

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

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

DECISION ON MOTION TO DISMISS CONTRACT DISPUTE

I. INTRODUCTION

This matter currently is before the Office of Dispute Resolution for Acquisition (“ODRA”) for consideration of a Motion to Dismiss (“Motion”) filed by a Federal Aviation Administration (“FAA”) Program Office (“Program Office”) seeking dismissal of the Contract Dispute (“Dispute”) of Astornet Technologies, Inc. (“Astornet”). The Motion requests that the Dispute be dismissed summarily, pursuant to the ODRA Procedural Regulations at 14 C.F.R. §17.29, as legally insufficient. Astornet filed an opposition to the Motion on November 31, 2008 (“Opposition”) and the Program Office filed a Reply to the Opposition on December 5, 2008 (“Reply”). Having reviewed the Motion, Opposition, and Reply, the ODRA concludes, for the reasons set forth herein, that a portion of Astornet’s Dispute lacks a factual or legal basis and therefore fails to state a claim upon which relief can be granted. The ODRA therefore grants the Motion in part and summarily dismisses the portion of the Dispute that alleges breach of a settlement agreement by the Program Office. With respect to the remaining allegations of the Dispute that the Program Office acted in bad faith in its dealings with Astornet, the ODRA denies the Motion without prejudice at this stage of the proceedings.

II. FACTUAL BACKGROUND

Astornet initially filed this Dispute with the ODRA on September 18, 2008 (“Initial Filing”). The Initial Filing consisted of a four page letter with no exhibits or other supporting documents. The Initial Filing referenced a settlement agreement executed on May 15, 2007 (“Settlement Agreement”), which resolved an earlier bid protest filed by Astornet and docketed as Case Number 07-ODRA-00409. Astornet’s Initial Filing alleged that “all indications and actions taken by FAA prove that FAA breached the [settlement] agreement and has blacklisted Astornet from doing any more work within FAA.” *Initial Filing at 1*. The Initial Filing goes on to reference a number of contacts and discussions that the President of Astornet had with FAA contracting officials. *Id. at 2, 3*.

On September 25, 2008, the ODRA forwarded a Letter to Astornet and to counsel for the Program Office referencing the Astornet Initial Filing. *See ODRA Letter dated September 24, 2008 at 1*. The Letter cited to the ODRA Procedural Regulations and stated that the parties would have a period of time to attempt to resolve the matter informally. The Letter further stated: “Astornet is directed to provide the information required by the ODRA Procedural Regulations at 14 C.F.R. §17.25 together with all the documents that Astornet believes are relevant to this dispute.” On October 7, 2008, Astornet filed its “Supplemental Contract Dispute” stating that “the basis for this dispute is that Astornet has recently learned of additional breaches by the FAA of the May 15, 2007 settlement agreement (copy attached) between the FAA and Astornet.” *See Supplemental Contract Dispute at 1*. The Supplement Contract Dispute goes on to reference and allege, as evidence of the breach of the Settlement Agreement, that a non-competitive award of Security Certification and Authorization Package (“SCAP”) work was made to another contractor.¹

¹ Astornet also filed a bid protest with the ODRA of the non-competitive award. That protest, docketed as ODRA Case No. 08-ODRA-0469 was summarily dismissed.

The Astornet Supplemental Contract Dispute alleges:

the FAA has repeatedly breached this agreement as follows:

1. The FAA SWIM program office has not invited Astornet to a single relevant contract opportunity since the time of the 2007 settlement agreement. The one “opportunity” identified to Astornet by the SWIM program office involved off-the-shelf software completely inapplicable to the type of work offered by Astornet.
2. The SWIM program office undoubtedly solicited and awarded contract work that Astornet could compete for but the SWIM program office has never communicated any such contract opportunities to Astornet.
3. FAA personnel have effectively “blacklisted” Astornet for using the FAA dispute resolution procedures, from competing on other FAA contract opportunities, such as the ATO Security Documentation work cited above.
4. The FAA’s unfair treatment of Astornet and the FAA breaches of the 2007 settlement agreement violate laws and regulations applicable to the FAA.

Id at 1, 2.

By letter of October 20, 2008, counsel for the Program Office reported on the status of dispute resolution efforts that had been made in the case (“October 30 Letter”). The October 30 Letter reports that “attempts to reach a resolution through informal discussions were unsuccessful.” *Id at 2.* Finally, the October 30 Letter noted that “Astornet has expressed it [sic] request to proceed with default adjudication. For these reasons, the Default Adjudication Process is needed.” *Id.* On November 7, 2008, Astornet responded to the October 30 Letter (“November 7 Letter”) seeking “to correct several inaccuracies...” in the Letter. The Astornet November 7 Letter cited to and quoted from an alternative dispute resolution (“ADR”) communication, from a neutral mediator who assisted the parties in reaching the Settlement Agreement, as evidence that the Program Office was contractually obligated by the Settlement Agreement to make additional contract work available to Astornet. *Id. at 2, 3.*

The current Motion was filed by counsel for the Program Office on November 10, 2008. In the Motion, the Program Office alleges that Astornet has failed to comply with the pleading requirements of the ODR Procedural Regulations at 14 C.F.R. § 17.25. *See*

Motion at 2. The Motion also alleges that Astornet's claims of blacklisting by the Program Office are "contrary to its pleadings." *Id.*

An initial scheduling conference was held in this matter on November 13, 2008. At that conference, Astornet requested to attempt alternative dispute resolution ("ADR"). Counsel for the Program Office indicated, however, that her client did not believe that ADR would be productive and, therefore, requested that the adjudication commence. *See Status Conference Memo dated November 18, 2008.* Astornet was given until November 28, 2008, to file an Opposition to the Motion. The Reply from the Program Office to the Opposition was due to be filed within 5 business days of receipt of Astornet's Opposition. Finally, in the Status Conference Memorandum, the ODRA stated that the Motion would be reviewed as a preliminary matter and that all other litigation activities, including discovery, would be deferred pending consideration of the Motion. *Id.*

Astornet filed its Opposition on November 28, 2008; the Opposition takes issue with the Program Office's claim that Astornet cannot prove any facts to support an alleged breach of the Settlement Agreement. In support of its allegation that the Settlement Agreement was breached, Astornet's Opposition states: "Astornet alleges that the FAA breached the Settlement Agreement in that the FAA SWIM program office has not invited Astornet to participate in a single relevant contract opportunity since the November of 2007 completion of the contract awarded to Astornet pursuant to paragraph 2 of the Settlement Agreement." *Opposition* at 3. The Opposition cites to Paragraph 2 of the Settlement Agreement, which provides:

TERMS. This Settlement Agreement is based on the following premises and promises:

Contract Award

The SWIM Program Office shall immediately award a contract ("Contract") to Astornet for the performance of a SWIM Test Tools Trade Study. The total amount of the Contract Award is \$128,800 to be performed over a period six calendar months.

The SWIM Program Office agrees that if Astornet successfully performs its obligation under the Contract, it shall continue to be eligible for future SWIM contracting opportunities, as appropriate.

Id. at 4. With respect to the above-cited language Astornet states:

The FAA and Astornet understood this language in paragraph 2 of the Settlement Agreement to mean that if Astornet successfully performed its obligations under the initial contract awarded pursuant to the Settlement Agreement, the FAA thereafter would seek to provide Astornet within its field of experience additional SEBD 8(a) non-competitive awards... and competitive contracting opportunities pursuant to the AMS where non-competitive awards could not be justified.

Id. Astornet goes on to argue in its Opposition that its “allegation...must be taken as correct at this motion to dismiss stage, because to do otherwise, the ODR effectively would be deciding the merits of the interpretation of the Settlement Agreement and the AMS regulations prior to the introduction of evidence and a rational consideration of the entire record.” *Id.* The Opposition goes on to cite to communications with the ADR neutral in this case as evidence of the “parties’ understanding of paragraph 2 of the Settlement Agreement.” *Id.* The Opposition alleges that “the FAA and SWIM Program Office have breached the Settlement Agreement by failing to seek Astornet’s participation in competitive and non-competitive contracting opportunities within Astornet’s field of experience from November 2007 to the present.” *Id.* at 5. The Opposition goes on to allege that the Program Office has awarded other non-competitive work to other companies. *Id.*

The Opposition also alleges that the Program Office acted in bad faith “in breaching the Settlement Agreement by failing to deal fairly with Astornet within the SWIM program.” *Id.* at 6. It goes on to allege that the “SWIM program officials’ refusal to seek Astornet’s participation was not based on valid, legitimate bases.” *Id.* In addition to the above, Astornet’s Opposition alleges that a separate office within the FAA, the Navigation Program Office, is guilty of not “dealing fairly with Astornet with regard to the FAA Navigation program.” *Id.* at 7; and that Astornet has been blacklisted by the FAA. *Id.*

In its Reply to the Motion, the Program Office reasserts its argument that Astornet fails to meet the requirements of the Procedural Regulations with respect to providing facts in support of its claim. *See Reply at 1.* The Reply further states that “the facts and allegations Astornet provides read in a light most favorable to it fail to establish the claims it asserts.....its Opposition simply repackages the information provided in earlier documents, but still falls short of providing any legal grounds supported by facts.” *Id at 2.*

With respect to the requirements of the Settlement Agreement, the Program Office notes that Astornet’s case is “flawed in its legal premise” in that “Astornet introduces an obligation not in the settlement agreement.” *Id.* In this regard, the Program Office relies on language from the Settlement Agreement, which it contends required the Program Office to immediately award a contract to Astornet and that if Astornet successfully performed its obligations under that contract, Astornet would be eligible for future contracting opportunities. *Id.* The Program Office states that “Astornet tries to turn this passive benefit (‘shall continue to be eligible’) to it into an affirmative obligation (‘shall seek and provide’) on the SWIM Program Office. This is clearly not within the plain meaning of the contract.” *Id. at 2, 3.* The Program Office further urges that inasmuch as the Settlement Agreement defines the rights and obligations of the parties, Astornet cannot successfully allege that an implied-in-fact contract exists requiring the Program Office to seek to provide Astornet with additional work. *Id. at 3.*

The Program Office Reply goes on to assert that “even if the Agency conceded that the duty ‘to seek and provide’ competitive and non-competitive contracts was present in the Settlement agreement [sic] or a separate implied contract, Astornet still fails to provide or assert any facts that would establish a breach of this duty.” *Id at 4.* Thus, the Program Office asserts that, even if there is a contractual obligation to seek to provide opportunities to Astornet, the mere fact the Program Office may have contracted with other parties does not establish a breach of that duty. The Program Office further argues that “‘seek to provide’ does not equate to a guarantee or promise that every contracting opportunity provided by the Agency must be awarded to Astornet....” *Id.*

The Program Office Reply also addresses Astornet's allegation that the Program Office failed to deal in good faith with Astornet. In its Reply, the Program Office states that, even if Astornet could prove that the Program Office failed to notify or solicit its participation in contracting opportunities, "these claims would not support a claim of failure to deal in good faith because there was no duty aside from those required by A.M.S. [sic] on the part of the Agency to 'notify or solicit' Astornet." *Id at 4, 5*. The Program Office Reply goes on to cite to the recognized presumption that government officials act in good faith in conducting their duties. Finally, the Program Office Reply points out that the alleged breaches of a duty to notify and solicit Astornet "are contradictory to Astornet's pleading." *Id at 5*.

Finally, the Program Office urges that Astornet's claim that the Program Office did not act in good faith in making a contract award to another company should be barred by the principal of *Res Judicata*. *Id*. In addition, the Program Office claims that Astornet's allegations of blacklisting are fatally deficient in that Astornet has not alleged facts demonstrating statements or conduct by Program Office officials that would support a claim of *de facto* debarment. *Id. at 6*.

III. DISCUSSION

Pursuant to the ODRA Procedural Regulations, upon a motion by a party or acting on its own initiative, the ODRA 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). As the ODRA has noted on several occasions, 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*. It also is well established that "prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the ODRA 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*. A case is defective if it fails to allege facts, which if proven would demonstrate

improper conduct or a violation of the AMS by the Program Office. *Protest of BEL-AIR Electric Construction, Inc.*, 98-ODRA-00084.

A. Breach of Contract Allegations

As is discussed above, Astornet is alleging a breach of the Settlement Agreement, as well as, a breach of the duty of good faith and fair dealing. The breach of contract allegations involve: (1) failure to award additional contract work to Astornet; (2) failure to notify and provide opportunities to Astornet to complete additional work for the Program Office; and (3) awards to other contractors of work that should have been made available to Astornet. Each of these alleged breaches of the Settlement Agreement will be discussed in this Section.

1. Failure to Award Additional Work

Astornet claims contractual entitlement under the Settlement Agreement to the award of additional contract work by the Program Office. This allegation is completely unsupported by the Settlement Agreement. Under the Settlement Agreement, Astornet was entitled to the award of one contract for a “SWIM Test Tool Trade Study” (“TTTS Contract”) in the amount of \$128,800. The TTTS Contract work was to be performed over a period of 6 calendar months. It is undisputed that the specified award was made to Astornet in accordance with the terms of the Settlement Agreement. Moreover, it is undisputed that Astornet successfully performed the TTTS Contract work.

The Settlement Agreement also clearly specified as follows: “The SWIM program office agrees that if Astornet successfully performs its obligations under the contract, it shall continue to be eligible for future SWIM contracting opportunities as appropriate.” *See Settlement Agreement* at Clause 2. Inasmuch as it is undisputed that Astornet successfully performed its obligations under the TTTS Contract, pursuant to the Settlement Agreement, “it shall continue to be eligible for future SWIM contracting opportunities as appropriate.” *Id.* There is no provision in the language of Clause 2 of the

Settlement Agreement, however, that obligates the Program Office to make additional awards of any contract work to Astornet.

It is axiomatic that the clear and express terms of a contract control the rights and obligation of the parties. *See Contract Dispute of Strand Hunt Construction, Inc.*, 00-ODRA-00142; *see also Enron Fed. Solutions, Inc. v. United States*, 80 Fed.Cl. 382, 393 (2008) (contract interpretation “start[s] with the plain meaning of the Contract’s text.”). Inasmuch as the Settlement Agreement in question is clear and unambiguous in providing that Astornet contractually was entitled to the single contract award that it received, the ODRA finds, to the extent that Astornet alleges it was contractually entitled to additional contract awards, that allegation is without basis in fact or law and, therefore, will be dismissed for failure to state a claim upon which relief can be granted.

2. Failure to notify of and provide opportunities for additional contract work

Astornet additionally alleges that the Settlement Agreement created an affirmative obligation on the part of the Program Office to notify Astornet and provide it opportunities for the award of additional contract work. As with Astornet’s allegations concerning contractual entitlement to additional contract work, these allegations have no support in the clear and unambiguous terms of the Settlement Agreement. The Settlement Agreement contains no provisions requiring that Astornet be notified of additional work or that additional work be made available to it. Rather, the express terms provide that based on successful performance of the TTTS Contract work, Astornet would “continue to be eligible...” for additional work. As counsel for the Program Office correctly points out, this language does not create an affirmative obligation on the part of the Program Office to notify Astornet or provide it opportunities regarding additional work.

Astornet claims, however, that it was the intent of the parties to create such affirmative obligations and rights in the Settlement Agreement. In this regard, Astornet has sought to introduce into evidence an email communication from the neutral who assisted the parties

in the ADR mediation effort that resulted in the Settlement Agreement. Notwithstanding this assertion, ADR communications generally are confidential. Additionally, the Settlement Agreement included an Integration Clause that expressly provides:

INTEGRATION. This Settlement Agreement is entered into by each of the parties without reliance upon any statement, representation, promise, inducement, or agreement not expressly contained herein. This Settlement Agreement constitutes the entire agreement between the parties concerning the aforesaid settlement and release of claims.

Moreover, even absent any restriction on the use of the ADR communication or the presence of an Integration Clause, the use of the communication involved here is constrained by the Parole Evidence Rule. It is well established that where clear and unambiguous terms of a contract are in place, the rights and obligations by the parties are controlled by those terms. *See West Bay Builders, Inc. v. United States*, 2008 WL 5248283 (Fed.Cl.) at 13. Parole evidence, such as communications prior to or subsequent to the signing of the contract, are only admissible in the event of some ambiguity or lack of clarity in the contract terms. *See King Fisher Marine Service, Inc. v. United States*, 16 Cl. Ct. 231 (1989). Parole evidence cannot be used “in order to create an ambiguity” “for the purpose of varying the meaning of clear unambiguous language.” *Id.* at 235.

Here, there is no lack of clarity present in the Settlement Agreement. There is no suggestion anywhere in the Settlement Agreement of an affirmative obligation on behalf of the Program Office, or a right on the part of Astornet to be informed about, or to be given opportunities to compete for, additional work. Rather, the plain language of the Settlement Agreement noted that Astornet would be “eligible” for such additional work based on its performance of the TTTS Contract. Thus, there is no need to interpret the meaning of the Settlement Agreement and no basis for utilizing parole evidence for that purpose. *Id.*

3. The Awarding of Work to Other Contractors

As was noted above, Astornet contends that the Program Office awarded contracts on a non-competitive basis to other companies for work that, pursuant to the Settlement Agreement, should have been provided to Astornet. For the reasons discussed above, the ODRA finds that there was no obligation established by the Settlement Agreement to award additional 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. Even assuming, for purposes of argument, that such an obligation to award additional contract work to Astornet did exist, there still would be no basis to support a conclusion that the Settlement Agreement is a “requirements” type contract mandating that all work that the Program Office needed and Astornet is capable of performing would be directed by the Program Office only to Astornet. Astornet’s allegation in this regard is completely without factual or legal basis and is frivolous. For that reason, this allegation of breach of the Settlement Agreement must be dismissed.

B. Breach of the duty of good faith and fair dealing.

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.* In *Dynamic Security*, the FAA Program Office filed a Motion to Summarily Dismiss, for failure to state a claim, a contract dispute alleging breach of the obligation to deal with the contractor fairly and in good faith. *Id.* In the Motion, the Program Office contended that the 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.* The ODRA went on to hold that “at this juncture it would be premature to dismiss this case particularly before the conduct of any discovery.” *Id.* In so holding, the ODRA recognized the existence of the well established presumption that government officials act in good faith, and that to overcome

this presumption contractors must submit clear and convincing evidence. *Id.* Finally, the ODRA further noted that “even assuming that the requisite proof of bad faith can be met, ... not all breaches are remediable in damages....” *Id.*

In the instant case, 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.

IV. CONCLUSION

The ODRA concludes that a portion of Astornet’s Dispute fails to state a claim upon which relief can be granted. The ODRA, therefore, grants the Motion in part and summarily dismisses the portions of Astornet’s Dispute alleging that the Program Office materially breached a requirement of the Settlement Agreement by: failing to award contract work to Astornet; failing to notify Astornet of or provide it opportunities in connection with additional contracts; and awarding work to other contractors rather than to Astornet. The ODRA denies the Motion, without prejudice, with respect to the allegations that the Program Office breached the duty of good faith and fair dealing with respect to Astornet.

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December 22, 2008