

**Heritage HealthCare Services, Inc.****CONTRACT NOs. V501P-2333  
V501P-2503****VABCA-5603 & 5604****VA MEDICAL CENTER  
Albuquerque, NM**

*Leonard Trainor III*, President, Heritage Healthcare Services Inc., Albuquerque, New Mexico, for the Appellant.

*Jeanne A. Anderson, 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 Board Rule 12.3)

In these appeals Appellant, Heritage Healthcare Services, Inc. (Heritage or HHSI) is seeking reimbursement for New Mexico Gross Receipt taxes (Tax) which it says it did not include in its bid for two successive contracts. Heritage argues that, prior to bidding, it was orally informed by a Contracting Officer that it would not have to pay the Tax. Heritage is seeking reformation of the contract. The Government does not concede that such a conversation took place but argues that, even if it did, the Contractor had no right to rely on legal advice provided by the Contracting Officer. It also argues that Appellant does not meet the tests required for reformation. The Record consists of the Complaint, Answer, Appeal File (R4, tabs A1-A15), Government's Motion to Dismiss, Government's Brief with seven exhibits including affidavits from Rhonda Stark and Nancy Cimermanis, as Exhibits 1 and 2 respectively, and a rebuttal Declaration from Rhonda Stark. Appellant's Brief is in the form of an affidavit from Leonard Trainor. Appellant did not respond to the Government's Brief.

### **FINDINGS OF FACT**

In October 1994, the Department of Veterans Affairs (VA or Government) issued Solicitation RFP No. 501-40-94 (Solicitation). On December 29, 1994, VA awarded Contract No. V501P-2333 (Contract) for a base year and two option years to Heritage Healthcare Services, Inc. to furnish Homemaker and Homehealth Aide Services to beneficiaries at the VA Medical Center, Albuquerque, New Mexico (VAMC Albuquerque). Both option years were exercised and the Contract was satisfactorily performed. On December 30, 1997, Contract V501P-2503 was awarded and again covered a base and two option years. Contract Specialist Rhonda Fleischman (now and hereafter referred to as Rhonda Stark) was the Contracting Officer (CO).

Mr. Trainor, President of Heritage, alleges that sometime in October or November 1994, he was completing his company's response to the Solicitation when he called the CO and, among other things, asked her about the state gross receipts tax. Section 7-9-2 of the New Mexico Statutes Annotated ("NMSA") provides as follows:

The Purpose of the Gross Receipts and Compensating

Tax Act (this article) is to provide revenue for public purposes *by levying a tax on* the privilege of engaging in certain activities within New Mexico and to protect New Mexico businessmen from the unfair competition that would otherwise result from the importation into the state of property without payment of a similar tax. NMSA 1978, Section 7-9-2. (Emphasis added.)

In New Mexico, the sale of services to a governmental agency is not deductible from the seller's gross receipts. 3 NMAC 2.54.9 If tangible personal property is used in performing the service, no deduction may be taken for the cost or value of the property used. A contract is for services if the greatest investment in performing the contract is for skills and labor. NM St. Tax. Rep. (CCH) ¶ 60-420.

Appellant's letters of March 17, March 25, and May 28, 1998, contain the identical assertion that:

When Heritage Healthcare Services Inc. (HHSI) entered into the initial contract . . . it was represented verbally by the contract specialist, Ms. Rhonda Fleischman [Stark}, that services provided to the VA Medical Center were exempt from New Mexico gross receipts tax. This was supported by the issuance of a nontaxable transaction certificate . . .

The letters do not indicate exactly when Ms. Stark made the alleged statement although it seems tied to the issuance of the nontaxable transaction certificate. In its Complaint, Heritage states: "HHSI understood that the services provided to the VA, being a government entity, to be tax exempt. *To comply with state law HHSI requested a tax-exempt certificate of the Veterans Administration Medical Center* for the services HHSI was providing to them. A tax exempt certificate was issued and verbal representation as to the tax exempt nature of the VA was made by the then Contracting Officer [Stark]." (Emphasis supplied) The Complaint seems to indicate that the VA's verbal representation was contemporaneous with the issuance of the tax-exempt certificate which occurred after price negotiations. However, in his affidavit Mr. Trainor states: "One of the questions I had for Ms. [Stark] with respect to the RFP had to do with gross receipts taxes in New Mexico. Ms. [Stark] told me that the services requested by the RFP would not be subject to New Mexico gross receipts taxes and that if HHSI was awarded a contract, that she would issue a Non-Taxable Transaction Certificate."

CO Stark does not recall such a conversation taking place. She states that if Mr. Trainor had called her as he claims, she would have documented the conversation and requested it in writing because it impacted both pricing and the specifications. She would have also shared this information with other bidders. There is nothing in the Record, including the records of negotiations, that indicates the tax situation was discussed with Heritage or with any of the other bidders. Heritage does not provide us with any specific details of this critical conversation that would help us confirm when and under what

context it actually took place nor have they submitted any business records memorializing the conversation.

The Contract contained Federal Acquisition Regulation (FAR) 52.229-3, Federal State and Local Taxes (Jan 1991), Paragraph (b) of which states "the contract price includes all applicable Federal, State, and local taxes and duties." The solicitation also contained FAR 52.215-14, Explanation To Prospective Offerors, which states that inquiries must be in writing and oral explanations will not be binding. Mr. Trainor submitted Heritage's proposal without any indication that the Tax was not included in its proposal. On December 16, 1994, a negotiation session was held and both parties agree that cost was discussed. The Stark memo sets out 14 separate items that were discussed during negotiations and item 10. states: "Discussed cost—included in their proposal are the following associated costs: cost, profit, overhead and 20% labor burden". The Trainor affidavit states: "We responded with an overall breakdown of the cost of providing the requested homemaker and homehealth labor, plus associated payroll tax expenses, general and professional worker's compensation insurance expenses and administrative overhead expenses necessary to coordinate the services. We did not discuss the nearly 6% New Mexico gross receipts tax which we had been told prior to completing the response to the RFP that gross receipts taxes was not a cost of providing services." The VA agrees that the Tax was not mentioned during the negotiations on December 28, 1994. (R4, tab 5; Exh. 1) Ms. Stark states in her declaration that she finds it difficult to believe that Heritage did not bring up the Tax when the VA was trying to negotiate Heritage's price down. The Stark price negotiation memo also states that Heritage had past working references with the VA, Physician Groups, etc. Neither party discusses how taxes were handled on the prior VA contracts.

During best and final offers (BAFO), Appellant lowered its price from \$107,500 to \$104,500. The next lowest offer was \$127,500. (R4, tab 2) On March 24, 1995, at the request of Heritage, CO Stark issued the Nontaxable Transaction Certificate. (R4, tab 8) The Certificate states that "The Registrant named above has been approved as eligible to issue Nontaxable Transaction Certificates for the transaction stated above and more specifically described in Gross Receipts and Compensating Tax Act." The exemption code on the Certificate was 09. The definition of exemption 09 is on the back of the certificate and states "Type 09 certificates may be issued by GOVERNMENTAL AGENCIES and 501(c)(3) ORGANIZATIONS for the purchase of TANGIBLE PERSONAL PROPERTY ONLY. These certificates may not be used for the purchase of services or for the lease of property." (R4, tab 8) Notwithstanding the non-applicability of the Certificate to a service contract such as this, the VA maintains that it was standard procedure to provide Certificates to any contractor who requested them. (Exh. 1)

In New Mexico a taxpayer has an affirmative duty to keep informed about changes in the tax law that might affect its liability. New Mexico Taxation & Revenue Reg. GR 43:9 (1990) states:

Acceptance of nontaxable transaction certificates (NTTCs) in good faith that the property or service sold thereunder will be employed by the purchaser in a nontaxable manner is determined at the time the certificates are initially accepted. The taxpayer claiming

the protection of a certificate continues to be responsible that the goods delivered thereafter are of the type covered by the certificate.

The Contract ran its course. Pursuant to a new solicitation, a new Contract, V501P-2503, was awarded to Heritage on December 30, 1997. (R4, tab 6) As with the initial Contract, there was no indication on Heritage's bid that taxes had been omitted and taxes were not discussed during negotiations. (R4, tab 5; Exh. 2) Appellant asked no questions concerning the 09-exemption language contained on the Certificate. The new Contract prices offered by Heritage would not increase the current Contract price for two years. (R4, tab 5) Contract Specialist Cimermanis, who was the contracting officer for the new Contract, was aware that Heritage had received the Nontaxable Transaction Certificate on March 24, 1995. (Exh. 2)

Heritage wrote CO Cimermanis on March 17, 1998 and advised her that the letter is a "claim or written assertion" because the New Mexico Taxation and Revenue Department had determined that the nontaxable certificate does not apply to the services that Heritage is performing for the VA. Appellant requested that its unit costs in Contract V501P-2503 be increased retroactive to January 1, 1998. (R4, tab 7) On March 25<sup>th</sup>, Heritage sent a "revised" claim which references a fax it received from the VA that is not part of the Record. Except for some minor word changes, the March 25<sup>th</sup> letter is identical to the March 17<sup>th</sup> letter. On March 30, Heritage modified its March 17<sup>th</sup> letter by adding additional costs for "other areas." (R4, tab 10)

On April 6, 1998, CO Cimermanis issued a final decision increasing the Contract price for the current Contract effective April 1, 1998 and rejecting the claim seeking to make the changes retroactive to the Contract start date of January 1<sup>st</sup>. No explanation or discussion is contained in the final decision detailing the basis for the decision. (R4, tab 11) On April 10, Appellant signed Supplemental Agreement No. 2, which modified the unit costs per his March 30 letter. The Supplemental agreement does not contain any claim release language. (R4, tab 12)

On May 28<sup>th</sup> Heritage wrote the VA advising that ". . . the New Mexico Taxation and Revenue Department has assessed a tax liability on the cash receipts from the VA Medical Center over the audited years of 1995, 1996, and 1997 amounting to \$38,191.60." (R4, tab 13) The letter attaches a "summary schedule of cash receipts for the audited years" prepared by Heritage. There are no documents in the Record from New Mexico demanding payment of any Tax, nor is there any evidence of Heritage's payment of the Tax. The letter requests that Contract V501P-2333 be adjusted and Heritage be paid \$38,191.60.

On June 3, 1998, CO Cimermanis issued a final decision denying the claim for initial Contract V501P-2333 stating only that "I have given your request thorough and careful consideration, and deny the claim." (R4, tab 14) The claimed total amount of the Tax is \$46,315.14 and Appellant argues that it is unreasonable for the VA to benefit to that magnitude at the expense of this very small business.

## DISCUSSION

The issue before us is whether Heritage is entitled to be reimbursed for gross receipt taxes it allegedly owes to the state of New Mexico for 1995 through March 1998. Appellant argues that "the gross receipts taxes were omitted [from the two Contracts] because of a mutual mistake by the parties during Contract negotiations" and that this is supported by the VA's subsequent increase of the Contract price in April 1998. The Government does not address its subsequent modification of the Contract but does argue vigorously that there was no mutual mistake of fact and no circumstances justifying reformation.

We agree with the Government that the Contract contains a clause that explicitly provides that applicable state taxes are to be included in the bid price. This clause places on contractors the risk of ascertaining the applicability of federal, state, and local taxes, and of including sufficient amounts to cover such taxes in their bids. **Turner Construction Co. v. General Services Administration**, GSBCA No. 11361, 92-3, BCA ¶25, 115; **Inland Empire Builders, Inc. v. United States**, 424 F.2d 1370 Ct. Cl. (1970) (contractor assumes risk that state and local taxes will be increased after contract award); **R. B. Hazard, Inc.**, ASBCA No. 35752, 88-3 BCA ¶20,873. There is no immunity from a tax whose incidence falls on a contractor doing business with the United States. **Turner**, 93-2 BCA at 125,212, quoting **United States v. Boyd**, 378 U.S. 39, 44 (1964); see also **United States v. New Mexico**, 455 U.S. 720 (1982).

Appellant, by its own admission, recognized and believed that the Tax was an issue with possible dire consequences for a small firm. Despite specific warnings in the solicitation that all inquiries must be in writing and oral interpretations would not be binding, Heritage's only inquiry as to its Tax status, by its own admission, was to initiate a pre-proposal call to the Contracting Officer. The specific nature or details of the inquiry have not been provided to us. Heritage cites us no authority that allows it to rely on a legal representation of a Contracting Officer or even that Ms. Stark was authorized to bind the Government. The VA, citing **Turner**, argues forcefully that legal advice provided by Government representatives, even if in writing, is not binding on the Government.

Generally, to obtain contract reformation based on a mutual mistake the Appellant has the burden to prove (a) the parties were mistaken in their belief regarding a fact, (b) the mistaken belief constituted a basic assumption underlying the contract, (c) the mistake had a material effect on the bargain, and (d) the contract did not place the risk on the party seeking reformation. **Dairyland Power Co-op. v. United States**, 16 F.3d 1197, 1202 (Fed. Cir. 1994). **Foley Co. v. United States**, 36 Fed. Cl. 788 (1996). In **Foley** a prospective bidder called the Government number set out in the IFB to inquire whether a proposed Corps of Engineers project in Kentucky would be subject to state taxes and was told that it was exempt. Based on that assurance, the bidder did not include state taxes in its bid but was later assessed a tax in excess of \$290,000. Foley sought reimbursement, but the Government denied the claim and the Court of Federal Claims upheld the denial. The Court said: "Contrary to Foley's assertions, this case is a prime example of the rationale for requiring contractors with questions regarding the Contract to obtain clarification in writing. The IFB requires each contractor to determine the applicable state

taxes on its own prior to submitting its bid. Foley cannot rely on the Corps to answer legal questions for it through some unofficial channel of which other bidders may not be aware." *Id.* at 791.

In the instant case the procurement was negotiated. If the VA had stated that the Tax was not applicable and knew during negotiations that the Contractor had removed the Tax from its proposal, then there may have been a mutual mistake that would allow contract reformation. Where material Government misrepresentation, whether intentional or unintentional, is involved in a negotiated procurement, the courts and boards generally permit the contractor to reform or rescind its contract if it relied on the misrepresentation to its detriment. *Jim Sena Const. Co., Inc.*, IBCA Nos. 3761-3765, 98-2 BCA ¶29,891 and cases cited therein. In *Sena* the contracting officer insisted several times that the Government was exempt from the very tax involved in this case and the contractor removed it from its bid. When it turned out that Sena did have to pay the tax, the Interior Board found for the Appellant. In our case the VA did not initiate the tax issue nor does it concede ever having the conversation on which Appellant claims to rely.

The Solicitation in this case places the burden of determining the applicability of the taxes on the contractor. The state regulation puts the contractor on a continuing duty to determine the applicability of its Nontaxable Transaction Certificate. Appellant asks us to find that it reasonably satisfied this burden by seeking the advice of a contracting officer prior to making its proposal, and thus reasonably relied on the VA's alleged assertions of Tax exemption for the project. The CO recalls no such conversation and states that she was unaware that Heritage was omitting the Tax from its proposal. We have no evidence, other than assertion by Appellant's President, that such a conversation took place prior to Heritage's submission of its proposal. For example, there is no business record memorializing the conversation, and no attempt was made by Heritage to confirm the Tax deletion during negotiations. We do not understand how a contractor, armed with what it believes to be a critical, verbal determination by the CO, would not take the prudent steps of an independent inquiry, indicate such on its proposal, insist on a solicitation or contract amendment, or confirm the Tax situation during negotiations, while being pressured to lower its price. In addition, when the second Contract was negotiated with a different CO, Heritage did not mention the Tax or question the language of the Certificate, which it had in its possession for almost three years. Whatever Heritage believed from its telephone conversation, it had ample opportunity in both its proposal and during negotiations to indicate or confirm its omission of the Tax from its bid. Legal advice provided by Government representatives is not binding on the Government. *F & D Trading Corp. v. United States*, 580 F.2d 414, 419 (Ct. Cl. 1978) A person who relies on a legal interpretation made by a Government officer does so at its own risk. *Airmotive Engineering Corp. V. United States*, 535 F.2d 8 (Ct. Cl. 1976)

Appellant has not established by a preponderance of the evidence that any conversation resulted in a material misrepresentation by the VA or that the VA was on notice that the Tax had been omitted from its proposal. Whatever conversation about the application of the Tax that might have taken place prior to the submission of the bid, it was not of sufficient detail or specificity to put Ms. Stark on notice that Heritage was omitting the Tax from its bid. Moreover, the Contractor is charged with reading the RFP, which unambiguously states that Contract questions should be submitted in writing and that oral interpretations are not binding.

Appellant makes much of the fact that after Contract award, it asked for and received a nontaxable transaction certificate from the VA. The Government says that as a "standard procedure" it routinely gives its Contractors any Government forms they ask for. Although we are very disturbed by this practice, which seems calculated to invite trouble for the unwary, we do not find that the routine providing of the form in response to a request after Contract award establishes a mutual mistake of fact in contract formation. Moreover, we note that the form itself, on its face, clearly indicates that the Tax exemption does not apply to the type of contract that was being performed by the Appellant.

As we have noted on previous occasions, the fact that an appeal is submitted on the record does not relieve the party with 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 a Rule 11 proceeding, took upon themselves the responsibility to provide this Board with adequate evidence upon which to make a finding in their favor.

In addition to the failure of proof previously noted, we observe that Appellant has not provided us with any form of document or evidence whatsoever from the State of New Mexico indicating that Heritage owes them any taxes. The Government highlighted this deficiency in its Brief, but Appellant declined the opportunity to respond and provide the necessary information.

We also note that the VA allowed Heritage to raise its prices to cover the Tax effective April 1, 1998. Whatever reasoning went into that decision has not been shared with us,

but we will assume the CO was satisfied at that point in time that the Tax had been omitted and the increased amount was equitable. Appellant argues that this was a belated realization by CO Cimermanis that the taxes were payable and were omitted because of a mutual mistake during negotiations. Such prospective action by the VA does not establish the Contractor's entitlement to reformation of a previous contract where the element of mutual mistake of fact has not been established.

Finally, we emphasize that our decision here deals only with the liability of the VA and does not address whatever relief the Appellant might be able to secure from the State of New Mexico. In this connection see; *Leaco Rural Tel. Coop., Inc. v. Bureau of Revenue*, 86 N.M. 629, 632-33, 526 P.2d 426, 429-30 (Ct.App.1974).

### DECISION

For the foregoing reasons, the Appeals are Denied.

Date: **January 21, 1999**

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William E. Thomas, Jr.  
Administrative Judge  
Panel Chairman

I Concur:

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Guy H. McMichael III  
Chief Administrative Judge