



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: May 28, 2014

CBCA 3288

JRS MANAGEMENT,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Jacqueline Sims, Owner of JRS Management, Lawrenceville, GA, appearing for Appellant.

William D. Robinson and Nihar H. Vora, Office of General Counsel, Federal Bureau of Prisons, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **STERN**, **VERGILIO**, and **McCANN**.

VERGILIO, Board Judge.

On March 6, 2013, the Board received a notice of appeal from JRS Management (contractor) concerning the denial of its claim to recover \$18,431.73. The dispute involves a contract, DJBP03091100010, and task order, DJBP030900000026, thereunder, under which the contractor was to provide culinary arts instructor services to the respondent, the Department of Justice (agency). The contractor here designates four counts for relief. First, the contractor asserts that the agency materially breached the contract and failed to perform its obligations. Second, the contractor alleges that the agency breached the contract in other ways. Third, the contractor seeks relief for a breach of the covenant of good faith and fair dealing. Fourth, the contractor asks the Board to provide relief for what it deems to be bad faith, and an arbitrary and capricious abuse of discretion by the agency in failing to exercise an option.

The agency has filed a motion to dismiss, which the Board treats as a motion for summary relief. The contractor opposes the motion. Undisputed material facts support the findings here made by the Board in the context of resolving a motion for summary relief. The Board's interpretation of the contract is at odds with the contractor-proffered interpretation, but consistent with the agency's interpretation. What the contractor claims to be agency breaches of contract and of duties of good faith and fair dealing are not supported by the record. Similarly, the record shows no bad faith by the agency. The contractor does not defeat the motion under the standards of resolving a motion for summary relief. Accordingly, the Board grants the motion of the agency and denies the appeal.

Findings of Fact

Contract

1. The agency issued a solicitation requesting quotations in order to obtain technical and price quotations for a vocational trades culinary arts instructor at the Federal Correctional Institution (FCI) in Miami, Florida. Exhibit 1 at 10 (all exhibits are in the appeal file). Particular Federal Acquisition Regulation (FAR) clauses, FAR 52.212-1, 52.212-3, 52.212-4, and 52.212-5, were incorporated by reference into the solicitation. Exhibit 1 at 6. Terms of the solicitation were incorporated into the contract. Exhibit 2 at 11.

2. The solicitation stated the agency's intent to make a single award of a firm, fixed-price contract for a base year, with four option years to be exercised unilaterally by the agency, with the agency not obligated to exercise any of the option years. Exhibit 1 at 10.

3. The agency awarded the contract, with an effective date of August 8, 2011, to the contractor. The contract required the contractor to commence performance no later than September 7, 2011 ("The Contractor shall commence full performance of the services under this contract within 30 calendar days from the effective date of award."). The base year of the contract ran through August 7, 2012, with funds to be obligated by individual delivery/task orders. Exhibits 1 at 23, 2 at 1, 5, 8. Under the Option To Extend the Terms of the Contract clause (Mar 2000), FAR 52.217-9 (2011), the agency could extend the term of the contract only if the agency had provided a preliminary written notice of its intent to extend the term of the contract no later than June 8, 2012. The clause specified that the issuance of a preliminary notice of intent to extend did not commit the agency to extend the contract. Exhibit 1 at 14.

4. The contract's scope of work paragraph stated:

The contractor shall provide the following: The contractor will on a non-discriminatory basis, develop, teach, and manage the Culinary Arts Program, as outlined in the State of Florida Department of Education curriculum framework. The contractor will be responsible for instruction of Culinary Arts Vocational Training program for inmates at Federal Correctional Institution, Miami, FL. Responsibilities include developing a curriculum prior to beginning instruction, which must be approved by the Food Service Administrator and the Supervisor of Education, and daily lesson plans for the program. The Lab experience will be an integral part of the program. The instructor will be expected to provide instruction and oversight in the areas of: sanitation, safety, and equipment; hospitality and service; nutrition and food management (menu planning, costing, recipe conversion, etc.); theories and principles of cookery; food preparation; soups, sauces, and gravies; basic quantity cooking, vegetables and starches; breads, rolls, and dough production; dessert preparation. Live work may comprise up to 40% of the curriculum. A minimum of five live work projects are scheduled each year.

Exhibit 1 at 10-11 (¶ 1).

5. The contract detailed specific requirements for an instructor to satisfy:

A) Education:

A Bachelor or Associate degree in Culinary Arts or other related fields Sous Chef, Executive Chef, or Gourmet Chef, a high school diploma or GED and completion of a program of preparation in the culinary field at an accredited private or public post-secondary vocational-technical school, or completion of an equivalent military or apprenticeship program

B) Experience and Qualifications:

1. One year of teaching experience with demonstrated competencies, skills, and knowledge levels on which the instructor will be expected to teach.
2. State of Florida Teaching Certificate or non-degree Vocational Teaching Certificate.

- [3.] Completion of three years of specialized experience in hospitality, hotel/restaurant management, or a related culinary arts field.

Exhibit 1 at 11 (¶ 2). Generally, the contractor was to provide two three-hour sessions four days each week. Exhibit 1 at 11 (¶ 3).

6. As to “teaching supplies” the contract stated:

The curriculum, textbooks, training aids, and materials for the drafting vocational class will be furnished by the Bureau of Prisons. All supplies utilized in Culinary Arts are subject to approval by the Supervisor of Education. An approved list of reference materials suggested by the Instructor may be ordered by the Education Department.

Exhibit 1 at 11 (¶ 4).

7. The contract also addressed “institutional security”: “The contractor/teacher will adhere to all regulations prescribed by FCI Miami for the safety, custody, and conduct of the inmates. The teacher shall attend an orientation program prior to assuming any Institutional involvement.” Exhibit 1 at 12 (¶ 7).

8. Among the special contract conditions was the following: “Contractor employees shall adhere to all institution regulations regarding conduct and performance. Contractor employees will be allowed access to the institution at the sole discretion of the Chief Executive Officer (CEO).” Exhibit 1 at 25.

Task order and performance

9. On September 15, 2011, the agency informed the contractor that its proposed instructor did not meet the agency’s criteria to be cleared to work; the agency sought another candidate for consideration to fulfill the contract requirements. Exhibit 3.

10. On November 10, 2011, the agency contacted the contractor, seeking the name of a candidate for consideration to fulfill contractual requirements. Exhibit 6. In response, on November 14, 2011, the contractor stated that no other candidate for the instructor position had been identified. Exhibit 7.

11. The agency provided the contractor with notice on January 5, 2012, that the agency sought a viable candidate for consideration by January 31, 2012. Moreover, the

notice specified that if the contractor was unable to provide a viable candidate by the given date, the agency would begin the termination process. Exhibit 8.

12. The agency placed a task/delivery order under the contract on March 30, 2012. The order required instructor services for FCI Miami from April 2 through August 7, 2012. Exhibit 9.

13. On April 2, 2012, the contractor replied, noting that efforts had begun on filling the order.

However, since you previously indicated that you would cancel the contract after January 31st, I did not think that we would be proceeding with the program, and did not pursue hiring these instructors. Since you obviously do wish to proceed with the contract, I have contacted both Instructors, and [one] is still available, and is very excited about teaching culinary classes at FCI Miami.

... I intend to utilize a staffing plan that consists of multiple instructors. After the background checks are completed, I will likely designate a primary Instructor, and will utilize the remainder as substitute Instructors.

Exhibit 10 at 1.

14. In April the contractor began submitting information on potential instructors. On April 27, 2012, the contractor notified the agency that full performance could not begin within thirty days, because the agency had not completed background checks. The contractor also requested a copy of the curriculum, and a list of the textbooks, training aids, and any other material that the agency would be furnishing under the contract. Exhibit 10 at 41-42.

15. On May 3, 2012, the agency sought from the contractor proper credentials and certifications of the candidates:

you have not satisfied the contract requirements by submitting viable candidates to meet the performance criteria until you provide this office with the proper credentials and certifications of your candidates. Therefore, until I receive verification and proof that you[r] candidates can satisfy the Education, Experience and Qualifications portion, you will not be considered as satisfying the requirements of the contract.

Please provide me copies of the credentials and certification for each [of the] candidates for my review.

Exhibit 10 at 4.

16. After receiving some information from the contractor, the contract specialist informed the contractor on May 9, 2012: "In order for me to verify that these candidates meets [sic] the experience and qualification requirements listed in the Statement of Work, I will need telephone numbers and points of contacts for the list of experience provided by these candidates. Additionally, I am still in need of the credentials and all verification information for [candidate five]." Further information was requested: "the curriculum for the Culinary Arts Program has not been submitted by you for approval." Exhibit 10 at 3.

17. By May 11, 2012, the contractor had completed its submissions of information regarding its proposed instructors. It offered five instructors.

18. The contractor's submissions indicated that candidate one held a bachelor of arts in psychology, a master's degree of science in exceptional student education, and an educational specialist degree (educational leadership). The submissions identified experience/qualifications as "5+ years of work experience teaching high risk youth and young adults; utilized culinary projects and cooking classes to plan and teach dynamic lessons to my students that correlated to the daily activities of life. Also have experience teaching Exceptional students." The individual held a temporary educator's certificate from Florida. Exhibit 10 at 5, 26-27.

19. For candidate two, the contractor's submissions listed a bachelor of science degree in home economics, and two years at a culinary arts training/internship program, the same two years identifying the institution as an employer. Experience/qualifications included "3 years of work experience with Pro-Start, a nationally recognized program of Culinary and Hospitality classes at the secondary level that provides the skills necessary to become successful in the wide array of career opportunities in the culinary/hospitality fields" and "1 1/2 years of work experience as an Operations Manager for private catering company, kept weekly and monthly inventories for all food and supplies; handled a majority of the purchasing and resourcing from purveyors and was responsible for overseeing all online food orders." The candidate possessed a professional educator's certificate from Florida. Exhibit 10 at 5, 29-31.

20. The contractor's submissions indicated that candidate three had a bachelor of arts degree in mathematics and secondary education, and identified one year at a hotel culinary/hospitality training program. The experience/qualifications included "4+ years of

work experience in food service including working in busy New York restaurants, catering private events in Miami, and working in hospitality at a hotel in Taiwan. Specialize in Southeast Asian cuisine drawing from my Indonesian background including Chinese.” The individual possessed a temporary educator’s certificate from Florida. Exhibit 10 at 6, 32-33.

21. For candidate four, the contractor’s submissions listed under education a bachelor of arts degree in education, and “Broward College, 2011, Nutrition.” The experience/qualifications section listed, in addition to teaching, “3 1/2 years of work experience in the restaurant and food services industries, which included preparing meals to order, and complying with Health Department policies and regulations pertaining to safety, sanitation and food quality.” The referenced employers included a restaurant and meat department, without specifying any position, work or duties. The individual possessed a professional educator’s certificate from Florida. Exhibit 10 at 7, 34-36.

22. Regarding a fifth candidate identified in the contractor’s submissions, who held a bachelor’s degree in health service administration for education, under experience/qualifications was stated: “4+ years of work experience teaching a variety of subject matters including Home Economics, which consisted of following the sunshine state regulations and a home economics curriculum that included the principles of basic food science, how to read, follow, and prepare recipes, the basic principles of nutrition, and basic safety instructions for the kitchen environment.” The submission also stated, “1 year of experience working in a restaurant.” Exhibit 10 at 7, 37-38.

23. On May 14, 2012, the contractor recommended textbooks and other training aids and handouts, while having no suggestions for reference materials. The contractor did not provide a curriculum. Exhibit 12.

24. An agency-internal email message indicates that candidate two was contacted in late May to come with two passport pictures to an agency office on May 29, 2012, for a urine analysis and to complete the clearance process. However, the individual did not appear. Exhibit 15. On the existing record, under the standards for summary relief, the Board cannot conclude that candidate two was so contacted.

25. Although the agency was of the view that the contractor was to furnish the curriculum, Exhibit 11 at 1, on May 31, 2012, the agency stated that it would furnish a copy of the curriculum “to clear up any misunderstanding as to the Statement of Work.” Further, the agency noted that only one proposed candidate (candidate two) satisfied the education, experience and qualifications requirements, and this individual did not report to complete the background investigation. Exhibit 16 at 3. For each of the other candidates, the agency detailed why the agency had concluded each was not a viable candidate. Those candidates

lacked formal education in culinary arts or a related field, and lacked sufficient experience in teaching in the culinary arts field. Exhibit 16 at 4-5.

26. On May 31, 2012, the agency provided written notification of its preliminary intent to exercise the first-year option, expressly noting that such was not an actual extension. Exhibit 13.

27. In response, on June 1, 2012, the contractor contended that neither it nor candidate two was aware of any testing scheduled for May 29. The contractor expressed its view of the required qualifications for candidates, with respect to teaching and education and culinary experience:

We appear to have a different understanding of the contract terms regarding the one year of teaching experience that is required. The contract does not specify that the instructor must have one year of teaching experience in culinary arts. The contract only specifies that the Instructor must have one year of teaching experience with demonstrated competencies, skills, and knowledge levels on which the instructor will be expected to teach. In other words, the Instructor must be competent skilled and knowledgeable in Culinary Arts, the field in which the instructor is expected to teach.

.....

We appear to have a different understanding of the contract terms regarding the educational requirements. The field of Instruction/Teaching is a related field to Culinary arts, therefore, a degree in Education meets the requirements of the contract (see the web sites below). The American Culinary Federation, which certifies Culinary Educator's [sic], also recognizes coursework in Education as being related to the field to Culinary arts.

Exhibit 16 at 2-3. The contractor also expressed the view that the contract did not require the contractor to provide passport photographs for the candidates. Moreover, the contractor posited that, in addition to candidate two (whom the agency deemed to be qualified), candidates one, three, and four possessed the required teaching experience and met the educational requirements; the contractor did not comment on candidate five. Exhibit 16 at 1-3.

28. For candidate one, the contractor noted, in relevant part:

Specifically, [the individual] has 5+ years of teaching experience with high risk youth and young adults, and she utilized culinary projects and cooking classes to teach her students. Since being an instructor is a related culinary arts field, this teaching experience meets both the requirements of the requisite teaching experience, AND the requirement for three years of specialized experience in hospitality, hotel/restaurant management, or related culinary arts field.

[The individual] has [a] Master's Degree in Exceptional Student Education, which meets the requirement of having a degree in a related Culinary Arts field.

Exhibit 16 at 2-3.

29. For candidate three, the contractor wrote, first regarding teaching experience, and then regarding educational requirements:

[The individual] meets the requirement in two different ways of having one year of teaching experience with demonstrated competencies, skills and knowledge levels on which the instructor will be expected to teach. As already noted, [the individual] has 8 years of teaching experience, and her 4+ years of culinary experience demonstrate that she has the competencies, skills and knowledge in culinary arts. Moreover, as the former owner of a catering company, [the individual] trained, and taught culinary skills to her workers.

[The individual] has 4+ years of culinary experience, and she therefore meets the requirement of having three years of specialized experience in hospitality, hotel/restaurant management, or related culinary arts field.

Exhibit 16 at 2-3.

30. For candidate four, the contractor wrote:

[The individual] has 5 years of teaching experience, has taken several nutrition classes, and has 3 1/2 years of Culinary experience with demonstrated competencies, skills and knowledge in culinary arts.

[The individual] has a Bachelor's degree in Elementary Education, which meets the requirement of having a degree in a related Culinary Arts field.

Exhibit 16 at 2-3.

31. The agency did not exercise the option. Exhibit 18 at 2 (¶ 1). As of August 7, 2012, no candidate had been cleared by the agency. Exhibit 18 at 1, 3. The contractor has not suggested that candidate two was made available for security clearance testing prior to the end of the contract.

The claim, denial, and appeal

32. By written submission dated October 15, 2012, the contractor submitted a claim to the agency, seeking \$18,431.73, raising three counts: (i) material breach of contract; (ii) breach of contract, and breach of the covenant of good faith and fair dealing; and (iii) bad faith, arbitrary and capricious abuse of discretion by failing to exercise option year one. Exhibit 17.

33. The agency denied the claim by decision dated December 13, 2012. Exhibit 18.

34. The contractor filed an appeal with the Board on March 6, 2013. Exhibit 19.

Discussion

The contractor raises four counts in its amended complaint. The agency filed a motion to dismiss the appeal with prejudice, prior to submission of the amended complaint. The amended complaint is not substantively different from the complaint for purposes of resolving the motion, which the Board treats as a motion for summary relief. The agency maintains that the contractor's pleadings do not support any of the allegations; it asks that the appeal be dismissed. The contractor opposes the motion.

As the moving party, the agency bears the burden of establishing the absence of any genuine issue of material fact. All significant doubt over factual issues must be resolved in favor of the party opposing summary relief. At this stage, the Board may not make determinations about the credibility of potential witnesses or the weight of the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). However, "the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987) (citations omitted). If a motion is made and supported as required in Federal Rule of Civil Procedure 56(a), the adverse party may not rest upon the mere allegations or denial in its filings, but must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-

24 (1986); *J.C. Lee v. Department of Agriculture*, CBCA 3536 (Apr. 29, 2014). The Board has made findings consistent with these dictates. Given that material facts are not in dispute, there is no need for discovery, which would not alter the conclusions reached. The agency is entitled to judgment as a matter of law.

Resolution of this dispute is largely controlled by the language of the contract and contract interpretation. After reaching conclusions from this starting point, the particulars of the counts raised by the contractor can be addressed in the context of the agency's motion.

Contract interpretation

The language of the contract and underlying order is specific regarding the distinct qualifications (education and experience/qualifications) of any instructor. In terms of education, instructors must possess a bachelor or associate degree in culinary arts or other related fields, or have other particularized, specified training. Every bachelor degree does not satisfy the requirement. Instructors also must have minimum specific experience, to include one year of teaching experience with demonstrated competencies, skills, and knowledge levels on which the instructor will be expected to teach, a teaching certificate, and completion of three years of specialized experience in hospitality, hotel/restaurant management, or a related culinary arts field. That is, one year of teaching experience must relate to the material to be taught; there must be specialized experience as well. Finding 5.

Contrary to the assertions of the contractor, a teaching certification and teaching experience, by themselves, do not satisfy the contract requirements. Rather, as the plain language of the contract dictates under education, the degree or training must be in the culinary arts or other related fields; similarly, the experience and qualifications of an instructor must satisfy minimums for teaching experience and specialized experience. Finding 5. The information the contractor provided to the agency during the course of performance fails to demonstrate that candidates one, three, four, and five satisfy the education requirements or the experience and qualifications requirements.

In its amended complaint (§ 79), the contractor asserts that a degree in education is to be considered as a field related to the culinary arts; it makes reference to a culinary federation's treatment of education. The submission with the amended complaint, Exhibit E, said to be from the federation, discusses an "advanced-degree culinary professional who is working as an educator at an accredited" institution. The submission indicates that culinary certification requires culinary skills. This does not support the position of the contractor. The contractor did not provide to the agency information that established that any of the candidates in question possessed either a certification from the federation or the equivalent of an advanced-degree culinary professional. In any event, the contract contained

explicit requirements for an instructor to satisfy. The agency reasonably and properly evaluated the credentials of the candidates as proffered by the contractor, Findings 18, 20-22, 28-30. On their face, the submissions for the candidates in question do not indicate compliance with contractual requirements.

Apart from the requirements for an instructor, the contractor proposes a novel interpretation of the contractual requirements that address developing and providing a curriculum. Findings 4, 6. The contractor maintains that the initial obligation was the agency's to provide the curriculum, and the ensuing obligation on the contractor to develop or refine it for the particular teaching.

The contractor's interpretation is inconsistent with the plain language of the contract. It was the responsibility of the contractor to develop a curriculum (which had to be approved) and daily lesson plans. Finding 4. This required the contractor to propose a curriculum to the agency for approval. In contrast, the contract, Finding 6, obligated the agency to provide "teaching supplies"--the curriculum and other materials--to the instructor and students for a given class. The contractor's interpretation of the contract and obligations of each party with respect to a curriculum is not reasonable, as it ignores the context of the agency's providing teaching supplies and materials and of the contractor's obligation to develop the curriculum. The agency's ultimate acquiescence in agreeing to provide a curriculum to the contractor does not alter the proper interpretation of the contract.

Regarding the contractor's claim relating to the non-exercise of the option, the contract specified that the agency's notification of intent to exercise an option would not bind the agency to exercise the option. The agency did not exercise the option; it was not obligated to exercise the option. At the time the contract lapsed, one year after contract award, the contractor had failed to satisfy its contractual obligations.

With this context, the specific counts can be addressed in light of the agency's motion.

Count one

The contractor maintains that the agency materially breached the contract and failed to perform its contractual obligations. In particular, the contractor asserts that the agency failed to furnish a curriculum, and did not provide textbooks, training aids, or other materials used for the culinary arts class. Further, the contractor states that the agency failed to complete background checks for any candidate and to provide four hours of security orientation training for any candidate. The contractor contends that the contractor fully satisfied its obligations and was prevented from fulfilling the remainder of its obligations because of the agency breaches.

As concluded above, the agency was not obligated to provide a curriculum initially. It was the contractor's obligation to develop the curriculum. The agency was required to provide teaching materials to the class and instructor. No class began. The agency never failed in its obligations.

Similarly, the agency was not required to complete background checks of, or provide security orientation training to, those candidates not deemed acceptable for performance under the contract. At the conclusion of the contract year, there was only one candidate who potentially satisfied the contract requirements. The contractor did not make that individual available for the completion of clearance testing procedures after June 1. Findings 24, 27, 31. Even if the agency had granted clearance to candidate two, the contractor intended to staff the contract with multiple instructors and never indicated to the agency that one instructor would be used to complete performance. Because the contractor has not demonstrated that a suitable staff was available to perform, the agency was not in material breach of the contract. The agency prevails on this aspect of its motion, such that the Board denies this element of the claim.

Count two

The contractor contends that the agency breached the contract by effectively and unilaterally changing the terms of the contract both by creating a requirement that the agency had to be able to contact previous culinary employers to verify culinary employment, even if the employment was outside the five-year period identified in the contract, and by prohibiting the contractor from utilizing instructors with bachelor's degrees in education who lacked one year of teaching experience in the culinary arts. The contractor contends that a degree in education is recognized as a field related to the culinary arts. Further, the contractor asserts that the agency breached the contract by requiring passport photographs.

The agency sought information for the candidates so as to ascertain compliance with education, experience, and qualification requirements. The initial submissions from the contractor failed to demonstrate compliance. The agency did not make the provision of contact data a precondition to deeming a candidate acceptable. In seeking telephone numbers and points of contact, the agency reasonably acted within the terms and conditions of the contract, as it attempted to go beyond the contractor's submissions, which did not on their face demonstrate compliance, to determine the actual qualifications of the candidates. Without additional information, the contractor's submissions did not demonstrate compliance for four of the five candidates.

A degree in education, not in a culinary field, does not satisfy the education requirements of the contract; the degree must be in the culinary arts or other related fields. The agency did not require more than the contract dictated.

While the contract does not explicitly require the contractor to provide passport photographs for a given candidate, the lack of such photographs is not stated to be a basis for the non-completion of the security clearance process or other actions or inactions under the contract. Thus, further facts need not be developed and legal conclusions on this item need not be reached.

The agency did not alter the contract. The agency required the contractor to identify candidates with information that satisfied explicit requirements. The contractor failed in its submissions to demonstrate compliance, even with the agency's request for additional information in support. There being no breach by the agency, the agency prevails on this aspect of its motion. The Board denies this element of the contractor's claim.

Count three

The contractor asserts that the agency breached the covenant of good faith and fair dealing by failing in its obligations to complete background checks and furnish the curriculum and materials. Further, the contractor alleges a lack of due diligence by the agency in making progress on and in failing to complete these tasks. The contractor misapprehends the obligations of the agency. The agency's obligation to perform various tasks did not arise because the contract own failed to provide instructors with demonstrated education, experience, and qualifications that satisfied the requirements of the contract.

The contract did not obligate the agency either to complete background checks when viable candidates were not identified, or to furnish the curriculum or materials for a class that never convened. The record and assertions lend no support to the claim of lack of due diligence by the agency which reviewed submissions by the contractor, sought additional information, and attempted to complete the clearance process for the one viable candidate.

The contractor also faults the agency regarding its failure to provide notice that the option would not be exercised, after the initial notice of intent to exercise the option and the ultimate failure to exercise the option. The record, and the contractor's assertions, reveal no agency failing. The agency's initial notice of intent to exercise the option did not commit the agency to exercise the option. The contract did not obligate the agency to provide notice that it would not be exercising the option. Because the agency was not obligated to exercise the option, the failure to do so cannot be equated to a lack of good faith or fair dealing.

The agency prevails on this aspect of its motion. The Board denies this element of the claim.

Count four

In its final count, the contractor asserts that by failing to exercise the option, the agency acted in bad faith and committed an arbitrary and capricious abuse of discretion. While the contractor attaches the words “bad faith” to various agency actions and inactions, those actions and inactions do not remotely have a factual or legal basis which could be used to demonstrate bad faith. The exercise of the option was within the agency’s discretion; the agency was not required to exercise the option. The contractor’s interpretation of its contractual obligations was at odds with that of the agency, and at odds with the conclusions of this Board. The contractor failed to have a viable candidate with the requisite clearances one year after contract award and for several months after receipt of the task order. Given this basic failure by the contractor, factually and legally the contractor has not offered valid support to demonstrate an arbitrary or capricious abuse of discretion by the agency.

The agency’s failure to exercise the option represents neither bad faith nor an abuse of discretion. The agency prevails on this aspect of its motion. The Board denies this element of the claim.

Decision

The Board **DENIES** the appeal.

JOSEPH A. VERGILIO
Board Judge

We concur:

JAMES L. STERN
Board Judge

R. ANTHONY McCANN
Board Judge