UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY JUDGMENT DENIED;
MOTION TO DISMISS IN PART DENIED: July 9, 2021

CBCA 6795

GRAND STRATEGY, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Gaëtan Gerville-Réache and Adam D. Bruski of Warner Norcross + Judd LLP, Grand Rapids, MI, counsel for Appellant.

Francis P. Gainer, Office of General Counsel, Department of Veterans Affairs, Washington, DC; and Jennifer Claypool, Office of General Counsel, Department of Veterans Affairs, Hines, IL, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **GOODMAN**, and **O'ROURKE**.

O'ROURKE, Board Judge.

Appellant, a service-disabled, veteran-owned small business, won two national requirements contracts with the Department of Veterans Affairs (VA) to provide towels and washcloths to VA medical centers. Both contracts included a period of performance of five years, consisting of one base year and four option years. Appellant challenges the agency's contention that both contracts ended at the conclusion of the base year since orders were placed and filled under the contracts throughout the five-year term. Appellant seeks breach of contract damages against the VA for placing orders with other vendors in violation of the contracts' Requirements clause, which gave appellant the exclusive right to supply these

items while the contracts were in effect. The VA filed motions for summary judgment and partial dismissal. We deny the motion for summary judgment based on a material dispute of fact over when the contracts concluded. We deny the motion to dismiss in part because appellant made no claim for relief based on alleged violations of a VA statute.

Findings of Fact

In 2012, the VA awarded two requirements contracts to Grand Strategy, LLC (Grand Strategy or appellant), one for towels and the other for washcloths. Both contracts were national awards, which meant that VA medical centers across the country were required to order these items from Grand Strategy and that Grand Strategy was required to fill them. Exceptions to this mandate were quantity based. For example, when an order was for less than twelve items or for more than one hundred items, the VA was not required to order them from Grand Strategy. Emergency orders were also excepted. Grand Strategy could decline emergency orders, and when it did, the VA could source the items through other vendors.

Both contracts had the same period of performance, one base year plus four option years, but only the towels contract contained the Federal Acquisition Regulation Option clause at 48 CFR 52.217-9, "Option to Extend the Term of the Contract (March 2000),"[1] which stated:

> (a) The Government may extend the term of this contract by written notice to the Contractor within 30 days; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit the Government to an extension.
>
> (b) If the Government exercises this option, the extended contract shall be considered to include this option clause.
>
> (c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed five (5) years.

The specific dates attached to the period of performance for both contracts were as follows:

[1] Respondent claims that this was an oversight and the washcloths contract should have also contained the Option clause.

Year	Start Date	End Date
Base	November 1, 2013	October 31, 2014
Option 1	November 1, 2014	October 31, 2015
Option 2	November 1, 2015	October 31, 2016
Option 3	November 1, 2016	October 31, 2017
Option 4	November 1, 2017	October 31, 2018

When the base year of each contract expired in October 2014, the VA did not execute written modifications to exercise the first option year. Nonetheless, the VA continued to place orders under the contracts, and Grand Strategy continued to fill them. In mid-2015, Grand Strategy informed the VA that certain medical centers were placing orders with other vendors and therefore not complying with the terms of the VA's requirements contracts with Grand Strategy. Grand Strategy expressed its concerns that only a few medical centers knew about the contracts and either did not believe they were mandatory or looked for ways around them. Discussions were held among various agency representatives to determine why these national contracts were underutilized, and on August 13, 2015, the contracting officer sent an announcement to purchasing offices at VA medical centers, alerting them to the national contracts and instructing them to forward the information to other VA purchasing offices.

On September 9, 2015, the VA sent a letter to appellant stating:

> This letter is in reference to your national contracts numbers VA797N-13 C 0010 for Reusable Towels and VA797N-13 C 0011 for Reusable Washcloths. In accordance with Federal Acquisition Regulation (FAR) clause 52-217.9, Option to Extend the Term of the Contract, this letter provides written notice that the Department of Veterans Affairs National Acquisition Center intends to exercise both contracts with twelve month options, 9/01/2015 08/30/16, respectively. However, this preliminary notice does not commit the Government to extend the contracts. If the Government actually exercises the option years, the contracts will be modified within 30-days prior to the expiration of the contracts, as provided in the referenced clause.

Forty days later, on October 19, 2015, the agency sent another letter to appellant informing it that the VA had decided *not* to exercise the options on the contracts, but then, on October 30, 2015, the contracting officer executed two modifications to do just that—exercise option year two under both contracts. The modifications, which were signed by the contracting officer, indicated that the second option would end on October 31, 2016.

The appeal file also contains two undated letters to Grand Strategy on VA letterhead from a VA contract specialist informing Grand Strategy that effective December 21, 2015, administration of the respective national contracts would transfer from the National Acquisition Center in Illinois to the Strategic Acquisition Center in Virginia. This occurred during option year two. There is no evidence that the contracts were further modified in order to exercise option years three or four. Nonetheless, orders continued to be made and filled under both contracts after option year two concluded. In 2018, appellant twice inquired about the contracts, and the agency responded by issuing two letters, one in May and one in September, stating that the contracts had expired. The second letter, dated September 5, 2018, specifically stated:

> Our review of VA's records and the documents you provided . . . indicates that contract VA797N-13-C-0010 and [contract] VA797N-13-C-0011 (for towels and washcloths) expired in 2016, due to the most recent option periods exercised under those contracts expired and the follow-on option period was not exercised. Those contracts are no longer active and no orders can be placed against them. VA's website is being corrected accordingly and Grand Strategy has no obligation to fill any orders that it may have received in error which cite to the expired contracts.

On October 30, 2019, appellant filed a certified claim with the contracting officer in the amount of $653,727, for breach of contract damages. In its claim, Grand Strategy maintains that the VA failed to abide by the exclusivity requirements of the contracts as evidenced by responses to numerous Freedom of Information Act (FOIA) requests and conversations with VA personnel. The contracting officer denied the claim on the basis that appellant failed to show that its contracts had been extended past the base period because there was no modification to the contracts exercising the first option, nor any evidence that the agency intended to exercise the same. The contracting officer further determined that "because Grand Strategy LLC continued to accept and receive orders outside of the terms and conditions of these contracts," and was paid for them, "Grand Strategy LLC has recouped any and all costs and has been made whole." Appellant timely appealed the contracting officer's final decision.

Discussion

Before us are two motions filed by the VA, one for summary judgment and the other for partial dismissal for failure to state a claim. The standard for summary judgment is well established. Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Harris IT Services Corp. v. Department of Veterans Affairs*, CBCA 5814, 20-1 BCA ¶ 37,533 (2019). A material fact is one that will affect the outcome of the case.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 15-1 BCA ¶ 36,139. When deciding a motion for summary judgment, all reasonable inferences and presumptions are resolved in favor of the non-moving party. *Anderson*, 477 U.S. at 255; *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377.

In its motion for summary judgment, the VA maintains that the requirements contracts at issue expired on October 31, 2014, at the end of their base year, and since the VA did not exercise any of the option years, the VA cannot be held liable for breach of contract for ordering towels and washcloths from other vendors after that date. The VA further argues that since the VA paid for all orders accepted and filled by appellant after the base year, appellant has been "made whole" and is not entitled to additional compensation. Appellant, on the other hand, contends that the VA exercised all four option years under both contracts. In support of its contention, appellant points to multiple written communications to that effect, as well as contract modifications that exercised option year two under both contracts, and the parties' continued performance under the terms and conditions of the contracts for the maximum performance period of five years.

Included in the appeal file are two signed contract modifications that were executed by the VA to exercise option year two under both contracts. The VA's statement of undisputed facts submitted in support of the motion references those modifications but describes them as "purported modifications." The appeal file also contains a number of documents from the VA that demonstrate that the contracts were active through option year two. Furthermore, both parties acknowledge that the VA continued to place orders under the contracts after 2016, and that appellant continued to fill the orders. The record also includes deposition testimony of a contracting officer who stated, "I exercised the second option but I cannot tell you who exercised the first option." In its motion, the VA asks the Board to find that the contracts expired in 2014, at the conclusion of the base years. Despite these opposing assertions, the VA represents that there are no material facts in dispute. We cannot agree.

As we noted, motions for summary judgment are appropriate for matters where the facts are not in dispute. In light of the VA's own admissions and the evidence in the appeal file, this case cannot be resolved on summary judgment, and the VA's additional arguments to the contrary—good faith, the doctrine of unclean hands, and illegal contract interpretation—are unavailing. Whether the contracts expired after the base year, at the conclusion of the second option year, or at some other point, is a question of fact which requires further investigation. For these reasons, we deny the VA's motion for summary judgment.

The VA also asks the Board to dismiss appellant's claim that the VA violated the Veterans Benefits, Healthcare, and Information Technology Act of 2006, 38 U.S.C. §§ 8127, 8128 (2018), when it ordered towels and washcloths from nonveteran-owned sources, at higher prices, and which were 100% imported. In its complaint, appellant argued that the VA's non-extension of the contracts was arbitrary and capricious, in part, because respondent "did not find another veteran-owned small business to serve as a responsible single source for towels and washcloths at best value to the Government."

The VA's motion acknowledges that these contracts were set aside under this statute but nonetheless urges the Board to dismiss the allegations that it violated the same or the objectives of the VA's Standardization Program[2] by placing orders with other nonveteran-owned vendors. "Even if true, [these allegations] do not state a claim under which Appellant would be entitled to relief under the contracts at issue." The VA also contends that "[Grand Strategy] did not include any such allegations in its Claim submitted to the contracting officer for a final decision," and therefore, the allegations should be dismissed because they do not meet the requirements of 41 U.S.C. § 7103(a).

As a threshold matter, the VA's dismissal motion calls into question the Board's jurisdiction over any claim related to the VA's alleged violation of the Veterans Benefits, Healthcare, and Information Technology Act of 2006, since it was not raised in the initial claim to the contracting officer. In examining both the complaint and the claim, however, we note that this issue was presented *not* as a separate claim for relief but rather as evidence in support of its breach claim against the VA and its allegation that any failure to exercise an option under the circumstances should be construed as arbitrary and capricious conduct on the part of the VA—both of which *were* raised in Grand Strategy's claim to the contracting officer. To the extent that the VA seeks dismissal of this claim for lack of jurisdiction, we deny the motion on those grounds.

The VA also seeks dismissal for failure to state a claim for relief, which we deny for the same reasons. *See Force 3, LLC v. Department of Health & Human Services*, CBCA 6654 (Apr. 14, 2021) ("In reviewing a motion to dismiss for failure to state a claim, 'we accept as true the complaint's well-pled factual allegations,' though not its 'asserted legal conclusions.'"). Even if the VA violated the statute and other VA regulations in its

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[2] The appeal file includes the "Mandatory National Contract Announcement" for these contracts. The announcement references VA Directive 1761.1, dated July17, 2003, "Standardization of Supplies and Equipment Procedures." Appellant asserts, on page 5 of its appeal, that "[t]he purpose of the VA's standardization program and the exclusivity of vendors it mandates is to ensure 'best value product pricing through volume purchasing and facilitate the delivery of high quality healthcare.'"

administration of the contracts, we find no evidence that Grand Strategy's claim sought relief for such violations. We view their reference as mere context in support of the claim squarely at issue in this appeal—a breach of contract claim for violating the Requirements clause of both contracts. Grand Strategy seeks damages for those violations and not for any alleged breaches of the VA's duty to the veteran-owned small business community. We deny the motion.

Decision

The motions are **DENIED**.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge