



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: August 8, 2013

CBCA 3170

CARE ONE EMS, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Joe D. Byars, Jr. of Byars, Hickey & Hall, P.L.L.C., Fort Smith, AR, counsel for Appellant.

Tracy Downing, Office of the Regional Counsel, Department of Veterans Affairs, Nashville, TN, counsel for Respondent.

Before Board Judges **STERN**, **BORWICK**, and **POLLACK**.

POLLACK, Board Judge.

This appeal was filed on December 21, 2012, contesting the termination for default of contract numbers VA256-P-0627 and VA256-P-0859 for ambulance services awarded to Care One EMS, LLC (Care One or appellant) by the Department of Veterans Affairs (VA or respondent). Respondent moves for summary relief on the grounds that appellant's contracts were properly terminated for default, as appellant breached the contracts when its advanced life support (ALS) ambulance license was downgraded to a non-conforming basic life support (BLS) license. Additionally, respondent contends that termination was justified because appellant did not have a medical director for a period prior to the time of termination

and that failure to have a properly licensed medical director constituted a breach justifying the termination. We do not here choose to address every possible issue as to fact or law that we see as applicable to the final resolution of this case. Rather, we focus on the justifications provided by the VA for the motion and challenges by appellant. Because we find genuine issues of material fact, we deny respondent's motion for summary relief.

Background

1. The Contracts

On June 1, 2009, the VA awarded contract number VA256-P-0627 to Care One EMS for ambulance, hired car, and litter van services in Fayetteville, Arkansas. On February 28, 2010, the VA awarded contract number VA256-P-0859 to Care One EMS for the same services in the Ft. Smith/Ozark, Arkansas, area. The contracts each outline in section 1, SERVICES, of the statement of work (SOW) that the “[c]ontractor shall provide 24-hour [BLS] and [ALS] Paramedic Ambulance Services, Hired Car, and Litter Van Services for the primary (ambulance) and/or supplemental (hired car and litter van) transportation of beneficiaries of the VA Medical Center.” The contracts also contain a licenser description found in section 2 of the SOW that provides as follows:

2. LICENSING: The Contractor must hold a valid ambulance service license issued by the Arkansas Department of Health [ADH]. The Contractor must meet all standards prescribed by and under Arkansas Code 20-13-200 and be licensed under this subchapter, and all personal operating ambulances in the State of Arkansas must meet the standards prescribed and under Arkansas Code 20-13-200.

Pursuant to Arkansas Code 20-13-200, the rules and regulations for emergency medical services state that “[e]ach licensee shall have an Arkansas licensed physician to serve as the [ALS] Medical Director who will provide medical oversight pursuant to Arkansas statutes and meets the requirements of Section I.A.” Section I.A. defines “ALS Medical Director” as “[a]n Arkansas licensed physician who provides medical oversight for any licensed ALS EMS entity, is either Board Certified in Emergency Medicine or holds a current ACLS card, and is identified with the Department as a medical director.”

As described by appellant, an important role of the medical director is to establish medical protocols for the ambulance staff. The protocols deal with medical procedures and the handling of medications, including narcotic medications. There appears to be no disagreement that up to and until the time of the termination of the contract on

September 28, 2012, Care One had in place protocols established by a properly licensed medical director, Dr. Robert Ross, which met Arkansas requirements.

The contracts also contain clause 52.212-4(m)—Termination for Cause, which provides that “[t]he Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms or conditions, or fails to provide the Government, upon request, with adequate assurances for future performance.”

2. The Dispute

Appellant asserts that on April 30, 2012, unbeknownst to it, the Arkansas medical license of its medical director, Robert Ross, expired. It appears that through inadvertence, Dr. Ross failed to renew his license on its anniversary date. As described by appellant, Dr. Ross had telephoned Care One in July 2012 to notify Care One that he was having some health problems and would be needing use of the Care One wheelchair van services. In the course of the conversation, he mentioned to Care One, for the first time, that he was not going to be returning to his practice, but stated he would continue as the Care One medical director until such time as he could have one of his associates take over. Care One states that Dr. Ross then put Care One in contact with one of his associates, Dr. Java Rana, who indicated an interest in taking the position. Steps were then taken to have Dr. Rana secure some additional certifications, which he needed so as to be qualified as the medical director. According to Care One, during this time, Care One believed that Dr. Ross was still fully licensed and was unaware that Dr. Ross had not renewed his Arkansas license. During this time period, Dr. Ross was still a licensed physician, as he continued to be licensed in Oklahoma. Oklahoma was one of the states within the service area provided by Care One. From April 30 forward, Care One continued to provide both BLS and ALS services to the VA and did so under the belief that it was complying with all applicable laws and requirements and that its medical director was properly licensed.

On August 1, 2012, the ADH performed an inspection regarding at least one Care One vehicle. According to Care One, ADH alleged that Care One had not properly secured narcotics and also contended that it had ALS supplies in a vehicle not manned by an ALS certified paramedic. ADH sent the results of its inspection to Dr. Ross by letter of August 9, 2012, and at some point thereafter, ADH learned that Dr. Ross’ Arkansas license had expired.

The VA asserts that on September 7, 2012, it was notified that Care One’s ambulance license was downgraded. Care One states that it believes the VA was notified by ADH of a potential problem on September 11, 2012. On that date, ADH issued to Care One a show

cause order, pursuant to Arkansas Code Ann. § 25-15-211, as to why the ambulance service license of Care One should not be downgraded to a BLS service. The basis of the action appeared to primarily be the lapse in Dr. Ross' license and ADH's conclusion that Care One was operating without the required medical director. The notice, titled "Emergency Order to Show Cause Why the Ambulance Service License of Care One EMS Should Not be Downgraded to BLS Service," reflected a ADH recommendation to downgrade appellant's license. However, it also specified that "pursuant to the request of the licensee an emergency hearing will be conducted on Thursday, September 13, 2012 . . . for purposes of determining whether the public health, safety or welfare requires sustaining the summary emergency downgrade to BLS Service of Care One EMS license # 797 to operate an ambulance service, pending formal proceedings for possible revocation or suspension of this license."

The VA states that the emergency order constituted a downgrade of the license. Appellant asserts otherwise and cites Arkansas law requiring due process (the hearing) before downgrading or revocation can be taken. Regardless, the clear intention of the notice was that Care One would have an opportunity to address matters on September 13, 2012, and that hearing would be material as to any action taken against Care One regarding the status of its license.

On September 12, 2012, the day after the notice and the day before the scheduled hearing, the VA's contracting officer (CO) sent a show cause notice to Care One, notifying Care One that a downgrade in its ambulance license resulted in a potential inability or failure to perform and/or comply with both contracts' licensing requirements. The VA's show cause notice gave Care One ten days to respond.

There was no hearing held on September 13. According to Care One, that was because Care One had provided ADH with the required paperwork establishing Dr. David Sills as its Arkansas medical director. Care One states that once ADH received Care One's paperwork, ADH took no adverse action as to Care One's status.

On September 16, 2012, Care One responded by letter to the CO show cause notice. The response, authored by the owner of Care One, Wes McCabe, was not sent to the appropriate CO. Instead, Mr. McCabe sent this letter to Laura Watts, who he understood was the CO on the Fayetteville contract. In his letter, Mr. McCabe addressed his efforts to contact the CO (who had issued the show cause), citing various voice mail messages he had left for her. He then turned to a number of topics including issues Care One had with the ADH official (Mr. Gregg Brown), who had recommended the downgrade, and reviewed the history as to learning of the lapse of Dr. Ross' license and efforts to secure a replacement. That ultimately culminated in Care One securing a commitment from Dr. Sills to serve as Care One's medical director. Mr. McCabe further said in the letter that Care One was 99%

complete with the transition to Dr. Sills. Finally, he stated, "I believe Gregg Brown has since sent you a notice that we can transport ALS patients." Mr. Brown was the state official involved in issuing the September 11 notice.

On September 20, 2012, Care One, through its attorney, submitted to the correct CO, Care One's official response to the show cause notice. In that letter, the attorney cited the September 16 letter noted above and sought a meeting. The record does not show whether Ms. Lenz, the CO who issued the termination, had been aware of the earlier September 16 letter; however, even if she had not earlier seen the letter, she was clearly alerted to it in the Care One attorney's September 20 response. We note here that we recognize that there are inconsistencies between some of the facts asserted in the September 16 and September 20 letters.

On September 28, 2012, without having responded to either the September 16 or September 20 letters, and without meeting with appellant or his counsel, the VA terminated the contracts for default. In the letter of termination, the VA said it had documents in its possession which revealed: (1) that Care One's medical director allowed his Arkansas license to lapse, (2) that Dr. Ross had told Care One some time between the first of the year and end of April of the lapse, (3) that an inspection in August 2012 by ADH found various violations as to securing narcotics and record keeping, (4) that Care One and Dr. Ross were issued notification of those violations in August 2012, and (5) that Care One's license was downgraded to BLS. The VA then stated that because Care One provided ALS transports during a time when its had no properly licensed medical director, the termination was justified. The VA also provided as an aside that "evidence from Dr. Ross also suggests that you were made aware of his licensing intentions and at no time informed the VA of any potential issue." Of the above items in support of termination, appellant has specifically provided evidence challenging items 2 and 5, as well as contested that Dr. Ross at any time prior to September told it that his license had lapsed. While the record shows that Dr. Ross had advised Care One that he planned to retire, there is no evidence that he indicated at that time to Care One that his license had lapsed. Finally, Mr. McCabe, in responding in this proceeding, has addressed and provided explanations as to the complaints regarding the handling of narcotics and presence of ALS material in a basic vehicle.

After appellant appealed the termination, the VA filed for summary relief. Appellant then filed objections to the VA's motion and submitted a brief to support its position that it was not in default of the terms of the respective contracts, and, alternatively, that if it was in default of a requirement, that failure was not material to performance and/or was promptly cured.

Discussion

It is well established that summary relief will not be granted if the moving party fails to establish the absence of any genuine issue of material fact (a fact that may affect the outcome of the litigation). *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). If there are any issues of material fact, then summary relief is not proper. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987); *6th and E Associates v. General Services Administration*, CBCA 1802, 10-2 BCA ¶ 34,596. The moving party shoulders the burden of proving that no genuine issue of material fact exists. *Patrick C. Sullivan v. General Services Administration*, CBCA 936, 08-1 BCA ¶ 33,820. Additionally, all justifiable inferences must be drawn in favor of the nonmovant. *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 10-2 BCA ¶ 34,479. At this stage in the process, our function is not to weigh the evidence and determine the ultimate truth of the matter, but rather, to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249; *accord JAVIS Automation & Engineering, Inc. v. Department of the Interior*, CBCA 938, 09-2 BCA ¶ 34,309, at 169,478.

The Supreme Court has instructed that in determining whether summary relief is appropriate, the trial court “must view the evidence presented through the prism of the substantive evidentiary burden” applicable to the particular cause of action before it. *Anderson*, 477 U.S. at 254. Turning to this matter, it is well-settled that a “default-termination is a drastic sanction . . . which should be imposed (or sustained) only for good grounds and on solid evidence.” *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969) (citation omitted). The initial burden in a termination for default case is on the Government to establish that the contractor was in default. *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987); *Florida Engineered Construction Products Corp. v. United States*, 41 Fed. Cl. 534, 538 (1998). If there is a genuine issue of fact that may affect the outcome of the court’s determination of whether the Government was justified in its default termination, then summary relief would not be appropriate.

The VA basis for the termination of the contracts is two fold. First, it determined that appellant’s license was downgraded to the BLS level, thereby putting appellant in non-compliance with the contract requirement that appellant be licensed to provide both BLS and ALS services. Second, the VA found that Care One breached the contract by failing to comply with ADH requirement that it have an Arkansas-licensed medical director during the time it provided ALS services, starting in May 2012.

It appears undisputed that appellant’s medical director’s license had lapsed in Arkansas on or about April 30, 2012, and that at the time of the issuance of the show cause notice on September 12, 2013, the VA believed that appellant did not have a medical director

in place. What the VA leaves out, however, is that in Mr. McCabe's September 16, 2012 letter, which was cited to the CO in the attorney's September 20 response to the show cause notice, appellant had advised the VA that Care One had secured the services of a new medical director, Dr. Sills, and it was able and willing to provide services. We recognize that there are inconsistencies between some of the facts stated in the September 16 letter and facts provided by Care One's attorney in his letter of September 20. Those inconsistencies will need to be resolved on the merits.

Moreover, the VA position also does not take into account (addressed in appellant's reply) that even if appellant was downgraded (contested by appellant), Care One could still have continued to provide ALS services either with a subcontractor or with an intermediate license (that being a license less than ALS, which permitted providing ALS services). For purposes of this motion, we accept that the options noted by appellant were available to it. We make that finding, recognizing that the VA may well contest appellant's assertions in a hearing or in a record submission.

In its response to the motion, appellant has provided sufficient evidence which could potentially justify overturning the termination. It has presented evidence that it did not learn of the lapse until September 2012 and that upon learning, Care One took immediate steps to cure the matter and appointed Dr. Sills. Further it provides evidence that at the time of the termination, its license was no longer in jeopardy and the ADH was satisfied with its compliance actions. Care One additionally points out that not only was its license not legally downgraded, but even if it had been, such downgrade would have been to an intermediate license under which it could have continued to properly provide the services. Appellant also asserts and contract language supports the charge that it could have subcontracted the services, if necessary. Finally, appellant asserts that even if it was in technical breach, the breach was not willful, did not occur with its knowledge and more important was not material. In support of the later, appellant points out that at all times, proper medical protocols were in place (even during the breach period) and that it had the trained staff in place to assure that neither the VA nor patients were adversely affected. It also points out that in short order, after Dr. Sills was on board, Care One's license was in fact renewed, without the State taking any adverse action.

For purposes of summary relief, we must take all inferences in favor of appellant. Doing that here, we find that appellant has provided us sufficient basis to question the propriety of the termination. Absent resolution of a number of the contested factual items, we cannot determine whether there was a material breach and whether that breach was of sufficient magnitude to justify termination. We also must resolve factual matters as to whether appellant cured prior to the termination, so as to obviate the VA action. How these

factual matters, as well as other legal matters, play out will determine the ultimate resolution of the termination. Because of that uncertainty, we deny the VA motion for summary relief.

Decision

For the reasons set out above, respondent's **MOTION FOR SUMMARY RELIEF** is **DENIED**.

HOWARD A. POLLACK
Board Judge

We concur:

JAMES L. STERN
Board Judge

ANTHONY S. BORWICK
Board Judge