

**BETTER HEALTH AMBULANCE
SERVICE**

CONTRACT NO. V558P-3065

VABCA-5475

**VA MEDICAL CENTER
DURHAM, NORTH CAROLINA**

Stephen D. Kiess, Esq., Everett, Warren, Swindell, Kiess & Jones,
Greenville, North Carolina, for the Appellant.

Cameron V. Gore, 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 ROBINSON
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

The Appellant, Better Health Ambulance Service (BHAS or Contractor), has timely appealed a final decision by a Contracting Officer (CO) for the Department of Veterans Affairs (VA or Government), denying its claim for the cost of providing registered nurses for a particular category of ambulance services. The Appellant claims that the VA is responsible for furnishing the necessary "medical control" during ambulance transport to allow its Contractor

to comply with North Carolina state law. In the case of trips originating beyond the boundaries of Durham County, the Contract required BHAS to provide advance life support (ALS) for the patients. North Carolina law specifies that there must be either medical control for ALS trips or that any ALS patient be accompanied by a registered nurse. Appellant seeks the cost of providing registered nurses for all ALS transports during the base year of this non-emergency service contract.

The Respondent VA moves for summary judgment, averring that there are no disputed material facts which could be construed to enable recovery by the Appellant, and that VA is entitled to judgment as a matter of law. According to the Respondent, it made no representations, either express or implied, that it would provide the "medical control," required by North Carolina state law. The VA's position is that it was the Appellant's independent responsibility to determine state requirements and to include the costs of compliance in its unit bid price for ALS ambulance transports.

The Appellant's position is that the VA's refusal to provide medical control increased its costs. It additionally asserts that the VA's designation of ALS treatment, as expressed during the course of performance, was at variance with those services designated as ALS under North Carolina law. These additional "ALS services" were not set forth in the solicitation or the resultant Contract. Thus, in Appellant's view, the need to employ registered nurses for ALS transports was caused by the VA's change in the terms of the Contract.

The record upon which the Board will base its decision consists of: the pleadings, cited as "Cmplnt. ∂ __" or "Ans. ∂ ___;" the VA's Rule 4 file, consisting of 23 tabbed documents, cited as "R4, tab ___;" The Affidavit of Appellant's General Manager, cited as "Bostic aff., ∂ ___;" as well as the VA's Motion, cited as "Gov't. MSJ. p. ___;" Appellant's Reply, cited as "App. Rep. Br., p. ___;" and the VA's Response, cited as "Gov't. Resp., p ___."

FINDINGS OF FACT

The following findings of fact are made solely for purposes of deciding this Motion.

On August 22, 1995, the Department of Veterans Affairs (VA or Government) issued a solicitation for the provision of “non-emergency ambulance service to beneficiaries of the VA Medical Center [VAMC] in Durham, NC . . . in accordance with all terms, conditions, provisions and schedule of [the] solicitation.” There were requirements for Category I and Category II ambulances as specified in the North Carolina Administrative Code. Category I ambulances were required for advanced life support, while Category II ambulances were required for basic life support (BLS). Category I transports were required only for trips either extending beyond Durham County or coming into the VAMC from a point outside Durham County. The solicitation made provision for two option years. (R4, tabs 1, 3, 4)

Section C of the solicitation requires both the vehicle and its equipment to be licensed and to meet the requirements of the North Carolina Administrative Code, Title 10, Chapter 3, Division of Facility Services, Subchapter 3D Rules and Regulations Governing Ambulance Service, Section 1000, Ambulance Equipment, dated December 11, 1989. Section H of the solicitation is entitled “Special Contract Requirements.” Paragraph 1.a states that: “Successful bidder shall meet all requirements of Federal, State, City and County codes regarding operations of this type of service.” This Section also deals with personnel requirements, specifically listing and discussing Attendants, Non-Emergency Attendant/Drivers and Emergency Medical Technicians (EMTs). There is no mention of the need for nurses of any type to accompany the several different categories of patient transport covered by the solicitation. Neither does the

solicitation represent that the VAMC will provide “medical control,” as that term is defined by the laws of North Carolina. (R4, tab 1)

One of the purposes of North Carolina’s Emergency Medical Services Act of 1973 was to authorize EMTs and paramedics to act as agents for physicians in providing certain medical care, without running afoul of the strictures against practicing medicine without a license. This medical care is defined as “advanced life support” (ALS) service. The provision of any ALS service, however, must be administered in accordance with an approved “medical control” regime. (Bostic aff., ¶ 10)

“Medical Control” is a term applied in North Carolina to patient transport systems where the ambulance attendants (paramedics or EMTs) are operating under the control and guidance of a hospital, so that they may administer certain medications and otherwise care for the patients while they are in transit. The particular hospital that supervises this treatment (the sponsor hospital) does so through its physician(s), who provide an advance written “playbook” describing the care and medication to be given based on the nature of the illness and the condition of the patient. For example, given an emergency patient’s age, vital statistics and injury or affliction, the “standing orders” detail what the EMT or paramedic is to do. Together, the sponsor hospital, the medical director and the standing orders constitute the “medical control” regime. The EMTs and paramedics are powerless to act outside of the medical control of their sponsor hospital. (Bostic aff., ¶ 10)

In contrast, nurses licensed in North Carolina are not limited to providing patient care within a “medical control” regime. Under the *Nurse Practice Act*, a nurse can be directed by a physician to provide a broad spectrum of medical care, including administering medicine. The physician’s order may be written or oral and may be taken by telephone or radio. (Bostic aff., ¶ 11)

The Contract for these ambulance services, Number V558P-3065, was awarded to BHAS on April 26, 1996. At the time the solicitation was issued and at all times during performance of the Contract, Appellant was licensed and certified to provide both BLS and ALS care. Both the Contractor's equipment and personnel had been certified by the North Carolina Office of Emergency Medical Services. Its sponsor hospital was Wayne Memorial Hospital, located in Wayne, County, North Carolina. (Bostic aff., ¶ 8)

Appellant's sponsor hospital and its medical director, were unwilling to provide medical control for patients being transported under the Contract between BHAS and the VA. Because these patients were being transported to and from the Durham VAMC at the direction of a VA physician, no North Carolina hospital or medical director was willing to assume medical control for any patient they would never see and over whom they would have no control. (Bostic aff., ¶ 12)

After award of the Contract, BHAS asked that the VAMC provide copies of its standing orders. VAMC representatives stated that they were unfamiliar with the subject of the Contractor's request, stating that they had no such standing orders. They also indicated that previous providers of ambulance transport services to the VAMC had ignored the requirements of state law and provided the [ALS] services without medical control. BHAS was threatened with termination (and liability for any excess costs of reprocurement) unless it too ignored these state requirements. (Bostic aff., ¶ 13)

When the VA explained to BHAS what it considered to be covered by the ALS designation, the Contractor stated that some of these services were beyond the North Carolina definitions. It specifically referred to the VA's need for inter-facility ambulance transportation of patients needing intra-venous medications such as heparin, lidocaine and dopamine, as well as inter-facility patient transportation involving maintenance of central IVs and feeding tubes. Under

North Carolina law, these procedures can only be carried out with a nurse or physician accompanying the patient. Because these particular services were not indicated in the Contract, the VA's requirement that they be provided changed the terms of the Contract, requiring that BHAS hire registered nurses instead of the less costly EMTs or paramedics. (Bostic aff., *¶* 14)

Fearing that it would run afoul of North Carolina law if it failed to provide registered nurses with ALS transports, the Contractor advised the Durham VAMC that unless the VAMC took steps to become a sponsor hospital or provided an ALS nurse, it would conform with the law and bill the VA for such nurse services. The VA actually paid the June 1996 invoice that included costs for registered nurses. Thereafter, through April 1997, the VA refused to pay BHAS for the nurse care portions of the monthly invoices. The VA ultimately terminated the ALS portion of its Contract with BHAS. The Contractor filed a claim totaling \$255,653 for the unpaid portion of the ALS invoices. The CO denied the claim and this timely appeal was lodged with the Board. (Bostic aff., *¶* 15; R4, tabs 8, 10, 20-22)

For its part, the VA advised the Contractor that it lacked the medical control regime necessary to act as a sponsor hospital. The VA also stated that it could spare none of its staff nurses to accompany ALS patient transports. Finally, the VA took the position that BHAS assumed the risk of compliance with all state laws and regulations when it bid on, and later signed, the Contract. In her final decision denying the claim, the CO stressed that, under the Supremacy Clause of the United States Constitution, no state can regulate the activity of a Federal agency such as the VA. Thus, the Durham VAMC had no legal duty to become a sponsor hospital for its ambulance Contractor. Neither did it have a contractual duty, the Contract being silent with respect to provision of medical control or supplying nurses for ALS transport services. (R4, tab 21)

The Office of Emergency Medical Services (OEMS) is the agency responsible for administering the laws and regulations pertaining to ambulance transport services within North Carolina. During the course of the Contract, both the VA and the Contractor communicated with OEMS. In a letter dated January 21, 1997, OEMS advised the VA that because BHAS was an independent contractor, not an employee of the VA, it had to comply with all North Carolina statutes and regulations regarding ambulance transport services. In accordance with applicable law, Durham County Hospital was identified as “currently the administratively responsible sponsor hospital [with] responsibility for medical control in Durham County . . .” The VA was not authorized to issue medical orders to ambulances unless it took steps necessary to become a sponsor hospital. This is a step that the VA declined to take. (R4, tabs 11, 17)

In another letter, dated April 29, 1997, OEMS advised the Contractor that to provide ALS care, it would have to be affiliated with an existing sponsor hospital or one or all of the VA hospitals could become ALS sponsor hospitals. (Attach. to VA’s MSJ)

Finally, in a letter to the VA of May 21, 1997, OEMS reiterated its prior advice that “the ultimate authority regarding [ALS] transport of patients is the sponsor hospital/physician medical director. *For the purposes of your contract, it may be difficult to find local ALS systems willing to sponsor a provider to routinely move patients across the state or out of state.*” Another option offered by this state agency was the provision of a nurse (or other caregiver). There is a caveat, however. In order to operate within the state rules, “the nurse (or other caregiver) must be affiliated with the transferring hospital. *It is not acceptable for a BLS provider to hire nurses to accompany an ambulance crew and claim that ALS care is available.*” With respect to future procurements, OEMS suggested that the VA require all ALS bidders to submit evidence that they can meet the requirements of the contract while complying with North Carolina law. This would take the form of a letter

from a sponsor hospital and physician provider confirming the level of ALS care offered and their willingness to sponsor the provider (bidder) for the services required by the contract to be let. (R4, tab 15) (Emphasis added)

In a June 20, 1997 letter to the Contractor's attorney, the CO reiterated her view that it was entirely the Contractor's responsibility to ascertain contract requirements prior to submitting its bid. (R4, tab 17) She concluded her letter as follows:

The VA is currently revising the specifications for advanced life support services to require the contractor to be part of an approved advanced life support program with necessary area of coverage to provide needed service for the VA. For the future, the VA is considering the possibility of establishing its own advanced life support program for the VAs in North Carolina. However, under the Supremacy Clause of the United States Constitution, the State cannot regulate activity of the Federal Government. The VA does not have a duty to become a sponsor hospital. The contractors are required to be in compliance with the North Carolina State Regulations governing ambulance service, not the VA.

DISCUSSION

The Government has moved for summary judgment, arguing that there are no disputed material facts which, if found in Appellant's favor, could result in a finding of entitlement to any relief on its claim. The burden to be met by the party seeking summary judgment was recently reiterated by this Board in the appeal of *Sabbia Corporation*, VABCA No. 5858, 99-2 BCA ∂ 30,463:

[I]n seeking summary judgment, the moving party has the burden to establish both that there is no issue of material fact and that it is entitled to judgment as a matter of law. All inferences as to the existence of a genuine issue of material fact will be drawn in favor of the non-moving party, and any doubt as to the existence of genuine issues of material fact must be resolved in favor of the non-moving party. *United States v.*

Diebold, 369 U.S. 654 (1962); *D.L. Auld Company v. Chroma Graphics Corp.*, 714 F.2d 1144 (Fed. Cir. 1983).

Applying those principles to the record presented by both parties, we conclude that there are not only material facts in dispute but that there is a good deal of confusion regarding the proper application of North Carolina laws and regulations to the provision of ALS services by ambulance operators. For these reasons, and as further discussed below, we decline to grant the Government's motion.

At page 8 of its brief, citing *Chevron U.S.A., Inc.*, ASBCA No. 32323, 90-1 BCA ¶ 22,602, the Government notes that the risk of increased performance costs in a fixed-price contract lies with the contractor unless the contract otherwise shifts that risk to the Government. This Board recently made a similar observation in *Maintenance Engineers, Inc.*, VABCA Nos. 5350, 5457, dec. 7/28/99, WL554576. In both of the above-cited cases, circumstance dictated that the contractors incur greater performance costs than they had anticipated. In *Chevron*, the contractor's decision to ship its crude oil to a different port was attributable to its safety concerns during the war between Iran and Iraq. Although this decision increased its transportation costs, the Government played no part in the decision, nor did any provision of the contract allow for reimbursement of additional transportation costs. In *Maintenance Engineers*, a severe snowstorm rendered cleanup more difficult, though not impossible. The Government did not cause or exacerbate the situation, nor did the contract provide for additional compensation. The snow removal contractor was denied the additional costs that it incurred. For reasons to be discussed, the general proposition stated in these two cases may well be inapplicable to the arguably unusual facts asserted in the *instant* appeal.

Based on the facts asserted by both parties to this motion, it appears that the Appellant was faced with more than merely increasing its costs of performance. The Appellant asserts that no other North Carolina hospital would agree to sponsor

its ALS transport of VA patients. The VA asserts that even the provision of registered nurses to accompany ALS transports violates applicable local laws/regulations. If both these assertions are true, this Contract may well have been impossible to perform in accordance with *all* its terms. Unlike the situation in the two above-cited appeals (where the Government had no control over the Iran-Iraq war or the weather), the expenditure of additional funds would not have enabled the Contractor to comply *fully* with its contractual obligations. Without the VA's agreement to act as a sponsor hospital, BHAS would be in violation of North Carolina law whether it hired paramedics, EMTs or nurses to accompany ALS patient transports. It thus appears that, without the cooperation of the VA, this Contract could not have been performed in full compliance with local laws and regulations, a contractual requirement which BHAS had to meet.

In our view, the above assertions, together with Appellant's unrebutted allegation that the VA was previously aware of the "disconnect" between satisfying the VA's stated needs and complying with state law, raise several issues that must be addressed in an evidentiary hearing. Was it within the VA's authority and resources to have agreed to sponsor the Appellant rather than threatening it with a default termination at the time that it "became aware" of the problem? If the VA had the power to thus correct an otherwise impossible situation, did its refusal to act as a sponsor for its ambulance contractor breach its implied duty of fair dealing? *See, e.g., George A. Fuller Co. v. United States*, 69 F. Supp. 409 (Ct. Cl. 1947); *S. A. Healy Co. v. United States*, 576 F. 2d 299 (Ct. Cl. 1978).

As the Court of Federal Claims reiterated in *Celeron Gathering Corporation v. United States*, 34 Fed. Cl. 745, 753 (1996):

The concept of fair dealing places on the government a duty to render reasonable cooperation to the contractor in the performance of the contract. . . . A claim under the duty of cooperation concerns the reasonableness of the government's actions after considering the facts and circumstances at the time. (Citations omitted)

The CO took the position, citing the concept of federal supremacy, that the VA cannot be compelled to comply with state law regarding establishment of medical control and ALS sponsorship. This seems to miss the salient question, which is not whether the state could compel the VA to be an ALS sponsor, but whether the VA's refusal to qualify itself as a sponsor hospital breached an *implied contractual duty*, thus making it legally impossible for Appellant to fully meet the terms of the Contract. With respect to the interaction of the Supremacy Clause of the U. S. Constitution with obligations of the Government as a contracting party, *see, Weaver Construction Company*, DOT BCA No. 2034, 91-2 BCA ∂ 23,800.

Finally, there is the Appellant's allegation that several medical procedures and IV medications required by the VA were beyond the scope of this Contract. With respect to these instances, according to the Appellant's affidavit, proper administration of such medications as heparin, lidocaine and dopamine could be done only by a registered nurse, and not by the paramedic or EMT referenced in the Contract. If this assertion can be proven, the Appellant may well be entitled to recover the difference between what it bid for the costs of paramedics and what it spent for nurse services on those particular ALR transports.

DECISION

For the reasons stated, this matter cannot be disposed of summarily. The further development and full exposition of the material facts bearing on both parties' contractual obligations, as well as the proper application of North Carolina laws and regulations, demands an evidentiary hearing. The Respondent's Motion is

DENIED. By not later than sixty days from receipt by the parties of this decision, they shall confer and apprise the Board of their proposed hearing date.

DATE: **November 2, 1999**

JAMES K. ROBINSON
Administrative Judge
Panel Chairman

We Concur:

GUY H. MCMICHAEL III
Chief Administrative Judge

RICHARD W. KREMPASKY
Administrative Judge