UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: August 7, 2009

CBCA 946

AFR & ASSOCIATES, INC.,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Richard L. Moorhouse, Emily C. Parker, and Andrew J. Belofsky of Greenberg Traurig, LLP, Washington, DC, counsel for Appellant.

Benjamin K. Gibbs, Office of General Counsel, Department of Housing and Urban Development, Atlanta, GA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **POLLACK**.

DANIELS, Board Judge.

The Department of Housing and Urban Development (HUD) declined to exercise its option to extend for an additional year a contract with AFR & Associates, Inc. (AFR). AFR submitted a claim in the amount of $3,384,716.92, contending that it is owed this sum because HUD's failure to exercise the option was arbitrary and capricious and the product of bad faith.

The parties have filed cross-motions for summary relief. We conclude, on the basis of uncontested facts and taking all reasonable inferences in favor of AFR, that HUD's determination not to exercise the option had a rational basis and was not tainted by bad faith.

Consequently, we grant the agency's motion, deny the contractor's motion, and deny the appeal.

Background

The Federal Housing Administration (FHA), a bureau of the Department of Housing and Urban Development (HUD), operates a mortgage insurance program which insures approved lenders against loss on loans financed for the purchase of single-family residences. Respondent's Statement of Uncontested Facts (RSUF) ¶ 1. When these loans go into default, requiring foreclosure, an FHA-approved lender, to avoid the loss, may submit a benefit claim to HUD for a portion of its loss and convey the property to HUD. *Id.* ¶ 2. The properties conveyed are commonly known as "HUD Homes." *Id.* ¶ 3.

After HUD takes possession of each of these houses, it must evaluate the condition of the house, make any necessary repairs to market it to potential buyers, market it, and sell it. RSUF ¶ 4. The proceeds from the sale are transferred to the FHA insurance fund, a largely self-sustaining fund that provides for claims filed by FHA-insured lenders. *Id.* ¶ 5.

In 1999, HUD decided to have the management and marketing (M&M) functions for HUD Homes performed by contractors. RSUF ¶ 9. On June 25, 2004, the agency awarded a contract to AFR to perform these services in the State of Georgia. *Id.* ¶ 14. The contract was for a base period running from the effective date of the contract through July 31, 2005. Appellant's Statement of Uncontested Facts (ASUF) ¶ 1; Appeal File, Exhibit 1 at 96.

The contract contains Federal Acquisition Regulation clause 52.217-9, "Option to Extend the Term of the Contract (Mar 2000)." This clause reads:

> (a) The Government may extend the term of this contract by written notice to the Contractor within 30 days of contract expiration; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit the Government to an extension.
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> (b) If the Government exercises this option, the extended contract shall be considered to include this option clause.
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> (c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed 5 years.

Appeal File, Exhibit 1 at 117.

The contract provided for four one-year option periods. ASUF ¶ 1. If the Government exercised the first option, option year 1 was to run from August 1, 2005, through July 31, 2006. Each successive option year, if the option was exercised, was to run from August 1 through July 31 of the following calendar year. Appeal File, Exhibit 1 at 96.

According to the contract, AFR was "to provide Management and Marketing services to successfully monitor mortgagee compliance, market and manage single family properties owned by, or in the custody of [HUD], and oversee the sales closing activity, including proper accounting for HUD's sales proceeds." RSUF ¶ 26 (quoting Appeal File, Exhibit 1 at 2). This was AFR's first M&M service contract. *Id.* ¶ 17.

M&M contractors were selected and supervised by HUD regional Homeownership Centers (HOCs). RSUF ¶ 18. Charles Gardner, the head of HUD's Atlanta HOC, was the chair of the technical evaluation panel that selected AFR. *Id.* Within the HOCs were Real Estate Owned (REO) divisions, which were responsible for the day-to-day management of single-family programs, including oversight of M&M contractors. *Id.* ¶ 23. The head of the Atlanta HOC's REO division was Janice Cooper. *Id.* ¶ 24. The government technical representative (GTR) for AFR's contract was a branch chief within this division, Debbie Bonelli-McMahan. *Id.* ¶ 25. As GTR, Ms. Bonelli-McMahan was responsible for giving AFR technical advice and guidance related to the work required by the contract. She also acted as the principal judge of AFR's performance and as the contracting officer's representative in all matters concerning the technical aspects of the contract. *Id.*

AFR's proposal included as the major subcontractor National Home Management Solutions (NHMS). RSUF ¶ 29; Appellant's Statement of Genuine Issues (ASGI) ¶ 29; ASUF ¶ 4. NHMS was a new company owned in part by Michael Hardiman. RSUF ¶ 30; ASUF ¶ 5. AFR selected NHMS as a significant subcontractor because of its extensive experience, and Mr. Hardiman as project director because of his own extensive experience in supporting HUD's M&M requirements. RSUF ¶ 31.

During the start-up phase of the contract, AFR had a number of disputes with subcontractors, including NHMS. RSUF ¶¶ 32-33. NHMS made demands regarding the subcontracting arrangement which AFR found unacceptable. *Id.* ¶ 34; ASGI ¶ 34; ASUF ¶ 7. HUD also found the demands unacceptable. ASUF ¶ 9. The contract required that AFR contact HUD prior to changing or substituting a replacement major subcontractor for NHMS. RSUF ¶ 35. When it became apparent that NHMS would not serve under this contract, HUD required AFR to obtain a replacement subcontractor for NHMS. *Id.* ¶ 36; ASUF ¶ 10. The contracting officer recommended several companies -- among them, First Preston Management, Inc. (First Preston) -- to replace NHMS. ASUF ¶ 11. AFR selected First Preston, HUD approved the change, and First Preston served as AFR's major subcontractor

and serviced the marketing portion of the contract for the duration of the contract. RSUF ¶¶ 38-39; ASUF ¶ 12. The four subcontractors other than NHMS which were named in AFR's proposal also fell through, and none of them was actually used during the contract. RSUF ¶ 40; ASUF ¶ 14.

HUD evaluated AFR's work monthly. The evaluations were based wholly (according to HUD) or in part (according to AFR) on the work required by the contract's lengthy performance work statement (PWS). RSUF ¶ 44; ASGI ¶ 44. The evaluations included statistical analyses of fifteen PWS requirements. RSUF ¶ 45. HUD government technical managers (GTMs) calculated a percentage of successful performance based on a sample size of property records, compared that percentage to HUD's "minimum satisfactory rating," and produced a "relative score." For example, if AFR received an 80% acceptable rating on the sample of customer service calls reviewed for the month, and the minimum satisfactory rating was 90% under the contract, AFR would receive a relative score of 89 (80/90 = 88.889 or 89). *Id.* ¶ 47. All fifteen relative scores under the performance metrics were then totaled, with slightly more weight given to four of the scores because of their significance to HUD. The overall scores represented performance quality as follows:

Excellent	111 or above
Good	101 to 110
Fully successful	100
Needs improvement	90 to 99
Unacceptable	89 or below

Id. ¶ 48.

HUD also evaluated the work of M&M contractors, including AFR, through random on-site inspections or on-line reviews of property condition reports. RSUF ¶ 50. The agency's evaluations -- both performance metrics and narrative evaluations -- were delivered to M&M contractors in monthly report cards beginning in March 2005. *Id.* ¶ 52. Thus, AFR (and other M&M contractors) received report cards beginning seven months after contract performance began -- a total of five report cards during the base year of the contract. *Id.* ¶¶ 53-54. During this year, AFR, in all five report cards, received evaluations of unacceptable -- the lowest possible score. *Id.* ¶ 55. AFR was also criticized in the narrative portion of the report cards for failure to meet the aspects of the PWS that were not scored numerically. *Id.* ¶ 56.

Nevertheless, with the expectation that AFR would improve its performance, HUD on June 30, 2005, exercised the option to extend the contract from August 1, 2005, through July 31, 2006. RSUF ¶ 58; ASUF ¶ 16. HUD also gave AFR an incentive payment for the

first year's performance. ASUF ¶ 16. The agency says it gave all M&M contractors nationwide an incentive payment, "due to an overly generous and erroneous formula." Respondent's Statement of Genuine Issues (RSGI) ¶ 16.

On August 29, 2005, Hurricane Katrina struck the Gulf Coast. In response, HUD unilaterally modified M&M contracts in the Southeast, including AFR's contract, to require contractors to remove certain properties in inventory from the market for evaluation of the availability of those properties for Katrina evacuees. RSUF ¶ 62; ASUF ¶ 18. HUD permitted AFR to submit a request for an equitable adjustment to compensate AFR for the increased work that resulted from this modification. RSUF ¶ 63. AFR did not object to the modification. *Id.* ¶ 64. The performance metrics were not to consider the properties that were removed from the market pursuant to the modification. *Id.*[1] In October 2005, properties that could not be made habitable for the allowable cost were permitted to be returned to the market, and in April 2006, all properties not yet rented to evacuees were permitted to be returned to the market. *Id.* ¶ 65.

On September 16, 2005 -- shortly after the modification resulting from Katrina -- HUD sent to AFR a "letter of concern" which articulated the agency's concerns with ten areas in which AFR was not improving. RSUF ¶ 59. The letter told AFR that "[t]he serious nature of these issues requires immediate attention and correction" and requested a response within ten days. *Id.* ¶ 60. The letter did not reflect any impact of the Katrina-inspired modification. *Id.* ¶ 66.

AFR responded to the letter of concern four weeks after receiving it. RSUF ¶ 67. AFR's response purported to challenge HUD's findings but provided few if any details as to how the contractor would address the deficiencies noted. *Id.* ¶ 68. HUD replied on December 20, 2005, asserting that AFR's rebuttals were mostly inaccurate and reflected a lack of understanding of contractual requirements. *Id.* ¶¶ 69-70; *see also* ASGI ¶ 69. AFR did not respond to this letter. RSUF ¶ 71.

On January 13, 2006, the contracting officer personally delivered to AFR's president a letter which requested that AFR "re-examine the actions [AFR] has taken in response to the concerns raised in our previous letters, and take further action as needed to address these

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[1] AFR asserts that "HUD's monthly report cards did in fact criticize AFR regarding . . . properties [that were taken off the market as a result of the modification]." ASUF ¶ 21. As HUD notes, however, AFR cites only one instance in support of this assertion, and even there, the criticism was as to the contractor's record keeping, a basic contractual requirement, not as to actions regarding the properties themselves. RSGI ¶ 21.

concerns satisfactorily." RSUF ¶ 72 (quoting Appeal File, Exhibit 43). This letter stated that the GTR's assessment of AFR's performance had worsened since the earlier letters and that "if HUD's monitoring of your firm's performance continues to reflect that AFR's performance is not improving, HUD will have to evaluate its options." *Id.* ¶ 74 (quoting Appeal File, Exhibit 43). HUD's deputy chief procurement officer discussed the situation with AFR's president, telling him that HUD would not hesitate to take action if AFR did not improve its performance. *Id.* ¶ 75.

AFR presented HUD with a performance improvement plan (PIP) on February 2, 2006. RSUF ¶ 78. HUD had criticized AFR for, among other things, failing to perform timely initial inspections of properties, failing to perform routine inspections, deviating from appraiser recommendations without GTR approval, failing to pay taxes and homeowner association dues timely, not conducting adequate quality control, and not ensuring that electronic data was comprehensive. The PIP pledged to resolve seventeen issues within certain time frames. *Id.* ¶ 79. The contracting officer gave AFR ninety days to demonstrate performance improvement. *Id.* ¶ 80. HUD also suggested bi-weekly meetings with AFR to discuss performance problems. *Id.* ¶ 81.

Beginning in February 2006, the contracting officer and HOC officials met with AFR officials frequently -- both formally and informally -- to discuss AFR's performance problems and how to resolve them. RSUF ¶ 82. AFR's performance became better; in each month from February to June 2006, the contractor achieved a rating of "needs improvement." *Id.* ¶ 84. In March, HUD's deputy chief procurement officer even commented that AFR was making good progress. ASGI ¶ 84. AFR never achieved a "fully successful" rating, however. RSUF ¶ 84.

AFR did not meet all of the representations it made in its PIP. For example, it acknowledged that it did not perform one hundred percent of initial inspections within twenty-four hours from its acquisition of properties, as required by the contract; it said that its average time was twice as long as required. RSUF ¶¶ 85-90. HUD inspections showed, and AFR acknowledged, that the contractor was not fully complying with the contract's health and safety requirements. *Id.* ¶¶ 91-96. HOC officials felt that although AFR showed some improvement in its performance, that improvement was not sufficient to warrant renewal of the contract. *Id.* ¶ 97. AFR believes that the improvement was sufficient to warrant renewal. ASGI ¶ 97.

HUD says that:

> [t]he PIP period and the frequent contact between the parties resulted in a heightened realization, in the Atlanta HOC's collective view, that AFR did not

> have the organizational and management capacity to perform under the Contract. In short, the failures of AFR to adequately improve during this period of intensive assistance from HUD convinced the HOC and [the contracting officer] that AFR would not be able to ever adequately perform.

RSUF ¶ 98. AFR contends to the contrary that "HUD's non-renewal decision was the culmination of acts taken in . . . bad faith and resulting from an abuse of discretion, not a realization that . . . AFR was unable to perform the contract." ASGI ¶ 98.

On April 10, 2006, HUD officials in Atlanta and Washington, D.C., held a conference call in which they decided to recommend to the contracting officer that she not exercise the option to extend AFR's contract for another year. RSUF ¶ 99; ASGI ¶ 99; *see also* ASUF ¶ 40, RSGI ¶ 40 (questioning whether the decision was actually that the option not be exercised, rather than to recommend that the contracting officer not exercise the option). Lengthy discussions continued within the agency after that date, as to how to proceed with regard to the contract. RSUF ¶ 100.

HUD considered various alternatives. One was to extend the contract for several months to provide more time in which to evaluate AFR's performance. RSUF ¶ 103. Others were to terminate the contract for default or to terminate it for the convenience of the Government. *Id.* ¶ 104. A representative of the Small Business Administration with whom the contracting officer consulted urged that the default termination alternative not be pursued. *Id.*

At a meeting held on April 24, 2006, Mr. Gardner, the director of the Atlanta HOC, told AFR's president, "I've one run [sic] M&M contractor out of town and I have no problem running AFR [out of town]." ASUF ¶ 44; RSGI ¶ 44; Appellant's Response to RSGI ¶ 44.

On May 31, 2006, HUD sent to AFR a "preliminary notice that HUD may exercise option year two on [your] contract." The notice cautioned, "This notice does not commit HUD to the extension. If the option is exercised, a modification to your contract . . . will be issued." Appeal File, Exhibit 66.

HUD did not send a cure notice to AFR. It believed that because it had pointed out its concerns to the contractor in many letters and orally, and AFR had not met its own representations in the PIP, a cure notice was necessary only as a preliminary step to a termination for default. RSUF ¶ 101.

In its proposed Statement of Uncontested Facts, AFR asserts that HUD made several errors in its evaluation of the contractor's performance. ASUF ¶¶ 21-39. In response, HUD

maintains that the criticisms are invalid, and that even if they were correct, the allegations are immaterial because AFR's performance was deficient in many areas not mentioned in the Statement. RSGI ¶¶ 21-39. In this regard, we note the following: Prior to the end of July 2006, HUD made numerical evaluations of AFR's performance for each month from March 2005 to June 2006, and also for the fourth quarter of federal fiscal year 2005 and the each of the first three quarters of federal fiscal year 2006. Each of these evaluations resulted in a score of either "unacceptable" or "needs improvement." Appeal File, Exhibits 5, 8, 11, 17, 19, 30, 34, 36, 38, 40, 42, 45, 52, 53, 55, 61, 63, 64, 69, 73. AFR contested the scores for only the first four of these months. In contesting the scores, AFR maintained that its score should be higher than the one assigned, but should still rank in the "unacceptable" range. *Id.*, Exhibits 7, 9, 15, 18. In responding specifically to other evaluation scores, AFR accepted HUD's number and promised to strive to reach a "fully successful" score in the future. *Id.*, Exhibits 27, 37, 44, 73.

Because HUD's internal deliberation process involved lengthy debate, discussion, and documentation, the final acceptance by the Deputy Federal Housing Commissioner of the decision not to exercise the option did not occur until July 28, 2006, three days before the then-existing option year was to end. RSUF ¶ 107.

HUD informed AFR by telephone on July 28, 2006 -- one business day before the expiration of the first option year under the contract -- that it would not exercise the option for an additional year of performance under the contract. ASUF ¶ 46. The contracting officer modified the contract on July 31 to implement the plan for transition to a new contractor. *Id.* The contracting officer was asked in her deposition, "Who made the decision not to renew AFR's contract?" She responded, "[I]t was my decision based on all the input I was getting from my customer." She acknowledged that during the long internal discussion as to how to proceed, she had at one point suggested extending the contract for a short period of time to give AFR further opportunity to improve its performance. Ultimately, however, "my technical experts [naming HOC officials Gardner, Cooper, and Bonelli-McMahan] convinced me that wasn't possible." "My customer[s] who were technical experts were of the . . . adamant and reasoned and documented opinion that AFR was not doing this particular function satisfactorily." RSUF, Exhibit 13 at 80-81, 121; *see also* ASUF ¶¶ 42-43 (contracting officer relied on advice from HOC staff and others in authority in determining not to exercise the option).

In lieu of extending AFR's contract, HUD identified three potential replacement M&M contractors who could handle the work in Georgia. RSUF ¶ 108. One of the agency's criteria for selecting the three contractors was that the contractor was "performing consistently at a satisfactory level or better." ASUF ¶ 48. HUD selected PEMCO, Ltd. from among these contractors to perform the work. *Id.* ¶ 109; ASGI ¶ 109; Appeal File, Exhibit

86. AFR asserts that PEMCO's overall score for the entire period of its then-current M&M contract fell in the "needs improvement" range. ASUF ¶ 49. While this is true, it is also true, as HUD points out, that PEMCO's score had been improving over time and had been in the "good" range during the most recent rating quarter. HUD believed that the earlier, lower ratings may have been attributable to errors in its sampling methodology regarding this contractor's inventory of properties. RSGI ¶ 49 (referencing ASUF, Exhibit 34 at 2).

In January 2007, Ms. Cooper, who had been the head of the Atlanta HOC's REO division, retired from government service and launched a consulting firm. Her clients consist almost entirely of entities that hold contracts with HUD; among them are PEMCO and NHMS. Ms. Cooper's work for PEMCO involves that firm's M&M work in Georgia. ASUF ¶ 53.

On March 22, 2007, AFR sent to the contracting officer a "claim for breach of contract damages for failure to exercise second option year." The claim, which was certified, was in the amount of $3,384,716.92. Appeal File, Exhibit 99. The contracting officer denied the claim on August 1, 2007, asserting, "HUD's actions in the non-exercise of the option were consistent with the law and, accordingly, AFR does not have a basis for a claim in this matter." *Id.*, Exhibit 100 at 1. AFR appealed her decision on October 26, 2007.

Discussion

Each party has asked the Board to resolve this appeal by granting its own motion for summary relief and denying the opposing party's motion. Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Nevertheless, to defeat a motion for summary relief, the nonmoving party must come forward with specific facts showing the existence of a genuine issue for trial. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

When both parties move for summary relief, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001). The mere fact that the parties have cross-moved for summary relief does not impel

a grant of one of the motions; each motion must be independently assessed on its own merit. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001).

> The Board has previously explained the law governing the merits of this case:
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> > Because an option clause does not obligate the Government to exercise an option, but rather gives the Government the discretion to decide whether to engage in such exercise, unless the contract says otherwise, the Government's discretion as to the exercise of an option is nearly complete. *Integral Systems, Inc. v. Department of Commerce*, GSBCA 16321-COM, 05-2 BCA ¶ 32,984, at 163,472. Case law establishes that the Government's decision not to exercise an option can provide a vehicle for relief only if the contractor proves that the decision was made in bad faith or was so arbitrary or capricious as to constitute an abuse of discretion. *Aspen Helicopters, Inc. v. Department of Commerce*, GSBCA 13258-COM, 99-2 BCA ¶ 30,581, at 151,024; *IMS Engineers-Architects, P.C.*, ASBCA 53471, 06-1 BCA ¶ 33,231, at 164,674 [*aff'd sub nom. IMS Engineers-Architects, P.C. v. Geren*, 274 F. App'x 898 (Fed. Cir. 2008)]; *James Hovanec*, PSBCA 4767, 04-2 BCA ¶ 32,805, at 162,262.

Greenlee Construction, Inc. v. General Services Administration, CBCA 416, 07-1 BCA ¶ 33,514, at 166,062; *see also Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 09-1 BCA ¶ 34,103, at 168,636; *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 44, et al., 08-1 BCA ¶ 33,854, at 167,584.

> A contractor who asserts that a government official was motivated by bad faith in the conduct of his duties bears the burden of proving its assertion by clear and convincing evidence -- "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is *highly probable*."

Greenlee Construction, 07-1 BCA at 166,062. In setting forth this standard, the Board relied on the decision of the Court of Appeals for the Federal Circuit in *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002). In so doing, we expressly declined to adopt a lesser standard advocated by the Court of Federal Claims in *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 757-72 (2005). In following *Am-Pro* rather than *Tecom*, we explained that the Court of Appeals for the Federal Circuit is our appellate authority and its decisions are binding on us, whereas the Court of Federal Claims merely has coordinate

jurisdiction to our own. *Greenlee Construction*, 07-1 BCA at 166,064 n.7.[2] The Federal Circuit has amplified its *Am-Pro* holding in *Galen Medical Associates, Inc. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004) (quotations and citations omitted):

> [W]hen a bidder alleges bad faith, in order to overcome the presumption of good faith on behalf of the government, the proof must be almost irrefragable. "Almost irrefragable proof" amounts to clear and convincing evidence. In the cases where the court has considered allegations of bad faith, the necessary "irrefragable proof" has been equated with evidence of some specific intent to injure the plaintiff.

In determining whether the decision not to exercise the option was so arbitrary or capricious as to constitute an abuse of discretion, we consider --

> (1) evidence of subjective bad faith on the part of the government official, (2) whether there is a reasonable, contract-related basis for the official's decision, (3) the amount of discretion given to the official, and (4) whether the official violated an applicable statute or regulation.

McDonnell Douglas Corp. v. United States, 182 F.3d 1319, 1326 (Fed. Cir. 1999) (citing *United States Fidelity & Guaranty Co. v. United States*, 676 F.2d 622, 630 (Ct. Cl. 1982)). Whether HUD acted in bad faith will be considered under the standards described above. AFR does not contend that HUD violated a statute or regulation in not exercising the option. Thus, our inquiry into whether the agency's decision was arbitrary or capricious will focus on factors (2) and (3).

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[2] AFR, which reiterates the arguments for a *Tecom* standard made unsuccessfully by the appellant in *Greenlee*, also contends that Federal Circuit decisions demonstrate that the Board is bound by decisions of the Court of Federal Claims. AFR cites for this proposition several decisions which were issued by the United States Court of Claims. Appellant's Memorandum in Response to HUD's Opposition to AFR's Cross-Motion for Summary Relief and HUD's Reply Brief in Support of HUD's Motion for Summary Relief at 4. The Court of Claims is a different court from the Court of Federal Claims. The Court of Claims was a predecessor court to the Federal Circuit, which accepts its decisions as binding precedent. *South Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (en banc). The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, which created the Federal Circuit, also established the Court of Federal Claims (then called the United States Claims Court) as a distinct, trial-level entity.

As to factor (3), the Court of Appeals has explained, "Where the Government is entitled to exercise its discretion, the 'plaintiff has an unusually heavy burden of proof in showing that the determination made . . . was arbitrary and capricious.'" *Balboa Insurance Co. v. United States*, 775 F.2d 1158, 1164 (Fed. Cir. 1985) (quoting *Royal Indemnity Co. v. United States*, 529 F.2d 1312, 1320 (Ct. Cl. 1976)). "[T]he greater the discretion granted to a contracting officer, the more difficult it will be to prove the decision was arbitrary and capricious." *Galen*, 369 F.3d at 1330 (quoting *Burroughs Corp. v. United States*, 617 F.2d 590, 597 (Ct. Cl. 1980)). The Government has the right under a standard option clause such as the one in this contract to exercise, or not to exercise, the option; the Government is not under an obligation to exercise it. *Continental Collection & Disposal, Inc. v. United States*, 29 Fed. Cl. 644, 650 (1993). The discretion to exercise a contract option or not has therefore been characterized as "broad." *IMS Engineers-Architects,* 06-1 BCA at 164,672; *Kirk/Marsland Advertising, Inc.*, ASBCA 51075, 99-2 BCA ¶ 30,439, at 150,408; *Plum Run, Inc.*, ASBCA 46091, et al., 97-2 BCA ¶ 29,193, at 145,230. Consequently, proving that the decision not to exercise the option was arbitrary or capricious will be difficult. We will examine factor (2), whether there was a reasonable, contract-related basis for the decision, in that light.

From the uncontested facts in this case, the picture that appears is essentially the one painted by the agency: HUD evaluated AFR's work on a regular, comprehensive basis and consistently determined that the work was unacceptable or needed improvement. The agency noted its concerns in a series of letters and met with the contractor frequently, during the first half of 2006, in an effort to prompt better performance. AFR's performance did improve, but it never reached the fully successful level, and it did not meet the goals the contractor set in a performance improvement plan it devised itself. HUD gave extensive consideration as to how to proceed with this contract. It reviewed several alternatives as a part of this process, which involved officials in both Atlanta and Washington. The contracting officer was not the sole participant in this review, but she was an active participant. She listened to the advice given by program officials and ultimately trusted their judgment that exercising the option to continue the contract for another year would not be in the agency's best interest. These uncontested facts do not reveal any bad faith on the part of the agency, or any abuse of discretion, in the determination not to exercise the option. *See Optimal Data Corp.*, NASA BCA 381-2, 85-1 BCA ¶ 17,760, at 88,719 (1984), *reconsideration denied*, 85-2 BCA ¶ 18,165 (contractor's unsatisfactory performance good cause for not exercising option).

AFR takes issue with this view, but in so doing, it merely nibbles around the edges of the picture described in the previous paragraph. AFR "conducted exhaustive discovery, including ten depositions of high-ranking HUD officials, and [received from HUD the production of] hundreds of confidential documents." Respondent's Memorandum in Support of Its Motion for Summary Relief at 2 (uncontested). Even with all this information at its

disposal, the contractor has not presented any evidence which would lead us reasonably to conclude that HUD acted in bad faith or abused its discretion in not renewing AFR's contract.

AFR urges that the problems it sees in the agency's actions reflect both bad faith and abuse of discretion, so we will examine the assertions as to both aspects of the appeal. Much of AFR's effort addresses imperfections in the scoring system HUD used in the metric part of its evaluations. Even if all the contractor's assertions as to the alleged imperfections are correct, however, AFR has not shown how the scores could be adjusted to a fully successful level; to the contrary, when the contractor did ask for adjustments, while the contract was in effect, those changes would merely have increased scores to be higher but still unacceptable. Similarly, AFR contends that HUD did not consider, in its evaluation of the contractor's performance, the number of houses AFR sold or the total revenue it returned to FHA funds (said to be about $600 million by HUD and about $700 million by AFR; *see* ASUF ¶ 17; RSGI ¶ 17). The contractor has failed to explain, however, whether these figures represented good, bad, or mediocre performance. Thus, the fact that AFR sold many houses does not show that HUD's evaluation was made in bad faith or arbitrary or capricious. And the fact that HUD gave AFR an incentive payment for its first year's performance does not invalidate the comprehensive monthly evaluations, given the agency's explanation that the payment was based on "an overly generous and erroneous formula."

AFR also sees HUD's failure to give the contractor a cure notice to be an indication of bad faith or arbitrary action. If any statute, regulation, or case law supports the theory that a cure notice is a necessary prerequisite to a determination not to exercise an option, however, AFR does not bring it to our attention. HUD did give AFR much notice, over a number of months, in both letters and meetings, that it was dissatisfied with the contractor's performance. Whether the written communications should have been denominated "letters of concern" (as HUD calls them) or not (as advocated by AFR), the communications clearly demonstrated concern. AFR recognized the criticisms; it made numerous promises to improve and even drafted and sent to HUD a performance improvement plan. The contractor failed to measure up to the standards it set for itself in its own performance plan, however.

AFR also finds perplexing HUD's decision not to exercise the option, less than two months after having sent a preliminary notice that it would exercise the option. We find no legal fault in the agency's actions. By the terms of a contract clause, HUD could not exercise the option unless it had sent the preliminary notice -- but sending the notice "[did] not commit the Government to an extension" of the contract. *Continental Collection & Disposal*, 29 Fed. Cl. at 650. Similarly, HUD's determination to renew the contracts of other M&M contractors who were not performing well, at the same time that it did not renew AFR's contract, does not show bad faith or an abuse of discretion. The performance of other

contractors has no bearing on whether AFR reached a level of performance that was acceptable to HUD. An agency "has the right to insist upon the quality of performance called for by the contract even though it may have accepted, under previous or future contracts, a lower level of quality than that to which it was entitled." *All South Properties, Inc.*, HUDBCA 92-G-7604-C12, et al., 97-2 BCA ¶ 29,329, at 145,818; *see also Patricia J. Stevens*, PSBCA 3272, 94-1 BCA ¶ 26,419, at 131,430 (1993), *reconsideration denied*, 94-2 BCA ¶ 26,951. And contrary to AFR's assertion, there is uncontested evidence that the contractor selected by HUD to replace AFR in Georgia was higher-rated than AFR.

AFR's president testified in his deposition that HUD's contracting officer had "always been fair with me" and would never intend to injure him or AFR. RSUF, Exhibit 12 at 43-44. Perhaps because the president had such respect for the contracting officer, the contractor urges that the contracting officer must have abdicated her responsibility, and improperly deferred to others in the agency, in deciding not to exercise the option. As the case law makes clear, however, the requirement for a decision by the contracting officer does not preclude the obtaining of advice from others within the agency. *Pacific Architects & Engineers Inc. v. United States*, 491 F.2d 734, 744 (Ct. Cl. 1974); *J. A. Terteling & Sons, Inc. v. United States*, 390 F.2d 926, 927 (Ct. Cl. 1968).

The Congress understood in establishing this requirement that --

> practicability dictates that the extent to which the contracting officer relies on his own judgment or abides by the advice or determination of others is dependent on a variety of factors, including the officer's personal knowledge, capability, and executive qualities, as well as the nature of the particular procurement. With so many variables, it is impossible to generalize as to what the contracting officer's role should be in all situations. In addition, it is unrealistic to suggest that the various levels of management responsible for the projects and programs to which a contract relates and that bear the responsibility for the propriety and wisdom of the agency's action should at all times remain aloof from the manner in which contracts are administered and contractual actions are taken.

S. Rep. No. 95-1118, at 11 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5255.

Applying this reasoning, one of our predecessor boards of contract appeals held, "While the decision must be that of the [contracting officer], the courts have recognized that the complexities of Government contracting may require extensive consultation, coordination and other staff assistance." *Mike Gibson & Mike Bearden, Co-Trustees in Dissolution of Delta Products Co.*, AGBCA 88-139-1, 93-2 BCA ¶ 25,615, at 127,508 (1992). As in

Gibson & Bearden, the contracting officer here "read [the decision] in detail, consulted with others within the agency, and agreed with the decision before signing it." *Id.* at 127,509. Indeed, the contracting officer here was extensively involved in the long, internal agency deliberations about the fate of AFR's contract. She ultimately accepted the judgment of her "technical experts" -- the agency program personnel who dealt with the contractor on a regular basis -- that the contract should not be extended because AFR "was not doing this particular function satisfactorily." This does not constitute an abdication of responsibility; rather, it seems to have been a thoughtful response to a difficult situation.

Finally, AFR sees bad faith and an abuse of discretion in the actions of two of the program personnel on whose advice the contracting officer relied, Mr. Gardner and Ms. Cooper. Mr. Gardner told AFR's president, "I've one run [sic] M&M contractor out of town and I have no problem running AFR [out of town]." This comment was intemperate. It was, however, an isolated statement, unlike the "virtual rancid cornucopia of . . . communications evidencing a specific intent by key government officials to injure" the contractor that was present in *North Star Alaska Housing Corp. v. United States*, 76 Fed. Cl. 158, 190-93 (2007). It was also out of character for Mr. Gardner, according to the deposition testimony of AFR representatives -- the company's president said that he had had "[v]ery good" experience with Mr. Gardner on prior contracts, and consultant Christopher Lord said that he had known Gardner for "some time" and had "never had a problem with him" and had never known him to treat a contractor unfairly. RSUF, Exhibits 12 at 15, 16 at 104-05. In the overall context of the uncontested facts before us, Mr. Gardner's comment standing alone does not provide a sufficient basis for a finding of bad faith on the part of HUD. Furthermore, "even if it were true that Government officials had animus towards [the contractor], the existence of such animus can not obviate the clear reasonable basis for permitting the contract to end without the exercise of options." *Pennyrile Plumbing, Inc.*, ASBCA 44555, et al., 96-1 BCA ¶ 28,044, at 140,029 (1995).

AFR's other allegation that Mr. Gardner showed bad faith toward it is even more attenuated. Mr. Gardner was the chair of the technical evaluation panel that selected AFR for award. The major subcontractor identified in AFR's proposal was NHMS. Mr. Gardner was also involved, prior to the inception of contract performance, in directing AFR to find a subcontractor to replace NHMS as the major subcontractor under the contract. HUD gave AFR only a short period of time in which to make this replacement. The predicament in which both the contractor and the agency found themselves at that time was caused by a dispute between the contractor and its subcontractor. We do not understand why the agency should have been responsible for this predicament, why it shows that Mr. Gardner favored NHMS over AFR, or why it was unreasonable for the agency to insist that AFR begin quickly the performance it had promised.

The problem asserted with regard to Ms. Cooper is also worthy of only brief mention. Ms. Cooper retired from government service at the end of 2006, five months after HUD had decided not to exercise the option to continue AFR's contract. AFR believes that in doing consulting work in 2007 for M&M contractors, including AFR's successor M&M contractor in Georgia (PEMCO), Ms. Cooper violated ethical guidelines set forth in 18 U.S.C. § 207. Whether Ms. Cooper violated these guidelines or not has no bearing on whether she showed bad faith toward AFR in recommending that the option not be exercised. AFR's president testified at his deposition that Ms. Cooper was a "taskmaster" -- a "[d]rill sergeant type" -- but that he found her to be "fair" in her dealings with him and AFR. RSUF, Exhibit 12 at 17. We do not see anything in the record before us on the cross-motions that indicates she behaved differently as to the option exercise issue.

Decision

HUD's motion for summary relief is granted. AFR's cross-motion for summary relief is denied. The appeal is **DENIED**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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HOWARD A. POLLACK
Board Judge