

CARDIOMETRIX**CONTRACT NO. V505P-906****VABCA-5404****VA MEDICAL CENTER
SEATTLE, WASHINGTON**

Robert J. Loring, Ph.D., Chief Operating Officer, CardioMetrix, Pennsauken, New Jersey, for the Appellant.

Merilee D. Rosenberg, Esq., Trial Attorney; *Philip S. Kauffman, Esq.*, Deputy Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE THOMAS**(Pursuant to Rule 12.2 Expedited Procedure)**

The Department of Veterans Affairs Medical Center (VAMC) American Lake, (Tacoma) Washington, entered into Contract No. V505P-906 on May 13, 1994, with CardioMetrix for complete cardiology scanning service for the period April 1, 1994 through March 31, 1995. (R4, tab 1) The Contract contained two option years. After exercising the option for the period April 1, 1995 to March 31, 1996, the VA placed orders against the Contract only until September 30, 1995. (R4, tab 5) The Contract was terminated for convenience and CardioMetrix filed a claim for unabsorbed overhead costs. The Contracting Officer denied the claim citing provisions of the short form termination for convenience clause. Appellant timely appealed to this Board and elected the Board's Expedited Procedure, Rule 12.2, and submitted the case on the record pursuant to Rule 11. The record consists of the Complaint, Appeal File (R4, tabs 1-10), Government's Exhibits (Exh. G-1 and G-2), Appellant's Exhibits (Exh. A-1 to A-5). Neither party filed a brief or cited any case law to support its position.

FINDINGS OF FACT

In response to Solicitation No. 505-14-94, the VAMC American Lake (VA or Government) entered into Contract No. V505P-906 on May 13, 1994, with CardioMetrix (Contractor) for complete cardiology scanning service for the period April 1, 1994 through March 31, 1995. (R4, tab 1) The requirements Contract contained two option years. The estimated quantities and the bid prices were the same for all three years:

1. Cardiology scanning service completed and returned within twenty-four (24) hours 240 ea. \$68.50
2. 48 Hour Holter Monitor 6 ea. \$129.50

3. Events Monitor 4 ea. \$149.50

(R4, tab 1)

According to Contracting Officer Gloria Cahill, the estimated quantities "were drawn from recent historical data of usage by the hospital at American Lake." (Exh. G-1) Pursuant to the Contract, CardioMetrix delivered Holter recorders, cardiac event recorders, various supply items and a printer to the VA. (Exh. A-5)

On April 26, 1995, the Contract was extended for the period of April 1, 1995 to March 31, 1996. (R4, tab 2) The VAMCs at American Lake and Seattle consolidated on July 1, 1995. A management team was selected and "began reviewing all services with the goal of combining resources where it was feasible." (Exh. G-1) The same type of services being purchased by the CardioMetrix contract at VAMC American Lake were being performed by VA staff at the VAMC Seattle. During the first few months of the consolidation the management team determined that there was sufficient capacity at the VAMC Seattle to perform the cardiology scanning services at VAMC American Lake. The Government determined that "it was in the best interest of our patients to provide consistent care at both facilities and to provide Cardiology Scanning utilizing available VA staff." (Exh. G-1)

While the record is silent as to the exact date that a decision was made, the VA placed no orders under this Contract after September 30, 1995. When the option was exercised in April 1995, the Contracting Officer was aware that the facilities consolidation would occur in July, but did not know that VAMC Seattle would subsequently perform the services being performed by CardioMetrix. (Exh. G-2)

On February 16, 1996, approximately 10 months into the option year, CardioMetrix's Chief Operating Officer, Dr. Robert Loring, wrote to Contracting Officer Richard Bedwell noting that there has been no Contract activity since September 30, 1995. (R4, tab 3) He asserted that having the VAMC Seattle perform these services violated the requirements clause of the Contract and insisted that the VA either reinstate the Contract immediately with a 5-month time extension or terminate it for convenience.

On March 5, 1996, Contracting Officer Cahill wrote CardioMetrix responding that because there had been a facility consolidation and the services were being performed at VAMC Seattle, the VA was "accepting your offer to terminate this contract for the convenience of the government." (R4, tab 4) The Contracting Officer added that the Contractor's equipment was being returned "under separate cover." (R4, tab 4)

Approximately a year later, on March 3, 1997, Dr. Loring wrote to the VA stating that he had never received a "written response" concerning his earlier letter. He asked for a formal written modification terminating the Contract for convenience and a cost settlement form. (R4, tab 5) Contracting Officer Cahill responded on March 17, 1997, forwarding a copy of FAR Clause 52.249-4 Termination For Convenience Of The Government (Services) (Short Form) (APR 1984). (R4, tab 6) That clause, which was incorporated into the Contract by reference, provides:

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the Government shall be liable only for payment under the payment provisions of this contract for services rendered before the effective date of termination.

On May 8, 1997, the Contractor submitted an equitable adjustment claim in the amount of \$4,580.98 seeking "unabsorbed overhead" and requested a final decision within 60 days. (R4, tab 7) The amount claimed was said to represent the:

difference between the overhead costs CardioMetrix actually recovered on the contract and the overhead costs they would have recovered had the Government's actual total delivery orders equaled the estimated quantities.

(R4, tab 7)

On July 1, 1997, Contracting Officer Cahill issued a Final Decision denying the unabsorbed overhead claim because the short form termination for convenience clause did not authorize "unabsorbed costs that might have been allowed under a different termination for convenience clause." (R4, tab 8) CardioMetrix timely appealed to this Board on July 23, 1997. The Appellant wrote to Government Counsel on October 10, 1997, stating the claim was increased to \$7,465.31 by including an alleged 42% shortfall during the base year and claiming the shortfall itself was proof that the estimates were negligent and defective from the outset. (Exh. A-5) On November 14, 1997, Appellant requested this Board to allow it to amend its claim to include the base year shortfall and to change the basis of its claim to negligent Government estimates.

DISCUSSION

The Appellant argues that it had an identical contract at another VAMC that was terminated for convenience using the same Termination For Convenience Of The Government (Services) (Short Form) clause as contained in this Contract, and it offers copies of letters indicating the Contracting Officer at that VAMC honored a claim and paid the full amount requested. Thus, Appellant concludes that the Contracting Officer's position in this case, that the Termination For Convenience Of The Government (Services) (Short Form) clause does not authorize payment, is "baseless." It is clear that a contracting officer is not bound by the actions or decisions of another contracting officer on a different contract. Moreover, this Board's review is *de novo* and we are not bound by the findings or decision of a contracting officer. *Wilner v. United States*, 24 F.3d 1397 (Fed. Cir.1994); *Conner Brothers Construction Company, Inc.*, VABCA Nos. 3837 *et al.*, 95-2 BCA ¶ 27,910.

The VA placed orders up until September 30, 1995. The issue before us in this Appeal is whether the Appellant is entitled to recover "unabsorbed overhead" for the first option extension period. As we have noted on previous occasions, the fact that an appeal is submitted on the record does not relieve the party of the burden of proof from providing the Board with sufficient evidence to support its claim. *D. M. Summers, Inc.*, VABCA No. 2750, 89-3 BCA ¶ 22,123; *Southland Construction Co.*, VABCA No. 2579, 89-2 BCA ¶ 21,704; *Jen-Beck Associates*, VABCA Nos. 2107 *et al.*, 87-2 BCA ¶ 19,831 at 100,322-23. We said in *Schoenfeld Associates*, VABCA Nos. 2104, 2510-17, 87-2 BCA ¶ 19,648 that:

While affidavits, given under oath, carry probative value, the mere allegation in an affidavit without additional explanatory facts or outside substantiation will not necessarily be sufficient to carry the burden of proof. In determining the reliability of conclusory statements, we look at whether there is other corroborative evidence supporting the statement, whether the other facts and circumstances surrounding the allegations make the allegations more believable than not, and to what extent the parties' version of the events and conclusions differ or can be reconciled. In weighing these elements, however, the moving party's position must be more reliable than its adversary in order for us to find in its favor. *See ACS Construction Company, Inc.*, ASBCA Nos. 28193 and 28666, 86-1 BCA ¶ 18,627; *Bruce-Anderson, Co., Inc.*, ASBCA No. 28099, 84-1 BCA ¶ 17,177.

The parties, by electing to submit the case on the record, took upon themselves the responsibility to provide this Board with adequate evidence upon which to make a finding in their favor.

The short form termination for convenience clause severely limits the exposure of the Government when it invokes the right reserved under this provision. Absent bad faith or abuse of discretion, a contractor is entitled only to be paid for the services rendered prior to the effective date of termination. *American Maintenance and Management Services, Inc.*, ASBCA No. 19,556, 76-2 BCA ¶ 11,960. While a requirements contract creates an exclusive relationship between the Government and the contractor, it is not a guarantee either of the volume of work or any work at all. Under the terms of the requirements clause, the Government's obligations are merely to exercise due care in preparing its estimates, and to order from the contractor, and no one else, the supplies or services required to be purchased by the ordering activity. *Crown Laundry and Dry Cleaners, Inc.*, 29 Fed. Cl. 506 (1993). In the absence of bad faith, the Government does not have to order supplies or services which are not needed or which can be provided in-house. *Skip Kirchdorfer, Inc.*, ASBCA No. 22997, 83-2 BCA ¶ 16,713.

There is no evidence in the record before us to establish bad faith or abuse of discretion on the part of the Government. Consequently, the costs sought here are not

recoverable under the terms of the Contract Termination For Convenience clause because they are not for "payment of services rendered."

The matter before us concerns Appellant's claim for recovery of unabsorbed overhead during the option year. It is clear from the Appellant's last submission to the Board, dated after the closing of the record, that the principal focus of Appellant's claim is not for unabsorbed overhead as presented to the Contracting Officer, but rather, a new claim to recover the costs associated with the "shortfall" allegedly experienced during the base period as well as allegations of negligent estimates. Appellant's shortfall allegation is based on negligent estimates and involves a different time period and different theories of recovery. That claim has not been the subject of a Contracting Officer's final decision. The *Contract Disputes Act of 1978*, sets forth the basis for jurisdiction by this Board over any claims made by the Appellant against the Government. Specifically, 41 U.S.C. § 605(a) provides that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. As we held in *Bridgewater Construction Corporation*, VABCA Nos. 2866 *et al.*, 90-2 BCA ¶ 22,764 at 114,264, in order to invoke the jurisdiction of the Board a contractor must:

- (1) submit to the Contracting Officer a written demand asserting specific rights and relief;
- (2) specify the monetary compensation sought;
- and (3) demand a final decision or certify the claim where necessary, in accordance with the requirements of the CDA.

This position was later supported in *Reflectone, Inc. v. John H. Dalton*,

60 F.3d 1572 (Fed. Cir. 1995). Once a claim is submitted to the contracting officer, 41 U.S.C. § 605 (c) provides that "[a] contracting officer shall issue a decision on any submitted claim for \$100,000 or less within 60 days from his receipt of a written request from the contractor that a decision be rendered within that period." In the absence of any communication by the contracting officer which might constitute a decision on a contractor's claim, the contractor's claim is not ripe for adjudication and the Board does not have jurisdiction over the claim. *Paragon Energy Corp. v. United States*, 645 F.2d 966, 967 (Ct. Cl. 1981); *White Plains Iron Works, Inc. v. United States*, 229 Ct. Cl. 626 (1981); *AB-Tech Construction, Inc.*, VABCA No. 1531, 82-2 BCA ¶ 15,897 at 78,823-26.

Accordingly, we are without jurisdiction to consider the negligent estimate claim. However this decision is without prejudice to the Contractor's right to present a proper claim to the contracting officer, and, in the event it receives an adverse final decision, or no decision within the time required by the *Contract Disputes Act*, to appeal either to this Board or to the United States Court of Federal Claims.

DECISION

For the foregoing reasons the appeal is denied.

Date: December 5, 1997

William E. Thomas
Administrative Judge

NOTE: This Decision is not subject to appeal, and may not be cited as precedent, pursuant to Board Rule 12.2 and Section 9 of the Contract Disputes Act of 1978, 41 U.S.C. Sec 608.