



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 4012, 4013 DISMISSED AS MOOT; CBCA 5083 DENIED: May 17, 2016

CBCA 4012, 4013, 5083

UNIVERSAL HOME HEALTH AND INDUSTRIAL SUPPLIES, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Anthony R. Smith, President of Universal Home Health and Industrial Supplies, Inc., Tampa, FL, appearing for Appellant.

David G. Fagan, Office of Regional Counsel, Department of Veterans Affairs, Portland, OR, counsel for Respondent.

Before Board Judges **GOODMAN**, **WALTERS**, and **SULLIVAN**.

SULLIVAN, Board Judge.

Appellant, Universal Home Health and Industrial Supplies, Inc. (Universal), appeals the decisions of the respondent, Department of Veterans Affairs (VA), to terminate two of its task orders (docketed as CBCA 4012 and 4013). Universal alleges that the initial decisions to terminate for default were undertaken in bad faith and, as a consequence, VA owes Universal damages, despite the fact that the terminations have been converted to terminations for convenience (docketed as CBCA 5083). The parties have submitted the appeals for a decision on the record, pursuant to Rule 19 of the Rules of the Civilian Board of Contract Appeals. 48 CFR 6101.19 (2015). For the reasons that

follow, the Board dismisses Universal's original appeals of the terminations for default (CBCA 4012 and 4013) and denies CBCA 5083.

Statement of Facts

I. The Contract and Task Orders

A. Underlying Federal Supply Schedule contract

The task orders at issue in these appeals were awarded based upon a Federal Supply Schedule (FSS) contract that Universal held to supply medical equipment and supplies (FSS contract number V797P-4612a). Exhibit 11 at 203.¹ The original contract period was February 20, 2004, through February 19, 2009, *id.* at 204, but through a series of modifications, the contract period was extended to February 14, 2014. *Id.* at 641; Exhibit 4 at 55.

This contract incorporated 48 CFR 52.212-4 (Federal Acquisition Regulation (FAR) 52.212-4), Contract Terms and Conditions—Commercial Items (Feb. 2003), which contains provisions for the termination of the contract for the Government's convenience and termination for cause. Exhibit 11 at 190. The contract also provided that any supplies to be furnished by Universal under the contract would be ordered by delivery or task order. *Id.* at 391 (FAR 52.216-18, Ordering). "Such orders may be issued during the contract term." *Id.*

The contract contained several FSS provisions, including the requirement to provide proof of uninterrupted supply:

When requested by the Contracting Officer, if other than the manufacturer, the offeror must submit prior to award of a contract, either (1) a letter of commitment from the manufacturer which will assure the offeror of a source of supply sufficient to satisfy the Government's requirements for the contract period, or (2) evidence that the offeror will have an uninterrupted

¹ Unless otherwise indicated, the exhibits are from the appeal file submitted by the VA in appeal CBCA 4012. The Portland task order termination is the subject of CBCA 4012. The Board ordered the agency to provide a copy of Universal's FSS contract, which it did on January 28, 2016. The Board cites throughout this decision to the contract submitted as Exhibit 11 of the appeal file in CBCA 4012.

source of supply from which to satisfy the Government's requirements for the contract award.

Exhibit 11 at 422 (I-FSS-644, Dealers and Suppliers (Oct. 1988)). The FSS contract contains such a statement from MedNet Health, dated August 1, 2008:

This letter is to certify that Universal Home Health and Industrial Supplies, Inc. is an authorized distributor for MedNet Health.

MedNet Health is committed to selling products to Universal Home Health and Industrial Supplies, Inc. to service the contract award from the award date through the end of the contract period.

Id. at 1544.

B. Portland and Boise VA task orders

1. Task orders awarded

On June 2, 2012, VA awarded to Universal a task order for the delivery of cardiac event monitoring services for patients at a VA hospital located in Portland, Oregon. Exhibit 9 at 157. The statement of work described the scope of work as follows:

The contracted company will provide all equipment needed for Event and Holter Monitor testing, either by hospital delivery or direct mail out to patient. The contracted company will provide continuous, twenty-four hour observation of rhythm strips and immediately inform a representative from the [electrocardiogram] lab, or the indicated interpreting physician of any significant changes as specified by doctor.

Id. at 162. The statement of work further stated that VA would provide names of patients and identify the type of monitoring required. *Id.* The task order allowed for a base year to run from June 4, 2012, through March 31, 2013, and for three option years to run from April 1, 2013, through March 31, 2016. *Id.* at 160-61. Universal agreed to provide cardiac event monitoring for an estimated 370 patients at a cost of \$160 per patient and cardiac holter monitoring for an estimated 270 patients at a cost of \$85 per patient each year. *Id.* The statement of work required Universal to provide invoices to VA "as necessary for billing and with all information needed by billing specialist." *Id.* at 163. The total value of the Portland contract, including option years, was estimated to be \$328,600. Exhibit 9 at 161.

On September 18, 2012, VA awarded another task order to Universal for the same types of monitoring services at the VA hospital located in Boise, Idaho.² CBCA 4013, Exhibit 6 at 75. The base year was to run from October 1, 2012, through September 30, 2013, and allowed for four option years to run from October 1, 2013, through September 30, 2017. *Id.* at 80-81. Universal was to provide holter monitoring for an estimated 300 patients and event monitoring for an estimated 240 patients at the same unit prices as the Portland task order. *Id.* at 81. The total value of the Boise task order, including option years, was estimated to be \$319,500. *Id.*

Both task orders designated the contracting officer's representative (COR) as the individual responsible for monitoring the contractor's performance. Exhibit 9 at 164; CBCA 4013, Exhibit 6 at 84. The Portland task order also contained a clause setting forth the order of precedence between the underlying FSS contract and the contract issued to Universal: the terms of the FSS contract applied to the individual contracts and, in the event of a conflict, the terms of the FSS contract would take precedence. Exhibit 9 at 177. The Boise task order did not contain this clause.

2. Modifications

With modification 0001 to the Portland task order, the agency incorporated FAR 52.237-3, Continuity of Services clause, which described the services provided as "vital to the Government and must be continued without interruption." Exhibit 9 (modification dated Aug. 8, 2012). This clause was already included in the Boise task order. CBCA 4013, Exhibit 6 at 96.

With modification 0001 to the Boise task order, executed on September 27, 2013, VA exercised the first option year, for performance from October 1, 2013, through September 30, 2014. CBCA 4013 Exhibit 5 at 51. With modification 0006 to the Portland task order, executed on March 17, 2014, the agency exercised option year two for services through March 31, 2015. Exhibit 5 at 88.

² The Boise task order termination is the subject of CBCA 4013. VA received two quotes for this task order, one from Universal and the other from CardioNet, Inc. CBCA 4013, Exhibit 6 at 98.

II. Agency Originally Terminated the Task Orders for Cause

On April 7, 2014, just after the agency sent the modification exercising the second option year on the Portland task order, the COR sent an email message to the contracting staff and others, advising of a possible service interruption on the contract:

The company [from which] the EKG lab receives holter and event monitors (MedNet) informed us today that we will no longer be able to enroll patients because they have not been paid by Universal Home Health in over four months. The representative for the company also alluded to the fact that the same situation is happening at the Boise VA.

Clinically, this is unacceptable as this service is a[] fundamental piece of the cardiology department. If we cannot offer this service to our patients, we will need to explore outsourcing IMMEDIATELY. I will forward the email I received from MedNet today, please scroll to the bottom to see the correspondence between MedNet and Universal Home Health.

Exhibit 4 at 84. The COR forwarded an email message she had received from MedNet which stated that Universal “issues the invoices and is expected to pay us. This has not been the case.” *Id.* at 81.

After speaking with the president of MedNet, the COR sent another message to the contracting staff and other agency employees regarding the need to continue the service:

The company that Universal Home Health is using for the event/holter service at Portland Veterans Affairs Medical Center] is MedNet. I spoke with the president of MedNet today and he was thankfully willing to temporarily re-open service to our patients while we are actively trying to investigate this issue. To continue keeping the service open he needs to be included in the resolution of this situation. . . . [The MedNet president] feels that his company has not been compensated for service since last October. He claims that the tax [identification] number was changed last September and since that time all of the money has been going directly to [the president of Universal], who has not been paying MedNet. On the phone today he clearly stated he feels this money is being misappropriated.

My clinical worry is losing access to this service, which is fundamental to cardiac care at PVAMC. If we must suspend dealing with Universal Home

Health, cardiology must have access to another avenue to provide event and holter monitors. My hope would be to provide continuity of care by staying with MedNet at this time, but I am willing to go whatever route is necessary to keep this service available.

Id. at 176. In response to these communications, the contract administrator advised the COR and other VA officials that VA would issue a cure notice, which would provide Universal ten days to correct the situation. The contract administrator further advised that, if the contract were terminated, an emergency contract would be put in place to maintain the services and “[w]e are in contact with MedNet and they have tentatively assured us that they will continue to provide service in relation to this contract.” *Id.* at 70.

The contract specialist then emailed the president of Universal and asked him to contact the specialist regarding a service issue and outlined complaints received from MedNet. Exhibit 4 at 67-8. The contract specialist advised that the agency was preparing a cure notice and urged the president to contact him. *Id.*³

The president of Universal responded that he had not been paid what he was owed by MedNet and that “the money [Universal] collected from the VA[] was owed to my company.” Exhibit 4 at 67. The president further explained that, “[w]hen I did not get paid and was not given the accounting information, I did not cancel the contract (which would have stopped the services), and I did not involve you; I went to them.” *Id.* The president concluded, “I have followed all VA guidelines, and I am in compliance. I am disputing Mednet’s allegations.” *Id.*

By letter dated April 10, 2014, the contracting officer issued a cure notice regarding Universal’s “failure to meet financial obligations which has in-turn impacted performance.” Exhibit 4 at 65. The letter described the failure as:

³ In its pleadings, Universal urges the Board to find, in part, that the contracting specialist’s efforts to alert Universal of the performance concerns constituted bad faith because the contracting specialist waited several hours after the COR alerted the contracting staff of the problems to contact Universal and, in the initial email message, failed to convey the seriousness of the concerns. While the tone of the contracting specialist’s initial email message does not convey the gravity of VA’s concerns, the Board does not find that the contracting specialist acted in bad faith in his efforts to advise Universal that the agency had concerns about future performance.

Universal Home Health and Industrial Supplies, Inc. failure that has made this cure notice necessary is the failure of fiscal responsibility which cause subsequent vendor MedNet to cease service regarding the Holter Monitor Service. The contracting office has been informed that Universal Home Health and Industrial Supplies Inc. failure to pay MedNet has led to the disruption of cardiac monitoring for authorized veteran patients.

Id. The contracting officer warned that, if Universal failed to cure this issue within ten days, the contract would be terminated for cause, pursuant to FAR 52.214-4(m). In the email message forwarding the cure notice, the contract administrator stated: “so again, we are very willing to keep you as our contractor, however, we need to have solid assurance that this situation is ‘cured’ between you and MedNet, so your timely response will help this situation immensely.” *Id.* at 60.

Universal responded to the cure notice by letter dated April 18, 2014. Exhibit 4 at 59. In this response, Universal disputed that it had failed to meet its financial obligations but “relinquish[ed]” the contract with the VA:

First, Universal Home Health and Industrial Supplies, Inc. (UHH) has not failed to meet financial obligations to MedNet. Second, as prime vendor, UHH has managed the Holter Monitor service contracts at the highest level of performance. Third, MedNet’s actions to cease services were done independent of UHH.

UHH has not failed to perform under the contracts and can replace MedNet with another vendor to provide the Holter Monitor services to the Portland VA Medical Center and to the Boise VA Medical Center. However, consistent with UHH’s practice of providing exemplary customer care, we have elected to relinquish the contract in order to provide a timely cure to this matter, as a result of MedNet’s disruptive actions.

Id. Universal also asked for payment on the outstanding invoices on the contract and stated that “UHH’s relinquishment of these contracts should not be reflected as an adverse action on UHH’s VA performance record.” *Id.*

On April 22, 2014, the contracting officer issued a show cause notice. Exhibit 4 at 56. In this notice, the contracting officer asked Universal to present any information regarding the determination that the “failure to perform arose from causes beyond your control and without fault or negligence on your part.” *Id.* The contracting officer gave Universal three days to respond to the notice.

On April 25, 2014, Universal responded to the show cause notice, asserting that the failure to perform was not Universal's fault:

There is no fault or negligence on the part of Universal Home Health and Industrial Supplies, Inc. (UHH) in the performance of this contract. During the contract period UHH performed in compliance with the terms and conditions of the contract with no deficiency in services by providing services to the Portland VA Medical Center and the Boise VA Medical Center.

It is not necessary to terminate contract #V797P-4612A, as the contract expired under its own terms on February 14, 2014. (See attached Department of Veterans Affairs Federal Supply Schedule Price List, Modification 021 (effective February 11, 2011). In April 2014, MedNet unilaterally ceased services. UHH has no fiscal obligation to MedNet.

Exhibit 4 at 54. Universal then reiterated its request for payment on outstanding invoices issued for services through March 2014. *Id.*

On April 30, 2014, the contracting officer issued modifications terminating the task orders for cause, pursuant to FAR 52.212-4(m), Termination for Cause. Exhibit 4 at 50; CBCA 4013, Exhibit 4 at 34. The contracting officer stated that "[t]he termination[s] w[ere] due to the vendor's inability to fulfill the Terms and Conditions of the contract[s]." Exhibit 4 at 50; CBCA 4013, Exhibit 4 at 34. The contracting officer also noted the issuance of cure and show cause notices, but stated that the "[v]endor has failed to correct this situation to the Government's satisfaction." Exhibit 4 at 50; CBCA 4013, Exhibit 4 at 34.

Just prior to terminating the task orders with Universal, the contracting officer signed a limited source justification for another contractor, CardioNet, to provide the services for the agency beginning May 1, 2014. Appellant's Claim to the Contracting Officer (Claim), Attachment 22. Part of the justification for the use of CardioNet was that it owned the equipment that Universal had been supplying on its task order.⁴ *Id.* On

⁴ Universal also asserts that the justification describes CardioNet as Universal's subcontractor for its terminated contract. The justification only says that CardioNet was "previously the subcontractor." Claim, Attachment 22. As Universal acknowledges, CardioNet was its competitor and held the monitoring contract before the contract was awarded to Universal. Claim at 9.

May 6, 2014, the contracting officer awarded a six-month bridge contract to CardioNet, Inc. for cardiac monitoring services at the Portland and Boise VA medical centers. Appellant's submission (Feb. 11, 2015), Attachment 4.

III. Agency Converted Terminations into Terminations for Convenience

A. Amounts owed for services rendered prior to termination

Beginning in May 2014, agency personnel attempted to determine the amount that Universal was owed for services provided from January through April 2014, because Universal had not and could not provide proper invoices for these amounts. Exhibit 3 at 37-47. Universal repeatedly asked VA to provide information on patients so that it could submit proper invoices. *Id.* In response, VA officials stated that VA did not have the information Universal requested and asked that Universal submit invoices with the same information that it had submitted in the past. *Id.* VA suggests that Universal's subcontractor had the required information but Universal was unwilling to ask its subcontractor to supply the information; Universal does not explain why it did not have the necessary data.

In May and June 2014, the COR compared the VA examination records for the period against the amount that Universal claimed it was owed. Claim, Attachment 40. Based upon the COR's review, it appeared that Universal's records did not match VA's and the invoices reflected less money than the VA records showed Universal was owed, in an amount of \$3550. *Id.* In an affidavit submitted by the agency, the contracting officer attests that she, with the assistance of the COR, determined that the value of the "services received" at the Portland VA was higher than the amount sought by Universal. Declaration of Contracting Officer (January 15, 2015) ¶ 26. On July 25, 2014, the supervisory contracting specialist sent an email message to Universal identifying the amounts that Universal should invoice. Declaration of Supervisory Contract Specialist (January 15, 2015) ¶ 16; Claim, Attachment 39. These invoice amounts matched the amounts that Universal claimed that it was owed. Claim, Attachment 39.

B. Universal's appeal and bilateral modification

On July 30, 2014, Universal filed two notices of appeal with the Board, challenging the terminations for cause of both task orders. As relief, Universal sought reversal of the terminations for cause, compensatory damages for the remaining years of the task orders, compensatory damages for the contracts that may have been adversely affected by the improper termination of the contract, attorney fees and costs, and the payments for services rendered on the task orders. Notices of Appeal.

On August 13, 2014, the contracting officer sent the president of Universal an email message advising that the agency wanted to convert the terminations to terminations for convenience:

By my request, the VA has completed an audit of the payment history for the subject contract for Portland and found multiple errors had been made dating all the way back to 2012. The VA intends to correct these errors, and is able at this time to make full payment of the invoices pending for January through April 2014. Funding is [a]vailable and payment can be processed this week. We also wish to convert the Termination for Cause into a Termination for Convenience of the Government, as you were found not to be at Fault. This has been a mis[-]communication within the VA and we apologize for the hardship that this has caused you and your company.

Exhibit 1 at 17. To the email message, the contracting officer attached the draft modification that identified the Universal invoices by month and amount that totaled \$58,580, but noted that Universal had already been paid \$5020, an amount that was deducted to arrive at the final payment amount. *Id.* at 20.

On the same day, the contracting officer signed a memo for the record, in which she noted that the original termination for cause was based upon a misunderstanding:

The original termination was based off default due to the Sub-contractor, MedNet refusing to work for Universal Home Health. At the time the CO believed that performance had stopped; however, that does not seem to be accurate. The dispute seems to have been based on who was being paid for the performance of this [delivery] order.

....

Universal Home Health has submitted a CBCA protest against the Termination for Default and is requesting payment in the amount of \$58,580. The service line and Fiscal have review[ed] these invoices and determined them to be accurate.

Exhibit 1 at 21.

On August 18, 2014, the parties executed a bilateral modification of the Portland task order to “settle final invoices due to vendor for services rendered and to convert the previous Termination for Default into a Termination for Convenience.” Exhibit 1 at 1-2. Pursuant to this modification, Universal was paid \$53,560 for outstanding invoices on that task order and Universal agreed that “[t]his modification shall serve as a final claim for all services performed prior to the Termination on 4/30/2014 with the exception of those claims specifically itemized on page 2 of the modification.” *Id.* On page 2, Universal reserved its rights to pursue its claims in the appeals pending before the Board for (1) “compensatory damages for the remaining option years” on the two task orders and (2) “compensatory damages for contracts that may be or may have been adversely impacted by the improper termination” of those task orders. *Id.* at 2.

On August 26, 2014, the parties executed a bilateral modification of the Boise task order to convert the termination for cause into a termination for convenience. CBCA 4013, Exhibit 1 at 1. The modification stated that all invoices for the task order, totaling \$35,760, had been paid in full. *Id.* The modification also noted that “[t]his modification shall serve as a final claim for all services performed prior to the Termination on 4/30/2014, with the exception of those claims specifically itemized.” *Id.* The claims specifically itemized were the same as those noted on the modification for the Portland task order, claims for compensatory damages arising from the termination of the contracts. *Id.* at 2.

IV. Universal’s claim

On August 17, 2015, Universal submitted a claim to the contracting officer in the amount of \$479,331.85. Claim, Attachment 1.⁵ Universal sought amounts for the option

⁵ The parties filed their original submissions for decision on the record in January and February 2015. After reviewing these submissions, the Board convened a conference call to discuss a jurisdictional hurdle the Board had identified—namely, the record on appeal did not contain a claim by Universal to the contracting officer for the damages it sought arising from the allegedly improper termination of its contracts. On May 27, 2015,

years that were canceled on each contract, the amounts for “contracts adversely affected by the termination of Universal’s contracts,” and lost profits. Claim at 1. Universal also sought \$3550, for services rendered on the contracts through April 2014. Universal claimed this amount as the difference between the amount it invoiced on the contract and the amount determined by VA through its review of patient services. Claim at 24. The contracting officer denied the claim in a decision issued on October 26, 2015.

Universal appealed this decision to the Board on November 25, 2015, and the Board consolidated the new appeal with the existing appeals. The parties filed supplements to the appeal file and submitted supplemental briefing on the issues in the appeals between December 2015 and February 2016. As part of its supplement to the record, Universal also provided estimates of its attorney costs, consulting costs, and staff time required to prepare the claim and prosecute its appeal. Appellant’s Supplemental submission (Dec. 18, 2015).⁶ The appeals are now ready for decision.

Discussion

I. Universal’s Appeals of the Original Termination for Default are Moot

Universal first appealed the contracting officer’s decisions terminating the task orders for default (CBCA 4012 and 4013). The contracting officer subsequently converted these terminations to terminations for convenience. As a result of the contracting officer’s actions, the terminations for default are withdrawn and Universal’s initial appeals are moot. *Care One EMS, LLC v. Department of Veterans Affairs*, CBCA 3170, 15-1 BCA ¶ 36,160, at 176,467. Because there is no further relief the Board may provide, the Board dismisses Universal’s initial appeals. *H.H. Christian Co.*, AGBCA 82-120-1, 83-1 BCA ¶ 16,335, at 81,190.

after Universal confirmed that it had not submitted a claim, the Board suspended proceedings in the appeals to allow Universal to submit its claim.

⁶ Claims for attorney fees and costs are processed pursuant to the Equal Access to Justice Act (EAJA), after a decision is rendered by the Board. *Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,209, at 176,679. However, under EAJA, Universal would have to be the prevailing party in the appeal before any attorney fees or costs could be awarded. *Elrich Contracting, Inc.*, ASBCA 50867, 02-2 BCA ¶ 31,950, at 157,841-2 (dismissal following conversion of termination for default into termination for convenience is not a decision on the merits as required for the award of fees).

II. The VA Did Not Act in Bad Faith when it Terminated Universal's Task Orders

Universal appeals the contracting officer's decision on its claim arising from the purported bad faith terminations of its task orders and seeks compensatory damages and anticipatory profits (CBCA 5083).

Generally, the contracting officer may terminate a contract for convenience without cause whenever it is determined to be in the Government's best interest. FAR 52.212-4(l) ("The Government reserves the right to termination this contract, or any part hereof, at its sole convenience."); *Corners & Edges, Inc. v. Department of Health & Human Services*, CBCA 693 et al., 08-2 BCA ¶ 33,961, at 168,022 ("[t]he termination for convenience clause grants the contracting officer exceptional authority.") A termination for convenience will only be a breach of contract if "the tribunal finds that the termination was motivated by bad faith or constituted an abuse of discretion, or that the Government entered into the contract with no intention of fulfilling its promises." *Greenlee Construction, Inc. v. General Services Administration*, CBCA 415 et al., 07-2 BCA ¶ 33,619, at 166,510. "In the absence of bad faith or clear abuse of discretion, the contracting officer's election to terminate for the government's convenience is conclusive." *T&M Distributors, Inc. v. United States*, 185 F.3d 1279, 1283 (Fed. Cir. 1999).

Universal bears a heavy burden to show that the termination was undertaken in bad faith. *Krygoski Construction Co. v. United States*, 94 F.3d 1537, 1541 (Fed. Cir. 1996); *Greenlee Construction*, 07-2 BCA at 166,510. The Board's analysis begins with the "presumption that public officials act 'conscientiously in the discharge of their duties.'" *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301 (Ct. Cl. 1976) (quoting *Librach v. United States*, 147 Ct. Cl. 605, 612 (1959)). "To prove bad faith, appellant must provide facts to show by clear and convincing evidence that [government] officials had something akin to a 'specific intent to injure' appellant, engaged in a 'proven conspiracy to get rid of' appellant, or were 'motivated alone by malice' against appellant." *V.I.C. Enterprises, Inc. v. Department of Veterans Affairs*, CBCA 1598, 09-2 BCA ¶ 34,284, at 169,363-64 (quoting *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002)). "The mere fact that a contracting officer awards a contract to another company after terminating the plaintiff's contract is insufficient to show bad faith." *Kalvar*, 543 F.2d at 1302. Similarly, the contracting officer's incorrect interpretation of the contract requirements or mistaken determination regarding the contract specifications is not sufficient to establish bad faith. *Id.* at 1302-03.

Absent this showing of bad faith or abuse of discretion, Universal's remedies are limited. A contractor may not recover anticipatory profits or consequential damages

when a contract has been properly terminated for convenience. *Arbor III Realty Co.*, HUD BCA 96-C-114-C5, 98-1 BCA ¶ 29,344, at 145,901 (1997). Instead, the contractor may only recover the costs of performance up through the date of termination. *Carol S. Best*, HUD BCA 82-693-C17, 85-1 BCA ¶ 17,712, at 88,397 (1984).

Universal alleges that the original termination for cause and the subsequent conversion to a termination for convenience were “predetermined” by the agency, that the contracting personnel did not act promptly to alert it to the problems on its contract, and that the agency improperly included Universal’s subcontractor, MedNet, in the solution to the problem. Claim at 5-13. Rather than the termination being “predetermined,” it appears that the agency took actions to resolve a possible disruption in heart monitoring services that were vital for the patients at the two VA hospitals. The actions to terminate the contract began when the COR, the individual charged with monitoring Universal’s performance, received word that MedNet, Universal’s supplier, was no longer willing to provide the monitoring services and equipment. Prior to terminating Universal’s contract, the contracting specialist and contracting officer provided Universal opportunities to resolve the situation and provide assurance of future performance. In response to the contracting specialist’s inquiry, Universal “disputed” MedNet’s allegations and provided further evidence that there was a dispute between itself and its subcontractor that reasonably could have been viewed as endangering future performance. In response to the cure notice, Universal told the contracting officials that it was “relinquishing” its contracts for these services and that MedNet was the company that had “ceased [providing] services.” In response to the show cause notice, Universal simply stated that there was no need to terminate the contract because the underlying FSS contract had ended on February 14, 2014.

Universal claims that VA issued a “false” cure notice because it knew that MedNet had not stopped providing services. Claim at 11. But Universal, in its communications with VA, did not choose to explain that services had not been interrupted or provide assurances that services would continue. Instead, Universal stated that MedNet was to blame for the interruption in service.

Universal asserts that VA demonstrated bad faith by obtaining services through a six-month bridge contract with CardioNet, Universal’s competitor, and apparently, MedNet’s parent company.⁷ Claim at 9-11. Universal also alleges, without providing

⁷ Universal provided to the Board a copy of a press release announcing the buyout of MedNet by CardioNet following resolution of a patent suit. Appellant’s Submission, Attachment 7.

any evidence, that VA paid CardioNet significantly more for services than were priced on Universal's task order. *Id.* at 23.⁸ The record shows, however, that CardioNet was one of the bidders on the Boise task order and, as Universal acknowledges, CardioNet had provided heart monitoring services to VA previously. These facts provide a reasoned basis for the contracting officer's decision to obtain services from CardioNet, despite its corporate relationship to MedNet, and do not support Universal's allegations of bad faith.

Finally, Universal contends that, rather than convert the terminations to terminations for convenience, VA should have reinstated the task orders. Claim at 18. This contention does not provide a basis for finding bad faith for two reasons. The task orders, by their terms, permitted the contracting officer to terminate the task orders for the Government's sole convenience. The contracting officer was within her authority to convert the terminations to terminations for convenience once she determined that Universal was not at fault in performance problems that led to the initial terminations. Additionally, the underlying FSS contract permitted the exercise of task orders, as long as the term of the FSS contract continued, but the underlying FSS contract ended in February 2014. The contracting officer could not reinstate the task orders because the authority to issue task orders expired with the underlying contract.

We find no evidence of bad faith or an abuse of discretion on the part of agency officials in the dealings with Universal. As noted above, a finding of bad faith would require a showing that actions were undertaken by the agency with a specific animus toward Universal. In contrast, this record reflects that the agency was seeking to fulfill the urgent needs of VA patients and provided Universal an opportunity to respond. Universal's allegations that the agency was somehow seeking to work directly with MedNet are not borne out by the record. Absent a finding of bad faith, Universal may not recover the damages that it seeks arising from the termination of the task orders.

III. Universal May Not Recover the Additional \$3550 that It Seeks

As noted above, with the conversion of the termination for default into a termination for convenience, the agency agreed to pay Universal \$53,560 for services rendered prior to the termination date. Universal, in its claim to the contracting officer, sought an additional amount of \$3550 for the services rendered between January and April 2014. Its claim for this additional amount is based upon the email message from

⁸ Universal cites attachment 38 to its claim as support for this allegation. The Board does not find support for this allegation in attachment 38 or any other attachments to Universal's claim.

the COR in which she states that her review of VA patient records showed that Universal was owed \$62,130 for services during this period, rather than the \$58,050 that it was seeking. The contracting officer did not address this claim in her decision and the agency asserts in a footnote in its supplemental briefing that Universal has waived its claim to these additional amounts because these amounts were not included in the reservation of rights set forth in the modifications that converted the terminations.

Universal's agreement to the modification that set forth the amount it was claiming constitutes accord and satisfaction of its claim for these additional amounts. "[W]hen a bilateral contract modification does not contain any reservation of claims, the modification constitutes an accord and satisfaction as to the subject matter of the modification and the contractor cannot later narrow the scope of the modification." *Trataros Construction, Inc. v. General Services Administration*, GSBCA 15344, 03-1 BCA ¶ 32,251, at 159,459.

The modification that Universal signed concerned the payment for services rendered prior to the terminations. The modification contained a reservation of rights for Universal's claims arising from the alleged bad faith terminations of the task orders, but not for additional sums owed for performance prior to the termination dates. In satisfaction of its claim for services rendered and prompt payment of these amounts, Universal accepted the agency's offer of payment. Universal chose not to decline the modification and develop additional evidence regarding what it was owed. Instead, Universal made a decision to rely upon the information provided by the agency and accept payment for that amount. Universal is bound by the agreement that it executed.

Decision

Universal's appeals of the contracting officer's terminations for cause are **DISMISSED AS MOOT**. Universal's appeal of the termination for convenience is **DENIED**.

MARIAN E. SULLIVAN
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

RICHARD C. WALTERS
Board Judge