



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: August 23, 2022

CBCA 6814

CARING HANDS HEALTH EQUIPMENT & SUPPLIES, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Edward J. Tolchin of Offit Kurman, PA, Bethesda, MD, counsel for Appellant.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA; and Donald C. Mobly, Office of General Counsel, Department of Veterans Affairs, Denver, CO, counsel for Respondent.

Before Board Judges, **RUSSELL**, **GOODMAN** and **CHADWICK**.

GOODMAN, Board Judge.

Appellant, Caring Hands Health Equipment & Supplies, LLC (Caring Hands), has appealed a decision by a contracting officer of respondent, Department of Veterans Affairs (VA). The parties have filed cross-motions for summary judgment as to entitlement. We grant respondent's motion, deny appellant's motion, and deny the appeal.

Background

Appellant and respondent entered into sixteen contracts, performed from 2014 through 2017, for appellant to deliver Government-owned home medical equipment (HME) from the VA's warehouse to beneficiaries of designated Veterans Affairs Medical Centers (VAMCs)

within a specific geographic area as defined in each contract. Appellant's motion for summary judgment divides the contracts into two groups, each containing eight contracts, which the parties refer to as the "2014 contracts" and the "2015 contracts."

The 2014 Contracts

The 2014 contracts were nos. VA247-14-D-0323 (VAMC Columbia SC); VA247-14-D-0324 (VAMC Atlanta GA); VA247-14-D-0325 (VAMC Augusta GA), VA247-14-D-0327 (VAMC Birmingham AL); VA247-14-D-0328 (VAMC CAVHCS Montgomery/Tuskegee AL); VA247-14-D-0329 (VAMC Charleston SC); VA247-14-D-0331 (VAMC Dublin GA); and VA247-14-D-0333 (VAMC Tuscaloosa AL).

The period of performance for these contracts was August 1, 2014, through July 31, 2015. According to appellant, each of the 2014 contracts referred to a statement of work (SOW) on its first page, but no SOW was attached.¹

The 2014 contracts contained the Federal Acquisition Regulation (FAR) Indefinite Quantity clause (48 CFR 52.216-22 (2014) (FAR 52.216-22)), which reads in relevant part:

INDEFINITE QUANTITY (OCT 1995)

(a) This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the "maximum." The Government shall order at least the quantity of supplies or services designated in the Schedule as the "minimum."

¹ Appellant alleges that the SOW would have been the same as that used in the 2015 contracts. Appellant supports this allegation by the deposition testimony of Kevin Warren, VA Contract Specialist. Respondent disputes this statement, as Mr. Warren stated in his deposition: "[B]ut I can't say that it would be [the same] . . . because it was . . . a year earlier." Deposition of Kevin Warren (June 21, 2021) at 29-30. Appellant's assertion that the SOW in these contracts would have been identical to those in the 2015 contracts is therefore speculative and not relevant to the disposition of this case.

(c) Except for any limitations on quantities in the Order Limitations clause or in the Schedule, there is no limit on the number of orders that may be issued. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

The 2014 contracts also contained the Orders Limitation clause (FAR 52-216-19), which reads in relevant part:

(a) Minimum order. When the Government requires supplies or services covered by this contract in an amount of less than _____ [insert dollar figure or quantity],^[2] the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract.

(b) Maximum order. The Contractor is not obligated to honor—

(1) Any order for a single item in excess of _____ [insert dollar figure or quantity];

(2) Any order for a combination of items in excess of _____ [insert dollar figure or quantity]; or

(3) A series of orders from the same ordering office within _____ days that together call for quantities exceeding the limitation in paragraph (b)(1) or (2) of this section.^[3]

(c) *If this is a requirements contract (i.e., includes the Requirements clause at subsection 52.216-21 of the Federal Acquisition Regulation (FAR)), the Government is not required to order a part of any one requirement from the Contractor if that requirement exceeds the maximum-order limitations in paragraph (b) of this section.*

(Emphasis added.)

The 2014 contracts did not contain the Requirements clause (FAR 52.216-21), but the following language was included in the General Requirements:

² Appellant states there is a material difference in four of the eight 2014 contracts which contained an error stating “an amount less than 1 order,” as there cannot be a number of orders less than 1. This alleged error was obvious before award of the contracts.

³ The dollar amounts in (b)(1)–(3) are not relevant to the resolution of this case.

B.3.1 The contractor shall furnish all labor, transportation, materials, tools, equipment and supervision required to provide Home Medical Equipment services to beneficiaries of VA medical centers located in the [designated] catchment areas. Service shall include the assembly, delivery, pick up, cleaning, repairing and storage of Government-owned HME. The contractor shall provide onsite telephone and warehouse coverage during normal business hours. Service hours will be accomplished by travel to and from beneficiary residences in the medical centers' primary service areas (PSA) and other combination zones (CZ). Combination zones are areas outside the medical center's PSA that are primarily serviced by other VA Medical Centers. The medical center may occasionally place orders for service in these combination zones that the contractor will be required to complete.

The designated catchment areas in the first sentence of the above provision were as follows, by contract number: VA247-14-D-0323 (VAMC Columbia SC) Catchment area – Columbia SC VA; VA247-14-D-0324 (VAMC Atlanta GA) Catchment area – Atlanta VA; VA247-14-D-0325 (VAMC Augusta GA) Catchment area – Augusta VA; VA247-14-D-0327 (VAMC Birmingham AL) Catchment area – Birmingham VA; VA247-14-D-0328 (VAMC CAVHCS Montgomery/Tuskegee AL [Central Alabama]) Catchment area – Atlanta (sic)⁴; VA247-14-D-0329 (VAMC Charleston SC) Catchment area – Charleston, SC VAMC; VA247-14-D-0331 (VAMC Dublin GA) Catchment area – Dublin GA VAMC; and VA247-14-D-0333 (VAMC Tuscaloosa AL) Catchment area – Tuscaloosa AL VAMC.

Clause B.3.1 defines a specific geographic area within which “[t]he contractor shall furnish all labor, transportation, materials, tools, equipment and supervision required to provide Home Medical Equipment services to beneficiaries of VA medical centers located within it, i.e., the VAMC’s catchment area specified in each contract. Central to the understanding of clause B.3.1 are the definitions of catchment area, primary service area, and combination zone. Respondent, as drafter of this clause, has explained these terms.⁵ According to respondent, the terms catchment area and primary service area (PSA) are synonymous. A catchment area’s boundaries are determined by the application of geographic principles, which result in a map of each catchment area. Veterans Health

⁴ Respondent states that this was a scrivener’s error which should have stated the CAVHCS (Central Alabama VA Healthcare System) catchment area as opposed to the Atlanta catchment area. While appellant did not clarify this error prior to award, nor dispute this characterization after the fact, the error does not create a disputed issue of material fact.

⁵ Respondent provided these explanations during the briefing of the motions in response to this Board’s inquiries.

Administration (VHA) facilities within a specified catchment area fall under the administrative jurisdiction of the leadership at the parent facility in the area, which is typically a VAMC. Hence, the first sentence of clause B.3.1 designates a catchment area by naming a specific VAMC. Respondent explains by example: “The Atlanta catchment area would fall under the administrative jurisdiction of the Atlanta Medical Center and includes VHA facilities in the greater Atlanta area as well as its environs.” Additionally, respondent states that certain counties in the geographic vicinity of a VAMC are designated as being within that VAMC’s catchment area.

A “combination zone” is an area which falls outside of a particular VAMC’s catchment area. An example would be a patient who is a beneficiary of the Birmingham VAMC catchment area, based on the patient’s county of residence, who temporarily travels to Atlanta and is in need of HME while in that temporary travel status. In that circumstance, Atlanta would be the combination zone and the HME provided via a warehouse in the Atlanta catchment area, though the cost of the HME would be funded in the patient’s traditionally-assigned catchment area, Birmingham.

The 2015 Contracts

The 2015 contracts were contract nos. VA247-15-D-0257 (VAMC Atlanta GA); VA247-15-D-0258 (VAMC Columbia SC); VA247-15-D-0259 (VAMC Augusta GA); VA247-15-D-0260 (VAMC Dublin GA); VA247-15-D-0261 (VAMC Birmingham AL); VA247-15-D-0262 (VAMC Charleston SC); VA247-15-D-0263 (VAMC Montgomery AL); and VA247-15-D-0264 (VAMC Tuscaloosa AL).

The period of performance for these contracts was August 2015 to January 2017. These contracts provided no award amounts or quantities, did not contain the Indefinite Quantity clause (FAR 52.216-22), the Orders Limitation clause (FAR 52-216-19), or the Requirements clause (FAR 52.216-21).

The contracts contained a SOW with clause C, “General Requirements,” as follows:

1. The volumes or amounts shown in the Contract Line Item Numbers (CLINS) are estimates only and impose no obligation on the VA. The contract shall be for the actual requirements of the VA as ordered by the VA during the life of the contract. The Contracting Officer’s Representative (COR) or designee shall provide (fax, or verbally) the contractor with notification to initiate individual Patient service requirements, including the Patient’s equipment, supplies and services to be provided including date and place of delivery.

2. The contractor shall furnish all labor, transportation, materials, tools, equipment and supervision required to provide Home Medical Equipment services to beneficiaries of the VA medical center located in [the designated], VAMC. Service shall include the assembly, delivery, pick-up, cleaning, repairing and storage of Government-owned D[urable] M[edical] E[quipment].^[6] The contractor shall provide onsite telephone and warehouse coverage during normal business hours (normal business hours are Monday through Friday 8:00 am – 4:30 pm). Service will be accomplished by travel to and from beneficiary residences in the medical centers' primary service areas (PSA) and other combination zones (CZ). Combination zones are areas outside the medical center's PSA that are primarily serviced by other VA Medical Centers. The medical center may occasionally place orders for a service in these combination zones that the contractor will be required to complete. Counties that fall under ___ VAMC are: [a list of named counties divided into three zones follow in each contract].

The specific, designated cities in the first and last sentence in clause C.2 were as follows, by contract number: VA247-15-D-0257 (VAMC - Atlanta GA) – first sentence, Atlanta, Georgia, last sentence, Atlanta; VA247-15-D-0258 (VAMC Columbia SC) – first sentence, Columbia, Georgia (sic), last sentence, Columbia; VA247-15-D-0259 (VAMC Augusta GA) – first sentence, Augusta, Georgia, second sentence, Augusta; VA247-15-D-0260 (VAMC Dublin GA) – first sentence, Dublin, Georgia, second sentence, Dublin; VA247-15-D-0261 (VAMC Birmingham AL) first sentence, Birmingham, Georgia (sic), second sentence, Birmingham; VA247-15-D-0262 (VAMC Charleston SC) first sentence, Charleston, Georgia (sic), second sentence, Charleston; VA247-15-D-0263 (VAMC Montgomery AL) – first sentence, Montgomery, Georgia (sic), second sentence, Montgomery; and VA247-15-D-0264 (VAMC Tuscaloosa AL) – first sentence, Tuscaloosa, Georgia (sic), second sentence, Tuscaloosa.⁷

Respondent explains that the language of Clause C.2 in the 2015 contracts is very similar to and is intended to be interpreted in the same manner as Clause B.3.1 in the 2014 contracts. Respondent provided the following explanations with regard to this clause.

Clause C.2 defines a specific geographic area within which “[t]he contractor shall furnish all labor, transportation, materials, tools, equipment and supervision required to provide Home Medical Equipment services to beneficiaries of the VA medical center located

⁶ HME is a subset of DME.

⁷ For the entries designated by (sic), it is assumed that these are scrivener's errors as explained by respondent for a similar error in a 2014 contract.

in [designated], VAMC,” i.e., the VAMC’s catchment area specified in each contract. In the first sentence, the phrase “located in [designated] VAMC” is a reference to the catchment area associated with the designated VA medical center. The VA determines that each beneficiary of a VA medical center is located in the designated VAMC by the following method:

Certain counties in the geographic vicinity of a Medical Center are designated as being within that Medical Center’s catchment area. As such, veterans who reside in those counties would be assigned to the Medical Center which corresponds to those counties and those veterans would be considered beneficiaries of that designated VA Medical Center. There are some caveats, however, in that if certain care (e.g., specialty care) is not available from a VA facility in a particular catchment area, the veteran would be referred for that care to a facility which could provide it, even if that facility is in a different catchment area.

In response to a Board inquiry whether different principles are applied to determine “beneficiaries of VA medical centers located in the [designated] catchment areas” as stated in the 2014 contracts and “beneficiaries of the VA medical center located in [designated], VAMC” as stated in the 2015 contracts, respondent offered the following:

No, the language is saying the same thing using similar but not identical phraseology. The language in the 2014 contracts was more precise in that it alluded to the fact that beneficiaries of certain VA Medical Centers would be within that Medical Center’s catchment area. The language in the 2015 contracts was briefer, but it too was meant to signify that beneficiaries of certain VA Medical Centers would be within that Medical Center’s catchment area. In terms of how it is determined which counties fall within a certain Medical Center’s catchment area, [the method is the same as that described previously].⁸

⁸ Respondent states that, as in the 2014 contracts, primary service area is synonymous with catchment area. Also with regard to combination zones, the definition is the same as for the 2014 contracts, as it is an area which falls outside of a particular medical center’s catchment area/PSA, and respondent repeats the example of a patient traveling outside the patient’s designated catchment area.

Contract Performance

Respondent ordered HME from entities other than appellant during the period of performance of the contracts at issue. When appellant found that others were receiving orders that it alleges should have been placed under its contracts, appellant complained to respondent, as appellant alleges that the parties understood that the 2014 and 2015 contracts were requirements contracts. To support this allegation, appellant states that “[t]he VA contracting officer notified all personnel in 2015, that they must order HME only from Caring Hands and not place orders with other companies for these products.” Appellant cites the following email from the contracting officer in support of this allegation, while respondent disputes that this email references any exclusive contractual right of appellant to fulfill all VA orders for HME.

From: Buggs, Ki G.
Sent: Tuesday, September 01, 2015 10:30 AM
To: Jones, Isaac W. III
Cc: Hughes, Charles E.; Floyd-Ross, Bonita
Subject: DME Contract- Columbia / Charleston
Importance: High

....

Please ensure that the facility orders from the contract if a contract is in place and the contract covers the services the facility is needed [sic]. We have had complaints recently about both Charleston and Columbia VA issuing orders to contractors that are covered under the current DME ordering vehicle. Please reach out to your PA(s) at these locations.

If total transparency is required, I will personally provide oversight and training to your PA(s)[.] Our Director of Contracting has already addressed issues with the facility Directors when it comes to this in the past.

If you have any questions please feel free to email me.

FYI

Please as a courtesy reach out to the contractor weekly to receive updates on contractor performance or issues related and forward these issues to me weekly. This will help limit confusion. Thanks[.]

Appellant's Claim

On January 7, 2020, appellant submitted a certified claim, pursuant to the Contract Disputes Act, 41 U.S.C. §§ 7101–7109 (2018), to the contracting officer, which it amended on February 4, 2020, alleging that appellant was the sole contracting party from which VA could order HME during the periods of the 2014 and 2015 contracts for the geographic areas

specified in the contracts. The contracting officer did not issue a decision in response to the claim and amended claim, and appellant filed an appeal of a deemed denial of its claim to this Board on May 14, 2020. The parties filed cross-motions for summary judgment in September 2021, and briefing was complete after submission of respondent's responses to the Board's inquiries in August 2022.

Discussion

Appellant's motion for summary judgment seeks a ruling that, based upon the contract provisions and the parties' intent, all the contracts were requirements contracts that respondent had breached by ordering HME from entities other than appellant.

Respondent's cross-motion for summary judgment alleges that, based upon a plain reading of the contracts, the 2014 contracts were indefinite delivery indefinite quantity (IDIQ) contracts that specified guaranteed minimum quantities, that quantities exceeding the guaranteed minimum were ordered and paid for, and that appellant was not entitled to any recovery. With regard to the 2015 contracts, respondent asserts that because they contained neither the Indefinite Quantities clause nor the Requirements clause, they were IDIQ contracts without a guaranteed minimum quantity, which resulted in the contracts being illusory and unenforceable except for orders which were actually placed with appellant, delivered, and paid for.

Pure contract interpretation is a question of law that may be resolved by summary judgment. *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984). However, the question of interpretation of language, the conduct, and the intent of the parties, i.e., the question of what is the meaning that should be given by a court or board to the words of a contract, may involve questions of material fact and not present a pure question of law. If there is a genuine dispute of material fact, summary judgment is inappropriate. *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1181 (Fed. Cir. 1988); see also *Butte Timberlands, LLC v. Department of Agriculture*, CBCA 646, 08-1 BCA ¶ 33,730 (2007).

While both parties are of the opinion that this dispute is ultimately one of contract interpretation, they not only have referred to the terms of the contract but have submitted statements of undisputed facts and opposing statements identifying genuine issues of material fact, which, while admitting issues of undisputed fact propounded by the opposing party, dispute these facts by extended "clarifying statements." However, we resolve the motions by interpreting the plain language of the contracts at issue. "It has been long recognized that where a contract provision is clear, '[t]he rules of contract construction should not be permitted to create an ambiguity where none exists or change or twist the plain meaning of a simple agreement.'" *Au' Authum Ki, Inc. v. Department of Energy*, CBCA 2505, 14-1

BCA ¶ 35,727, at 174,890-91 (quoting *National Housing Group, Inc. v. Department of Housing & Urban Development*, CBCA 340, et al., 09-1 BCA ¶ 34,043, at 168,377).

With regard to cases in which a party asserts a requirements contract exists, we stated in *Integhearty Wheelchair Van Services, LLC v. Department of Veterans Affairs*, CBCA 7318 (July 8, 2022):

To determine the extent to which the VA was obligated to order services from [a contractor], we first look to the language of the parties' contract. "[A] requirements contract necessarily obligates the Government to purchase exclusively from a single source" during the life of the contract. *Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1305 (Fed. Cir. 1998); see *Modern Systems Technology Corp. v. United States*, 979 F.2d 200, 205 (Fed. Cir. 1992) ("[A]n essential element of a requirements contract is the promise by the buyer to purchase the subject matter of the contract exclusively from the seller."); FAR 16.503(a) (discussing requirements contracts). . . .

. . . We have previously interpreted *Coyle's Pest* to mean that, where "the contract does not contain the FAR Requirements clause, to qualify as a requirements contract it must contain 'words of exclusivity' that not merely suggest, but require that *all* of the work be assigned to the contractor." *Environmental Quality Management, Inc. v. Environmental Protection Agency*, CBCA 3072, 13 BCA ¶ 35,300, at 171,283.

Slip op at 6-7.

We find that the 2014 contracts are IDIQ contracts, as they contain the elements of an IDIQ contract, i.e., the Indefinite Quantity clause and Orders Limitation clause which included a guaranteed minimum quantity. These contracts do not contain the FAR 52.216-21 Requirements clause or any other provision or language containing "words of exclusivity" that require all work to be assigned to the contractor, including clause B.3.1, which only requires the contractor to fulfill requirements ordered. The contract cannot be a requirements contract, because while appellant had the legal obligation to provide the services ordered, it did not have the exclusive right to satisfy all of the VA's requirements. *Valor Healthcare, Inc. v. Department of Veterans Affairs*, CBCA 6824, 22-1 BCA ¶ 38,039, at 184,733 (2021). As respondent ordered and paid for quantities exceeding the guaranteed minimum under these IDIQ contracts, appellant is not entitled to additional recovery.

We find that the 2015 contracts are illusory. These contracts are neither IDIQ nor requirements contracts, as they provide no award amounts or quantities and do not contain the Indefinite Quantity clause, the Orders Limitation clause, the Requirements clause, or any

other provision or language containing “words of exclusivity” that require all work to be assigned to the contractor. While clause C.2 of the SOW states that “[t]he contract shall be for the actual requirements of the VA as ordered by the VA during the life of the contract,” this must be read together with clause C.1, which states, “The volumes or amounts shown in the Contract Line Item Numbers (CLINS) are estimates only and impose no obligation on the VA.” There is no requirement for the VA to order any specific quantity pursuant to these contracts, which renders the obligation under these contracts illusory, and therefore unenforceable. As such, the VA is only obligated to pay for quantities actually ordered. *See MLB Transportation, Inc. v. Department of Veterans Affairs*, CBCA 7019, 21-1 BCA ¶ 37,919, at 184,159.

There are no issues of material fact in dispute. Based upon the plain meaning of the relevant contract language, the contracts are not requirements contracts as alleged by appellant.⁹ With regard to the contracting officer’s email message cited by appellant, we do not look to individuals’ purported interpretations to interpret contract provisions that are clear on their face. A verbal interpretation of an agency official, even a contracting officer, does not change the express terms of a contract. *Future Forest, LLC v. Department of Agriculture*, CBCA 5764, 19-1 BCA ¶ 37,238, at 181,269 (2018).

Decision

With regard to all contracts at issue, respondent’s motion for summary judgment is granted, and appellant’s motion for summary judgment is denied. The appeal is **DENIED**.

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

⁹ Appellant’s interpretation that the contracts obligate respondent to order all of its requirements from appellant is based upon allegations of patent ambiguities which would have obliged the contractor to seek clarification before award. Appellant did not clarify the alleged ambiguities and cannot prevail “regardless of the reasonableness of [its] interpretation.” *Fortec Constructors v. United States*, 760 F.2d 1288, 1291 (Fed. Cir. 1985); *F.A. Wilhelm Construction Co. v. Department of Veterans Affairs*, CBCA 719, 09-2 BCA ¶ 34,228.

We concur:

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge