UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION GRANTED IN PART: February 2, 2017

CBCA 4410

THINKGLOBAL INC.,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Respondent.

Justin E. Proper and Sam Dalke of White and Williams LLP, Philadelphia, PA, counsel for Appellant.

Mark Langstein, Office of the General Counsel, Department of Commerce, Washington, DC, counsel for Respondent.

Before Board Judges **SHERIDAN**, **LESTER**, and **CHADWICK**.

CHADWICK, Board Judge.

ThinkGlobal, Inc. (TGI) timely sought reconsideration of our decision granting in part the motion of the respondent, Department of Commerce (DOC), to dismiss the appeal for failure to state a claim on which we could grant relief. *ThinkGlobal Inc. v. Department of Commerce*, CBCA 4410, 16-1 BCA ¶ 36,489. We agree in part with TGI as to one of the issues it raises, involving the statute of limitations. We therefore grant the motion for reconsideration to that extent and otherwise deny it.

Background

Familiarity with our prior decision is assumed. DOC awarded TGI two successive no-cost contracts, in 2004 and 2009, to publish an advertising catalog called Commercial News USA (CNUSA) for distribution to agency commercial posts overseas. DOC ordered TGI to

stop work on the 2009 contract in July 2013. "It is unclear in the record" whether TGI was performing a validly exercised contract option at that time. *ThinkGlobal*, 16-1 BCA at 177,796. TGI submitted a certified claim on July 25, 2014, for $8,678,475 in damages arising from alleged breaches by DOC of both contracts. TGI later appealed from a deemed denial of that claim and filed a complaint containing three counts, alleging that DOC (1) breached the express terms of the 2004 and 2009 contracts, (2) breached implied covenants under both contracts, and (3) engaged in "unfair competition" under both contracts. Among the alleged breaches of the 2009 contract were that DOC was dilatory in responding to Freedom of Information Act (FOIA) requests and abused its discretion or showed bad faith in terminating the contract.

DOC moved to dismiss the appeal in its entirety for, alternatively, lack of jurisdiction, failure to state a claim under the contracts, or untimeliness. We concluded that we have jurisdiction but found, as relevant here, that all of TGI's claims under the 2004 contract were untimely, and that TGI's complaint failed to state claims under the 2009 contract for breaches relating to TGI's FOIA requests, the 2013 termination, or unfair competition. TGI argues in its motion for reconsideration that we (1) "may have misinterpreted the continu[ing] claims doctrine" in dismissing TGI's claims under the 2004 contract, (2) overlooked some well-pled allegations relating to the termination of the 2009 contract, and (3) erred in dismissing TGI's unfair competition claim. DOC opposes the motion.

Discussion

I. Standard of Review

The Board grants reconsideration for the limited reasons customarily recognized by courts and other tribunals, *see Oregon Woods, Inc. v. Department of the Interior*, CBCA 1072-R, 09-1 BCA ¶ 34,063, at 168,431-32, *aff'd*, 355 F. App'x 403 (Fed. Cir. 2009), including when we are persuaded that we construed a party's allegations too narrowly in granting a motion to dismiss. *E.g.*, *Bannum, Inc. v. Department of Justice*, CBCA 2686-R, 12-1 BCA ¶ 35,022. Movants should as a rule avoid both "[a]rguments already made," Board Rule 26 (48 CFR 6101.26 (2015)), and "arguments [that] could have been made on the basis of the documents in the record but were not." *Bryan Concrete & Excavation, Inc. v. Department of Veterans Affairs*, CBCA 2882-R, 16-1 BCA ¶ 36,549, at 178,031.

II. Timeliness of Claims Under the 2004 Contract

Because the Contract Disputes Act requires a claim to be presented to the contracting officer within six years of its accrual, 41 U.S.C. § 7103(a)(4)(A) (2012), the key date for timeliness here is July 25, 2008, six years before TGI submitted its certified claim. Claims

that DOC can show accrued before that date—about fourteen months before the 2004 contract expired—are barred. *See ThinkGlobal*, 16-1 BCA at 177,792. In our original decision, we noted that the complaint alleges that DOC failed to provide several kinds of information that section 4 of the 2004 contract said DOC would provide "upon contract award" or "immediately upon contract signing." We held that "claims relating to DOC's failure to provide information required by section 4 should have been known, and therefore accrued," at or around contract award in April 2004. We dismissed all claims under the 2004 contract as untimely on that basis. We noted that TGI argued that "claims under the 2004 contract were continuing and did not accrue until March 11, 2011," when TGI received documents from DOC pursuant to a FOIA request, but we rejected that argument on the grounds that TGI was on notice of the alleged breaches "[w]hen DOC did not provide the information upon contract award or shortly after contract signing." *Id*. at 177,792.

TGI argues on reconsideration that the "2004 contract is inherently susceptible to being broken down into new and distinct events," and that its complaint alleged "specific instances of new breaches that were unrelated to the DOC's failure to provide documents after contract signing." TGI argues that the complaint alleged that the agency (1) held no "semi-annual reviews" of the CNUSA program with TGI as provided in the 2004 contract; (2) failed to distribute "at least six issues of the [catalog]" at overseas commercial posts within thirty days of receipt, as required by the 2004 contract, between August 2008 and August 2009; and (3) failed to provide "current" information relevant to the contract, a requirement that TGI argues "does not have a temporal limitation."

The second enumerated allegation does not, in fact, appear in TGI's complaint. Neither the complaint nor, importantly, the certified claim alleges that DOC failed to distribute CNUSA at foreign posts within thirty days of receipt between July 25, 2008, and the expiration of the 2004 contract. The third allegation appears in the complaint but fails to establish a continuing claim that could overcome the agency's statute of limitations defense, because no language in the 2004 contract imposed upon DOC a recurring duty to provide "current" information to TGI, after the information that DOC agreed to provide upon or shortly after contract award. *Cf. Ariadne Financial Services Pty. Ltd. v. United States*, 133 F.3d 874, 879 (Fed. Cir. 1998) (finding no continuing claim where "the government's continued refusal to allow the use of supervisory goodwill flow[ed] from its original repudiation"); *Caraballo v. United States*, 124 Fed. Cl. 741, 749 (2016) ("[T]he continuing claims doctrine applies to cases where recurring [performance is] required.").

We grant reconsideration as to the timeliness of TGI's claim based on the lack of semi-annual reviews. DOC did not demonstrate in its motion to dismiss that we could not grant relief under the 2004 contract for that particular alleged breach. DOC's arguments on the merits focused on the no-cost nature of the 2004 and 2009 contracts and did not

specifically address provisions governing performance. *See ThinkGlobal*, 16-1 BCA at 177,794. Therefore, we leave for another time such questions as whether the 2004 contract obligated (rather than simply permitted) the agency to conduct semi-annual reviews, and, if so, whether the failure to conduct reviews was a material contract change or caused any damages. It suffices to find that *if* the 2004 contract *required* DOC to conduct semi-annual reviews, this would have been a continuing (semi-annual) duty under the contract. TGI's certified claim and complaint colorably allege that no semi-annual reviews occurred in the final year of the 2004 contract, which was after July 25, 2008. To that limited extent, this claim under the 2004 contract would have accrued less than six years before TGI submitted its certified claim and is not time barred.

III. Termination of the 2009 Contract

As noted, it is unclear at this point whether DOC exercised the option under the 2009 contract under which TGI alleges it was performing when it was told to stop work in July 2013. We held that TGI failed to state a claim on the merits for bad faith or abuse of discretion by DOC in *not* exercising a contract option, but we allowed further development of "the record on whether DOC should be viewed as having exercised any of the 2009 contract options at issue here (other than the first-year option), whether DOC permitted performance of [the] contract after it had expired, and what remedies and damages, if any, are available to TGI for that." *ThinkGlobal*, 16-1 BCA at 177,796. In addition to repeating arguments previously made (which we reject for that reason), TGI argues that its complaint "clearly avers that the options [under the 2009 contract] were exercised," and that it should be able to "pursue [a] theory" that DOC terminated the contract for convenience in bad faith.

We have held that TGI can try to prove that DOC exercised the options. We deny reconsideration with respect to whether TGI can pursue a bad-faith-termination theory. The complaint does not allege facts that, if proven, would plausibly support relief on such a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Sigma Services, Inc. v. Department of Housing & Urban Development*, CBCA 2704, 12-2 BCA ¶ 35,173, at 172,591. Instead, the complaint simply assigns conclusory labels such as "bad faith" and "wrongful" to the agency's conduct in stopping TGI's work, yet alleges, "To date, it is still unknown why the Government abruptly terminated [the] CNUSA . . . program." TGI has colorably alleged a sloppy end to the 2009 contract. This is a far cry from alleging facts supporting an inference that DOC lacked sound policy or business reasons to stop the work in 2013, or that DOC acted with a specific intent to harm or "get rid of" TGI, the indicia of bad faith. *See V.I.C. Enterprises, Inc. v. Department of Veterans Affairs*, CBCA 1598, 09-2 BCA ¶ 34,284, at 169,363-64 (citing *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002)). TGI may pursue relief for the option years along the lines we laid out.

IV. Unfair Competition

The complaint gathers a number of TGI's general criticisms of DOC's conduct, many of them alleged on "information and belief," into an "unfair competition" count. We focused on TGI's allegations that DOC "hinder[ed]" TGI's "efforts to leverage" two other government programs, and that DOC "refused to . . . open[] a discussion with . . . official strategic partners in regard to the . . . CNUSA program," because those allegations seemed to be related to the contract terms but unrelated to the FOIA allegations, which we addressed separately. We dismissed this count for failure to state a claim because the 2009 contract contained no "language that could be interpreted as requiring DOC to provide 'leverage' for TGI" or to introduce TGI to other companies. *ThinkGlobal*, 16-1 BCA at 177,796-97.

TGI argues that we "improperly narrowed its claim." It says the claim is actually that "DOC breached its contractual obligations to the Appellant because the DOC benefited financially from other fee-generating DOC programs that were in direct competition with the CNUSA program—to the detriment of Appellant." This new statement of the claim has to do with DOC's motives, rather than its actionable conduct. Moreover, the complaint alleges no facts supporting an inference that either DOC or "fee-generating DOC programs" "competed" with TGI to perform the contract work (publishing the CNUSA catalog), and TGI cites no contract language that would bar such competition. TGI notes that section 2 of the 2009 contract "refers to" Office of Management and Budget circular A-25, and that this circular relates in general to public-private "competition." The reference in the contract, however, was solely to the circular's "mandate for full cost recovery" by the Government when providing services to private entities, and did not purport to impose any enforceable obligations on the agency. We deny reconsideration of our dismissal of this count.

Decision

The motion for reconsideration is **GRANTED IN PART**. TGI's claim that DOC breached the 2004 contract by not holding semi-annual reviews after July 25, 2008, is not time barred. The motion is otherwise denied.

KYLE CHADWICK
Board Judge

We concur:

PATRICIA J. SHERIDAN
Board Judge

HAROLD D. LESTER, JR.
Board Judge