UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS, OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY RELIEF GRANTED IN PART: June 11, 2014

CBCA 3522

EHR DOCTORS, INC.,

Appellant,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

Richard Braman, Vice President of EHR Doctors, Inc., Pompano Beach, FL, appearing for Appellant.

Lucinda E. Davis and Dorothy M. Guy, Office of the General Counsel, Social Security Administration, Baltimore, MD, counsel for Respondent.

Before Board Judges **SOMERS**, **VERGILIO**, and **STEEL**.

SOMERS, Board Judge.

On February 1, 2010, the Social Security Administration (SSA or the Government) awarded a contract to EHR Doctors, Inc. (EHR) to provide medical information electronically from health care providers through integration with the Nationwide Health Information Network (NHIN). In a claim submitted on July 9, 2013, EHR asserts that it is entitled to be paid $250,000, the difference between the original contract amount and the contract price as modified. EHR states that it signed the contract modification under duress. The contracting officer denied the claim, and EHR appealed to the Board.

SSA has submitted a motion to dismiss, or, alternatively, for summary relief. According to the agency, the bilateral modification reducing the contract amount acted as an accord and satisfaction and bars EHR's current claim related to the reduced contract price. SSA contends that, for the first time, EHR alleges in its complaint that it incurred $246,208.32 in extra costs when SSA required it to perform more work than initially contemplated. Because this second claim had not been submitted to the contracting officer, SSA argues that the Board does not possess jurisdiction to entertain the claim.[1]

Because genuine issues of material fact exist concerning whether the contract modification should be given effect, the Board denies SSA's motion as it relates to EHR's July 9, 2013, claim. However, the Board grants SSA's motion to dismiss the portion of EHR's complaint seeking compensation for costs arising from additional work, given that the contractor had not filed a claim on that issue prior to filing this appeal.

Background[2]

On February 1, 2010, SSA awarded a contract to EHR to set up a computerized process for electronically obtaining medical records of applicants for Social Security disability benefits. The statement of work (SOW) explains:

> SSA's objective is to improve the speed and quality of the disability determination process through a more efficient and effective medical information gathering process. To meet this objective, SSA intends to expand the number of healthcare providers participating with SSA in the Nationwide Health Information Network (NHIN). This will give medical providers the capacity to receive a standardized electronic request for

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[1] After SSA filed its motion, EHR submitted a claim to the contracting officer. The contracting officer denied EHR's claim for $246,208.32 on March 11, 2014. *See* Respondent's Reply Brief in Support of its Motion to Dismiss or, in the Alternative, Motion for Summary Relief, Exhibit 1. The Board held a status conference call with the parties on May 15, 2014. At that time, EHR's representative indicated that EHR had not yet decided on its next course of action. In any event, EHR has not appealed the contracting officer's decision.

[2] Some of the facts set forth in this opinion come from a decision issued by the Board in a previous appeal involving the same "claim." *EHR Doctors, Inc. v. Social Security Administration*, CBCA 3426, 13 BCA ¶ 35,371.

> medical records along with a patient's authorization. Medical providers will then be able to automatically respond to SSA requests with structured medical information through a Continuity of Care Document (CCD).
>
> With these fixed price contracts, SSA intends to partner with medical providers to request and receive medical information in a standards based data format through the NHIN.

As noted in Section 4.3 of the SOW, the contract required EHR to provide a production gateway and to integrate participating providers/facilities to the NHIN, among other things. EHR's contract with SSA contained three performance "milestones." SSA paid EHR a percentage of the contract price upon the completion of each milestone.

The parties initially valued the contract between EHR and SSA at $1,000,000 based on EHR's submission of 1000 medical records to SSA from EHR's subcontractor, Oroville Hospital (Oroville). After contract award, EHR alleges that SSA, through the project manager, informed EHR that respondent required EHR to perform more duties than EHR originally contemplated when it submitted its proposal. Specifically, EHR contends that SSA wanted EHR to be the "NHIN gateway" instead of simply providing the gateway, and to "not only hook up a single hospital, but as many hospitals as possible." EHR claims that when Oroville found out that EHR, rather than Oroville, was to be the gateway, the subcontractor refused to cooperate.

When Oroville failed to provide EHR with the medical records necessary to create the document required under Milestone 1, this jeopardized EHR's ability to timely perform contract requirements. On July 19, 2010, SSA issued a cure notice to EHR. EHR asked SSA to allow EHR to replace Oroville with another medical provider so that EHR could continue with contract performance.

SSA initially agreed to consider allowing EHR to substitute for Oroville another subcontractor, Midland Medical Hospital (Midland). When SSA discovered that Midland's estimated transaction volume appeared to be substantially less than Oroville's, representing a 32.6% decrease in medical records, SSA informed EHR that it could not substitute Midland as subcontractor unless the parties could agree to a price reduction of the contract. Initially, SSA proposed that the contract price be reduced to $677,000, reflecting the decreased estimated transaction volume. After further discussion, SSA proposed a new contract price of $750,000.

EHR claims that although it was reluctant to agree to the contract modification, EHR decided to accept the proposed changes. In an e-mail message dated September 14, 2010, submitted to the contracting officer, Richard Braman of EHR stated:

> Pursuant to the call we had yesterday and our conversation with our attorney yesterday evening, EHR Doctors, Inc., accepts the SSA's proposed changes. We feel it is in our mutual best interests to put this dispute behind us and move forward. Please forward the contract modification so that we may execute it and move forward. We are ready to put these difficult circumstances behind us and get working on a more positive note.

The parties signed a bilateral contract modification, substituting Midland for Oroville, and reducing the contract price from $1,000,000 to $750,000. EHR completed its work under the contract and SSA paid it in full.

On March 11, 2013, an auditor in SSA's Office of Acquisitions & Grants notified EHR by e-mail that the contract was in the process of being closed out. The e-mail message requested EHR to "complete the attached Certification as to any outstanding claims against the contract." The hard copy of the close-out document, also signed by the auditor, did not use the term "certification," but requested EHR to "inform [SSA] of any outstanding invoices or claims against this contract within [seven] days. After we receive your reply, we will proceed with contract closeout."

The close out document had two options for EHR to check: (1) a box followed by the statement: "There are no outstanding claims," and (2) a box followed by the statement: "The following claims/invoices are outstanding." EHR sent the document back to the auditor with the second box checked and with the accompanying statement:

> The original contract awarded was in the amount of $1,000,000. SSA forcibly made a $250,000 modification to the contract with no justification and under threat of termination. [EHR] accepted [the] modification under duress. Contractor seeks to recover $250,000 from SSA.

On June 20, 2013, having heard nothing from SSA, EHR sent an e-mail message to the auditor, stating that it would "wait to file" if it received a response to its "settlement offer" of $250,000 by the close of business the next day. EHR stated that it reserved the right to "add additional claims to this claim if we cannot reach a settlement when we file with the CBCA [Civilian Board of Contract Appeals] or the Court of Federal Claims."

The contracting officer replied, stating that SSA would not enter into settlement negotiations with EHR, noting that the parties had entered into a bilateral modification, that the contract between the parties was concluded, and that all payments due under the contract had been made. On June 25, 2013, EHR filed a notice of appeal to the Board.

On June 27, 2013, the Board issued an order asking whether EHR had submitted a certified claim to the contracting officer or whether the contracting officer had issued a final decision. Ultimately, SSA submitted a motion to dismiss for lack of jurisdiction, on the grounds that EHR had failed to submit a certified claim to the contracting officer before filing an appeal before the Board. The Board dismissed the appeal for lack of jurisdiction. *See* 13 BCA ¶ 35,371.

On July 9, 2013, EHR submitted a certified claim to SSA for $250,000 – the difference between the initial contract price and the price under the bilateral modification. The contracting officer denied the claim and EHR appealed.

In count 2 of its complaint, EHR alleges that it accepted the contract modification under duress and under the threat of termination, consistent with the allegations asserted in its July 9, 2013, claim. In addition, in count 1, EHR asserts new allegations, specifically, that because EHR was forced to perform additional work under the contract, SSA should pay EHR an additional $246,208.32. Thus, this allegation seeks compensation for costs incurred that are in addition to the sum sought in the original claim.

As noted previously, at the time that EHR filed its complaint, it had not submitted to the contracting officer a claim for the additional costs based upon the change in the scope of work. However, after SSA filed its motion to dismiss, or, alternatively, for summary relief, EHR submitted the second claim. The contracting officer denied the second claim by letter dated March 11, 2014. EHR has not appealed the decision.

Discussion

Motion to dismiss

SSA moves us to dismiss the portion of EHR's complaint which requests $246,208.32 for additional labor and expenses allegedly incurred under the contract. According to the agency, this request is a claim which had not been presented to the contracting officer before the filing of this appeal and because the Board may consider only claims which were so presented, we have no jurisdiction to consider this one. *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987). EHR

disagrees, contending that this claim arises from the same set of facts that gave rise to its first claim, and that "this amount of damage at issue, is part and parcel to the Appellant's existing certified claim, and therefore subject to the Board's jurisdiction."

In evaluating SSA's contention that we lack jurisdiction to consider EHR's claim for additional labor and expenses, we must decide whether the claims originally presented to the contracting officer can reasonably be viewed as encompassing the matters raised in this part of EHR's complaint. An action brought under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (2012), must be "based on the same claim previously presented to and denied by the contracting officer." *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003) (quoting *Cerberonics, Inc. v. United States*, 13 Cl. Ct. 415, 417 (1987)). As this Board explained:

> The law is clear that in an appeal from a contracting officer's decision, a contractor may increase the amount of its claim and present evidence in support of an increase, but may not raise any new claims which were not presented to the contracting officer. *Sante Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987). "A new claim is one that does not arise from the same operative facts as the claim submitted to the contracting officer." *Hawkins & Powers Aviation, Inc. v. United States*, 46 Fed. Cl. 238, 243 (2000). "[S]o long as the essential nature and operative facts of the claim remain unchanged, the Board has jurisdiction to consider . . . increased/modified amounts of damages first raised in pleadings . . . ." *Whiting-Turner/A.L. Johnson Joint Venture v. General Services Administration*, GSBCA 15401, 02-1 BCA ¶ 31,708, at 156,622-23 (quoting *American Consulting Services, Inc.*, ASBCA 52923, 00-2 BCA ¶ 31,084, at 153,485). Updates to a claim which do not change the nature of the claim, its basic underlying facts, or the theory of recovery are allowed. *McDonnell Douglas Services, Inc.*, ASBCA 45556, 94-3 BCA ¶ 27,234, at 135,706-07.

Ketchikan Indian Community v. Department of Health and Human Services, CBCA 1053-ISDA, et al., 13 BCA ¶ 35,436, at 173,808 (quoting *New South Associates v. Department of Agriculture*, CBCA 848, 08-1 BCA ¶ 33,785, at 167,211).

When a new claim is asserted that is not directly addressed in the appellant's original claim submission, the tribunal must examine whether the newly posed claim derives from the same operative facts, seeks essentially the same relief, and, in essence, merely asserts a new legal theory for the recovery originally sought. *Scott Timber Co.*, 333 F.3d at 1365; *Ketchikan Indian Community*, 13 BCA at 173,808. "To determine

whether two or more separate claims . . . exist[], the court must assess whether . . . the claims are based on a common or related set of operative facts. If the court will have to review the same or related evidence to make its decision, then only one claim exists." *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990).

In EHR's July 9, 2013, certified claim, EHR asserts as follows:

> The following invoices/claims are outstanding: The original contract award was in the amount of $1,000,000. SSA forcibly made a $250,000 modification to the contract with no justification and under threat of termination. EHR Doctors accepted modification under duress. Contractor seeks to recover $250,000 from SSA.

Thus, in EHR's first claim, the focus is upon the contract modification. EHR claims that it accepted the modification under duress, believing that the contract would be terminated for default unless it accepted the price reduction proposed by SSA.

In its complaint, EHR presents two counts in its prayer for relief. Count 2 is consistent with the original claim, focusing on the contract modification. In Count 1, EHR asserts a different argument. EHR contends that "Respondent changed the scope of the project by requiring Appellant to function as an HIE [health information exchange] and as the NHIN Gateway. Appellant did not contemplate this arrangement when it entered into the Original Contract as evidenced by Appellant's Proposal." EHR goes on to allege that the "change in scope amounted to a malfeasance/breach of duty of good faith and fair dealing," resulting in damages of $246,208.32. The costs arose when EHR accelerated efforts to obtain a new hospital partner for the project and because EHR had to "restructure" itself in order to operate as an HIE. EHR also alleges that SSA provided an accommodation to another contractor in a similar situation under another contract, but did not provide such an accommodation to EHR.

To evaluate the first claim, the contracting officer would need to examine the facts that led to the contract modification. The parties agreed to modify the contract when EHR's subcontractor failed to perform, which caused EHR to miss the first contract milestone and the contracting officer to issue a cure notice. EHR sought to substitute subcontractors, and the parties entered into negotiations which resulted in a lower price due to the decrease in the volume of medical records that SSA would receive from the new subcontractor. The contracting officer rejected the claim, stating, among other things, that EHR failed to submit any documentation or other evidence to support its allegation that it signed the modification under duress.

The facts underlying the second claim are different from the facts underlying the first claim. In the second claim, EHR alleges that, after entering into the contract, SSA imposed new requirements that expanded the amount of work required. To evaluate this claim, the contracting officer would have to review assertions concerning a change in the scope of work, as well as the allegations related to EHR's claim that the Government breached a duty of good faith and fair dealing.

Allegations seeking an equitable adjustment due to a change in the scope of work and claims that respondent breached its duty of good faith and fair dealing are very different from allegations that a contractor signed a modification permitting the substitution of another subcontractor under duress. The allegations contained in count 1 of the complaint had not been presented to the contracting officer at the time that EHR submitted its notice of appeal to the Board on September 5, 2013. Moreover, the contractor has not attempted to explain how this claim would fall within its limited reservation of claims at the time of contract close out. Accordingly, EHR has raised a claim for which the Board cannot provide relief. *Yurok Tribe v. Department of the Interior*, CBCA 3519-ISDA, 14-1 BCA ¶ 35,528, *reconsideration denied*, 14-1 BCA ¶ 35,577, *appeal filed*, No. 14-1529 (Fed. Cir. June 3, 2014).

Motion for summary relief

The Board considers SSA's motion to dismiss count 2 of appellant's complaint as a motion for summary relief because the parties have both referenced materials outside of the pleadings. *Payne Enterprises v. Department of Agriculture*, CBCA 2899, 13 BCA ¶ 35,261. 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).

In its complaint, EHR asserts that the contract modification should not have included a $250,000 price reduction, claiming that the "improper post award contract price reduction included in the contract modification was proposed by Respondent under continual threat of termination under a Cure Notice." EHR alleges that "Respondent should have never tendered Cure Notice [sic] to Appellant because the events that gave rise to the performance delay were caused by Respondent." In addition, EHR contends that "Appellant notified Respondent both verbally and in writing on multiple occasions that it disagreed with the price reduction." EHR does not dispute that it signed the contract modification reducing the price for the contract in return for permitting it to

substitute one subcontractor for another. Nor does it dispute that it sought legal advice prior to signing the modification.

SSA's motion for summary relief focuses on the fact that EHR executed the bilateral modification without change, without any written reservations of rights, and after seeking the advice of counsel. While this may be true, EHR has raised genuine issues of material fact sufficient to preclude the granting of the motion for summary relief at this point in the litigation. In particular, EHR asserts that it continually protested the terms of the modification, that SSA used "strong arm" tactics that forced it to sign the modification rather than face a termination for default, and that there was no true meeting of the minds when the parties signed the modification. The record includes affidavits submitted by EHR's president and vice president, which provide factual details EHR contends support its allegations that it was forced to sign the modification. Finally, EHR notes that the contract modification did not include any waiver and release language, affording it the opportunity to present claims at a later point.

In its opposition brief, in addition to raising these genuine issues of material fact, EHR has noted that it seeks the opportunity to engage in discovery in order to obtain further support for its legal arguments. EHR has identified persons it seeks to depose and documents it wishes to review. At this point in the litigation, the parties have yet to engage in any discovery.

Genuine issues of material fact preclude the granting of SSA's motion for summary relief. The parties have the opportunity to engage in discovery and to develop the record.

Decision

The agency's motion to dismiss, or, alternatively, for summary relief, relating to the portion of appellant's complaint (count 1) seeking compensation for additional costs is **GRANTED**. The portion of the agency's motion to dismiss, or, alternatively, for summary relief, relating to the bilateral modification as detailed in appellant's July 9, 2013, claim (count 2) is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

CANDIDA S. STEEL
Board Judge