UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF GRANTED IN PART: July 12, 2011

CBCA 986

DeLEON INDUSTRIES, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Christopher C. Sharp of Sharp Law Firm, P.A., Plantation, FL, counsel for Appellant.

Karen Mulcahy, Office of Regional Counsel, Department of Veterans Affairs, Bay Pines, FL, counsel for Respondent.

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

DANIELS, Board Judge.

The Department of Veterans Affairs (VA), respondent, moves the Board for summary relief in an appeal filed by DeLeon Industries, LLC (DeLeon), appellant, involving contracts for the replacement of windows at a VA facility in Miami, Florida. Through the appeal, the contractor seeks payment for windows it supplied, costs of storing the windows, damages for delays allegedly caused by the agency, and lost profits on these contracts and additional work. The motion asks the Board to deny, as a matter of law, the claim for lost profits on additional work. It also asks us to find for the agency on two matters which may be relevant to the case – both involving a requirement for the contractor to provide a notice of acceptance (NOA) from Miami-Dade County. We grant the motion as to the claim for lost profits on

additional work. We also address the other two matters raised by the agency, in the interest of narrowing issues as the case develops.

Background

On or about August 10, 2005, the VA awarded two contracts to DeLeon to replace windows at the VA's medical center in Miami, Florida. The Phase 1 contract was in the amount of $505,019. The Phase 2 contract was in the amount of $900,740. Respondent's Statement of Uncontested Facts (RSUF) ¶¶ 1, 2; Appeal File, Exhibits 1 at 1, 2 at 1.

The contracts were signed on behalf of the VA by contracting officer James S. Hicks, Jr. RSUF ¶ 3; Appeal File, Exhibits 1 at 2, 2 at 2. Another VA contracting officer, Stacey L. Malott, notified DeLeon of the awards. Appeal File, Exhibits 3, 4. Each contract states that the contracting officer responsible for handling proposals and administering the contract was Ms. Malott. *Id.*, Exhibits 1 at 4, 8; 2 at 4, 8. According to both Mr. Hicks and Ms. Malott, the two worked on the contracts as a team and each had authority to represent the agency in its dealings with the contractor. Deposition of James Hicks (June 24, 2008) at 8; Deposition of Stacey Malott (June 24, 2008) at 18-19.[1]

Each contract was described as a "Fixed Price Construction contract" under which DeLeon would "[f]urnish all labor, material and equipment to: Replace Windows – Phase [1 or 2] as per specifications and plans." Appeal File, Exhibits 1 at 1, 20; 2 at 1, 20.

The Phase 1 contract contained specification section 08520, "Aluminum Windows." This section states, in paragraph 1.07.F, "Miami-Dade Product Control Notice of Acceptance (NOA): submit NOA indicating compliance with wind resistance and impact requirements in accordance with the Florida Building Code, including large and small missile impact tests." Appeal File, Exhibit 1 at 08510-4.

The parties appear to agree that a requirement for submission of a NOA was included in the Phase 2 contract as well. RSUF ¶ 6; Appellant's Statement of Genuine Issues (ASGI) ¶ 6. The exhibit submitted by the VA which purports to be the Phase 2 contract does not

[1] The VA's assertion that Ms. Malott "assisted Hicks with CO [contracting officer] duties when needed," RSUF ¶ 4, is contradicted by the evidence the agency cites in support of its assertion.

include specification section 08520, however, and thus does not mention a NOA. Appeal File, Exhibit 2.[2]

DeLeon submitted to the VA on June 8, 2005, a bid to perform all phases of window replacement at the Miami VA facility. The bid states, "Pricing and all alternates have been included . . . [P]rovision and installation of new windows including a one-time NOA . . . have . . . been included." Appellant's Appeal File, Exhibit 1 at 1. The window replacement project was later divided into five phases – according to DeLeon, "because the VA did not have the funds to install all of the windows under one contract." Appellant's Response to Respondent's Motion (Appellant's Response) at 26. On June 20, 2005, DeLeon submitted a bid for Phase 1 alone. The quoted portion of the June 8 bid, to perform all phases, does not appear in the June 20 bid, to perform Phase 1 alone. Appellant's Appeal File, Exhibit 1 at 6 (unnumbered). Thus, the VA's statement, "Contractor's bid expressly referenced providing the NOA for the windows," RSUF ¶ 7, does not apply to the bid for the Phase 1 contract.

In any event, Ms. Malott testified at deposition that following a meeting with Sam Bailey, the VA's contracting officer's technical representative (COTR) for the Phase 1 contract, she orally told Edward Lynch, Sr., DeLeon's president, in November 2005 that the VA would waive the requirement for a NOA if the contractor would provide in its place a rational analysis or some other means of demonstrating that the windows would meet the contract's technical requirements. Ms. Malott explained that she and Mr. Bailey were concerned that securing a NOA could take as much as a year, so requiring a NOA would excessively delay window installation. Malott Deposition at 35-39. The supervisor of Ms. Malott and Mr. Hicks, contracting officer Heidi Winer, has stated that Ms. Malott had the authority to bind the Government as to the waiver of the NOA requirement. Deposition of Heidi Winer (June 26, 2008) at 32-33.

On November 29, 2005, Ms. Malott issued, and Mr. Lynch accepted, a notice to proceed on the Phase 1 contract. The notice required that the contract be completed within two hundred days of November 29 (in other words, by June 27, 2006). RSUF ¶ 8; Appeal File, Exhibit 9.

On January 5, 2006, DeLeon submitted to the VA its shop drawings for the Phase 1 windows. Appellant's Appeal File, Exhibit 2 at 2; Malott Deposition at 44. The agency's architect/engineer for the windows project, Rodriguez Peterson & Porras (RPP), responded

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[2] The exhibit includes a "Table of Contents" (page 00003-1) which mentions specification section 08520, but it does not include such a section.

on January 27. Appeal File, Exhibit 12. According to Ms. Malott and Mr. Hicks, RPP was supposed to respond to submittals within two weeks of receiving them. Malott Deposition at 43; Hicks Deposition at 16. This was one of several instances of delay by RPP in responding to contractor submittals, according to the contracting officers. RPP was sometimes late by as much as a few weeks. Malott Deposition at 47-48, 50-51; Appellant's Appeal File, Exhibit 3 at 2, 28.

DeLeon was concerned that "[t]he shop drawings need to be turned around [as] quickly as possible in order to get the windows assembled and here when we have them scheduled to be installed. . . . If we do not receive the windows prior to our scheduled start date [April 3, 2006] there will be a need for a time extension based on the new delivery schedule." Appellant's Appeal File, Exhibit 2 at 1. Delays in receiving the architect's comments, Mr. Lynch repeatedly warned the VA, "may cause major delays in the manufacturing process" and could increase the costs of the windows. *Id.*, Exhibit 3 at 6, 10-11, 17-18, 20. DeLeon had advised the VA at the outset of the contract that once the order for the windows was placed, the manufacturer could not supply the windows for ten to twelve weeks. Hicks Deposition at 17.

On February 17, 2006, following a meeting with DeLeon and its supplier, RPP issued new comments on the shop drawings. The architect/engineer stated, "Window products proposed appear to be in compliance with project requirements. However, documentation supporting that the proposed windows satisfy the performances specified were not submitted." The comments cited several forms of documentation, including "Miami-Dade County NOA." RPP stated further, "Subject to contractor and manufacturer acceptance of responsibility for windows performance and supporting documentation as specified, the windows could go into fabrication in an effort to expedite the project. Final approval and payments would be subject to satisfaction of specified submittal requirements." RSUF ¶¶ 11, 12; Appeal File, Exhibit 13.

On April 6, DeLeon proposed supplying a different window from the one specified, so as to be able to install windows sooner. DeLeon asserted that delays in receiving shop drawings back from RPP had caused "a serious delay in the manufacture of the [specified] windows." The contractor said that it was submitting a NOA for the substitute windows. RSUF ¶ 13; Appellant's Appeal File, Exhibit 3 at 10-13. The following day, RPP advised the VA that "it appears that the proposed product may not meet project requirements and is not the best product for the VAMC [VA medical center] conditions." Appellant's Appeal File, Exhibit 3 at 14. The VA decided to insist on the windows specified in the contract. RSUF ¶ 14.

On May 18, RPP told the VA that based on the architect/engineer's review of DeLeon's April 25 shop drawings, "Window products proposed appear to be in compliance with project requirements." RPP continued to note, however, that DeLeon had still not submitted certain required documentation and that its approval was based on the expectation that the documentation would be forthcoming. The NOA was not included in the list of required documentation. Appeal File, Exhibit 16. These comments were repeated by RPP on July 7 (said to be a review of shop drawings dated December 28, 2005). *Id.*, Exhibit 18.

During the spring of 2006, VA contracting and engineering personnel were concerned that the project was taking longer than anticipated to complete. Ms. Malott believed that RPP's delays in reviewing submittals were "a big part of the delay." Malott Deposition at 53-54, 60. Mr. Lynch told her that because of the delay, DeLeon had lost its slot to get the windows manufactured, which meant that the project would be further prolonged. *Id.* at 54.

On June 20, 2006, Ms. Malott issued, and Mr. Lynch accepted, a notice to proceed on the Phase 2 contract. The notice required the contract to be completed within three hundred sixty-five days of June 20 (in other words, by June 20, 2007). Appeal File, Exhibit 17.

On August 17, DeLeon made a submittal for the Phase 2 contract. On September 7, RPP reported to the VA, "This submittal does not satisfy the submittal requirements for this project. Our recommendations are to 'revise and resubmit.'" With reference to specification section 08520, the architect/engineer stated, "Documentation supporting that the proposed windows satisfy the performances specified were not submitted." A NOA is not mentioned among the necessary documentation. RSUF ¶ 19; Appeal File, Exhibit 19.

On September 13, RPP architect Orestes R. Rodriguez signed what he and VA contracting officer Hicks called an "authorization letter" regarding DeLeon's shop drawings for the Phase 2 windows. Appellant's Appeal File, Exhibit 7 at 3, 7. Nine days later, DeLeon's Mr. Lynch told Mr. Hicks, "We have indicated to the manufacturer to proceed with the fabrication of the windows for phase 2 based on the authorization letter . . . which approved the shop drawings as per the manufacturer's requirements." *Id.* at 6. Mr. Hicks understood that fabrication of the windows would then begin and never told DeLeon not to proceed because fabrication had not been approved. Hicks Deposition at 24-25, 34.

Meanwhile, work on Phase 1 continued to be incomplete. On October 19, 2006, DeLeon requested a time extension of at least 224 days in which to complete the Phase 1 contract. Appellant's Appeal File, Exhibit 8 at 9. On November 13, Mr. Hicks prepared contract modifications to extend the term of the contract by 286 days – until January 11,

2007.[3] The proposed modifications stated that they were being made "due to submittals not being approved by the A/E [the architect/engineer, RPP] as scheduled." Hicks Deposition at 14-16; Appellant's Appeal File, Exhibit 16. DeLeon did not sign these proposed modifications – according to counsel, because by doing so, it would have waived its right to seek delay damages. Hicks Deposition at 14-15; ASGI ¶ 15.

On or about November 9, 2006, the VA approved payment to DeLeon for the Phase 1 windows. RSUF ¶ 21. Contracting officer Hicks says that at this time, COTR Bailey had told him that the windows met all of the VA's specifications. Hicks Deposition at 26. DeLeon notes that payment was made, notwithstanding the fact that the contractor had not provided a NOA for the windows. ASGI ¶ 21.

On December 27, 2006, VA contracting officer supervisor Winer wrote to Mr. Lynch, asking him to supply a NOA for the Phase 1 windows. Appellant's Appeal File, Exhibit 9 at 1. The VA says that this message was written by Ms. Winer "after learning that Stacey Malott may have attempted to waive the NOA requirement." RSUF ¶ 23. DeLeon says that the VA's characterization of Ms. Malott's action is unsupported "since DeLeon has pointed to other record evidence – including Ms. [Malott's] own deposition testimony, supported by that of James Hicks – that the NOA requirement was actually waived in November 2005." ASGI ¶ 23.

On January 2, 2007, Ms. Winer wrote to Mr. Lynch, regarding the Phase 1 contract, suspending work "until the Miami VA Healthcare [System] receives and approves the Notice of Acceptance (NOA) and related [structural] calculations as required by subject contract." Ms. Winer said that when the suspension was lifted, DeLeon would have ninety days to complete the project. Appeal File, Exhibit 23.

On January 8, the VA issued two change orders to the Phase 1 contract. One reduced the contract price by $42,359, due to deletion of work to remove and install doors. The other

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[3] We note that Mr. Hicks' first proposed amendment says that it would "extend the term of the contract for fifty-seven (57) days . . . . The new completion date shall now read May 26, 2006." Appellant's Appeal File, Exhibit 16 at 1. The date on this proposed amendment is inconsistent with the statement in the notice to proceed that the contract is to be completed within two hundred days of November 29, 2005, which is June 17, 2006. *See* Appeal File, Exhibit 3. The dates on Mr. Hicks' other proposed amendments follow from March 31, 2006 – the date fifty-seven days earlier than May 26, 2006 – rather than June 17, 2006. Two hundred eight-six days from June 17, 2006, is actually March 30, 2007 – not, as Mr. Hicks stated in the last of his proposed amendments, January 11, 2007.

increased the contract price by $171,700.50 due to increased prices for materials. RSUF ¶ 17; Appeal File, Exhibit 24.

On January 18, Ms. Winer asked Ms. Malott whether she or Phase 1 COTR Sam Bailey had waived the Phase 1 contract requirement for a NOA. Ms. Malott responded the next day, stating that both she and Mr. Bailey had done so and that RPP architect Rodriguez had specified what the contractor might provide in place of a NOA. Appellant's Appeal File, Exhibit 9 at 7, 10. She reiterated this statement in another message to Ms. Winer on January 24. *Id.* at 14.

Ms. Winer wrote to Mr. Lynch on February 1, making the following points:

> A. . . . [T]he NOA is a requirement of the contract [not specified whether Phase 1, Phase 2, or both], and the Suspension of Work on Phase I will not be lifted until an NOA is submitted and approved by the VA.
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> B. A Suspension of Work will be issued on Phase II until the NOA (and related calculations) are submitted and approved by the VA.
>
> C. We are willing to negotiate an equitable adjustment based on Government-[caused] delays, [even though] this is a Firm-Fixed Price contract.

Appellant's Appeal File, Exhibit 9 at 17.

In February 2007, DeLeon began to demand payment for the Phase 2 windows. Appellant's Appeal File, Exhibits 3 at 70-73, 13 at 9.

At some time prior to February 12, 2007, DeLeon made a submittal for the Phase 1 windows which included a NOA. On February 12, RPP required that the contractor revise and resubmit the submittal, saying that "the NOA submitted indicates window fastening / anchoring to substrate instead of specified subframe. This condition requires submittal of fastening details and structural calculations supporting that the subframe is capable of resisting loads applied by window and by mullion." Appeal File, Exhibit 35 at 1.

On March 12, 2007, the VA issued a stop work order on the Phase 2 contract. The order was to be effective for 120 days, or until July 9, 2007. RSUF ¶ 6; Appellant's Appeal File, Exhibit 20.

On July 19, 2007, VA contracting officer Hicks asked DeLeon to submit numerous documents which he said were necessary for the agency to pay for the Phase 1 windows.

Appeal File, Exhibit 25. Although the VA asserts that "[r]equired items included the Miami-Dade NOA," RSUF ¶ 30, the exhibit the agency cites in support of this statement requests not the NOA, but rather, the information noted by RPP on February 12, 2007.

On July 27, 2007, DeLeon sent to contracting officer Hicks a certified claim on the Phase 1 and Phase 2 contracts. RSUF ¶ 31; Appeal File, Exhibit 27. The claim asserts that the VA breached both contracts in three ways – first, by requiring a NOA to be issued by Miami-Dade County, after previously taking that requirement out of the contract; second, by claiming that the NOA requirement was never waived while preventing DeLeon from installing the windows and refusing to authorize a payment for the NOA; and third, by not paying for windows that the agency had authorized DeLeon to order. Appeal File, Exhibit 27 at 2.

In its claim, DeLeon said that it was entitled to "the price [it is] charging for the windows (plus interest), damages for overhead, lost profits on other projects that DeLeon could have been awarded but could not get due to [its] bonding being tied up on this Agency delayed projects (two of which were at the Miami VA and one at the Tampa VA), supervision costs, general conditions costs, delay costs and lost profits on these projects." Appeal File, Exhibit 27 at 3.

More specifically, DeLeon made the following claims:

– "Windows plus interest. This item includes the cost for the windows that DeLeon was authorized to order plus the increase in cost of the windows due to the delays caused by the Agency in ordering the windows." The amount claimed was $678,462.50, plus interest from January 8, 2007.

– "Storage costs for windows. This item is based on DeLeon's storage costs for the windows and rental costs for swing stage since they were delivered in October 2006." The amounts identified were $3300 per month for swing stage and $450 per month for storage costs.

– "Damages for overhead and Agency caused delays. The length of the delays caused by the Agency's breach of contract is 392 days for Phase 1 (as of 7/15/07) and 227 days for Phase 2, for a total of 619 days. The contract includes a liquidated damages amount in favor of the Agency of $1500 per day for contractor delays. If the same number is used for the delays caused by the Agency, it would come to $928,500.00 as of 7/15/07. In the alternative, DeLeon's fixed overhead for 2005 was $252,462 or $691.68 per day, as shown on [its] financial statements. DeLeon's fixed overhead for 2006 (when the delays occurred) is estimated at $517,0000 or $1,416.44

per day. These two projects comprised 66% of the company's sales during this time; therefore, 66% of 2006 fixed overhead would be $920.66 per day. That amount multiplied by the 619 days of delays is $569,888.54."

– "Lost profits on other window projects. This is more difficult to determine with specificity at this time due to the fact that DeLeon is not quite sure which project the company would or could have received if [its] bonding was freed up and it was able to go after additional work." DeLeon said that it had had to pass on approximately $1 million of work it was offered by the VA in Miami, and at least $500,000 of work in Tampa, due to its bonding capacity being limited. The contractor said that because its profit margin is about 17%, it should receive $255,000 on this aspect of its claim.

– "Lost profits on Miami Phase 1 and 2 windows projects. Using the very conservative number of 17% profit, by not allowing DeLeon to complete the Miami windows projects, the company will lose approximately $260,963.85 in anticipated profits as a result of the Agency's breach of contract."

– "Lost profits on Phase 3 windows project. . . . "Deleon [sic] was apparently promised that project if the company worked out lower numbers on the first two phases, which it did." Therefore, the contractor said, it was entitled to 17% (its profit margin) of the total cost of the Phase 3 project.

Appeal File, Exhibit 27 at 4-5.

On or about September 27, 2007, the VA, in a letter from contracting officer Hicks, responded to the claim. The letter stated, "Despite your allegations that the Notice of Acceptance (NOA) contract requirement was verbally waived by the contracting staff, it is the Government's position that it will require a Miami-Dade county-approved NOA for Phase 1 & 2 windows prior to installation." The letter also asserted that by "not providing [various specified] submittals as required by terms and conditions of the contracts [Mr. Lynch] has not fulfilled his obligation and all Mr. Lynch has done is to cause unnecessary delays." According to the letter, "[t]he Government is unable to submit further payment for Phase 1 & 2 windows as [DeLeon] has not yet fulfilled [its] obligations required by the terms and conditions of the contract." RSUF ¶ 32; Appeal File, Exhibit 28.

On November 19, 2007, DeLeon appealed the contracting officer's decision to this Board. RSUF ¶ 33.

On May 7, 2008, Pacific Tech Construction, Inc., a contractor which had been awarded contracts for window replacement Phases 3, 4, and 5, submitted a NOA issued by Miami-Dade County which covered all of the windows for Phases 1 through 5. RSUF ¶ 34. Architectural Aluminum & Glass Contractors, Inc., which was a subcontractor to both DeLeon and Pacific Tech Construction, Inc., had applied for the NOA. RSUF ¶ 35.

Five days later, on May 12, DeLeon submitted this NOA to the VA and said that "the VA should now begin processing the invoice for the Phase 2 windows that was submitted to Mr. Hicks in early January 2007, in the amount of $712,436.10." RSUF ¶ 36; Appeal File, Exhibit 37. DeLeon notes that the VA did not make payment at this time, however. ASGI ¶ 36.

On June 6, RPP reported to the VA that after reviewing DeLeon's submittals for Phases 1 and 2, it believed that "the documentation submitted to date does not satisfy all project requirements and does not provide a complete set of documents as necessary for adequate project records and for adequate quality assurance during installation." RSUF ¶ 37; Appeal File, Exhibit 30. DeLeon notes that the VA continued to withhold payment for the Phase 2 windows. ASGI ¶ 37. RPP reiterated its June 6 comments on June 26. RSUF ¶ 38; Appeal File, Exhibit 31.

On August 19, after reviewing additional documents, RPP advised the VA that "[t]his submittal is recommended for approval subject to compliance with the following comments." The comments include a detailed list of pending items related to blast resistance, thermal and condensation resistance, shop drawings, and other items required in specification section 08520. RSUF ¶ 39; Appeal File, Exhibit 32. The architect/engineer reiterated this conclusion, with similar comments, on September 17. RSUF ¶ 40; Appeal File, Exhibit 33.

On November 19, 2008, after meetings with DeLeon and subcontractors, the VA agreed to pay for the Phase 2 windows within three days of receiving certain items. RSUF ¶ 41. The agency approved payment of $678,462.50 on November 25. RSUF ¶ 42; Appeal File, Exhibit 38. The parties jointly moved the Board to dismiss from the appeal the portion of DeLeon's claim which was for payment for the Phase 2 windows, and on December 18, 2008, the Board dismissed the matter labeled "Windows plus interest" in the claim.

On February 24, 2009, the VA terminated for the convenience of the Government both the Phase 1 and Phase 2 contracts. RSUF ¶ 44; Appeal File, Exhibit 39. DeLeon submitted termination for convenience proposals in November 2009. RSUF ¶ 45. By January 2011, according to DeLeon, the agency had not yet responded to the proposals. ASGI ¶ 45. This case does not involve a claim for termination costs.

Discussion

DeLeon has made a claim for six separate items under contracts for Phase 1 and Phase 2 window replacement at the Miami, Florida, Department of Veterans Affairs Medical Center. The contractor has identified these items as follows:

1. Windows plus interest

2. Storage costs for windows

3. Damages for overhead and Agency caused delays

4. Lost profits on other window projects

5. Lost profits on Miami Phase 1 and 2 windows projects

6. Lost profits on Phase 3 windows project

The VA has filed a motion for summary relief which contains three headings:

1. Appellant was Required to Provide a Notice of Acceptance (NOA) from Miami-Dade County for the Windows

2. Appellant was Not Entitled to Payment for Windows until Government Acceptance

3. Contractor is Not Entitled to Lost Profits on Other Projects

Only one of the three headings in the motion addresses directly any of the claim items. That is heading 3, which addresses claim items 4 and 6. We agree with the VA on this point and consequently deny the appeal as to those items. The relevance of the other portions of the motion to the remaining claim items is uncertain. We analyze the matter raised in those headings in the interest of narrowing issues as the case proceeds.

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 non-movant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

With regard to DeLeon's claims for lost profits on other window projects, including Phase 3 of window replacement at the VA's Miami medical center, the Court of Appeals for the Federal Circuit has provided pertinent guidance: Not every injury resulting from a breach of contract is remediable in damages. Remote and consequential damages are not recoverable. In particular, damages for profits lost on transactions not directly related to the contract which was breached are not recoverable. Further, where a company loses its bonding capacity as a result of government wrongdoing and is therefore unable to obtain unrelated contracts, damages are not available. *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1021-23 (Fed. Cir. 1996) (citing *Olin Jones Sand Co. v. United States*, 225 Ct. Cl. 741, 743-44 (1980); *Northern Helex Co. v. United States*, 524 F.2d 707, 713, 720 (Ct. Cl. 1975)); *see also Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1333 (Fed. Cir. 2003); *Ramsey v. United States*, 101 F. Supp. 353, 357-58 (Ct. Cl. 1951); *Precision Pine & Timber, Inc. v. United States*, 81 Fed. Cl. 235, 246-50 (2007), *aff'd in part, rev'd in part on other grounds*, 596 F.3d 817 (Fed. Cir. 2010) (noting, at page 246, critiques of the rule regarding loss of bonding capacity).

Applying this guidance, even if we accept as true DeLeon's assertion that the VA breached the Phase 1 and 2 contracts, and that but for that breach, DeLeon would have completed those contracts, had its bonding capacity freed up, and secured additional work in Tampa and Miami (including the Phase 3 contract in Miami), the contractor cannot recover the lost profits it seeks on those other contracts. A loss of bonding capacity due to government wrongdoing, is, under established law, insufficient to serve as a basis for recovery. The other contracts were not directly related to the Phase 1 and 2 contracts, so profit on them is unavailable. Further, as the VA points out, DeLeon confirms the speculative nature of the other contracts when it says that it "is not quite sure which project the company would or could have received if [its] bonding was freed up and it was able to go after additional work." DeLeon's inability to identify other contracts makes impossible a demonstration that the company's securing those contracts was foreseeable by the VA when the contract was made. *Western Aviation Maintenance, Inc. v. General Services Administration*, GSBCA 14165, 00-2 BCA ¶ 31,123, at 153,740.

As to the Phase 3 contract in particular, even if its award were considered akin to the exercise of an option – which it was not – the agency's discretion to award or not to award it would have been extremely broad, and an award of damages for the unexercised option years would have been rejected as inherently speculative. *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 44, et al., 08-1 BCA ¶ 33,854, at 167,584; *Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 08-1 BCA ¶ 33,770, at 167,160-61. The only way to escape this conclusion would be to demonstrate that the agency's determination was made in bad faith or constituted an abuse of discretion, *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416,

07-1 BCA ¶ 33,514, at 166,062, and DeLeon has not essayed such a demonstration. If recovery could not be had for the failure to exercise an option, it surely cannot be had for the failure to award a separate contract. Further, DeLeon's assertion that it would have received the Phase 3 contract but for the Government's mismanagement of the Phase 1 and 2 contracts is belied by the evidence the contractor presents in support of the assertion: Contracting officer Malott testified only that she told DeLeon that "if . . . the first two phases came out good, [DeLeon would] have a good chance to get the other ones, but . . . we still had to follow the procedures to go for the award, so it wasn't necessarily for [DeLeon]." Malott Deposition at 16; *see also* Hicks Deposition at 41-42.

We consequently grant the VA's motion for summary relief to the extent of denying items 4 and 6 of DeLeon's claim.

We do not agree, however, with the position taken by the agency that the contractor was required to provide a Notice of Acceptance from Miami-Dade County for the windows under the Phase 1 contract. The uncontested record is clear that although a NOA was required in the Phase 1 contract, contracting officer Malott waived that requirement, even before issuing a notice to proceed, for the benefit of the agency (so that the windows could be installed within the contractual time limit). Contrary to the VA's assertion that Ms. Malott was "[the contracting officer] not of record for the . . . contracts," Motion at 9, the contract identified her as the contracting officer responsible for administering the contract, and she and Mr. Hicks worked together on the project. Both of these contracting officers testified that Ms. Malott had authority to represent the agency in its dealings with the contractor, and their supervisor, Ms. Winer, testified that Ms. Malott had the authority to bind the Government as to the waiver of this requirement.

Having waived the requirement, the agency "cannot suddenly revive [it] to the prejudice of the contractor who changed its position in reliance on the . . . waiver." *Walsky Construction Co.*, ASBCA 36940, 90-2 BCA ¶ 22,934, at 115,125 (referencing *Gresham & Co. v. United States*, 470 F.2d 542, 544 (Ct. Cl. 1972)). The VA's effort to re-impose the NOA requirement through communications from Ms. Winer and RPP in the winter of 2006-2007, the suspension of work mandated on February 1, 2007, and Mr. Hicks' decision in September 2007 was not reasonable.

We are unsure why the agency has raised the issue of when the contractor was entitled to payment for the Phase 2 windows. Claim item 1, "Windows plus interest," which "includes the cost for the windows that DeLeon was authorized to order plus the increase in cost of the windows due to the delays caused by the Agency in ordering the windows," has been resolved. The parties settled this item, and at their request, on December 18, 2008, the Board dismissed the appeal to the extent that it involved this item.

The parties have discussed, under this heading, the issue of whether DeLeon was justified in acting as if the NOA requirement was waived for the Phase 2 contract, as it was for the Phase 1 contract. We offer comments on this issue because it may be relevant to the contractor's claim item 3, regarding delay costs.

DeLeon's principal argument on the matter is that in waiving the NOA requirement for the Phase 1 windows, Ms. Malott established a prior course of dealing that the contractor reasonably relied on in not providing a NOA for the Phase 2 windows. We agree with the VA that this theory is inapposite. "A course of dealing is defined as 'a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.'" *Underground Construction Co. v. United States*, 16 Cl. Ct. 60, 66 (1988) (quoting Restatement (Second) of Contracts § 223 (1981)). "The emphasis is on a sequence of events; a single transaction cannot constitute a course of dealing." *Id.* at 67 (quoting *International Therapeutics, Inc. v. McGraw-Edison Co.*, 721 F.2d 488, 491 (5th Cir. 1983)). Here, all the contractor can point to is a single transaction.

Nevertheless, we are not convinced that the VA acted reasonably in imposing the NOA requirement for the Phase 2 windows. On the basis of the record before us, there is no basis for the imposition of the requirement; the Phase 2 contract, as included in the appeal file submitted by the agency, does not contain such a requirement. Even if the contract did contain the requirement – meaning that the agency's appeal file is incomplete – the reasonableness of the requirement is suspect. DeLeon asserts that "[t]he windows for the projects all came from the same manufacturer. . . . Each Phase required nearly identical submittals and structural calculations and although the shop drawings for each Phase differed slightly based on the location of the windows, this was essentially one window project broken up into five smaller pieces, each of which had the same specifications." Appellant's Response at 26. The VA says that "[t]he rationale behind [its] specifications was to ensure that the windows would comply with Florida Building Codes, and especially Miami-Dade County's stringent hurricane codes." Motion at 10. If both of these statements are true, and documentation other than a NOA was sufficient to meet the agency's needs for Phase 1 windows, that documentation should have met the agency's needs. Further, because a NOA was ultimately provided for the Phase 3, 4, and 5 windows, if the Phase 1 and 2 windows were essentially identical to the Phase 3, 4, and 5 windows, as maintained by DeLeon, any questions about whether the Phase 2 windows met the agency's needs should have evaporated as soon as the NOA was accepted for the later phase windows. On the other hand, if the VA's architect/engineer's 2008 concerns about the usefulness of the documentation DeLeon did provide are valid, the agency may have had valid justification for withholding payment for the Phase 2 windows until further documentation was submitted. We clearly need more information about this matter in order to reach a conclusion.

Decision

The Board dismissed the appeal, insofar as it pertains to claim item 1, on December 18, 2008. We now **GRANT IN PART THE MOTION FOR SUMMARY RELIEF** by denying the appeal, insofar as it pertains to claim items 4 and 6. The appeal remains before the Board, insofar as it pertains to claim items 2, 3, and 5. The presiding judge will schedule further proceedings as to these items.

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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