UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION TO DISMISS GRANTED IN PART: January 23, 2008

CBCA 718

BLACKSTONE CONSULTING, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Cynthia Malyszek of Malyszek & Malyszek, Los Angeles, CA, appearing for Appellant.

Mel Myers, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **GILMORE**, **BORWICK**, and **VERGILIO**.

BORWICK, Board Judge.

The General Services Administration (GSA or respondent) moves to dismiss that portion of a claim filed by Blackstone Consulting, Inc. (Blackstone or appellant) for lost and anticipatory profits for unexercised option years of a janitorial services contract. Respondent maintains that appellant has failed to state a claim upon which relief can be granted. For the reasons stated below, we deny the motion as to option year three, but grant the motion as to option year four.

Background

For the purpose of resolving this motion only, we state alleged facts which are in the pleadings or are in documents referenced in the pleadings.[1] On or about December 23, 2003, respondent awarded contract GS05P04GAC0043 for janitorial services for the John C. Kluczynski (JCK) Federal Building and the United States Post Office (USPO) Loop Station, Chicago, Illinois. Request for Equitable Adjustment (REA) ¶ II. The contract had an effective date of February 19, 2004, and incorporated the terms of Request for Proposals GS05P03GAC0007. *Id*; Appeal File, Exhibit 1 at 18.[2]

The contemplated term of the contract was one year, with four one-year options exercisable unilaterally by the Government. Appeal File, Exhibit 1 at 92 (§ F, ¶¶ B, C). Under the standard Federal Acquisition Regulation (FAR) clause incorporated into the contract, the Government could exercise the option upon thirty days' written notice to the contractor, provided the Government gave a preliminary written notice of its intent to extend at least sixty days before the contract expired. *Id*. at 156 (¶ 83, FAR 52.217-9--Option to Extend the Term of the Contract (Mar. 2000)).

The contract contained a mutual cancellation clause, whereby either the Government or the contractor could unilaterally cancel the contract without cost, effective 120 calendar days after receipt of written notice. Appeal File, Exhibit 1 at 89 (§ E, ¶ G).

The base term of the contract ran from February 19, 2004, through July 31, 2004. Appeal File, Exhibit 1 at 18. On July 30, 2004, respondent exercised the first option year, extending the contract term through July 31, 2005. Appeal File, Exhibit 1 at 10. On July 29, 2005, respondent exercised the second option year, extending the contract term through July 31, 2006. *Id*. at 2.

In March 2006, a sexual harassment complaint was filed against the husband of respondent's contracting officer's representative (COR). Appeal File, Exhibit 55 at 2. In March and April 2006, on many occasions, respondent noted appellant's allegedly deficient contract performance and consequently took deductions from payments otherwise due

[1] We also summarize the contract's undisputed terms and conditions, a recitation necessary for a complete understanding of the parties' positions.

[2] Pagination reference is to the handwritten consecutive pagination in Appeal File, Exhibit 1.

appellant under the contract. *See generally* Appeal File, Exhibits 33-48.[3] On April 26, appellant cancelled the contract under the mutual cancellation clause of the contract. REA at 4; Appeal File, Exhibit 51. Appellant stated in pertinent part:

> We have reached the conclusion that there is no chance of [appellant] being successful on this project. While we certainly understand the nature of 'challenging customers'. . . , the actions of the contracting officer, contracting officer representative and quality assurance personnel over the past [four to eight] weeks demonstrates that we are being held to standards that are unreasonable and that we can not adequately resolve. While we acknowledge that we are not perfect, we can not continue to operate in an environment where deficiency notices and associated deductions are assessed based on very subjective criteria.
>
> For the record, we are also quite troubled by the fact that many of the deficiency notices and deductions started occurring after we pointed out and provided detailed information about an alleged sexual harassment complaint against the contracting officer representative's husband by one of our employees. While we wrestled with the decision to bring this matter to JCK's attention given the COR's relationship with the accused, we ultimately felt that it was our fiduciary duty to do so. We can't help but feel that recent actions are a form of retaliation for our decision.

Id.. Per the mutual cancellation clause of the contract, the cancellation would have been effective one hundred and twenty days later, i.e., on August 24, 2006. However, option year two--and the contract, if additional options were not exercised--expired by its terms on July 31, 2006. *Id*., Exhibit 1 at 2.

On November 21, 2006, appellant submitted its REA to respondent, seeking $450,929.99 in damages as follows:

Supervisory & Postal Deductions

September 1-30, 2005	$801.54
April 1-30, 2005	517.68
March 1-31, 2006	1098.00

[3] We also note that respondent had advised appellant of allegedly deficient performance well before March 2006. *See generally* Appeal File, Exhibits 17-32.

Postal	15,355.00
January 1-31 2006	109.80
April 1-30, 2006	2294.82
Total Deductions	$20,176.84
Cost of replacement employees	2786.82
Unpaid invoices	92,345.27
Lost profit	291,251.90
Settlement costs	44,369.16
Claim total	$450,929.99

REA at 9. The REA does not allocate appellant's alleged lost and anticipatory profits claim between the unexercised option periods three and four. The REA, and subsequent appeal, assert that:

> On April 26, 2006, Blackstone sent a letter notifying [respondent] that Blackstone was exercising its 120-day cancellation right under the terms of the contract. In the letter Blackstone expressed the unreasonable level of scrutiny and unjustifiable performance deductions [respondent] began imposing on Blackstone after the sexual harassment complaint.
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> . . . .
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> Following Blackstone's [employee's] submission of [a] sexual harassment complaint against the COR's husband, Blackstone became the victim of retaliatory invoice deductions. For work done the same month the complaint was filed the GSA arbitrarily deducted 75% from [appellant's] invoice for unspecified performance deficiencies. Despite a clear conflict the COR was not switched with an unbiased person and the GSA's only recommendation to [appellant] was to simply move the employee to the another floor. The GSA's actions served no other purpose than to do harm to [appellant], and as such amount to bad faith conduct on the part of the GSA.

REA at 4, 6.

Discussion

Respondent moves to dismiss the claim of lost and anticipatory profits in the amount of $291,251.90, noting that the Government has unfettered discretion to exercise contract renewal options, with perhaps the exception of a non-exercise in bad faith. Respondent's Motion at 3-4. Respondent argues:

> Here [appellant] has made no such allegations of bad faith regarding [respondent's] discretion not to exercise the option in the contract. The reason appellant has not made any such allegations is quite obvious. The [respondent] was never able to contemplate exercising another option year because [appellant] had already cancelled the contract before such discussions could occur. [Appellant's] sole allegation here of bad faith is that [respondent] improperly took deductions in retaliation for a Blackstone employee's allegations against [respondent's] contracting officer representative's husband. Therefore, since no bad faith or arbitrariness is alleged as to additional contract option years, by law the appellant's claim for anticipatory profit must fail.

Respondent's Motion at 4.

Appellant disputes that it is claiming bad faith only for the deductions and not for the option years. In its opposition to respondent's motion, appellant argues:

> The Government's act of bad faith breached the contract and was the catalyst and reason causing Blackstone to cancel the contract. But for the Government's acts of bad faith, Blackstone would not have cancelled the contract. Prior to the Government's receiving the harassment complaint from Blackstone, the Government had intended to award the following option years 3 and 4.

Appellant's Opposition at 2. Appellant argues that respondent never gave any reason or indication that it was dissatisfied with continuing appellant's performance and thus did not intend to renew the option year. Appellant also states that it did not give a reason why respondent withheld $15,355 from its March 2006 invoice. *Id*. at 2.

Appellant further states in its opposition:

> Through discovery, we will be able to establish that the Government intended to grant option year[s] 3 and 4. There is nothing in the record that states

> otherwise, either with performance or price. It will be established that through the Government's normal procedures in issuing an option that [appellant] would have met the [Federal Acquisition Regulation] requirements and that the Government market research [would have shown] that exercising the option with [appellant] would have been most advantageous to the Government. However, the Government's bad faith actions of retaliatory deductions of March 2006 left [appellant] with no alternative but to cancel the contract. *Even if it is arguable that option year four may be based on more [sic] speculation, it is clear and can be established through discovery that the Government meant and intended to award option year 3 to Blackstone, resulting in lost and anticipatory profits to Blackstone.*

Appellant's Opposition at 3 (emphasis added).

Recently, we examined the standards for granting a motion to dismiss for failure to state a claim upon which relief can be granted:

> A motion to dismiss for failure to state a claim upon which relief [is appropriate and] can be granted ... when the facts asserted by the claimant do not entitle it to a legal remedy. *Boyle v. United States*, 200 F.3d 1369 (Fed. Cir. 2000). Controlling precedent at the Court of Appeals for the Federal Circuit, noted recently that "[i]n reviewing a dismissal 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." *Anaheim Gardens v. United States*, 444 F.3d 1309, 1314-15 (Fed. Cir. 2006) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). 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. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Icenogle Construction Management, Inc.*, VABCA 7534, 06-2 BCA ¶ 33,325, at 165,271; *South Carolina Public Service Authority*, ASBCA 53701, 04-2 BCA ¶ 132,651 at 161,607; *Thai Hai*, ASBCA 53375, 02-2 BCA ¶ 31,971, at 157,920, *reconsideration denied*, 03-1 BCA ¶ 32,130, aff'd, 82 F.App'x 226 (Fed. Cir. 2003).

Charles Engineering Co. v. Department of Veterans Affairs, CBCA 582, 07-2 BCA ¶ 33,698, at 166,831.

Respondent's motion is based upon the premise that appellant's bad faith claim relates only to the deductions from appellant's contract invoices, not to the consequences of the

alleged bad faith such as appellant's exercise of the mutual cancellation clause. Respondent argues that appellant's voluntary cancellation made exercise of the options a non-issue. Respondent says that the law, therefore, affords appellant no recovery for respondent's non-exercise of the options.

Respondent's statement of the law is correct as to the limited liability of the Government when it decides not to exercise a contract option. Generally, contract damages are limited to the base year and exercised option years, because the Government is under no obligation to exercise contract options. Therefore, an award of damages for unexercised option years of a contract would be inherently speculative. *Hi-Shear Technology Corp. v. United States*, 356 F.3d 1372, 1380 (Fed. Cir. 2004); *Marketing & Management Information, Inc. v. United States*, 62 Fed. Cl. 126, 131 (2004).

However, we do not read appellant's claim and subsequent appeal as narrowly as respondent does. In its REA and subsequent pleadings, appellant posits conspiracy by respondent's officials in retaliation for a sexual harassment claim, which affected the contemplated exercise of the options. Appellant maintains that respondent, in bad faith, took significant (for appellant at least) deductions from appellant's contract invoices. The deductions, in turn, allegedly forced appellant to cancel the contract so that respondent did not exercise the remaining contract options.

A tribunal may award damages for unexercised option years of a contract if a contractor proves that the decision not to exercise an option was a product of bad faith or so arbitrary and capricious as to be an abuse of discretion. *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514 at 166,062; *Nova Express*, PSBCA 5102, 2008 WL 103951 (Jan. 10, 2008); *IMS-Engineers-Architects, PC*, ASBCA 53471, 06-1 BCA ¶ 33,231 at 164,674.

Indulging in every reasonable inference in favor of the appellant, as we must, we cannot say that there is no set of facts upon which appellant can prevail as to the alleged bad faith regarding the alleged forced cancellation of the contract and the subsequent non-exercise of option year three. Appellant pleads that there was a sexual harassment complaint filed and that there were significant deductions from appellant's contract invoices after the filing of that complaint, deductions that appear to be greater than those taken before the filing of the complaint.

The claim of lost and anticipatory profits for option year four is dismissed as speculative and too remote in time given that the claim as to option year four is premised upon an anticipated exercise of option year four before option year three had even commenced. Appellant's pleadings concede that premise is speculative.

Decision

Respondent's Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted is **GRANTED IN PART**. The claim of lost and anticipatory profits for option year four is **DISMISSED**.

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ANTHONY S. BORWICK
Board Judge

We concur:

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BERYL S. GILMORE
Board Judge

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JOSEPH A. VERGILIO
Board Judge