UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR FAILURE TO STATE
A CLAIM GRANTED IN PART: September 9, 2016

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.

Erin Frazee Masini and Mark Langstein, Office of General Counsel, Department of Commerce, Washington, DC, counsel for Respondent.

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

DRUMMOND, Board Judge.

ThinkGlobal Inc. (TGI) has appealed the deemed denial of its certified claim arising from two separate no-cost contracts (2004 and 2009) with the Department of Commerce (DOC) to market, produce, and distribute (hereinafter publish) an advertising catalog called Commercial News USA (CNUSA). TGI seeks $8,678,475[1] in lost profits and unearned revenues.

DOC moves to dismiss the above-captioned appeal for failure to state a claim upon which relief can be granted, or in the alternative, for untimeliness and lack of subject matter

[1] TGI offers no information as to how the $8,678,475 is distributed between the contracts.

jurisdiction. TGI opposes DOC's motion.[2] For the reasons set forth below, DOC's motion is granted in part and denied in part.

Background[3]

The 2004 Contract

On April 1, 2004, TGI entered into a no-cost contract (2004 contract) with DOC, under which TGI agreed to publish CNUSA[4] in print and to post an electronic copy on DOC's website "BuyUSA.com."[5] Complaint ¶¶ 66, 68 & Exhibit A[6] at 1, 3; Respondent's Motion to Dismiss at 5 n.2. The first issue of CNUSA was to be published within "120 days of contract signing." Complaint, Exhibit A at 5. The base term of the 2004 contract ran from April 1, 2004, through August 31, 2006, with the possibility of three no-cost option years. *Id*. at 1, 2, 7.

The 2004 contract specified that DOC bore no risk of loss associated with the publication and that TGI's advertising sales would generate sufficient revenue to cover TGI's "costs and afford a reasonable profit." Complaint ¶¶ 53, 54 & Exhibit A at 1, 4-7.

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[2] The record includes the appeal file, TGI's complaint and its two exhibits, DOC's answer, Respondent's Motion to Dismiss, Appellant's Response to Motion to Dismiss, and Respondent's Reply to Appellant's Response.

[3] The factual allegations are taken primarily from the complaint, supplemented by information in the contracts, appeal file, and certified claim, to which TGI refers in its complaint.

[4] The 2004 contract described CNUSA as the "official catalog of U.S. suppliers." It consisted almost entirely of paid advertising by American companies and was routinely placed in lobby areas of Foreign Commercial Service offices for visitors to peruse. The goal of the program was to provide foreign businesses with information regarding potential American partners.

[5] The 2004 contract described BuyUSA.com as a Government-to-Business website intended to assist U.S. exporters in locating qualified international buyers and trading partners. DOC discontinued the BuyUSA program during the 2004 contract.

[6] Exhibit A to TGI's complaint is the 2004 contract. Exhibit B is the 2009 contract.

According to TGI, the "CNUSA program remained marginally profitable . . . under the 2004 contract." Complaint ¶ 141.

Under the terms of the 2004 contract, TGI agreed to use "its market research, budget, channels of distribution and schedules to develop and," with the "**cooperation** of [DOC] field offices, implement a domestic promotional campaign for CNUSA." Complaint ¶ 158 & Exhibit A at 4 (emphasis added).

Section 4 of the 2004 contract discussed in part the information that DOC may furnish to TGI. Exhibit A at 5. Section 4.A of the 2004 contract stated that "**upon contract award**," DOC will, "as relevant and appropriate," provide to TGI "information for companies currently advertising in both the online and print versions of CNUSA." Complaint ¶ 71 & Exhibit A at 5 (emphasis added). This section also stated that DOC will, "to the degree possible, provide current marketing materials, training materials and other information deemed relevant to the program." Additionally, this section stated that "**immediately after contract signing**," DOC "will, to the degree possible, supply" TGI with "a complete data base of current and past CNUSA advertisers"; "a detailed breakdown of all distribution costs"; "a revised distribution list" **by the** "**end of December 2004**"; and "space on the www.export.gov website." *Id*. (emphasis added).

Section 4.B of the 2004 contract stated that "**immediately after contract signing**," DOC will use "its best efforts (subject to the previous publisher [sic] willingness to supply such items in its possession)" to provide TGI price lists, media kits, and past issues of CNUSA. Complaint ¶ 72 & Exhibit A at 5 (emphasis added). Section 5.B.2 of the 2004 contract stated, inter alia, that DOC will "**perform semi-annual reviews of the project's operations and revenues**." Complaint ¶ 73 & Exhibit A at 6 (emphasis added). This section also stated that the "semi-annual review meetings shall alternate between Washington, DC and the contractor headquarters." *Id*.

DOC did not exercise the first option by the conclusion of the initial base period. Complaint, Exhibit A at 2. TGI, however, continued to publish CNUSA, and approximately thirteen months later, DOC and TGI executed bilateral modification 1 with an effective date of October 3, 2007. Appeal File, Exhibit 2. Bilateral modification 1 exercised DOC's option for option years I and II. The 2007 modification incorporated by reference all the terms and conditions of the 2004 contract, including that the services were to be performed at no cost to DOC. DOC and TGI later executed bilateral modification 2 with an effective date of August 31, 2008. Appeal File, Exhibit 4. Modification 2 exercised DOC's option for option year III for the period September 1, 2008, through August 31, 2009. The 2008 modification incorporated by reference all the terms and conditions of the 2004 contract, including that

the services would be performed at no cost to DOC. TGI's services under the exercised options ended on August 31, 2009.

The 2009 Contract

In September 2009, TGI entered into a new contract (2009 contract) with DOC, under which TGI agreed to publish CNUSA in print and electronically at no cost to DOC. Complaint ¶¶ 149, 153 & Exhibit B at 2, 4. The 2009 contract, like the 2004 contract, called for TGI to recover its costs and a reasonable profit from revenue generated by CNUSA. Complaint ¶153 & Exhibit B at 4. The 2009 contract had an initial base term, September 1, 2009, through August 31, 2010, with the possibility of four one-year options. Complaint ¶ 155 & Exhibit B at 7.

The 2009 contract stated that "at a later date, the contractor also **may** be requested to provide marketing and maintenance services for the Featured U.S. Exporters (FUSE) program."[7] Complaint, Exhibit B at 4 (emphasis added). DOC continued to operate the FUSE program during the 2009 contract; at no time during the 2009 contract did DOC request TGI to take over the FUSE program. Complaint ¶ 190; Answer ¶ 190.

As with the 2004 contract, the 2009 contract stated, inter alia, that TGI "shall use its market research, budget, channels of distribution and schedules to develop and," **with the "cooperation of [DOC] field offices**, implement a domestic promotional campaign for CNUSA." Compliant ¶ 158 (emphasis added).

Section 4.B of the 2009 contract stated, inter alia, that DOC "will, as relevant and appropriate, provide contractor information for current online and print advertisers" and "current marketing materials, training materials and other information deemed relevant to the program." Complaint ¶ 159.

Section 6 of the 2009 contract stated that DOC may extend the term of the 2009 contract through four one-year periods[8] "based upon satisfactory performance." Complaint ¶¶ 155, 156 & Exhibit B at 2, 7. Option year I would run from September 3, 2010, to September 2, 2011. Complaint, Exhibit B at 2. Each subsequent option, if elected, was to

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[7] FUSE is an online directory of U.S. products and services featured on government websites around the world.

[8] We refer to each annual extension by option year, i.e., option year I (term ran from September 3, 2010, to September 2, 2011) and option year II (term ran from September 3, 2011, through September 2, 2012).

continue for twelve months thereafter. *Id*. Although DOC did not exercise further options under the 2009 contract after option year I ended on September 2, 2011, TGI continued to provide services after this date. Complaint ¶ 231; Answer ¶ 231.

By email message dated July 10, 2013, DOC ordered TGI to stop work, which it did. Complaint ¶ 238.

The Claim

By letter dated July 25, 2014, TGI submitted a certified claim to a DOC contracting officer asserting breaches of the 2004 and 2009 contracts, continuous breaches of its implied covenants under both contracts, unfair competition under both contracts, bad faith termination of the 2009 contract, and entitlement to $8,678,475 in lost profits and unearned revenues. Complaint ¶¶ 31, 32, 36-41, 266-72, 278-88, 304-06, 309; Certified Claim at 1, 23-31. TGI complained that after award of the 2004 contract it "encountered a number of significant administrative obstacles" that continued into the 2009 contract. Certified Claim at 7-23. In discussing the breach claims, TGI, inter alia, alleged that DOC failed to provide timely, complete, accurate, and easy to format data, as well as failed to commit the cooperation of the field offices under both contracts. Complaint ¶ 266; Certified Claim at 1, 2, 5-8, 13-16. TGI asserted that DOC was "unable to maintain the website on a daily, real-time basis," and to solve the problem, TGI "built and hosted a non-government website at ThinkGlobal.us." Certified Claim at 7. TGI also asserted that, although the 2004 contract "encouraged [TGI] to develop cost-savings strategies and partnership agreements for the distribution of the print magazine," DOC "repeatedly refused to leverage the Government's formal MOA [memorandum of agreement] and strategic partnership with FedEx," and later with DHL and UPS. *Id*. Finally, TGI asserted that DOC never conducted the semi-annual reviews as required by the 2004 contract. *Id*.

Concerning the breach claims arising under the 2004 contract, TGI alleged that the claims accrued on March 11, 2011, after DOC's refusal to provide documents requested under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006). TGI alleged further that it was only then that TGI knew that DOC had breached its obligations under the 2004 contract. Appellant's Response to Motion to Dismiss at 12-16.

By letter dated September 25, 2014, a DOC contracting officer requested that TGI provide additional information about its certified claim that DOC had received on July 29, 2014. Complaint ¶ 32; Answer ¶ 32. After allowing more than ninety days to pass from the initial submission of the claim, TGI filed its appeal with the Board from a deemed denial on December 22, 2014. TGI subsequently filed a complaint, alleging that DOC breached the 2004 and 2009 contracts, breached its implied covenants under both contracts, engaged in

unfair competition under both contracts, and acted in bad faith in terminating the 2009 contract. The complaint requested $8,678,475 for lost profits and unearned revenues.

Discussion

In its complaint, TGI argues that the 2004 and 2009 contracts placed specific obligations upon DOC, namely, DOC was obligated to cooperate with and assist TGI in "managing and ensuring the success of the CNUSA program." In particular, TGI's complaint contains three counts. In count I of the complaint, TGI alleges that DOC "systematically and continuously failed to meet its contractual obligations to cooperate" with TGI under the 2004 and 2009 contracts by (1) "providing only a partial, outdated and inconsistent list of past advertisers"; (2) "failing to provide a distribution database"; (3) "failing to provide ThinkGlobal with a detailed and accurate breakdown of distribution costs"; (4) "failing to cooperate with ThinkGlobal to minimize distribution costs"; (5) "ignoring its administrative duties, including foregoing semi-annual reviews, performance assessments, and strategic assessments"; (6) "failing to provide ThinkGlobal with daily, real-time space on the www.export.gov website"; (7) "failing to commit the cooperation of the field offices"; (8) "refusing to entertain any discussion about incorporating the FUSE program into CNUSA"; and (9) "failing to properly administer the 2012 and 2013 options."

TGI also asserts in count I of the complaint that all the breach claims associated with the 2004 contract accrued on March 11, 2011, after DOC's refusal to provide documents in response to a FOIA request. TGI alleges that it was only then that TGI knew that DOC had breached its obligations under the 2004 contract.

In count II of the complaint, TGI alleges, inter alia, that DOC breached its implied covenant of good faith and fair dealing by repeatedly failing to meet its contractual obligations under the 2004 and 2009 contracts, and by terminating the 2009 contract in bad faith.

In count III of the complaint, TGI alleges that DOC unfairly competed with TGI by hindering its efforts to leverage the FUSE program.

Each count requests the same amount of damages: $8,678,475.

Jurisdiction

DOC argues that TGI "improperly proceeds before this Board" because TGI "has not allowed the contracting officer a meaningful opportunity to issue a considered final decision

in this matter." DOC alleges that, rather "than submitting documentation explaining how two no-cost contracts could yield $9 million in damages . . . [TGI] simply filed an appeal to bring its claim before this Board and continue litigation." DOC asks the Board to remand the issues back to the contracting officer for issuance of a final decision.

DOC's argument is not persuasive. Section 7103(f)(2) of the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (2012) (CDA), requires the contracting officer to respond within sixty days of receipt of a certified claim by issuing a decision or notifying the contractor of the time within which a decision will be issued. As of September 27, 2014, TGI's claim had been before the contracting officer for sixty days, and the contracting officer had done neither of these things. The Government "has no basis for imposing a documentation requirement upon [the contractor] as a jurisdictional prerequisite to appeal." *Corrections Corp. of America v. Department of Homeland Security*, CBCA 2647, 15-1 BCA ¶ 35,971, at 175,742. As TGI filed the appeal after September 27, 2014, we find that TGI acted within its rights in appealing the deemed denial to the Board. *See, e.g.*, *Westclox Military Products*, ASBCA 25592, 81-2 BCA ¶ 15,270, at 75,615. We possess jurisdiction to consider this appeal.

Failure to State a Claim

In considering any such motion, "we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *Kiewit-Turner, a Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 14-1 BCA ¶ 35,705, at 174,846 (quoting *Anaheim Gardens v. United States*, 444 F.3d 1309, 1314-15 (Fed. Cir. 2006)). However, to survive the motion, a complaint must contain sufficient factual matter, accepted as true, to "state a claim that is plausible on its face." *Ashcroft v. Iqbal*, 555 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 556 (2009)). This means that the complaint must "raise a right of relief above the speculative level." *Twombly*, 550 U.S. at 555. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Further, courts are "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 284 (1986).

A. Timeliness of the 2004 breach claims (counts I and II)

Here, there is no question that TGI has alleged the necessary elements for a breach of contract claim. DOC seeks partial dismissal, however, arguing that all breach "claims under the 2004 contract are untimely on their face." DOC contends that the breach claims under

the 2004 contract accrued at contract award or April 1, 2004, and that TGI had notice of them. TGI alleges that the claims under the 2004 contract were continuing and accrued on March 11, 2011. TGI asserts that only after DOC's refusal to provide documents requested under FOIA did it know that DOC had breached its obligations under the 2004 contract.

The CDA requires that "each claim by a contractor against the Federal Government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A); *see* 48 CFR 33.206(a) (2004) (implementing CDA limitations period). A party's failure to submit a claim within six years of accrual is an affirmative defense to the claim. *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,789; *Kellogg Brown & Root Services, Inc.*, ASBCA 58175, 15-1 BCA ¶ 35,988, at 175,825. As the proponent of its affirmative defense, DOC bears the burden of proving that TGI's claim for damages under the 2004 contract is untimely. *See Shell Oil Co. v. United States*, 751 F.3d 1282, 1297 (Fed. Cir. 2014); *Brunswick Bank & Trust Co. v. United States*, 707 F.2d 1355, 1360 (Fed. Cir. 1983) (party raising an affirmative defense normally bears the burden of proof).

Pursuant to Federal Acquisition Regulation (FAR) 33.201, a claim against the United States first accrues on "the date when all events, that fix the alleged liability on either the Government or contractor and permit assertion of the claim, were known or should have been known." 48 CFR 33.201. In breach of contract actions, "accrual generally occurs 'at the time of breach.'" *Arakaki v. United States*, 62 Fed. Cl. 244, 254 (2004). "[O]nce a party is on notice that it has a potential claim the limitations period begins to run." *Cardinal Maintenance Service, Inc.*, ASBCA 56885, 11-1 BCA ¶ 34,616, at 170,610 (2010). Claim accrual need not await contract completion when all the events that fix liability were known at an earlier date. *DTS Aviation Services, Inc.*, ASBCA 56352, 09-2 BCA ¶ 34,288, at 169,379 ("[T]he FAR definition states that for liability to fix for purposes of claim accrual, only 'some' but not necessarily 'all' of the injury must be shown.").

Here, based on the language of the 2004 contract, claims relating to DOC's failure to provide information required by section 4 should have been known, and therefore accrued, upon contract award (April 1, 2004), when DOC failed to provide certain data under the 2004 contract. TGI was aware of an alleged breach at that time. TGI argues, however, that claims under the 2004 contract were continuing and did not accrue until March 11, 2011, after it had submitted its FOIA request. As for TGI's continuing breach theory, the alleged breaches here occurred well before TGI submitted a FOIA request to receive the information stated in section 4 of the contract. When DOC did not provide the information upon contract award or shortly after contract signing, TGI knew or should have been aware of the basis of any claims it had relating to DOC's express and implied contract obligations and the claims, therefore, accrued.

TGI's estoppel argument is also not applicable, as TGI does not allege affirmative misconduct on the part of DOC that induced TGI not to submit a claim until 2014. The failure to allege such misconduct is fatal to its estoppel argument. *California Business Telephones v. Department of Agriculture*, CBCA 135, 07-1 BCA ¶ 33,553, at 166,172. In addition, TGI has not alleged any trickery on the part of DOC in this case. Therefore, the statutory period of six years was not equitably tolled. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990).

We find that TGI's express and implied breach claims relating to the 2004 contract, and the options under that contract, were untimely. They must be dismissed for failure to state a claim because these claims accrued more than six years before TGI submitted its claim to the DOC contracting officer on July 25, 2014.

B. Timeliness of the 2009 breach claims (counts I and II)

DOC also seeks to dismiss the 2009 breach claims as untimely, stating that they are simply a continuation of TGI's 2004 breach of contract claims. DOC argues that we should find that the statute of limitations started to run in 2004 on DOC's alleged failure to provide information and documentation to TGI at the outset of the 2004 contract.

"In general, a cause of action against the government accrues 'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" *FloorPro, Inc. v. United States*, 680 F.3d 1377, 1381 (Fed. Cir. 2012) (quoting *Goodrich v. United States*, 434 F.3d 1329, 1333 (Fed. Cir. 2006)). DOC's obligation to provide information under the 2009 contract could not have arisen before the 2009 contract was awarded. Accordingly, there is no basis for DOC's argument that the statute of limitations applicable to the 2009 contract claims arose prior to 2009. We recognize that a great deal of TGI's complaint is based upon its allegations that DOC failed to provide copies of documents and information that it was required to provide under the contracts. Reviewing the contracts accompanying TGI's response brief, it seems clear that, although the 2004 contract contained a list of government-furnished data that DOC was to provide to TGI, the 2009 contract contains no such list. That may affect the merits of TGI's breach claims. It does not, however, make the 2009 breach claims untimely. To the extent that DOC failed to provide the information and documentation that it was required to provide under the terms of its 2009 contract, that is a different cause of action that is separate and distinct from the causes of action arising out of TGI's 2004 contract. DOC's request to dismiss the 2009 contract claims as untimely is denied.

C. The merits of the 2009 contract breach claims (counts I and II)

1. The no-cost nature of the contract

DOC argues that, because the 2009 contract was a no-cost contract, and because TGI admits that it actually earned profits from third parties under that no-cost contract, there is no set of facts that could entitle TGI to relief.

> Generally, a no-cost contract is a formal arrangement between a government entity and a vendor under which the government makes no monetary payment for the vendor's performance. Under a typical no-cost contract, a vendor provides a service that an agency would otherwise perform, but instead of receiving compensation from the agency, the vendor charges and retains fees assessed against third parties for its services.

Honorable Barbara A. Mikulski, B-308968 (Nov. 27, 2007) (citations and internal brackets omitted). Accordingly, an agency generally "has no financial obligation and the contractor has no expectation of payment from the government" for services performed under such contracts. *Id.*

Although the Government will not pay for services rendered under no-cost contracts, that does not mean that the Government is similarly immune from paying damages for breaching the terms of a no-cost contract in a way that limits the contractor's ability to earn monies from third parties under its contract. In a similar case, *Impact Associates, Inc. v. General Services Administration*, CBCA 3552, 15-1 BCA ¶ 35,910, we rejected the Government's argument where it issued directives that potentially limited a contractor's compensation:

> These clauses, the task order, and the underlying schedule contract do not shield the ordering agency from liability arising from the directives. The directives by the ordering agency are not consistent with the contract, and the limitations of the clauses are not applicable to the directives. The Government's directives were not changes within the scope of the contract, as they were neither a reduction in participation nor a withdrawal. Rather, the agency took away the contractor's ability to receive compensation for its services, thereby fundamentally changing the bargain. Therefore, while the contract clauses may have insulated the Government from liability in some circumstances, when the ordering agency acted in a manner inconsistent with the contract, it was indeed foreseeable that the contractor would be harmed.

Id. at 175,537; *see SUFI Network Services, Inc. v. United States*, 755 F.3d 1305, 1312-24 (Fed. Cir. 2014) (finding contractor entitled to damages for breach, even though contract was supposed to be at no cost to the Government). Accordingly, we cannot dismiss TGI's 2009 contract breach claims simply because the contract at issue was a no-cost contract. Although DOC calls TGI's claim a request for "Government-backed indemnification against TGI's failure to achieve more lavish profits" than it actually earned, Respondent's Motion to Dismiss at 5, TGI is entitled to attempt to prove that DOC breached the contract and that the breach caused it damage.

This is not to say that all of the allegations contained in TGI's claim and complaint identify actionable contract breaches. TGI's complaint is a hodgepodge of allegations of malfeasance and impropriety by DOC, some of which do not withstand scrutiny as a basis for a breach claim (particularly when compared with the actual language of the 2009 contract). For example, TGI alleges that DOC breached the 2009 contract by "[r]efusing to seriously evaluate incorporating the [Featured United States Exporters (FUSE)] program into CNUSA as outlined in the 2009 Contract, thereby forcing [TGI] to compete against this program for U.S. export advertising dollars." Appellant's Opposition to Motion to Dismiss at 8. Yet, as it relates to FUSE, the 2009 contract provides only that, "[a]t a later date, the contractor may also be requested to provide marketing and maintenance services for the [FUSE] program." Complaint, Exhibit B at 4. There is no language in the 2009 contract including FUSE in, or obligating DOC to add FUSE to, TGI's contract. At most, the language in the 2009 contract provides TGI with notice of the FUSE program and of the possibility that DOC might add the FUSE program to CNUSA at some point. The contract language does not appear to create any rights for TGI in the FUSE program or create a contractual obligation upon DOC to "seriously evaluate" adding FUSE to CNUSA.

Similarly, TGI complains that DOC refused TGI's "requests to reduce its largest cost, i.e., distribution, by leveraging the Government's strategic partnerships with official strategic partners to distribute CNUSA overseas." Appellant's Opposition to Motion to Dismiss at 7. Yet TGI cites nothing in the 2009 contract that would require DOC to do that. TGI appears to be alleging that, despite the absence of any contractual language obligating DOC to perform such a task, DOC had an implied duty of good faith and fair dealing to do so. That theory does not permit TGI to impose extra-contractual obligations upon the Government that go beyond what the actual contract terms require. *See CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377, at 177,349 (implied duty of good faith and fair dealing "is not designed to give the contractor additional rights beyond, or greater rights than, those that the contract provides").

The motion and briefing that we have before us, however, do not allow us to address all of TGI's allegations of breach. DOC's motion is focused mainly upon the nature of TGI's

no-cost contract, rather than upon which of TGI's breach allegations are tied to actual contract terms. To the extent that DOC wishes to narrow the issues in dispute between the parties in this appeal, it will need to file a motion (to which TGI can respond) that addresses with specificity each of TGI's allegations of breach (which appear to be identified in a list format on pages 7 and 8 of TGI's response brief) and show the extent to which some or all of them are untethered from any contractual requirements under the 2009 contract.

2. The contract termination issue

TGI alleges in its complaint that DOC acted in bad faith by terminating the 2009 contract. Complaint ¶¶ 221-60. It is clear from TGI's allegations that it is actually complaining about DOC's failure to extend the contract through the affirmative exercise of contract options.

A failure to exercise an option is not a contract termination – it merely reflects the Government's decision not to *extend* the contract. *Uniq Computer Corp. v. United States*, 20 Cl. Ct. 222, 235 (1990). An option is "a unilateral right in a contract by which, for a specified time, the government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract." *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1276 (Fed. Cir. 1999) (quoting FAR language now located at 48 CFR 2.101 (2015)). "An option contract generally binds the option giver, not the option holder," *Continential Collection & Disposal, Inc. v. United States*, 29 Fed. Cl. 644, 650 (1993), and it gives the option holder "the legal privilege of not exercising" the option. *Dynamics Corp. of America v. United States*, 389 F.2d 424, 431 (Ct. Cl. 1968) (quoting 1A Arthur Corbin, *Contracts* § 259, at 464 (1963)); *see Hi-Shear Technology Corp. v. United States*, 356 F.3d 1372, 1380 (Fed. Cir. 2004) (if the contract is renewable at the Government's option, the Government is under no obligation to exercise the option). "The government's failure to exercise an option in a contract does not ordinarily give rise to a breach of contract action." *Optimal Data Corp. v. United States*, 17 Cl. Ct. 723, 731 (1989), *aff'd*, 904 F.2d 45 (Fed. Cir. 1990) (table); *see Fields v. United States*, 53 Fed. Cl. 412, 419 (2002) ("the exercise of the contract's options rested within the sole discretion of the [agency], and its decision not to exercise those options does not breach the contract").

TGI alleges that there are two reasons that the general rule about the Government's discretionary right not to exercise an option does not apply to its situation. First, TGI alleges that the language of the option in the 2009 contract limits DOC's discretion and requires DOC to exercise each option so long as TGI's performance was satisfactory. Complaint ¶ 157. It relies on the following contract language from section 6 of the 2009 contract:

> The initial term of the resulting contract will be for a base year starting September 1, 2009 and ending August 31, 2010, with options for four (4) one-year periods based upon satisfactory performance.

Complaint, Exhibit B at 7. Pursuant to this provision, according to TGI, DOC "was obligated to exercise the option period provided that [TGI's] performance with the CNUSA was 'satisfactory.'" Complaint ¶ 157. That is, TGI asserts that, in reality, it had a five-year contract rather than a contract of only one year, subject only to a requirement that it provide satisfactory performance each year. Complaint ¶ 222.

The inclusion of the words "based upon satisfactory performance" at the end of the option language does not somehow eliminate the discretion that the Government typically enjoys in deciding whether to exercise an option. Section 6 of the contract expressly addresses "option periods" and sets forth the Government's right to extend the contract by one-year periods. The FAR expressly defines an option as "a unilateral right." 48 CFR 2.101. TGI's interpretation of the provision would take that unilateral right – the right to decide whether to extend the contract – out of the Government's hands and give it solely to TGI. That is, if TGI were to perform satisfactorily, the Government would have no choice but to exercise the option, eliminating the Government's discretion. That is the reverse of how the FAR defines an option. "[O]nly specific language will limit [the Government's] choice." *Sundowner 102, LLC v. United States*, 108 Fed. Cl. 737, 741 (2013); *see Government Systems Advisors, Inc. v. United States*, 847 F.2d 811, 813 (Fed. Cir. 1988) ("An option is normally an option, and nothing . . . limited the circumstances under which the government could decline to exercise that bargained-for right in this case."). Here, the option provision is most reasonably interpreted not as an obligation upon the Government to exercise the option if TGI performs satisfactorily, but a *limitation* upon the Government's discretion: that is, the Government *cannot* exercise the option *unless* TGI is performing satisfactorily, even though DOC is not obligated to exercise the option simply because it finds satisfactory performance. We cannot find that DOC was required to exercise each option if TGI satisfactorily performed. We therefore grant the motion to dismiss for failure to state a claim, to the extent that it addresses this TGI argument.

Second, TGI asserts that, even if DOC retained the Government's traditional discretion in deciding whether to exercise an option, the Government acted in bad faith, with a specific intent to injure TGI, when it failed to exercise the options. Complaint ¶ 24. We have previously held that a contractor can successfully challenge an agency's decision not to exercise an option "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." *G2G, LLC v. Department of Commerce*, CBCA 4996, 16-1 BCA ¶ 36,266, at 176,916, *reconsideration denied*, 16-1 BCA ¶ 36,346 (quoting *Greenlee Construction, Inc. v. General Services Administration*,

CBCA 416, 07-1 BCA ¶ 33,514, at 166,062). Nevertheless, in applying that precedent, we must recognize that the Government's right to decline to exercise an option is so broad that, "unless the contract says otherwise, the Government's discretion is nearly complete." *Id.* (quoting *Integral Systems, Inc. v. Department of Commerce*, GSBCA 16321-COM, 05-2 BCA ¶ 32,984, at 163,472); *see* 1 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 5:15, at 1016 (4th ed. 2007) (the amount of discretion that the option holder possesses generally leaves the option holder "free to either accept or not, at his or her whim"). "Generally, such options are made for the benefit of the Government and absent express limitations in the contract, contractors have no recourse for the Government's failure to exercise an option." *Brenda R. Ronhaar*, AGBCA 98-147-1, 00-1 BCA ¶ 30,591, at 151,074 (1999). A contractor might be able to establish an abuse of discretion by showing, for example, that the Government failed to follow mandatory regulatory procedural requirements in declining to exercise the option, that the decision not to exercise created an illegality, or that the contract itself otherwise required the agency to consider factors that the agency did not, in fact, consider. *See, e.g.*, *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 874-75 (D.C. Cir. 1970); *Northrop Grumman Computing Systems, Inc. v. United States*, 93 Fed. Cl. 144, 149 (2010). Absent the existence of tangible standards that the Government has to apply in deciding whether to exercise an option, though, a contractor would have an extremely difficult time challenging a government decision not to exercise. *See Drake v. Federal Aviation Administration*, 291 F.3d 59, 70 (D.C. Cir. 2002) (in applicable circumstances, an agency's discretion can be so broad "as to essentially rule out the possibility of abuse"); *Baird Corp. v. United States*, 1 Cl. Ct. 662, 664 n.2 (1983) (the greater the discretion that underscores an agency decision, the heavier the burden of proof the challenger has in seeking to overturn it).

In this appeal, TGI has not identified any standards in the contract itself that DOC was required to consider when deciding whether to exercise any options (other than the limitation upon DOC's authority requiring that TGI perform satisfactorily before option exercise). In addition, although it alleges mismanagement and, perhaps, incompetence in DOC's handling of its contract options, *see* Complaint ¶¶ 221-60, TGI does appear to have alleged any facts indicating a specific intent by DOC to injure TGI, a necessary element of a bad faith claim against the Government. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002). The Court of Federal Claims has held that, where "the agency was under no contractual obligation to continue exercising option years, it could not have been bad faith for the agency to end the contract . . . , even if it did so for ill motives." *Sundowner*, 108 Fed. Cl. at 743. "The covenant of good faith and fair dealing," the court held, "presumes a contract right in the [appellant] that [respondent] has thwarted by extra-contractual conduct." *Id.* By failing to exercise an option, the Government generally is "not interfer[ing] with [appellant's] contract rights," but is "merely exercis[ing] its own rights." *Id.*

Nevertheless, based on the record before us, there is an argument that DOC did, in fact, actually exercise some of the options, even if it did not satisfy administrative mechanisms that it might typically follow. The parties agree that on September 2, 2011, the DOC contracting officer sent an email message to TGI stating that "[t]he Government is exercising CLIN (contract line item number) 2001 of DOC/NOAA Contract DC1350-09-UE0012 (Sept. 3, 2011 to Sept. 2, 2012) at no cost to the Government" and that FAR 52.217-9, Option to Extend the Term of the Contract, "is hereby added to this contract." Complaint ¶ 225; Answer ¶ 225. "The acceptance of an option, to be effective, must be unqualified, absolute, unconditional, unequivocal, unambiguous, positive, without reservation, and according to the terms or conditions of the option." *Uniq Computer*, 20 Cl. Ct. at 231 (quoting *Civic Plaza National Bank v. First National Bank in Dallas*, 401 F.2d 193, 197 (8th Cir. 1968)). There was nothing in this contract's option clause that set any specific prerequisites for the manner in which these options could be exercised, Complaint ¶ 221; Answer ¶ 221, making it appear as though the email message above could constitute an effective exercise of the option. Even though the contracting officer further indicated in the email message that "[a] modification to the contract will be issued to formalize this agreement," Complaint ¶ 225, and even though that modification was never issued, TGI allegedly continued to perform the CNUSA services until 2013 without objection from, and with the explicit approval of, DOC employees, who were allegedly actively reviewing TGI's work during the option years. It is unclear in the record here whether each party ever viewed the email message as an effective option exercise or what actions occurred that allowed TGI to continue providing CNUSA services. In addition, to the extent that DOC actually permitted performance through 2013, with or without an affirmative option exercise, it is unclear what damages, if any, TGI could be seeking for this period of performance (during which time it presumably was earning monies from third parties with the implicit permission of DOC employees). The record here is sufficiently unclear as to warrant further proceedings, during which time the parties can more fully develop 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 a contract after it had expired, and what remedies and damages, if any, are available to TGI for that. We consequently deny the motion to dismiss for failure to state a claim, to the extent that it addresses this aspect of TGI's bad faith assertion.

D. Unfair competition claims

DOC contends that count III of TGI's complaint fails to state a claim upon which relief may be granted. In count III of its complaint, TGI alleges that DOC "unfairly competed" with TGI under the 2004 and 2009 contracts "by hindering [TGI's] efforts to leverage the BuyUSA.com and FUSE programs." Complaint ¶ 305. It asserts that the contracts "specifically contemplate[d] that [TGI] would ultimately benefit from the

programs, but [DOC] never engaged in any discussion with [TGI] about either program." *Id.* ¶ 306. TGI also asserts that DOC "unfairly competed" with it "by repeatedly refusing to cooperate with [TGI] by opening a discussion with . . . its official strategic partners in regard to the distribution or marketing of the CNUSA program." *Id.* ¶ 296. Instead, TGI complains, DOC "leveraged those strategic partner arrangements, including [an] arrangement with [Federal Express], to increase revenue by benefitting other fee-based government programs and services in competition with [TGI] and/or to prevent [TGI from] reducing its costs, which in turn could impact the revenue [DOC] received from these other competing programs." *Id.* ¶ 297.

DOC's motion is akin to a Rule 12(b)(6) motion under the Federal Rules of Civil Procedure. To survive the motion, the complaint must contain sufficient factual matter, accepted as true, that would entitle TGI to the requested relief. *Sigma Services, Inc. v. Department of Housing & Urban Development*, CBCA 2704, 12-2 BCA ¶ 35,173, at 172,591 (citing *Arctic Slope Native Ass'n v. Department of Health & Human Services*, CBCA 294-ISDA, et al., 09-2 BCA ¶ 34,281, at 169,350).

DOC correctly argues that neither the 2004 nor the 2009 contract grants TGI a right to provide services for the FUSE program. Rather, the 2009 contract states that, "[a]t a later date, the contractor also *may* be requested to provide marketing and maintenance for the [FUSE] program." Complaint, Exhibit B at 6 (emphasis added). DOC never issued an amendment for TGI to provide services for the FUSE program. Similarly, there is no contract language that could be interpreted as requiring DOC to provide "leverage" for TGI in its BuyUSA.com program or to fold TGI into DOC's pre-existing shipping contracts with Federal Express or other shipping contractors. Indulging in every reasonable inference in favor of TGI, as we must, we find that TGI has failed to plead sufficient facts to state a facially plausible claim for relief on an unfair competition theory. While TGI recognizes that the contract language does not obligate DOC to add TGI to any of these programs or contracts, TGI maintains that DOC was required to do so under its implied duty of good faith and fair dealing. TGI cannot rely upon that theory to create extra-contractual obligations upon the Government. *See CAE USA*, 16-1 BCA ¶ 36,377, at 177,349. We dismiss, for failure to state a claim, count III of TGI's complaint alleging unfair competition.

E. TGI's Freedom of Information Act challenges

TGI complains that DOC improperly used FOIA "as a tool to harm [TGI] by depriving it access to documents for years to which it was entitled to receive voluntarily under both [the 2004 and 2009] contracts." Complaint ¶ 298. To the extent that TGI's *contract* entitled it to documents that DOC failed to provide, TGI can potentially complain that the Government's failure to deliver those documents constituted a breach of its contract.

However, TGI cannot complain to the Board that the Government's delay in responding to FOIA requests constituted or is a part of an actionable contract claim. An entity's ability to obtain documents through FOIA is a right created by statute, not by contract. Challenges to an agency's response (or failure to respond) to a FOIA request are properly made to the United States district courts, 5 U.S.C. § 552(a)(4)(B) (2012), and, even then, the FOIA does not provide a private right of action for money damages associated with a delay in, or even malfeasance in, FOIA processing. *Campbell v. United States Department of Justice*, 133 F. Supp. 3d 58, 65 (D.D.C. 2015) (citing *Johnson v. Executive Office for United States Attorneys*, 310 F.3d 771, 777 (D.C. Cir. 2002)). TGI cannot recover damages here for any DOC delays in processing its FOIA requests, even if the requests sought documents associated with TGI's contracts. To the extent that TGI has included allegations about DOC's FOIA delays and alleged gamesmanship in its complaint under the guise of its unfair competition argument, they do not create a cause of action properly before this Board.

Decision

For the foregoing reasons, DOC's motion to dismiss for failure to state a claim is **GRANTED IN PART**. Accordingly,

1. DOC's motion to dismiss for lack of jurisdiction is denied.

2. DOC's motion to dismiss for failure to state claim is granted as to the 2004 contract breach claims in counts I and II of the complaint and some aspects of the 2009 contract breach claims in those counts -- and denied in part -- as to another aspect of the 2009 breach of contract claims in Counts I and II of the complaint.

3. DOC's motion to dismiss for failure to state a claim is granted as to the unfair competition claims under the 2004 and 2009 contracts in count III of the complaint.

JEROME M. DRUMMOND
Board Judge

We concur:

PATRICIA J. SHERIDAN
Board Judge

HAROLD D. LESTER, JR.
Board Judge