

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

_____)	
Contract Dispute of)	
)	
Astornet Technologies, Inc.)	Docket No. 08-ODRA-00466
)	
_____)	

DECISION ON MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter currently is before the Office of Dispute Resolution for Acquisition (“ODRA”) for consideration of a Motion for Summary Judgment (“Motion”) filed by the Federal Aviation Administration (“FAA”) Program Office (“Program Office”) in the Contract Dispute (“Dispute”) of Astornet Technologies, Inc. (“Astornet”). The Motion requests a summary decision pursuant to the ODRA Procedural Regulations at 14 C.F.R. §17.29. Astornet filed an opposition to the Motion on June 12, 2009 (“Opposition”) and the Program Office filed a Reply to the Opposition on June 18, 2009 (“Reply”). After reviewing the Motion, Opposition, and Reply as well as the entire record, the ODRA has concluded, for the reasons discussed herein, that: (1) there are no material facts in dispute with respect to Astornet’s claim that the Agency breached the duty of good faith and fair dealing with regard to Astornet (“Fair Dealing Claim”); and (2) the Program Office is entitled to judgment as a matter of law in this Dispute.¹

¹ Astornet’s Dispute originally had included both a claim for breach of a Settlement Agreement and its Fair Dealing Claim. The claim of Settlement Agreement breach was dismissed by the ODRA, for failure to state a claim, in a Decision dated December 22, 2008 (“December 22 Decision”). In the same December 22 Decision the ODRA denied without prejudice the Program Office Motion to Dismiss Astornet’s Fair Dealing Claim.

II. FACTUAL AND LEGAL BACKGROUND

This Dispute was filed with the ODRA in two parts on September 18, 2008 and on October 7, 2008, respectively. For a recitation of the factual background of these proceedings, please refer to the December 22 Decision, which hereby is incorporated in this Decision.

In the December 22 Decision, the ODRA noted with respect to the Fair Dealing Claim that:

In several places throughout its pleadings, Astornet has alleged that it was “blacklisted” and generally that the Program Office failed to deal with Astornet in good faith. It is well established that the government owes a duty of good faith and dealing to its contractors. *See Contract Dispute of Dynamic Security Concepts, Inc. 05-ODRA-00356, Decision denying Motion to Dismiss dated August 23, 2005.*

Id. at 11. The December 22 Decision went on to conclude that:

Astornet has made unsupported and general allegations of blacklisting by the Program Office. For purposes of this Motion, the ODRA accepts these allegations as true, and thus, will not *at this stage of the proceedings* dismiss the portion of Astornet’s Contract Dispute alleging a breach of the duty of good faith and fair dealing. *See Contract Dispute of Dynamics Security Concepts, Inc., Supra.* The Motion will be denied without prejudice with respect to this issue. As was the case in *Dynamic Security, supra*, Astornet has the burden of proving its allegations of bad faith by clear and convincing evidence.

Id. at 12. (emphasis added). *Dynamic Security* also involved a contract dispute alleging breach of the obligation to deal with the contractor fairly and in good faith. *Id.* In a motion to dismiss presented at an early stage of that case, the Program Office contended that the *Dynamic Security* Contract Dispute “is based only on ‘speculative beliefs’ that are unsubstantiated and without merit.” *Id.* In denying the Motion without prejudice, the ODRA concluded that the contractor had alleged “a bare foundation for a claim of breach

of good faith and fair dealing and that facts could be presented to establish bad faith.” *Id.* at 6. As it did in the December 22 Decision in the instant Dispute, the ODRA went on to hold in *Dynamic Security* that “at this juncture it would be premature to dismiss this case particularly before the conduct of any discovery.” *Id.*

After issuing the December 22 Decision, the ODRA established a schedule for the completion of the adjudication process, including a period of time for the completion of additional discovery and for the filing of Astornet’s Supplement to the Agency Dispute File. *See* ODRA Scheduling Letter, dated February 24, 2009 (“Scheduling Letter”). The Agency Dispute File was timely filed with the ODRA and served on Astornet on February 6, 2009. In accordance with the ODRA’s Procedural Regulations, the Agency Dispute File included the Program Office’s legal position on the Dispute as well as all of the relevant documents chronologically arranged and indexed. The Scheduling Letter also established a due date for the filing by Astornet of its Supplement to the Agency Dispute File, including any additional documents that Astornet believed relevant. Astornet failed to file a Supplement to the Agency Dispute File. Nor did it seek additional discovery following the issuance of the December 22 Decision.²

In the instant Motion for Summary Judgment, which was filed on May 19, 2009, the Program Office asserts that Astornet has failed to proffer any facts that could support its Fair Dealing Claim. *See* Motion at 2. The Motion also points out that “Astornet has not disputed any of the facts submitted by the Agency in its Dispute File.” *Id.* Finally, the Motion notes that Astornet did not seek additional discovery from the Agency during the discovery period specified in the Scheduling Letter and that Astornet failed to file a Supplement of any kind to the Agency Dispute File. *Id.* at 1, 2. The Motion references the Declarations of a number of individual agency employees regarding their dealings with Astornet. *See* Agency Dispute File Exhibits 1, 24, 28-43. (“Declarations”). In this regard, the Motion points out that: “there has been no evidence submitted to establish that any of

² Astornet had previously sought and obtained document discovery from the Program Office. *See* ODRA Letter regarding discovery issues, dated January 27, 2009.

the named government officials attempted in any manner to discourage colleagues from reviewing proposals from Astornet.” *Id.* at 7.³

In its Opposition to the Motion, Astornet baldly asserts that there are facts in dispute and reasserts the same broad allegations that were set forth in its original Dispute. *See Opposition* at 1-7. The Opposition asserts that Astornet is not asserting a “bad faith” claim, but rather a claim that “the FAA breached its duty of fair dealings and its obligations under the AMS...” as well as its obligations under the Settlement Agreement. *Id.* at 1. Astornet also requests to cross-examine, at an evidentiary hearing, the Agency individuals whose Declarations were referenced in support of the Motion. *Id.* Astornet asserts in that regard it “will show through the testimony of its president, and through the testimony of the relevant FAA personnel, and the documents currently in the record, that the FAA breached its duty of fair dealings and its obligations under the AMS.” *Id.* Finally, the Opposition cites, as evidence of bad faith, instances where the Agency awarded to other contractors work that could have been done by Astornet. *Id.* at 4-6. Astornet submitted no affidavits or declarations in response to the Motion.

The Program Office Reply to the Opposition notes that “Astornet continues to assert, despite ODRA holdings to the contrary, that there was a breach of an affirmative duty on the part of the Agency to give notice and provide opportunities to Astornet under the Settlement Agreement. It is on this faulty premise that it hangs its speculative conspiracy theory of failure to act in good faith.” *Reply* at 3. The Reply further asserts that: “[t]he facts pointed to in Astornet’s Opposition only support the Agency’s position that there is no clear and convincing evidence of failure to act in good faith.” *Id.* at 4.

III. DISCUSSION

The duty to act in good faith is well established. *See Centex Corp. v. United States*, 49 Fed.Cl. 691, 708 (2001)(“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.”); Restatement (Second) of

³ Astornet did not seek to depose any Agency personnel in connection with this case.

Contracts § 205 (all contracts, including government contracts, contain an implied covenant of good faith and fair dealing). The ODRA previously has recognized the long established principle that government officials are presumed to act in good faith, and accordingly it follows that “proof of a breach of the duty of good faith and fair dealing requires clear and convincing proof of egregious conduct, specific intent to injure, malice, or conspiracy.” *Contract Dispute of Dynamic Security Concepts Inc. (“DCSP”)*, 05-ODRA-00346, p. 113 (2007); *see also Torncello v. United States*, 231 Ct. Cl. 20, 681 F. 2d 756, 770 (1982) (stating “the necessary ‘irrefragable proof’ has been equated with evidence of some *specific intent to injure the plaintiff*”) (emphasis in the original).

The pertinent part of the Agency’s Settlement Agreement with Astornet reads: “if Astornet successfully performs its obligation under the Contract, *it shall continue to be eligible for future SWIM contracting opportunities*, as appropriate.” Settlement Agreement, p. 1 (emphasis added). Pursuant to the rules of contract interpretation, unambiguous, express terms of a contract must be given their plain meaning. *Contract Dispute of Globe Aviation Services. Corp.*, ODRA Docket No. 04-TSA-0007 (2005) at 23; *McAbee Const. Inc. v. U.S.*, 97 F.3d 1431, 1435 (C.A.Fed. 1996); *see also Den Norske Bank AS v. First Nat’l Bank of Boston*, 75 F.3d 49 (C.A.1 (Mass.) 1996) (stating “should the court find the contract language unambiguous, we interpret it according to its plain terms”). “Eligible” is defined as “[f]it and proper to be chosen; qualified to be elected. Capable of serving, legally qualified to serve.” Black’s Law Dictionary 467 (5th Ed. 1979). The phrase “*eligible for future SWIM contracting opportunities*” in no way implied or guaranteed that additional contract work would be awarded to Astornet, beyond the single contract expressly promised in the Settlement Agreement. Thus, the limit of the Agency’s fair dealing duty under the Settlement Agreement was to ensure that Astornet was treated as eligible for additional awards, assuming Astornet successfully fulfilled its obligations under the contract expressly promised to it in the Settlement Agreement. *See Globe Aviation Services. Corp.*, at 23.

As the ODRA already has ruled, “there was no obligation established by the Settlement Agreement to award additional contract work to Astornet. Thus, the awarding of contracts to other companies of work that Astornet may have been capable of performing does not constitute a breach of the Settlement Agreement.” *See* December 22 Decision at 11. Astornet continues, however, to assert in response to the Motion that under the terms of the Settlement Agreement it had a contractual right to be notified of, compete for, and receive additional contract work beyond the single contract that expressly was promised. *See* Opposition at 1, 4 and 7. Inasmuch as this argument expressly was considered and rejected in the December 22 Decision, under the Principle of Law of the Case, it will not be reconsidered here. *See* December 22 Decision at 8-11; *Contract Dispute of Huntleigh USA Corporation*, 06-ODRA-008 and 025 (Decision Denying Cross Motions for Summary Judgment, dated March 30, 2009).

It is undisputed that Astornet successfully performed its obligations under the Contract that was awarded to it under the express terms of the Settlement Agreement. The Program Office was obligated, therefore, to treat Astornet as eligible for additional contract work. Thus, the only legitimate issue that could be presented by Astornet’s Fair Dealing Claim is whether the Program Office failed to live up to that obligation, and thus breached its duty of good faith by what would essentially constitute a *de facto* debarment of Astornet. In an attempt to support its Fair Dealing Claim, Astornet presents a line of email communications between Agency officials from July through December 2007. *See* Opposition at 2. Astornet alleges those emails show the Agency shielded work from Astornet, by “steering Astornet to the website” while “steering sole source contracts to firms other than Astornet.” *Id.* at 6. Astornet then lists six 8(a) sole source competition awards made without notice to Astornet. *Id.* Astornet essentially attempts to equate the fact that Astornet did not receive a contract with bad faith on the part of the Agency’s contracting officials. *Id.* at 6, 7.

Notwithstanding Astornet’s speculative assertions, the record contains no evidence demonstrating that Astornet was treated as other than an eligible contractor. Rather, the record shows contracting officers discussing options for a contract with Astornet. These

emails indicate that Astornet was clearly treated as eligible for work in the Agency's eyes. For example, an email dated October 2, 2007, states in part that an FAA employee "said that he recommends [Astornet] for the prototyping work and that [another FAA employee] felt *he was a good fit.*" *Id.* at. 4 (emphasis in original). The record shows contracting officers discussing opportunities for Astornet consistent with the Agency's obligation under the Settlement Agreement. Directing Astornet to a contracting website for work opportunities cannot be considered egregious or malicious under any standard, and certainly does not meet the clear and convincing threshold. Astornet's suspicions and unsupported speculative allegations aside, it has simply failed to proffer any evidence of conspiracy or malicious intent. The awarding of contracts to other vendors rather than to Astornet does not, under the undisputed facts here, equate with a breach of the duty of good faith and fair dealing.

Pursuant to the ODR A Procedural Regulations, upon a motion by a party, or acting on its own initiative, the ODR A may exercise its discretion to issue a summary dismissal in whole or in part in a matter. *See* 14 C.F.R. §17.29(c). In this regard, the ODR A recently held that:

The ODR A's Procedural Regulations at 14 C.F.R. § 17.29, contemplate the issuance of summary judgment decisions in contract disputes. Summary judgment is proper under the Federal Rules of Civil Procedure [Footnote omitted] when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), *citing* Fed. R. Civ. P. 56(c); *see also, Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed.Cir.1987).

Contract Dispute of Huntleigh USA Corporation, supra. A case is subject to dismissal if it is untimely, without a basis in fact or law, or if it fails to state a claim upon which relief may be granted. *See Protest of CNI Aviation, LLC, 07-ODRA-00428.* The ODR A also has held, based on its Procedural Regulations that "prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the ODR A shall afford all parties against whom the dismissal or summary decision is to be entered, the opportunity to respond to the proposed dismissal or summary decision." *Id.* at 6.

It is well established that when faced with a supported motion for summary judgment a responding party must do more than merely rely on its allegations. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). “When the moving party has shown an absence of evidence supporting the non-moving party's case, the burden shifts to the other party to establish that there is a genuine issue of material fact.” *Marine Metal, Inc. v. Department of Transportation*, 07-1 BCA P 33554, CBCA 537, 2007 WL 1197783 (Civilian B.C.A.), citing *Celotex*, 477 U.S. at 324. It similarly is well established that summary judgment is appropriate “after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, *supra*.

The principle announced by the Supreme Court in *Celotex*, was applied in a summary judgment context in a good faith and fair dealing case in *Long Lane Limited Partnership v. Bibb*, 159 Fed. Appx. 189, 2005 WL 3304124 (C.A. Fed.). *Long Lane* involved a claim by a landlord that the General Services Administration (“GSA”) had breached the implied covenant of good faith and fair dealing by conspiring with another agency to terminate a lease to punish the landlord for pursuing a legal action. The United States Court of Appeals for the Federal Circuit in *Long Lane* upheld a decision of the GSA Board of Contract Appeals granting the Government’s Motion for Summary Judgment on the bad faith claim. In so doing, the Court held that “because Long Lane failed to proffer evidence reasonably demonstrating that GSA terminated its lease in bad faith, the Board did not err in dismissing Long Lane’s appeal.” *Id.* at 2.

The claimant in *Long Lane* had produced evidence in the form of an uncorroborated affidavit of a principal of *Long Lane* to attempt to respond to the Government’s Motion. After reviewing that evidence, the Court reasoned that “even if we were to accept Long Lane’s suspicion of GSA’s motivation, we still cannot say the Board erred in holding that Long Lane did not meet its burden of supplying ‘clear and convincing’ proof of bad faith... there is no real evidence to support Long Lane’s allegations of bad faith sufficient

to withstand the government's motion for summary relief." *Id.* at 193. The Court went on to explain that "regarding Long Lane's assertion of bad faith, it has not produced any evidence, other than... uncorroborated, speculative statements, to support its theory..." *Id.* at 4. The Court ultimately held that: "[a]fter considering Long Lane's proffered evidence in a light most favorable to Long Lane, we agree with the Board that Long Lane has failed to provide sufficient evidence to support its claim that GSA terminated the 67 Long Lane building lease in bad faith." *Id.* at 4.

Significantly, the Court upheld the Board's grant of summary judgment in *Long Lane* notwithstanding that *Long Lane's* plaintiff had proffered more evidence than has Astornet in the instant case. *See also Springs Window Fashions L.P. v. Novo Industries, L.P.*, 323 F.3d 989, 999 (C.A. Fed. 2003). The ODRA specifically directed Astornet to include in its Opposition to the Motion, "Astornet's legal position on the Motion, as well as a statement of the specific material facts in dispute that Astornet contends preclude summary judgment in this case, together with any supporting materials." *See* ODRA letter of May 26, 2009. It failed to provide a supported response to the Motion. Nor has it proffered any evidence that could constitute substantial, much less clear and convincing evidence of breach of the duty of good faith and fair dealing.

As noted above, at an early stage of this case, a motion to dismiss the Fair Dealing Claim was denied without prejudice. *See* December 22 Decision at 11, 12. A reasonable period for completion of discovery was permitted in accordance with the ODRA's Procedural Regulations. During the discovery period the Program Office provided extensive document discovery to Astornet. Significantly Astornet apparently chose not to seek to depose any of the Program Office personnel. Under the circumstances, there is no basis for permitting Astornet to use the vehicle of an evidentiary hearing to attempt to obtain discovery through cross-examination. *See Greenlee Construction, Inc. v. GSA*, 2007 WL 837860 (Civilian B.C.A. 2007) (holding that a "party's speculative hope that yet more discovery will produce necessary evidence, after considerable opportunity for discovery has failed to turn up proof, is not a good reason for denying a motion for summary relief.").

Even viewing the record herein in a light most favorable to Astornet, it has not made a supported showing of material facts in dispute that could support its Fair Dealing Claim, nor proffered any documentary or other evidence that would support a finding of clear and convincing evidence of bad faith on the part of Agency officials. *See Celotex Corp. v. Catrett, supra; Long Lane Limited Partnership v. Bibb, supra.* Rather, Astornet relies on its own unsubstantiated broad and speculative allegations and a series of communications with Program Office personnel that, far from supporting Astornet's claim, actually demonstrate that the Program Office in fact treated Astornet as "*eligible for future SWIM contracting opportunities, as appropriate.*" Settlement Agreement, *supra.*(emphasis added).

IV. CONCLUSION

For the reasons discussed herein, the ODRA concludes that there are no material facts in dispute regarding the allegation that the Agency breached the duty of good faith and fair dealing with respect to Astornet; and that the Program Office is entitled to summary judgment as a matter of law. There being no other claims remaining to be adjudicated in this Dispute, the ODRA recommends that it be dismissed with prejudice pursuant to 14 C.F.R. §17.29.

-S-

Anthony N. Palladino
Associate Chief Counsel and Director
FAA Office of Dispute Resolution
For Acquisition
July 10, 2009