



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: September 26, 2013

CBCA 2805

K&R CONSULTING, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

J. Hatcher Graham, Warner Robins, GA, counsel for Appellant.

Harold W. Askins III, Office of Regional Counsel, Department of Veterans Affairs, Charleston, SC, counsel for Respondent.

Before Board Judges **McCANN**, **STEEL**, and **ZISCHKAU**.

STEEL, Board Judge.

Appellant, K&R Consulting, Inc. (K&R), has appealed the deemed denial by the Department of Veterans Affairs (VA or the Government) of appellant's claim for payment for text contained in the headers and footers of transcribed medical records. K&R has filed a motion for summary relief. In response, the Government has filed a motion to dismiss for failure to state a claim upon which relief may be granted, or alternatively, for summary relief. For the reasons set forth below, we grant the Government's motion for summary relief and deny appellant's motion for summary relief.

Background

The VA awarded to K&R in 2009 two successive contracts for transcription services at the VA Medical Center in Augusta, Georgia. The instruments were indefinite quantity contracts which provided that K&R would be paid for its services on a per-line basis.

The contracts provided that:

Each VA facility will provide the contractor with their [sic] upload header and footer format. . . . The header will include the following: Document type, patient name, social security number, date of encounter, full name of document author, the attending physician and transcriptionist identifier. **Header text is non-printable and non-viewable to the VA and these are non-billable characters.**

The contracts also included definitions of the terms “Visible Black Character” and “Visual Black Character (VBC) Line or ASCII (American Standard Code for Information Interchange) no Spaces Line.” According to these definitions, a Visible Black Character “can be seen with the naked eye as a mark, regardless of whether viewed electronically or on a printed page,” and a VBC Line is “the total number of characters you can see with the naked eye, divided by 65.” A VBC Line “includes any character contained within a header or footer.”

These definitions are also included in VHA [Veterans Health Administration] Directive 2008-042, a 2008 document which “establishes a policy for standardized contract template language that must be used for all medical transcription contracts at all [VA] facilities.” The directive speaks to pricing only in that it establishes a policy that the agency “attain the most favorable pricing possible” for medical transcription contracts.

The initial contract between these parties was agreed to when the VA accepted a bid K&R had made in response to a solicitation issued by the VA. While the solicitation was pending, a prospective bidder asked a question about the foregoing provisions, which were also included in that document. A solicitation amendment issued by the VA printed the following question and answer:

There is conflicting information referring to headers In section 2.1.0, it states that VBC includes any character contained within a header In 2.4 it states . . . that header text is non-billable.

Answer: The intent of the verbiage in section 2.1.b is that . . . only the viewable characters are billable. As the characters contained within the headers are not viewable to the VA, they are not billable. Further, clarification of the headers was provided in section 2.4 that headers were non-billable.

K&R's president states, in an affidavit, that "[w]hen K&R reviewed the solicitation . . . we noticed the conflict between the two paragraphs. He states further, "K&R priced its bid to be competitive and determined that it would have to absorb the extra work involved in the header characters."

On January 17, 2012, K&R submitted to a VA contracting officer a claim for \$73,018.78, which represented the payment allegedly due for the contractor's having typed headers as part of the transcription process under the contracts. According to this claim, the headers are visible, so VHA Directive 2008-042 mandates that the characters in them be billable. The contractor has appealed from a deemed denial of this claim. The appeal states that the amount in controversy at the time of the filing was \$81,065.97.

Discussion

Respondent and appellant agree that the subject solicitation, contracts, and modifications all included the statement that "header text is non-printable and non-viewable to the VA and these are non-billable characters." In its motion, K&R contends that the Government did not follow VHA Directive 2008-042, which it contends required that the VA pay for header data. Appellant argues that characters contained in the headers are "visible black characters" and that the directive provided evidence that the VA intended to pay for all visible black characters or VBCs. Appellant also argues that the local contracting officer did not have the authority to deviate from the directive and that the text in the header could be seen by VA personnel because header text is used to load the report to the correct patient record and to attribute the report to the correct provider. Appellant also asserts that there are no local requirements that would have dictated the deviation. Therefore, K&R maintains it is entitled to summary relief.

By contrast, the Government argues that relevant provisions of VHA Directive 2008-042 were included in the contracts with appellant. Furthermore, it argues that header text is not viewable by VA personnel. Lastly, the Government argues that appellant agreed to the provisions of the contract at the time of signing.

In a recent bid protest, K&R made the same allegations of a conflict between the same two solicitation provisions as it asserts in this case. The Government Accountability Office (GAO) held that there was no conflict between the provisions and that there was no conflict

between them and VHA Directive 2008-042. *K&R Consulting, Inc.*, B-407907 (Jan. 17, 2013). Even if we were to disagree with GAO's conclusions, we could not find for K&R here. This is because the VA told K&R and other prospective bidders how the provisions would be interpreted before bids were submitted. The agency made clear that transcription of headers would not be billable. K&R bid with knowledge of this interpretation – and indeed, its president says that it structured its bid knowing that it would not be paid for typing header characters. Since the contractor and the agency entered into the contracts with the same understanding, the contractor's current position is not viable.

Furthermore, appellant's argument that its interpretation should be read into the contract does not satisfy the *Christian* doctrine. Under the *Christian* doctrine, a contract can be read to include a certain clause, even though it is not physically incorporated in the contract, if it expresses a significant or deeply-ingrained strand of public procurement policy. *G.L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963). There is no significant or deeply-ingrained public procurement policy which would require inclusion of the clause under the *Christian* doctrine. Making all inferences in favor of the non-moving party, we cannot find in favor of appellant, but rather find that the Government has shown that it is entitled to summary relief.

Decision

For these reasons, the appellant's motion for summary relief is denied, and the VA's motion for summary relief is granted. The appeal is **DENIED**.

CANDIDA S. STEEL
Board Judge

We concur:

R. ANTHONY McCANN
Board Judge

JONATHAN D. ZISCHKAU
Board Judge