood suggests, to explain or justify Mr. Faust's actions. In order to prevail here, Brightwood must demonstrate that the VA engaged in bad faith, which it has not done. Finally, contrary to Brightwood's contention, Mr. Faust had no authority to select the subsequent contractor so there is no merit to the suggestion that Mr. Faust was steering the procurement process in a certain direction.

II. Good Faith and Fair Dealing

Brightwood also alleges that the VA breached its duty of good faith and fair dealing by declining to exercise the option years. A claim based on a breach of the covenant of good faith and fair dealing is different from an allegation of bad faith. *Sigma Services, Inc. v. Department of Housing and Urban Development*, CBCA 2704, 12-2 BCA ¶ 35,173, at 172,591. "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." *Id.*; see *Rivera Agredano v. United States*, 70 Fed. Cl. 564, 575 n.9 (Fed. Cl. 2006). The covenant of good faith and fair dealing cannot be used to expand a party's duties outside of what is within the contract and does not create a right or obligation where one does not already exist. *Sigma Services*, 12-2 BCA at 172,591. Here, the VA is only exercising a right that it had from the original contract—the right not to exercise an option. The VA is under no obligation to exercise an option.

Brightwood contends that Mr. Zagaruyka's failure to issue timely task orders during the term of the contract violated the covenant of good faith and fair dealing by unfairly impairing Brightwood's performance. However, during the hearing, Mr. Zagaruyka testified that the contract's funding delays causing the untimely task orders were due to much larger issues funding the contract's continuing resolution appropriations source. Brightwood introduced no evidence that the VA forced it to perform without task orders being issued, and we see no evidence of harm to Brightwood from the VA's failure to issue the task orders.

Brightwood has not presented compelling evidence that the VA acted in bad faith or in violation of the covenant of good faith and fair dealing by not exercising the contract options. The VA would have been free to pursue a different contractor after Brightwood's base year was completed even had there been no performance issues.

Decision

The appeal is **DENIED**.

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