



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: January 14, 2011

CBCA 2137, 2141

HEALTHCARE TECHNOLOGY SOLUTIONS INTERNATIONAL,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

David F. Barton and Elizabeth Haws Connally of The Gardner Law Firm, San Antonio, TX, counsel for Appellant.

Kate Gorney, Office of Regional Counsel, Department of Veterans Affairs, Philadelphia, PA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **GOODMAN**.

DANIELS, Board Judge.

Healthcare Technology Solutions International (HTSI) and the Department of Veterans Affairs (VA) have filed cross-motions for summary relief regarding the contractor's appeals of contracting officer decisions. The decisions denied claims made under a contract for patient coding services at a VA medical center. We grant VA's motion and deny HTSI's, and thereby deny the appeals.

Uncontested Facts

On February 28, 2001, VA awarded to HTSI a contract for the provision of “all labor, materials, supervision and transportation necessary to perform inpatient and outpatient coding services” for the VA Medical Center (DVAMC) in Wilkes-Barre, Pennsylvania, and two outpatient clinic substations.

The contract’s initial period of performance ended on March 31, 2002. The contract was extended several times, however, through the VA’s exercise of options and the execution of bilateral contract modifications. It ultimately ended on March 31, 2010.

The contract included paragraph 13, DVAMC Requirements, which provided in pertinent part, “*DVAMC will provide space, equipment, and actual records, and/or access to PTF [Patient Treatment File], PCE [Patient Care Encounter] and Billing Menu options in VISTA [the Veterans Health Information Systems and Technology Architecture] for each FTEE [full-time equivalent employee?].*”¹ (Emphasis added.)

Of the many contract modifications, the one most important to these cases is number 9, which was signed by the contracting officer on March 14, 2005, and by the contractor’s president on March 17, 2005. Modification 9 says that it “outlines the change in occupancy from the main building to Building 3.” It then states, in full:

1. Contractor will lease and occupy Building 3 as of Monday 14 March 2005.
2. The initial rate is \$3,500.00 per month. The lease amount will adjust annually at a rate equal to the federal civil service cost of living adjustment.
3. Monthly payment will be by check payable to WBVAMC [Wilkes-Barre Veterans Affairs Medical Center] Agent Cashier by the end of the fifth business day each month with a copy to the Contracting Officer.

¹ The contract explained that “[t]he PTF is the DVAMC’s automated discharge database. PTF maintains a record on every inpatient treated in a DVAMC facility or in a non-DVAMC facility at DVAMC expense. These PTF records provide a computerized abstract of each patient’s discharge and contain over 100 different data items which describe the characteristics of the patient and the reason for the hospital stay.” Also, “Outpatient information is entered through the VISTA Patient Care Encounter.”

4. The cost of initial wood floor refinishing, \$600.00, will be paid by the Contractor with a check payable to WBVAMC Agent Cashier, with a copy to the Contracting Officer.
4. [sic] WBVAMC will provide grounds and exterior building maintenance; interior maintenance and routine housekeeping, and utilities.
5. Contractor will make no structural changes or renovations to the building. Accidental damages will be reported to the Contracting Officer within two business days of occurrence and repaired by WBVAMC at Contractor expense.
6. Contractor will report a lost or missing key to the Contracting Officer within 24 hours of discovery and is responsible for the full cost of lock and key replacement.
7. Upon contract expiration or termination,
 - a. Contractor shall remove property and vacate the building, leaving the premises clean and orderly. Repairs necessary will be deducted from the final invoice payment.
 - b. At VA option, ownership of contractor-owned modular furniture passes to WBVAMC in lieu of payment for window treatments. If VA declines ownership, Contractor shall remove and dispose of furniture at Contractor expense.
 - c. Contractor will return each key to WBVAMC Projects Office.

On April 28 and May 2, 2005, the contracting officer and HTSI's president signed modification 10. This modification effectively made administrative changes to paragraph 3 of modification 9, regarding checks for payment of rent. It provided, "Effective this date, Contractor shall submit the monthly lease payment, using a delivery method that confirms receipt on or before the fifth business day of each month, to the Contracting Officer. The Contracting Officer will forward the lease payment to the WBVAMC Agent Cashier. Lease and other checks will be made payable to 'WBVAMC Agent Cashier.'"

Prior to March 2005, WBVAMC provided space to HTSI in the main building at no charge. On or about March 17, 2005, HTSI moved from the main building to Building 3.

HTSI then began sending to WBVAMC Agent Cashier monthly checks, each in the amount of \$3500, to cover rent for space in Building 3. According to the complaint, the total amount paid over the remaining period of the contract was \$211,750. There is no indication in the record that during this five-year period, the contractor raised any objection to paying this rent.

The VA's contracting officer's technical representative for this contract has submitted a declaration which makes the following two uncontested points: The space HTSI occupied in Building 3 was more than four times as large as the space the contractor had occupied in the main building (3415 square feet versus 800 square feet). HTSI was able to have all its personnel in the same area in Building 3, something that had not been possible previously. In addition, VA has also stated, without contest, that it paid \$11,500 for window treatments for the space in Building 3 which was occupied by HTSI.

On or about May 20, 2010, HTSI submitted two claims to the contracting officer. One, in the amount of \$211,750, was for recovery of the rent the contractor paid for space in Building 3 from March 2005 to March 2010. The other, in the amount of \$18,892, was for the cost of furniture HTSI purchased for use in Building 3. In separate decisions, the contracting officer denied the claims. HTSI has appealed both of these decisions. The appeal regarding rent has been docketed as CBCA 2137, and the appeal regarding furniture cost has been docketed as CBCA 2141.

Discussion

Each party has asked the Board to resolve these appeals by granting its own motion for summary relief and denying the opposing party's motion. Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The sole issue presented here is one of contract interpretation, a question of law, so considering the issue on motions for summary relief is appropriate. *Olympus Corp. v. United States*, 98 F.3d 1314, 1316 (Fed. Cir. 1996).

The contract originally provided in paragraph 13 that the VA medical center "will provide space [and] equipment" to the contractor for the performance of the work. This paragraph was never mentioned in any of the modifications to the contract, including modification 9. However, modification 9 did require that HTSI move its operations from one building to another, pay \$3500 per month in rent for the new space, and give its modular furniture to VA when the contract ended (unless the agency did not want the furniture).

From these facts, the parties perceive very different consequences. According to HTSI, VA's insistence that the contractor pay rent for the new space was a breach of the contract -- indeed, a cardinal change -- or alternatively, gave rise to a type I differing site condition. According to VA, modification 9 effectively amended paragraph 13; by agreeing to the modification, HTSI accepted the conditions that it pay rent and eventually transfer ownership of the furniture.

In our view, VA is clearly correct. Paragraph 13 required VA to provide space and equipment to the contractor, but did not specify what that space and equipment would be or how much the agency would charge for it. Modification 9 filled in details: under it, VA would provide a defined space (in Building 3) and defined equipment (window treatments, at least) at a defined cost (monthly rent for the space and, among other things, transfer of ownership of furniture at contract's end). This modification was agreed to by both parties -- as was modification 10, which altered it slightly -- and neither party has alleged that it signed either document under duress. The contract as modified was implemented without objection by both parties for the next five years. To the extent that paragraph 13 may have been understood to require VA to provide space and equipment without charge, modification 9 changed that requirement -- even if it did not mention paragraph 13 explicitly. Any reasonably prudent contractor should have recognized this when presented with the modification, and HTSI confirmed its recognition of the change by paying monthly rent on a consistent basis for what turned out to be the five remaining years of the contract. Quite simply, by signature and action, HTSI agreed to be bound by modification 9, so relieving it from its obligations under the modification is inappropriate now.

It is difficult for us to understand how a mutually agreed upon contract modification might be construed as a breach of contract by one of the parties. Nor do we comprehend how a cardinal change might have occurred through that modification. A cardinal change "occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for." *Allied Materials & Equipment Co. v. United States*, 569 F.2d 562, 563-64 (Ct. Cl. 1978); see also *International Data Products Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007). Here, no evidence has been presented that through modification 9 or any other means, VA ever required HTSI to do any work other than what was originally bargained for -- the performance of inpatient and outpatient coding services. The Differing Site Conditions clause is intended to be included in construction contracts where subsurface conditions are in question, 48 CFR 36.502, 52.236-2 (2009), and every case we have found which involves a type I differing site condition considers whether subsurface conditions on a construction project were other than as represented in the contract. See, e.g., *Renda Marine, Inc. v. United States*, 509 F.3d 1372 (Fed. Cir. 2007); *Comtrol, Inc. v. United States*, 294 F.3d 1357 (Fed. Cir. 2002); *Whiting-Turner/A.L. Johnson Joint Venture v. General Services Administration*,

GSBCA 15401, 02-1 BCA ¶ 31,708 (2001). The concept of differing site conditions is inapplicable to this case.

Decision

HTSI's motion for summary relief is denied. VA's cross-motion for summary relief is granted. Both CBCA 2137 and CBCA 2141 are **DENIED**.

STEPHEN M. DANIELS
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

ALLAN H. GOODMAN
Board Judge