UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF IN CBCA 340 DENIED; CBCA 341 DENIED:
January 6, 2009

CBCA 340, 341

NATIONAL HOUSING GROUP, INC.,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Sean A. Roberts of The Roberts Law Firm, Houston, TX; and Harold A. Odom, III of Schiffer Odom Hicks, Houston, TX, counsel for Appellant.

Doris S. Finnerman, Office of General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **DRUMMOND**, and **KULLBERG**.

KULLBERG, Board Judge.

The Department of Housing and Urban Development (HUD) has moved for summary relief[1] in the above-captioned appeals brought by appellant, National Housing Group, Inc.

[1] In addition to respondent's motion for summary relief, the other submissions from the parties relevant to this decision include appellant's response and respondent's reply brief.

(NHG), which were originally filed at the HUD Board of Contract Appeals (HUDBCA) as HUDBCA 05-K-101-C2 and 06-K-102-C3.[2] On January 6, 2007, in accordance with section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3391, the Civilian Board of Contract Appeals (CBCA) was established, and these appeals were transferred to this Board. This Board then docketed HUDBCA 06-K-102-C3 as CBCA 340 and HUDBCA 05-K-101-C2 as CBCA 341. We deny HUD's motion with regard to CBCA 340, and we grant HUD's motion with regard to CBCA 341.

Background[3]

The Solicitation

On August 5, 2002, HUD issued its request for proposals (RFP) R-OPC-22253 for services to be provided under one or more contracts for properties in the inventory of HUD's Multifamily Property Disposition Centers (MFPDs) in Atlanta, Georgia, and Fort Worth, Texas. Appeal File (CBCA 341), Vol. 7, Exhibit 2.1 at B-1.[4] Multifamily was defined "as 5 or more units of residential housing." *Id*. at C-4. The Atlanta and Fort Worth MFPDs held multifamily properties in five geographic areas of the United States, which together comprised all fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. *Id*. at B-1. The contract performance period included a base period of two years and three option years. *Id*. at I-5. The RFP incorporated in full text the following Federal Acquisition Regulation (FAR) clauses: 48 CFR 52.216-18 (2001) (FAR 52.216-18), Ordering (Oct. 1995); FAR 52.216-19, Order Limitations (Oct. 1995); and FAR 52.216-22, Indefinite Quantity (Oct. 1995). *Id*. at I-3-4.

Under the RFP, a combination firm-fixed-price and cost-reimbursement, no-fee, indefinite delivery/indefinite quantity (IDIQ) contract would be awarded for each of the five geographic areas. Appeal File (CBCA 341), Vol. 7, Exhibit 2.1 at B-1-2, L-7. The contracts

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[2] NHG's appeal of the denial of its May 24, 2005, claim was docketed as HUDBCA 05-K-101-C2, and its appeal of the denial of its March 31, 2005, claim was docketed as HUDBCA 06-K-102-C3.

[3] These findings are made only for the purpose of deciding the Government's motion.

[4] Unless otherwise noted, all exhibits are found in either the appeal file for CBCA 340, which consists of one volume, or the appeal file for CBCA 341, which consists of eight volumes.

would be performed by a property manager (PM), which could be an individual, a partnership, a corporation, or other entity. *Id*. at C-4. The RFP stated the following:

> This is an Indefinite-Quantity contract as defined at Subpart 16.504 of the Federal Acquisition Regulation (FAR) and in Section I, Clause FAR 52.216, Indefinite-Quantity, herein. A Firm Fixed Unit Price contract will be awarded. Services provided by the Property Manager (PM) under this contract shall be secured by issuance of orders placed in accordance with item G.7, Ordering Procedures and Section I, Clauses FAR 52.216, Ordering and FAR 52.216-19, Order Limitations and the clause Ordering Procedures[.]

Id. at B-1. The RFP provided that the "Government shall order a minimum quantity of . . . properties [for each geographic area] to be managed during the base year of th[e] contract, and . . . during each option year period, if exercised." *Id*. There was no guarantee that the Government would order the maximum quantity of properties for any of the geographic areas. *Id*. The RFP also stated, "HUD is under no obligation to assign properties exceeding the minimum quantity specified. Properties may be removed from the PM's inventory at any time by issuance of a modification to the task order that assigned the property to the PM." *Id*. at B-2.

Payments under the contracts to be awarded included monthly management fees "for work required, performed and accepted . . . ." Appeal File (CBCA 341), Vol. 7, Exhibit 2.1 at B-2. Such payments would be "prorated as of the date a property is assigned to the PM through the date of closing the sale of the property or the property is otherwise removed." *Id*. The management fees did not include property expenses, which were "costs of operation, repair or maintenance . . . ." *Id*. Such costs were paid out of an approved property budget. *Id*. at B-3.

For each geographic area, the RFP provided a schedule for proposing monthly unit prices for managing the various types of properties for the base period of two years and three option years. Appeal File (CBCA 341), Vol. 7, Exhibits 2.1 at B-4-22, 2.4. The guaranteed minimum numbers of properties that HUD was required to assign for each geographic area were as follows: area 1, ten properties; area 2, twelve properties; area 3, nine properties; area 4, four properties; and area 5, one property. *Id*. The maximum number of properties that HUD could assign for the life of the contracts were the following: areas 1 and 3, 100 properties; areas 2 and 4, seventy-five properties; and area 5, twenty-five properties. *Id*. The different types of properties that could be assigned under a contract included residential housing, retirement service centers, nursing homes, assisted living facilities, hospitals, mobile

home parks, vacant land, off-line (unfit for occupancy) properties, tenant relocations, and commercial space. *Id.*

Attachments 9 and 11 in section J of the RFP included "[a]dditional historical information . . . ." Appeal File (CBCA 341), Exhibit 2.1 at L-15. Attachment 9 provided information about "properties by location and number of units." *Id.*, Attachment 9. Attachment 9 also advised that the inventory was current as of June 30, 2002, and that the "[i]nventory [wa]s not constant and subject to change." *Id.* Attachment 11 was a "current inventory by city and provide[d] additional historical information." *Id.* at L-15. Attachment 11 identified specific properties in each city, and for each property, information was provided as to the number of units and the date the property was acquired by HUD. *Id.*, Attachment 11.

The Contracts

On December 31, 2002, NHG, a small, disadvantaged, women-owned business, was awarded contract C-OPC-22253 (contract 253) for geographic area 1,[5] contract C-OPC-22376 (contract 376) for geographic area 2,[6] contract C-OPC-22377 (contract 377) for geographic area 3,[7] and contract C-OPC-22378 (contract 378) for geographic area 4.[8] Appeal File (CBCA 341), Vol. 8, Exhibits 2.6, 2.7, 2.37, 2.54, 2.71. Each of the four contracts stated that the Government shall order a minimum number of "properties to be managed during the base years of this contract." *Id.* at B-1. The required minimum numbers of properties to be

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[5] Geographic area 1 included Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, New Jersey, New York, Delaware, Maryland, Pennsylvania, Virginia, Washington, D.C., and West Virginia. Appeal File (CBCA 341), Vol. 7, Exhibit 2.1 at B-1.

[6] Geographic area 2 was divided into geographic area 2(a), which included Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee, and geographic area 2(b), which included the Commonwealth of Puerto Rico and the U.S. Virgin Islands. Appeal File (CBCA 341), Vol. 7, Exhibit 2.1 at B-1.

[7] Geographic area 3 included Illinois, Indiana, Minnesota, Michigan, Ohio, Wisconsin, Iowa, Kansas, Missouri, and Nebraska. Appeal File (CBCA 341), Vol. 7, Exhibit 2.1 at B-1.

[8] Geographic area 4 included Arkansas, Louisiana, New Mexico, Oklahoma, Texas, Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming. Appeal File (CBCA 341), Vol. 8, Exhibit 2.71 at B-1.

assigned under each of the contracts was the same as the minimum quantities shown in the RFP for geographic areas 1 through 4. *Id*. All four of the contracts also stated that "[p]roperties may be removed from the PM's inventory at any time . . . ." *Id*.

On February 1, 2003, NHG began to receive assignments of properties that had been managed by the predecessor contractors. Respondent's Reply Brief, Exhibit J. HUD assigned NHG the following numbers of properties: seventeen properties under contract 253, which exceeded the required minimum of ten properties; nine properties under contract 377, which equaled the required minimum; and four properties under contract 378, which also equaled the required minimum. Appeal File (CBCA 341), Vol. 1, Exhibit 1.1 at 2; Vol. 7, Exhibits 2.6-2.77; Complaint (CBCA 341) ¶ 20. In the case of contract 376, however, HUD only assigned six properties, which was less than the required minimum number of twelve properties for geographic area 2. *Id*.

HUD's Atlanta office was initially responsible for administration of the contracts, but Ms. Maggie Pedraza, one of NHG's principals, alleged that "there was a lot of animosity . . . to the point we were told that they were not going to be assigning any properties . . . until we could demonstrate . . . we were qualified to do the work . . . ." Deposition of Maggie Pedraza (Mar. 12, 2008) at 97. According to Ms. Jo Baylor, a former chief procurement officer at HUD, one "of the staff members [during a conference call] even said, 'Well, this firm is not qualified, and, you know, as far as I'm concerned, I'll see them bankrupt before I'll hand over properties.'" Deposition of Jo Baylor (Mar. 11, 2008) at 9. Ms. Baylor subsequently complained about that comment, which she claimed had been made by Ms. Norma Cannon, director of contracting at HUD's Atlanta office. Appellant's Response to Respondent's Motion for Summary Relief at 21-22 (quoting Baylor Deposition). Responsibility for the administration of all four of NHG's contracts was then transferred to HUD's Fort Worth office on February 26, 2003. Respondent's Reply Brief, Exhibit C.

According to Ms. Pedraza, the situation regarding the initial assignment of properties was "rectified . . . and [NHG] received the initial portfolio . . . but there were things that were different in the way that work was assigned . . . versus the previous contractors." Pedraza Deposition at 97. "[W]here for years [HUD] rolled the portfolio into these management contracts and held these properties, now the priority was to sell them[.]" *Id*. at 98. After the administration of the contracts was transferred to HUD's Fort Worth office, Mr. Ernest Worsham was responsible for contract administration. Deposition of Annette Hancock (May 15, 2008) at 67. Ms. Hancock testified in her deposition that Mr. Worsham reported to Ms. Cannon, but she knew of no instance in which Ms. Cannon continued to have any involvement with NHG's contracts. *Id*. at 114. NHG continued to complain about the administration of the contracts after the transfer of contract administration to Fort Worth. *Id*. On May 1, 2003, administration of the contracts was transferred a second time from

HUD's Fort Worth office to HUD's Washington, D.C., office, and Ms. Hancock took over administration of the contracts. *Id*. at 114-15; Respondent's Reply Brief, Exhibit D.

NHG's claim dated March 31, 2005

On March 31, 2005, NHG submitted to HUD a claim in the amount of $8,429,188.40 under contract 376. Appeal File (CBCA 340), Exhibit 1.2 at 4. NHG sought to recover its "nonrecurring costs/start up expenses, lost profits[,] and other business opportunities caused by HUD's decision to order fewer services than the guaranteed minimum and other actions and omissions . . . ." *Id*. at 5. NHG's claim included the fees plus profit that it would have received for managing six additional properties, which were not assigned, during the base period of contract 376. *Id*. at 19. Additionally, NHG's claim sought $1,597,502 for "change of scope." *Id*.

On April 5, 2005, NHG and HUD executed a "Supplemental Agreement and Partial Settlement of Breach of Contract Claims." Appeal File (CBCA 340), Exhibit 1.3. The agreement stated the following:

> 1. On 31 December 2002, the Department of Housing and Urban Development awarded contract numbers C-OPC-22253, C-OPC-22376, C-OPC-22377, and C-OPC-22378 to National Housing Group, Inc. (NHG): four indefinite delivery-indefinite quantity contracts for multifamily property management services. NHG continues to perform task orders issued against these contracts in four regions of the country. NHG is a small disadvantaged business and the Department's sole provider of essential multifamily property management services.
>
> 2. On March 30, 2005, NHG submitted a certified claim for $8,429,188.40 in connection with contract C-OPC-22376, identified within paragraph 1. This certified claim was submitted in accordance with the Disputes Clause, FAR 52-233-1, and followed several months of negotiations between the NHG and the Department concerning the matters underlying NHG's certified claim. While negotiations are ongoing, and the parties have not been able to resolve all of the issues raised by NHG, the parties have made substantial progress negotiating the matter of HUD's failure to order the guaranteed minimums, and NHG's resultant breach of contract claim.

3. The parties have reached an agreement that the Department met the guaranteed minimum ordering quantity of properties under contracts C-OPC-22253, C-OPC-22377, and C-OPC-22378. The parties, further, agree that the Department did not meet the guaranteed minimum ordering quantity with respect to contract C-OPC-22376, where there was a minimum guaranteed order of property management services for twelve properties, but the Department ordered (through assignment) property management services for only six properties.

4. Whereas, NHG received a fixed, monthly property management fee based on the type of property unit and occupancy of the property unit, and NHG incurred costs in performing these property management services,

5. Whereas, it has been determined that the Department assigned six properties under contract C-OPC-22376 containing approximately 713 units, and that on average, NHG performed property management services for these six properties for a full year, and

6. Having agreed to a provisional property unit rate, and the Contracting Officer having conducted some examination of NHG's claimed costs with respect to the provision of those six properties,

7. The parties have reached a partial settlement agreement in the amount of $427,800, which the parties agree is a fair and reasonable settlement of the breach of contract claim with respect to contract C-OPC-22376, pending the final examination of NHG's cost proposal and receipt of the formal audit determination.

8. In consideration of the foregoing, NHG agrees to allow a formal audit of its claim and waives any right to the payment of interest under the Contract Dispute[s] Act on any portion of the claim associated with not meeting the guaranteed minimum for contract C-OPC-22376. NHG further agrees that, based upon the receipt of audit determinations and final analysis of NHG's cost proposal, the Contracting Officer shall revisit this

> settlement amount and shall recover any overpayment that the Department determines is due and owing by any remedies available to the Department, including set-off against any contracts that NHG holds with the Department or any other federal agency. As further consideration for the Department's payment of $427,800, NHG waives any future claims against the Government in connection with the guaranteed minimums in contracts C-OPC-22253, C-OPC-22376, C-OPC-22377, and C-OPC-22378.
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> 9. The parties agree to work in good faith to resolve this dispute amicably through full negotiations and final settlement after the results of the audit findings, and the contract terms and conditions.
>
> 10. Nothing contained herein shall be construed as a waiver of NHG's right to contest the audit findings in connection with the March 30, 2005 claim under Contract C-OPC-22376, or any contracting officer's final decision resulting therefrom, or NHG's right to appeal such decisions to the appropriate Board of Contract Appeals.

Id. There is no dispute that HUD paid NHG $427,800.

Subsequent to executing the partial settlement agreement, the Defense Contract Audit Agency (DCAA) issued on August 19, 2005, its audit report regarding NHG's March 31, 2005, claim under contract 376. Appeal File (CBCA 340), Exhibit 3.1. The purpose of the audit was limited to assisting HUD "in evaluating [NHG's] proposed monthly property management rate . . . ." *Id*. at 2. HUD and NHG exchanged letters subsequent to DCAA's issuing its report in which HUD questioned the method by which NHG computed its claim, and NHG reasserted its rationale for computing its damages. *Id*., Exhibits 1.10-1.12. There is, however, no evidence that negotiations took place between HUD and NHG to arrive at a final resolution of the dispute as called for in paragraph nine of the partial settlement agreement.

On June 6, 2006, the contracting officer's (CO's) decision denied NHG's claim dated March 31, 2005. Appeal File (CBCA 340), Exhibit 1.1. The CO also found that the payment of $427,800 under the partial settlement agreement dated April 5, 2005, was excessive and demanded that NHG repay $164,327. *Id*. at 8. The CO determined that HUD and NHG had failed to reach an agreement as to the amount of compensation owed as a result of HUD's

assigning less than the required minimum number of properties under the contract. *Id*. at 2. While agreeing with NHG's method for developing its claim, the CO disagreed "with all the factors used to calculate the amount due except for the number of properties and the unit price per month per unit set forth in the contract." *Id*. The CO calculated NHG's damages based upon "historical trends for HUD's Property Disposition Inventory . . . using the data derived from the historical information with the largest number of properties managed over the longest period of time." *Id*. at 4. The CO concluded that the proper compensation for HUD's failure to assign the required minimum number of properties under contract 376 should have been $236,473. *Id*. at 8. NHG was, consequently, found to be in debt to HUD in the amount of $164,327, which it was directed to repay in thirty days. *Id*. NHG timely appealed the CO's decision; the appeal is now docketed as CBCA 340.

NHG's claim dated May 24, 2005

On May 24, 2005, NHG submitted to the CO its certified claim in the amount of $6,276,442 for additional costs incurred under all four contracts. Appeal File (CBCA 341), Vol. 1, Exhibit 1.2. The basis for NHG's claim included the following:

> (1) HUD's negligent preparation of its estimated work load; (2) HUD's failure to disclose vital information to NHG regarding the scope of the required services and HUD's plans for these properties under all four Contracts during the solicitation, (3) constructive changes to various task orders issued to NHG, which ca[u]sed NHG's monthly unit costs increase [to] far exceed those that could be expected if it had been allowed to perform the task orders as originally issued, and (4) HUD's breach of its implied duties to cooperate and not to hinder NHG's performance of these [c]ontracts.

Id. at 1. Additionally, NHG alleged that its proposal assumed "HUD would award at least the guaranteed minimum number of properties to NHG and that the total estimated number of properties and units reflected in Attachments 9 and 11 were realistic and a reasonable estimate of the number of units that would be assigned to NHG over the life of the Contracts." *Id*. at 3. In the case of geographic area 1, NHG contends that it had expected that the Boston-area properties listed in attachment 11 would be assigned, but HUD failed to do so. *Id*. at 3. NHG claimed $1,247,376 for lost revenue due to not being assigned Boston-area properties. *Id*. at 13.

Also, NHG contended that HUD constructively changed the orders for the properties it was assigned by shortening the period of time such properties would be managed. Appeal

File (CBCA 341), Vol. 1, Exhibit 1.2 at 8. NHG had expected that properties would be assigned for the full twenty-four month base period, and it was unable to recover its startup costs as a result of holding properties for shorter periods, which resulted in higher per-unit costs. *Id*. at 5. Such actions, according to NHG, were "instances in which HUD's Contracting Officer showed animosity toward NHG . . . and the Government breached its duty to cooperate and not interfere with NHG's performance of these property management services." *Id*. at 10. NHG also alleged that the shortened periods in which properties were assigned resulted from "a change in the way HUD manages its inventory of properties and that a decision ha[d] been made with regard to many of the properties listed in the solicitation, to sell them at a public auction, rather than continue to manage them." *Id*. at 4.

The only item included in NHG's claim for a lost business opportunity was a property management contract in the Commonwealth of Puerto Rico. Appeal File (CBCA 341), Vol. 1, Exhibit 1.2 at 13; Vol. 7, Exhibit 1.3, Tab Q. NHG's claim for not obtaining that contract totaled $2,536,758. *Id*. No other lost business opportunity was specifically identified and set forth in a dollar amount in NHG's claim.

On July 27, 2005, the CO denied NHG's claim dated May 24, 2005. Appeal File (CBCA 341), Exhibit 1.1. The CO noted that NHG's claim for HUD's failure to order the minimum number of properties under contract 376 was the subject of a separate claim, and his decision did not address that matter. *Id*. at 2. NHG's claim was denied in its entirety. *Id*. at 9. The CO's decision found no basis for additional compensation due to HUD's failure to assign a greater number of properties than the minimum quantities shown in the contracts or the length of time that HUD assigned properties to NHG. *Id*. at 3-8. NHG timely appealed the denial of its claim; the appeal is now docketed as CBCA 341.

Discussion

HUD moves for summary relief with regard to CBCA 340 on the grounds that NHG's appeal is barred by an accord and satisfaction under the terms of the April 5, 2005, partial settlement agreement. With regard to CBCA 341, HUD moves for summary relief on all five counts in NHG's complaint, which included latent ambiguity, *contra proferentem*, negligent estimates, constructive change, and breach of duty of good faith and fair dealing. Additionally, HUD moves for summary relief with regard to NHG's claim for a lost business opportunity, which was the award of a contract in the Commonwealth of Puerto Rico.

In ruling upon HUD's motion, we recognize the following:

> Summary relief is this "Board's analogous procedure to summary judgment in court . . . ." *GE Capital Information*

> *Technology Solutions-Federal Systems v. General Services Administration*, GSBCA 15467, 01-2 BCA ¶ 31,445, at 155,306. It is well recognized that granting summary judgment is only appropriate where there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id*. In considering summary judgment, it is not the judge's function "to weigh the evidence and determine the truth of the matter." *Id*. at 249. All justifiable inferences and presumptions are to be resolved in favor of the nonmoving party. *Id*. at 255. The moving party has the initial responsibility of stating the basis for its motion and "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The nonmoving party is then required to "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.'" *Id*. at 324.

Navigant SatoTravel v. General Services Administration, CBCA 449, 08-1 BCA ¶ 33,821, at 167,410. We deny HUD's motion as it relates to CBCA 340, and we grant HUD's motion as it relates to CBCA 341.

CBCA 340

Accord and Satisfaction

HUD argues that the partial settlement agreement dated April 5, 2005, was an accord and satisfaction that bars NHG's claim under contract 376. "A claim is discharged by an accord and satisfaction when 'some performance different from that which was claimed as due is rendered and substituted performance is accepted by the claimant as full satisfaction of his claim." *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 849 (Fed. Cir. 2004) (quoting *O'Connor v. United States*, 308 F.3d 1233, 1240 (Fed. Cir. 2002)). "An accord is an agreement by one party to supply or perform, and by the other party to accept, in settlement or satisfaction of an existing claim, something other than what originally was due." *C & H Commercial Contractors, Inc. v. United States*, 35 Fed. Cl. 246, 252 (1996). "Satisfaction is the execution and/or performance of the agreement, the actual giving or taking of some agreed item or service." *Id*. An accord and satisfaction binds the parties and

precludes further payment for a claim that has been satisfied. *Spirit Leveling Contractors v. United States*, 19 Cl. Ct. 84, 92-93 (1989). Five elements are necessary to establish an accord and satisfaction: "(1) proper subject matter; (2) competent parties; (3) resolution of a bona fide dispute between the parties; (4) meeting of the minds of the parties; and (5) consideration." *American Telephone & Telegraph Co., Federal Systems Advanced Technologies*, DOT BCA 2479, 93-3 BCA ¶ 26,250, at 130,579 (citing *Cyr Construction Co. v. United States*, 27 Fed. Cl. 153 (1992); *Commercial Contractors, Inc. v. United States*, 25 Cl. Ct. 666 (1992)).[9]

The third element of an accord and satisfaction, resolution of a bona fide dispute between the parties, was not met under the terms of the partial settlement agreement in that it provided for future negotiations by the parties to reach a final resolution, and HUD has not shown undisputed evidence that a final resolution of the matters in dispute was reached. The partial settlement agreement contained clear language that called for additional negotiations before the settlement was deemed final. Paragraph two stated that the parties were engaged in ongoing negotiations. Appeal File (CBCA 340), Exhibit 1.3. Paragraph six stated that the parties had "agreed to a provisional property unit rate." *Id*. Paragraph eight made reference to a future audit, the results of which would be the basis for negotiations. *Id*. Paragraph nine required that the parties in good faith "resolve this dispute amicably through full negotiations and final settlement . . . ." *Id*. Although the partial settlement agreement provided the means for final resolution of the dispute, it also provided for the failure of the parties to reach such

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[9] HUD's motion cited *Brock & Blevins Co. v. United States*, 343 F.2d 951 (Ct. Cl. 1965), to show that the elements necessary to prove an accord and satisfaction were " (1) proper subject matter; (2) competent parties; (3) a meeting of the minds of the parties; and (4) consideration." Respondent's Motion for Summary Relief at 18. Although HUD's citation to *Brock & Blevins Co.* makes no mention of a resolution of a bona fide dispute as an element of an accord and satisfaction, the Court in that case stated:

> The essential elements of an effective accord and satisfaction are proper subject matter, competent parties, meeting of the minds of the parties, and consideration. And its most common pattern is a mutual agreement between the parties in *which one pays or performs and the other accepts payment or performance in satisfaction of a claim or demand which is a bona fide dispute*.

343 F.2d at 955 (quoting *Nevada Half Moon Mining Co. v. Combined Metals Reduction Co.*, 176 F.2d 73, 76 (10th Cir. 1950)) (emphasis added).

a resolution in that paragraph eight allowed the contracting officer to later determine that the payment of $427,800 was excessive and demand that NHG pay back any overpayment, and paragraph ten provided that NHG could appeal any such determination.

Our inquiry then turns to whether NHG and HUD engaged in good faith negotiations under the terms of the partial settlement agreement and resolved the dispute. The only issue that appears to have been resolved, as evidenced by the CO's decision dated June 6, 2006, is that HUD agreed to NHG's unit price, but all of the other factors related to the computation of NHG's March 30, 2005, claim remained in dispute. We find no evidence that NHG and HUD ever reached a final resolution under the partial settlement agreement. Thus, a required element of an accord and satisfaction is lacking. To the contrary, HUD's contracting officer issued a final decision that denied NHG's claim and demanded repayment of $164,327, which NHG appealed. Those actions by HUD and NHG, which were allowed under the terms of the partial settlement agreement, amount to a continuation of the dispute as opposed to a final resolution.

HUD argues that payment of $427,800 to NHG, subject to HUD's demand for partial repayment, was consideration for the release of NHG's claim. A "settlement agreement is a contract and disputes arising from settlement agreements are governed by contract principles." *Government Marketing Group v. Department of Justice*, CBCA 71, 08-1 BCA ¶ 33,834, at 167,461. "To be valid and enforceable, a contract must have both consideration to ensure mutuality of obligation . . . and sufficient definiteness so as to 'provide a basis for determining the existence of a breach and for giving an appropriate remedy.'" *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058, 1061 (Fed. Cir. 2002) (quoting *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1332 (Fed. Cir. 2000)). In order "[t]o constitute consideration, a performance or a return promise must be bargained for." *Id*. (quoting *Restatement (Second) of Contracts* § 71(1) (1979)). The partial settlement in paragraph seven referred to $427,800 as a "fair and reasonable settlement of the breach of contract claim." Appeal File (CBCA 340), Exhibit 1.3. The issue before this Board is not whether payment of $427,800 was an accord and satisfaction. The issue is whether a reduced settlement was consideration for an accord and satisfaction. HUD chose to exercise its rights under paragraph eight of the partial settlement agreement by reducing the settlement by $164,327 and demanding repayment of that amount. As a result of the CO making such a demand, NHG exercised its right of appeal under the agreement. We find that the settlement agreement at paragraph eight provided for HUD's right to reduce the $427,800 paid to NHG, but in bargaining for the CO's right to demand back some portion of that amount, NHG also bargained in paragraph ten for the right to appeal such a determination. HUD's argument that there was an accord and satisfaction that effectively denies NHG its right to appeal the reduction of the amount of the settlement amount misreads the terms of the agreement. The partial settlement agreement provided that the parties could bargain for a settlement of the

dispute, but the parties also bargained for the continuation of the dispute in the event HUD determined that it had overpaid NHG. We do not find, therefore, that a reduced settlement amount was consideration for NHG's release of its claim.

Additionally, HUD argues that paragraph eight of the partial settlement agreement provided for NHG's release of any future claims in connection with any guaranteed minimums under all four contracts in consideration of the payment of $427,800. Since that provision referred to future claims, that language could not be construed as a release of NHG's March 31, 2005, claim, which was dated before the partial settlement agreement. Such language can only be read as resulting in a waiver where the parties reached a final settlement, and, as discussed above, we do not find undisputed evidence of such a final resolution.

Finally, HUD contends that it would be contrary to law to interpret the payment of $427,800 under the partial settlement agreement as a "gratuitous gesture" without a final settlement since expenditure of money for such purposes is prohibited. Respondent's Reply Brief at 22. However, the Government's payment of money to a contractor absent an agreement between the parties that extinguished the claim is not an accord and satisfaction. *See Howell v. United States*, 51 Fed. Cl. 516, 525-26 (2002). As discussed above, HUD has not shown the undisputed facts necessary to prove the elements of an accord and satisfaction, and HUD's payment to NHG does not overcome that deficiency in its case.

Lost Profits

In the alternative, HUD argues that even if there is no accord and satisfaction, the Board should still grant summary relief regarding CBCA 340 because NHG's damages for breach are lost profits, but NHG would not have made a profit even if HUD had not breached the contract. The issue of whether a party can sustain its burden of proof is "a genuine issue of material fact precluding the award of summary judgment." *GE Capital Information Technology Solutions-Federal Systems*, 01-2 BCA at 155,306 (quoting *Jo-Ja Construction, Ltd. v. General Services Administration*, GSBCA 14786, 00-2 BCA ¶ 30,964, at 152,793). "Both the existence of lost profits and their quantum are factual matters that should not be decided on summary judgment if material facts are in dispute." *California Federal Bank v. United States*, 245 F.3d 1342, 1350 (Fed. Cir. 2001). HUD's motion asserts that the assignment of six additional properties would have doubled NHG's revenue to approximately $311,000, but that increase would have still been less than its incurred expenses of $946,572. Respondent's Motion for Summary Relief at 19. NHG, according to HUD, would not have made any profit even if there had been no breach of contract 376. *Id*. Aside from merely doubling NHG's revenue, HUD does not explain further its methodology for showing that NHG would have made no profit if there had been no breach, and the Board finds HUD's

argument to be little more than conjecture. Additionally, HUD asserts that because NHG made no profits on its other three contracts with HUD, NHG would not have made a profit on contract 376. For purposes of ruling on a motion for summary relief, the Board does not draw inferences in favor of the moving party nor does it weigh evidence. *See Anderson*, 477 U.S. at 249.

Finally, HUD argues that the deposition testimony of Ms. Wynee Joyner, one of NHG's principals, supports its argument that NHG would not have made a profit on contract 376 even if the required minimum of twelve properties had been assigned. In one portion of her deposition testimony, Ms. Joyner appears to agree that NHG would not have made a profit. Respondent's Motion for Summary Relief at 20. Ms. Joyner's testimony, however, also included the following exchange:

> Q. Okay. Is it not true that NHG would have also incurred costs to manage those properties?
>
> A Yes, they would have incurred some costs.
>
> Q Leaving you with a net profit, right?
>
> A Yes.

Deposition of Wynee Joyner (Aug. 28, 2007) at 127. The Board does not find the excerpts from Ms. Joyner's deposition testimony to be sufficient to draw any conclusions on the issue of damages in that her testimony is not clear as to her belief whether NHG would have made a profit under those circumstances. The task of determining the weight of Ms. Joyner's testimony as well as sifting through the rest of the record in order to determine whether NHG would have operated at a loss even if there had been no breach of contract, is a matter of weighing evidence that is not appropriate in deciding a motion for summary relief. "It is well established that a tribunal should deny summary judgment until the facts have sufficiently developed to enable it to reasonably apply the law." *GE Capital Information Technology Solutions-Federal Systems*, 01-2 BCA at 155,306 (quoting *Jo-Ja Construction, Ltd.*, 00-2 BCA at 152,793).

CBCA 341

Latent ambiguity and contra proferentem

HUD argues that the Board should dismiss for lack of jurisdiction counts one and two of NHG's complaint in that NHG did not make any allegation related to ambiguity in its

claim. "In order to assert a claim under the Contract Disputes Act, the contractor must submit to the contracting officer a clear and unequivocal written statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Weaver Construction Co.*, DOT BCA 2034, 91-2 BCA ¶ 23,800, at 119,181 (1990). Additional theories in a complaint that are advanced in support of a claim are not new claims where such theories arise from the same set of operative facts. *Id*. A new theory raised in a complaint that does not allege a new claim, therefore, will not be dismissed. *Lloyd Kidder*, AGBCA 84-352-3, et al., 85-3 BCA ¶ 18,247 (1984). The allegations of latent ambiguity in NHG's complaint are based on the same operative facts raised in its claim dated May 24, 2005. In both its claim and complaint, NHG alleged that HUD assigned fewer properties for shorter periods of time than expected. NHG's complaint does not assert any new claim for additional amounts, but, instead, reiterates the same amount asserted in its claim. Accordingly, the Board denies HUD's motion to dismiss for lack of jurisdiction counts one and two in NHG's complaint.

Even if the Board finds that it has jurisdiction to determine the issue of latent ambiguity, HUD contends that there is no issue of fact as to the meaning of required minimum number of properties under NHG's contracts, and summary relief should be granted with regard to counts one and two of NHG's complaint. "Contract interpretation is a question of law . . . ." *California Federal Bank*, 245 F.3d at 1346. It is well settled that determining whether a contract is ambiguous begins with the plain language of the contract. *See Gardiner, Kamya & Associates, P.C. v. Jackson*, 467 F.3d 1348, 1353 (Fed. Cir. 2006). An "interpretation that gives a reasonable meaning to all parts of the contract will be preferred to one that leaves portions of the contract meaningless; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible." *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1555 (Fed. Cir. 1983) (citing *Hol-Gar Manufacturing Corp. v United States*, 351 F.2d 972, 979 (Ct. Cl. 1965)). It has been long recognized that where a contract provision is clear, "[t]he rules of contract construction should not be permitted to create an ambiguity where none exists or change or twist the plain meaning of a simple agreement." *WIBCO, Inc.*, GSBCA 4247, 75-2 BCA ¶ 11,564, at 55,208.

We find no ambiguity in NHG's contracts as to the required minimum quantities in that each contract set forth the number of properties that HUD was required to assign. Count one of NHG's complaint alleged a latent ambiguity as to the minimum quantities of properties stated in the contracts, and count two alleges that this Board should apply the doctrine of *contra proferentem* to find that the contracts were not IDIQ contracts, but rather, requirements contracts. NHG alleges in its complaint that "the contracts did not expressly contain a guaranteed minimum number of units that would be assigned . . . ." Complaint (CBCA 341) ¶ 21. A multifamily property was defined in the RFP as consisting of five or

more units, and the schedule in the RFP required unit prices for the different types of properties that could be assigned. The FAR provides that an IDIQ contract can define a minimum quantity "as number of units or as dollar values." 48 CFR 16.504(a) (2001) (FAR 16.504(a)). NHG's contracts were IDIQ contracts in that the RFP and all four contracts contained the required clauses (FAR 52.215-18, -19, and -22) for an IDIQ contract. *Id*. 16.506. Additional language in the RFP also plainly stated HUD's intent to award IDIQ contracts. Each contract defined minimum quantities as numbers of multifamily properties. The fact that each assigned property could vary in size from five to more than five units is not an ambiguity in that the purpose of an IDIQ contract is to provide the Government with the "purchasing flexibility for requirements that it cannot accurately anticipate." *Travel Centre v. Barram*, 236 F.3d 1316, 1318 (Fed. Cir. 2001).

Additionally, since there is no latent ambiguity as to minimum quantities under NHG's contracts, it is not necessary to address whether *contra proferentem* is applicable as argued in count two of NHG's complaint. It is well established that *contra proferentem* is inapplicable to the interpretation of a contract where the contract's terms are clear and unambiguous. *See Gardiner, Kamya & Associates.* NHG asserts in count two that it reasonably interpreted that its contracts were requirements contracts. A requirements contract obligates the Government to purchase all of its requirements from that contractor, while an IDIQ contract only obligates the Government to purchase a required minimum. *Travel Centre*, 236 F.3d at 1319-20. All four of NHG's contracts contained language that plainly stated that the contracts were IDIQ contracts. Nothing in the contracts relevant to these appeals could be reasonably construed as requiring HUD to order anything more than the required minimums stated in the contracts. Accordingly, we grant HUD's motion for summary relief with respect to counts one and two of NHG's complaint under CBCA 341.

Negligent estimates

HUD argues that the Board should grant summary relief with regard to count three of NHG's complaint, which alleges that the RFP contained negligent estimates. Under an IDIQ contract, the Government is not obligated to order more than the required minimum quantities, and once those minimum quantities are ordered, the Government's obligations are satisfied. *See Travel Centre*; *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514. In *Travel Centre*, the Court of Appeals for the Federal Circuit (CAFC) reversed the General Services Administration Board of Contract Appeals (GSBCA) decision[10] that had found a breach of duty to deal fairly and in good faith

[10] *Travel Centre v. General Services Administration*, GSBCA 14057, 98-1 BCA ¶ 29,536 (1997), *motion for reconsideration denied*, 98-1 BCA ¶ 29,541.

where the General Services Administration (GSA) was aware during the solicitation process that the potential quantity of business from certain Department of Defense units represented in a solicitation was incorrect as a result of recent changes in the manner in which those units planned to obtain travel services. That information was not made available to potential bidders. In reversing the GSBCA, the CAFC stated that "[r]egardless of the accuracy of the estimates delineated in the solicitation, based on the language of the solicitation for the IDIQ contract, Travel Centre could not have had a reasonable expectation that any of the government's needs beyond the minimum contract price would necessarily be satisfied under the contract." *Travel Centre*, 236 F.3d at 1319. The CAFC noted that GSA's "less than ideal contracting tactics fail[ed] to constitute a breach." *Id*. Although NHG has argued that the historic data in attachments 9 and 11 in the RFP created the expectation that it would be assigned a greater number of properties or units contained within those properties, HUD was under no obligation to assign more than the required minimum numbers of properties stated in NHG's four contracts. We grant, therefore, summary relief with regard to count three in NHG's complaint.

Constructive Change

HUD moves for summary relief with regard to count four of NHG's complaint that alleges HUD constructively changed the terms of its contracts. "A constructive change, by definition, occurs when '. . . a contractor performs work beyond the contract requirements, without a formal order under the changes clause, either by an informal order of the Government or by fault of the Government.'" *Johnson Management Group CFC, Inc.*, HUD BCA 96-C-132-C15, et al., 00-2 BCA ¶ 31,116, at 153,683 (quoting *CTA Inc. v. United States*, 44 Fed. Cl. 684, 696 (1999)). NHG argues that HUD constructively changed the terms of the contract in that properties were not assigned for the entire two-year base period, as expected, and it was unable to recover certain startup costs and incurred higher per-unit costs. NHG's contracts, however, did not specify that assignments would be for the entire base period of the contracts, but rather, the contracts stated that properties could be removed at any time. When NHG proposed its unit prices for its contracts, the RFP was also clear as to HUD's right to remove properties at any time from a contractor's inventory, and NHG bore the risk that property assignments could be of a shorter duration than the two-year base period. *See Ocean Technology, Ltd.*, IBCA 2651, 91-2 BCA ¶ 23,797. Relief under a theory of constructive change is inapplicable for the purpose of shifting a contractor's risk to the Government where there was no direction to NHG to perform its contracts in a manner different from that specified. *Id*. Since HUD was allowed under the contracts to remove properties from NHG's inventory at any time, there was, consequently, no constructive change because properties were assigned for periods shorter than NHG expected. We grant summary judgment as to count four of NHG's complaint.

Duty of good faith and fair dealing

HUD moves for summary relief with regard to count five of NHG's complaint, which alleges that HUD breached its implied duty of good faith and cooperation by assigning properties and then removing those properties from its inventory before NHG could recover its costs. A finding of bad faith requires "'[w]ell-nigh irrefragable' proof . . . ." *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002). This Board recently recognized the following in ruling on a motion for summary relief as to whether a CO acted in bad faith in terminating a contract for convenience:

> Government officials are presumed to act in good faith. To overcome that presumption, a contractor must prove, by clear and convincing evidence, that the officials had specific intent to injure the company. *Galen Medical Associates, Inc. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004); *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002). . . . The suggestion that the agency's actions smell bad is insufficient, however, to create a genuine issue as to bad faith. A speculative hope of finding evidence that might tend to support a claim does not raise a genuine issue of material fact. *T&M Distributors, Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999).

Oregon Woods, Inc. v. Department of the Interior, CBCA 1072, slip op. at 9 (Nov. 24, 2008).

NHG argues that a material issue of bad faith has been demonstrated by Ms. Cannon's alleged threat to see NHG "bankrupt." Ms. Cannon, however, ceased to be involved in the administration of NHG's contracts on February 26, 2003, which was less than one month after the initial assignment of properties to NHG and two months after the award of NHG's contracts. The transfer of contract administration from HUD's Atlanta office to its Fort Worth office was, according to Ms. Baylor, due to Ms. Cannon's alleged remarks. There is no evidence that Ms. Cannon had any further involvement in the assignment of properties or the removal of properties from NHG's inventory after contract administration was transferred out of her Atlanta office. Although the alleged statements of Ms. Cannon, if true, would show evidence of a personal animus toward NHG, such an attitude does not amount to bad faith where the record contains no evidence that Ms. Cannon or any other HUD official carried out any action with a specific intent to injure appellant. *See Apex International Management Services, Inc., by Trustee in Bankruptcy*, ASBCA 38087, et al., 94-2 BCA ¶ 26,842 (breach of contract established by findings of acts of oppressive conduct).

NHG has also alleged that HUD changed the manner in which it managed properties such that properties were held for a shorter period of time, and HUD, consequently, violated its duty not to interfere with contract performance. It is well settled that:

> The covenant of good faith and fair dealing is an implied duty that each party to a contract owes to its contracting partner. The covenant imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.

Centex Corp. v. United States, 395 F.3d 1283, 1304 (Fed. Cir. 2005). This Board recognizes that "[a]n implied covenant of good faith and fair dealing imposes an obligation on the part of each party to a contract to act reasonably." *Butte Timberlands, LCC v. Department of Agriculture*, CBCA 646, 08-1 BCA ¶ 33,730, at 166,994 (2007).

We find, however, no evidence in the record to support NHG's allegation that HUD changed the length of time that it held properties and, consequently, breached its duty of good faith and fair dealing. In opposing a motion for summary judgment "more is required than mere assertions of counsel." *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984). The nonmoving party "must set out . . . what specific evidence could be offered at trial." *Id*. at 627. It is not sufficient for purposes of opposing a motion for summary relief that the nonmoving party rests upon the pleadings alone, but, instead, that party must show specific facts to establish a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324. NHG has only asserted that HUD changed the way in which it managed properties by establishing a priority to sell rather than hold the properties, and it has failed to show any evidence to support such an assertion to establish a material issue of fact. We grant HUD's motion for summary relief with regard to count five of NHG's complaint.

Lost business opportunity

Finally, HUD moves for summary relief with regard to NHG's claim in the amount of $2,536,758 for a lost business opportunity, which was the award of a property management contract in the Commonwealth of Puerto Rico. This Board recognizes the following with regard to such claimed losses:

> Longstanding case law of the Federal Circuit and its predecessor court, the Court of Claims, has held that for a contractor to recover lost profits those losses must flow from the contract the

> contractor has with the Government, and not from prospective, independent, or collateral undertakings.

Charles Engineering Co. v. Department of Veterans Affairs, CBCA 582, 07-2 BCA ¶ 33,698, at 166,824. In the case of an alleged breach of contract, "[d]amages for profits lost on transactions not directly related to the contract that was breached have routinely been deemed . . . too uncertain, remote, and consequential to be considered as a part of the damages occasioned by the breach of a contract." *Id*. NHG's claim alleges only in general terms that it lost business opportunities as a result of HUD's actions, and no connection between a contract in the Commonwealth of Puerto Rico and the contracts relevant to NHG's appeals has been established. NHG's response to HUD's motion for summary relief did not provide any discussion of this issue. Accordingly, we grant HUD's motion for summary relief as to NHG's claim for its lost business opportunity, and deny that portion of NHG's claim.

Conclusion

For the reasons discussed above, we deny HUD's motion for summary relief as it pertains to CBCA 340, and we grant HUD's motion as it pertains to CBCA 341. The only triable issues that remain before the Board are entitlement and quantum under CBCA 340 due to HUD's assignment of only six of the required minimum number of twelve properties under contract 376. We find that there are no triable issues pertaining to entitlement with regard to contracts 253, 377, and 378. Accordingly, we deny CBCA 341.

Decision

The Government's **MOTION FOR SUMMARY RELIEF** in CBCA 340 is **DENIED**.

The Government's motion for summary relief in CBCA 341 is granted; CBCA 341 is **DENIED**.

_____
H. CHUCK KULLBERG
Board Judge

We concur:

_____
JEROME M. DRUMMOND
Board Judge

_____
CATHERINE B. HYATT
Board Judge