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07-1 BCA P 33514, CBCA 416, 2007 WL 837860
(Civilian B.C.A.)

CBCA

Civilian Board of Contract Appeals

GREENLEE CONSTRUCTION, INC., APPELLANT,
LANI,

v

GENERAL SERVICES ADMINISTRATION, RESPONDENT

DENIED IN PART; DISMISSED FOR LACK OF
JURISDICTION IN PART: March 6, 2007

Gary Greenlee, President of Greenlee Construction, Inc., Alpharetta, GA, appearing for Appellant
David A. Leib, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman),
PARKER, and **GOODMAN**

DANIELS, Board Judge

This case involves a contract between Greenlee Construction, Inc. (Greenlee) and the General Services Administration (GSA). The contract was entitled "Partitioning and Miscellaneous Repairs - Augusta, Macon, Savannah & Tallahassee - Georgia and Surrounding Areas" The date of award was June 2, 1998. The contract covered a base period and two option periods. GSA exercised its option for the first option period, but did not exercise its option for the second option period.

The claims

On June 20, 2005, Greenlee submitted to GSA three certified claims under this contract. No contracting officer ever issued a decision on any of the claims, and Greenlee appealed from deemed denials of the claims.

The first claim is based on the contention that "[t]he contract in question had \$3,000,000[,] defrauded away from Greenlee." As a result of this action, the contractor maintains, GSA owes it \$1,230,400 - \$450,000 in anticipatory profit (fifteen percent of \$3,000,000); \$510,000 in overhead (seventeen percent of \$3,000,000); and \$270,400 in wages of Gary Greenlee, Greenlee's president (\$65 per hour times 4160 hours)

For the base period and the first option period, GSA required Greenlee to post a performance bond in the amount of \$50,000 and a payment bond in the amount of \$25,000. GSA notified Greenlee that as a condition to the agency's exercising the option for the second option period, the contractor would have to post a performance bond in the amount of \$250,000 and a payment bond in the amount of \$125,000. The second claim is based on the contention that "[t]his adverse action that [the agency] took by raising the bonding limits on the second option year caused Greenlee to loose [sic] the last year of the contract" (Greenlee says that it did not have the capability to secure the additional bonds, so it was unable to fulfill the specified condition.) As a result of GSA's action, the contractor maintains, the agency owes it \$295,200 - \$75,000 in anticipatory profit (fifteen percent of \$500,000); \$85,000 in overhead (seventeen percent of \$500,000); and \$135,200 in wages of Gary Greenlee, Greenlee's president (\$65 per hour times 2080 hours)

Greenlee's third claim alleges, "The first two years of this contract were subcontracted to Bill Bullard Construction due to coercion by [GSA employees] Billy Dixon, Kimsey Rutland, and John Kohler. We received 12.5% of the contract instead of 15% profit, overhead, and wages that Gary Greenlee would have earned." As a result of this action, the contractor maintains, GSA owes it \$465,000 - \$25,000 in anticipatory profit (2.5 percent of \$1,000,000); \$170,000 in overhead (seventeen percent of \$1,000,000); and \$270,000 in wages of Gary Greenlee, Greenlee's president (\$65 per hour

times 4160 hours) [FN1]

The total amount sought by Greenlee through these three claims is \$1,990,600.

The motions

Greenlee has filed a motion for summary relief. GSA has filed a cross-motion for summary relief and, in the alternative, to dismiss for lack of jurisdiction. In this decision, we consider and rule on the motions

Appellant's motion

Greenlee's motion is based on a report of investigation prepared by GSA's Office of Inspector General in April 2002. According to the contractor:

This document lays out in very detailed narrative the deeds that John Kohler, [FN2] Billy Dixon and Kimsey Rutland were able to perpetrate against Greenlee. . . [T]his document . . . verifies everything we have stated . . . This report by the Government documents that there are no contested material facts regarding this case as far as Greenlee being cheated out of our contract. . . The report by the [Office of Inspector General] verifies that by the bad faith of these lying, thieving contracting officers . . . Greenlee lost substantial amounts of our contracts and that interprets into lost money that the government owes Greenlee

In response, GSA acknowledges that Mr. Kolar and Mr. Dixon were indicted for conspiracy, mail and honest services fraud, false statements, aiding and abetting, and tampering with a witness [FN3]. The agency observes, however, that these individuals were acquitted of the charges. Furthermore, and of particular relevance to Greenlee's motion, GSA points out that the Office of Inspector General report does not make the findings that the contractor asserts it makes. The report mentions Greenlee only in passing. In memoranda of interviews, the report states that according to Mr. Kolar, in both December 1999 and March 2000, Bill Bullard performed under subcontract all the work given to Greenlee under the latter's GSA partition contract. The report

does not say that GSA defrauded (or "cheated," as Greenlee sometimes phrases it) the contractor out of \$3,000,000 under its contract; that GSA acted impermissibly in requiring higher bonding amounts as a condition of exercising the option for the second option period; or that any GSA employees coerced Greenlee to award subcontracts to Mr. Bullard or any of the companies he controlled.

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).

Greenlee has not met its burden of demonstrating the absence of genuine issues of material fact as to the assertions it has made. The Office of Inspector General report does not provide a basis on which we could hold that Greenlee is entitled to judgment as a matter of law. We therefore deny the contractor's motion for summary relief.

Respondent's motion

GSA's motion for summary relief and, in the alternative, to dismiss for lack of jurisdiction is predicated on the following assertions. As to Greenlee's first claim, the contractor could not have been "defrauded" (or "cheated") out of its contract because the contract was an indefinite delivery/indefinite quantity (IDIQ) contract and the agency issued delivery orders for more than the minimum amount of money Greenlee was guaranteed. As to Greenlee's second claim, GSA raised the required bonding amounts for legitimate reasons. As to the contractor's third claim, the contractor has produced no evidence in support of the allegation that it was coerced by GSA to subcontract its work to a particular firm. As to all of the claims, the claims are time-barred because they were raised more than six years after they accrued and the damages sought are speculative and not related to the alleged breaches

of the contract.

We consider GSA's motion on a claim-by-claim basis.

1 The contract says that it is an "indefinite quantity contract" under which the contractor would perform work "when authorized by properly executed Delivery Orders." Lest there be any doubt about the variety of contract, the instrument states:

In no way does an award of this contract give the contractor exclusive right to receive orders for work of the type covered by the contract. The contract type cannot therefore be interpreted as a requirements contract. The Government reserves the right to perform work of the same type covered in this contract with its own forces or by separate contract, and to do so will not breach or otherwise violate the contract.

The contract guarantees that GSA will issue orders to Greenlee, during the base period and each option period for which the agency exercises its option, worth a minimum of \$50,000.

Contrary to these statements, Greenlee asserts that the contract was implemented as a requirements contract in that all the work GSA required, of the nature and in the locations provided in the contract, was ordered from Greenlee for performance by Bill Bullard Construction

An indefinite delivery/indefinite quantity (IDIQ) contract obliges the buyer to purchase from the seller only a stated minimum quantity. Once the buyer purchases that quantity, its legal obligation under the contract is satisfied. A requirements contract, on the other hand, obliges the buyer to purchase from the seller all of its requirements of the relevant goods or services. Whether a contract is of one variety or the other is determined by an objective reading of the language of the contract, not by one party's characterization of the instrument. Varilease Technology Group, Inc. v. United States, 289 F.3d 795, 799 (Fed. Cir. 2002); Travel Centre v. Barram, 236 F.3d 1316, 1319 (Fed. Cir. 2001); Maintenance Engineers v. United States, 749 F.2d 724, 726 n.3 (Fed. Cir. 1984); Marut Testing & In-

spection Services, Inc. v. General Services Administration, GSBKA 15412, 02-2 BCA ¶ 31,945, at 157,820.

It is clear from the language of this contract that the instrument was an IDIQ contract. It is also clear, from Greenlee's failure to contest GSA's assertion as an undisputed fact, that GSA ordered from Greenlee more than the guaranteed minimum of \$50,000 during each of the periods during which the contract was in effect. Consequently, GSA met its obligations under the contract for those periods, and it cannot be deemed to have "defrauded" or "cheated" Greenlee out of the contract. Whether GSA ordered all its work from Greenlee or not is immaterial; the point is that the agency was not forced by the contract to place such orders. GSA's motion for summary relief is granted as to the first of Greenlee's claims.

2 The contract provided that upon award, Greenlee would have to "furnish a performance bond in the amount of 100 percent of the contract minimum order limitation [or \$50,000] and a payment bond in the amount of 50 percent of the contract minimum order limitation [or \$25,000]." The contract also provided that whenever GSA exercised an option to extend the contract for an option period, Greenlee would "be required to furnish new performance and payment bonds." Additionally:

The Contractor will be required to increase the penal amounts of the performance and payment bonds proportionately or to obtain additional bonding if the total value of work orders issued exceeds 100% of the 'contract minimum order limitation'. The Contractor shall be required to be bonded for 100% of the actual orders issued, including orders issued in excess of the maximum order limitation of \$50,000 [FN4]

In responding to Greenlee's "interrogatories" (actually requests for deposition on written questions) as to her reason for increasing the bonding amount for the second option period, GSA contracting officer Corlis J. Moore stated, under penalty of perjury:

The bonding was increased from

\$50,000/\$25,000 to \$250,000/ \$125,000 in accordance with FAR [Federal Acquisition Regulation] 52.228-2(c), ADDITIONAL BOND SECURITY (OCT 1997), [which states in part:] “The contractor shall furnish additional security required to protect the Government and persons supplying labor and materials under this contract if -

(c) The contract price is increased so that the penal sum of any bond becomes inadequate in the opinion of the Contracting Officer[]”

Greenlee Construction performed work in excess of \$50,000 during the base year and the Option I period of the contract, [FN5] but the company failed to provide the additional bond security required during either period. Several attempts were made to contact Mr. Greenlee concerning this contract requirement. The contractor never responded to my inquiries

My intent was to ensure the government was provided the performance and payment protection required by the contract

Greenlee takes issue with Ms. Moore's statement. It maintains:

Moore raised the bonding requirements 500% over the first two contract periods in direct contrast to contract requirements. The specific intent of the government was to make the bonding so high that Greenlee could not qualify for the bonds. This bonding was raised because Greenlee was cooperating with federal investigators concerning the investigation in Savannah, Georgia. [FN6]

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, GSBCEA 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 re-

lief 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; James Hovanec, PSBCA 4767, 04-2 BCA ¶ 1132,805, at 162,262.

Greenlee maintains that GS A's determination not to exercise the option for the second option period was made in bad faith, with specific intent to injure the contractor. 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*.” Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002) (quotation and citation omitted). [FN7] Because the burden of proof for a contention of bad faith is high, a contractor must produce enough evidence to create a genuine factual issue in order to overcome a motion for summary relief against such a contention. Id. at 1238-39.

Greenlee's position on this matter, as quoted above, is contained in its opposition to GSA's cross-motion for summary relief. Although Greenlee characterizes the exposition as a “sworn statement,” it is not sworn and is merely an argument made by the contractor's president. We give greater procedural latitude to pro se appellants than we give to parties represented by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972); Zamot v. Merit Systems Protection Board, 332 F.3d 1374, 1381 (Fed. Cir. 2003) (Newman, J, dissenting). Consequently, we might consider that Greenlee's position is one that while not yet contained in a sworn statement, could become the product of such a statement by the contractor's president.

Even if we were to extend this latitude to Greenlee's pleadings, however, what the contractor has said is not sufficient to defeat GSA's motion for

summary relief. The statement is conclusive in nature; no similar statement was ever made until Greenlee submitted its claim in June 2005, nearly five years after the contracting officer chose not to exercise the option; and the statement has not been corroborated by any documentary evidence, either contemporaneous with the contracting officer's determination or later. Am-Pro, 281 F.3d at 1241-43; Plum Run, Inc., ASBCA 49203, et al., 97-2 BCA ¶ 29,193, at 145,231. Although Greenlee says that additional discovery from GSA employees could provide the clear and convincing evidence necessary to prove that the contracting officer's determination was motivated by bad faith, the contractor has already been afforded depositions on written questions from twenty-one GSA employees in this case and others related to it, and if any of those depositions has produced evidence relevant to this claim, Greenlee has not shown it to us. A party's speculative hope that yet more discovery will produce necessary evidence, after considerable opportunity for discovery has failed to turn up proof, is not a good reason for denying a motion for summary relief. Long Lane L.P. v. General Services Administration, GSBGA 15334, 04-2 BCA ¶32,659, at 161,656-57, reconsideration denied, 04-2 BC A ¶ 32,75 1 *aff'd sub nom. Long Lane L.P. v. Bibb*, 159 Fed. Appx. 189 (Fed. Cir. 2005); Plum Run, 97-2 BCA at 145,230 (citing Pure Gold, Inc v Syntex (USA), Inc., 739F 2d 624, 627 (Fed Cir 1984)) GSA's motion for summary relief as to Greenlee's second claim is granted.

3 Greenlee maintains that at the first meeting its president had with GSA contracting personnel after the award of the contract, in 1998, the contractor was told that if it did not subcontract to Bill Bullard Construction all the work for which the agency might issue delivery orders under the contract, GSA would issue no such orders. GSA acknowledges that Bill Bullard was present at the meeting and that Greenlee subcontracted nearly \$700,000 of work to Bullard Construction under the contract from October 1998 to September 2000. GSA says that Greenlee has not presented any evidence that agency employees coerced the contractor to subcontract the work.

Under the Contract Disputes Act, 41 U.S.C. § 605(a) (2000), "Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim." According to the Federal Acquisition Regulation, 48 CFR 33.201 (2005), "*Accrual of a claim* means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred." If a claim accrued - if all events that fixed the alleged liability were known or should have been known - more than six years before the claim was submitted to the contracting officer, the Board lacks jurisdiction to consider an appeal involving the claim. Gray Personnel, Inc., ASBCA 54652, 06-2 BCA ¶ 33,378, at 165,474-75; see also Axion Corp. v. United States, 68 Fed. Cl. 468, 480 (2005).

The meeting at which, according to Greenlee, GSA employees forced it to subcontract contract work to Bullard Construction occurred during 1998. Thus, Greenlee's third claim accrued during that year. The claim for moneys allegedly lost as a result of coercion was not submitted, however, until 2005 - more than six years after the claim accrued. A claim based on a single distinct event, which may have continued ill effects later on, is considered to have accrued upon the occurrence of that event. Brown Park Estates-Fairfield Development Co. v. United States, 127 F.3d 1449, 1456-57 (Fed. Cir. 1997). Since the coercion is alleged to have been applied at the 1998 meeting, even though some of its putative effects may have been felt within six years of the submission of the claim, the appeal may not be heard. We grant GSA's motion to dismiss for lack of jurisdiction the portion of the case which involves Greenlee's third claim.

Decision

Greenlee's motion for summary relief is denied. As to Greenlee's first two claims, GSA's motion for

summary relief is granted and the appeal is **DENIED**. As to the contractor's third claim, GSA's motion to dismiss is granted and the appeal is **DISMISSED FOR LACK OF JURISDICTION**

STEPHEN M. DANIELS
Board Judge

We concur:
ROBERT W. PARKER
Board Judge

ALLAN H. GOODMAN
Board Judge

FN1. The figure for Mr. Greenlee's wages is miscalculated. Sixty-five dollars per hour times 4160 hours is actually \$270,400.

FN2. Spelled "Kolar" in the report.

FN3. The report states that Mr. Rutland, who has retired from government service, was offered and accepted immunity from prosecution in exchange for his testimony against the other defendants.

FN4. On the copy of the contract which has been provided for our review, someone has crossed out "\$50,000" and written in its place "\$500,000." This alteration makes the provision consistent with the remainder of the contract, which identifies the "maximum order limitation" as \$500,000. (We note that the term "maximum order limitation" is a misnomer, because orders which total more than that amount could be placed and accepted under the contract.)

FN5. The parties have not favored us with any evidence as to the total value of the orders placed by GSA under the contract. An indication of the value, however, is contained in an exhibit filed by the agency, the validity of which was not contested by Greenlee. According to this exhibit, during the period from October 1998 to September 1999, subcontractors sent Greenlee invoices in the total amount of more than \$750,000.

FN6. That investigation was apparently the one that led to issuance of the Office of Inspector General

report mentioned earlier.

FN7. Greenlee calls to our attention Judge Wolski's learned critique of court decisions regarding the presumption that government officials perform their duties with regularity and in good faith. See *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 757-72 (2005). The scholarship of this opinion is impressive, but the opinion itself is not binding on us because it was issued by a court with coordinate jurisdiction to our own, not our appellate authority. We follow the teachings of the Court of Appeals for the Federal Circuit, as expressed in *Am-Pro*, which are binding on this Board.

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