



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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MOTION TO DISMISS COUNT IV DENIED: November 14, 2012

CBCA 2878

JANE MOBLEY ASSOCIATES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Ralph C. Thomas, III of Barton Baker Thomas & Tolle, LLP, McLean, VA, counsel for Appellant.

Catherine Crow and John S. Tobey, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **McCANN**, **SHERIDAN**, and **KULLBERG**.

**McCANN**, Board Judge.

Respondent, the General Services Administration (GSA), has moved to dismiss count IV of the complaint on the grounds that appellant, Jane Mobley Associates, Inc. (JMA), has failed to state a claim upon which relief can be granted. We deny the motion.

Background

The facts alleged by appellant are more fully set forth in its complaint. In summary, GSA awarded a task order to JMA in the amount of \$99,940.25 under JMA's Federal Supply Schedule contract GS-23F-0354P. The services to be provided were expertise and technical

support, equipment, materials, and supplies needed to support the Government in responding to complaints against government officials by current and former government employees indicating health concerns caused by toxic substances at the Bannister Federal Complex in Kansas City, Missouri.

The task order was issued as a firm fixed-price contract. On March 8, 2010, GSA issued a modification to extend the task order for two months. The modification stated that JMA “will be paid based on the hours documented and verified for each labor category and task during that month.” Appellant contends that it was assured that the language did not change the nature or terms of the contract.

After completion of the contract and after contract closeout, an audit was conducted by the Office of the GSA Inspector General (IG). The IG reported that during the two-month contract extension period, JMA had incorrectly invoiced for hours that “grossly exceeded hours” in JMA’s time records. The Government issued a demand letter in the amount of \$37,235.60. Appellant disputed it and the contracting officer issued a final decision on June 1, 2012, asserting the Government’s right to recoup an overpayment of \$37,235.60. JMA appealed the final decision.

In count IV of the complaint, appellant contends that respondent “improperly compromised JMA’s firm fixed price contract and failed to ensure that JMA received impartial, fair and equitable treatment as required by the FAR [Federal Acquisition Regulation].” The issue raised by this count is whether respondent, by changing the practice as to payments through the modification, violated the implied covenant of good faith and fair dealing present in all contracts. The Government’s motion to dismiss argues that a violation of the implied covenant of good faith and fair dealing must be analyzed in the same manner as an allegation of bad faith, and since appellant has not alleged any facts to support a finding of bad faith, count IV should be dismissed for failure to state a claim upon which relief could be granted.

### Discussion

The Board has addressed the elements necessary to support a motion to dismiss for failure to state a claim:

A motion to dismiss for failure to state a claim upon which relief [is appropriate and] can be granted . . . when the facts asserted by the claimant do not entitle it to a legal remedy. *Boyle v. United States*, 200 F.3d 1369 (Fed. Cir. 2000). Controlling precedent at the Court of Appeals for the Federal

Circuit[] noted recently that “[i]n reviewing a dismissal for failure to state a claim, we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant.” *Anaheim Gardens v. United States*, 444 F.3d 1309, 1314-15 (Fed. Cir. 2006) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). Dismissal for failure to state a claim should not be granted unless it appears beyond doubt that the appellant cannot prove any set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Icenogle Construction Management, Inc.*, VABCA 7534, 06-2 BCA ¶ 33,325, at 165,271; *South Carolina Public Service Authority*, ASBCA 53701, 04-2 BCA ¶ 132,651 at 161,607; *Thai Hai*, ASBCA 53375, 02-2 BCA ¶ 31,971, at 157,920, *reconsideration denied*, 03-1 BCA ¶ 32,130, *aff’d*, 82 F. App’x 226 (Fed. Cir. 2003).

*Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 08-1 BCA ¶ 33,770, at 167,160 (quoting *Charles Engineering Co. v. Department of Veterans Affairs*, CBCA 582, 07-2 BCA 33,698, at 166,831).

We recently issued a decision on a motion involving a breach of the covenant of good faith and fair dealing in which the appellant did not allege bad faith. In denying the Government’s motion to dismiss for failure to state a claim, the Board stated, “A claim that [the agency] breached the implied covenant of good faith does not require a showing of bad faith.” *Sigma Services, Inc. v. Department of Housing and Urban Development*, CBCA 2704, slip op. at 3 (Nov. 5, 2012) (citing *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005); *Rivera Agredano v. United States*, 70 Fed. Cl. 564, 574 n.8 (2006)).

Respondent is incorrect in arguing that appellant must allege facts supporting a finding of bad faith for count IV to survive. By asserting that respondent issued an improper modification that violated the covenant of good faith and fair dealing, appellant has stated a claim upon which relief can be granted. For appellant to prevail on this count, appellant does not necessarily have to prove that respondent acted in bad faith in issuing the modification. Other circumstances might be present that do not rise to the level of bad faith but still support a finding that the Government violated the covenant of good faith and fair dealing. Ultimately, appellant bears the burden of proving that the issuance of the modification violated the covenant.

Decision

The motion is **DENIED**.

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R. ANTHONY McCANN  
Board Judge

We concur:

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PATRICIA J. SHERIDAN  
Board Judge

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H. CHUCK KULLBERG  
Board Judge