

ANOTHER NON-EXERCISE OF OPTIONS: NO BAD FAITH AND NO VIOLATION OF THE COVENANT

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In another non-exercise of options by the government case, the Civilian Board held that there was no bad faith and no violation of the covenant of good faith and fair dealing. *Brightwood Management Partners v. Dept of Veterans Affairs*, CBCA 7351, March 1, 2023. Brightwood had a base plus four option year contract for ground maintenance and internments at Hampton National Cemetery. When the Department of Veterans Affairs (“VA”) decided not to exercise the option period, Brightwood submitted a claim for damages of \$941,000, alleging bad faith by the government, and breach of the covenant of good faith and fair dealing by the government.

During performance of the contract, the government noted specific performance concerns involving maintenance of cemetery grounds and improper burial setup. Two government contracting officer representatives issued three contract discrepancy reports to Brightwood, and ultimately the government notified Brightwood that it had not performed in a satisfactory manner and the VA did not wish to exercise the contract’s first option.

Within 45 days of the notification regarding non-exercise of the option, Brightwood submitted its claim to the VA. The claim alleged that the VA entertained other landscape contractors before the contract was completed, intending to award a subsequent contract to the new contractor.

The Board noted that the government has full discretion on option exercise, and a contractor does not have rights to relief if the government fails to exercise an option. In order to show that the government was “out to get” Brightwood, and wanted to replace it with another contractor, the evidence must be “almost irrefragable and is usually equated with evidence of some specific intent” to injure the contractor. The Board concluded that there was no showing of bad faith or intent to injure the contractor—but there were specific details of Brightwood’s performance shortfalls in the records. The Board concluded there was no bad faith.

On the matter of VA’s alleged breach of the duty of good faith and fair dealing, the Board noted that the VA was only exercising a right that it had in the contract—the right not to exercise the option. Although there were funding delays causing untimely task orders, this was due to much larger issues funding the contract through a continuing resolutions appropriation. The VA concluded that there was no violation of the covenant.

Takeaway: The government will always have significant discretion in exercising or non-exercising options in a contract, and strong evidence of bad faith or even violation of the covenant must be shown in order to overcome that normal presumption.

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