

**RECORD STEEL AND  
CONSTRUCTION, INC.**

**CONTRACT NO. V531C-298**

**VABCA-5966**

**VA MEDICAL CENTER  
BOISE, IDAHO**

*John Spencer Stewart, Esq.*, Stewart, Sokol & Gray, LLC, Portland, Oregon, for the Appellant.

*Anna C. Maddan, Esq.*, Trial Attorney, San Francisco, California; *Charlma J. Quarles, 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 KREMPASKY**

Respondent, Department of Veterans Affairs (VA or Government) has moved for partial summary judgment on the appeal of Record Steel and Construction, Inc. (RSCI), VABCA-5966. This timely appeal arises from the VA Contracting Officer's (CO) denial of RSCI's claim for additional direct costs and overhead on Contract No. V531C-298 (Contract) in the amount of \$25,719.59. RSCI has subsequently amended the amount it claims to "an approximate amount" of \$18,153.58 for additional direct costs and extended overhead resulting from changes to the Contract. The VA moves that the appeal, to the extent the amounts claimed result from changes and Contract time extensions reflected in the 12 supplemental agreements to the Contract executed by the parties, be denied.

The record before the Board for consideration of the VA's MOTION consists of the Complaint and Answer in this appeal; the Appeal File consisting of 33

exhibits; the VA's MOTION FOR PARTIAL SUMMARY JUDGMENT; RSCI's OPPOSITION TO RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT; the AFFIDAVIT OF SUSAN T. RECORD IN SUPPORT OF APPELLANT'S OPPOSITION TO RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT; and, the VA's REPLY TO APPELLANT'S OPPOSITION TO RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

### **FINDINGS OF FACT**

The following findings of fact are made for the purposes of this decision only and are not in dispute.

The VA awarded the Contract to RSCI on February 12, 1998, in the amount of \$776,762 for the Primary Care Consolidation project at the Department of Veterans Affairs Medical Center at Boise, Idaho (VAMC Boise). The VA issued the Notice To Proceed with the work on February 17, 1998 which provided that RSCI was to start work on April 13, 1998. The Contract provides for completion of the work in 250 calendar days, making the original Contract completion date December 19, 1998.

The Contract includes the standard Federal Acquisition Regulation ("FAR"), 48 C.F.R. Chapter 1, and Department of Veterans Affairs Acquisition Regulation ("VAAR"), 48 C.F.R. Chapter 8, clauses usually found in VA construction contracts, including the following clauses relevant to the

consideration of this MOTION:

DISPUTES (ALTERNATE I), FAR 52.233-1 (DEC 1991);  
CONTRACT CHANGES, CHANGES-SUPPLEMENT (FOR CHANGES COSTING  
\$500,00 OR LESS) VAAR 852.236-88 (JUN 1987); and,  
CHANGES, FAR 52.243-4 (AUG 1987).

There were a total of 17 modifications to the Contract, 12 bilateral Supplemental Agreements, 3 unilateral Change Orders and 2 unilateral Settlements By Determination; the Board considers the Settlements By Determination to be additional unilateral Change Orders. One of the Change Orders (CO A) was superceded by a subsequent supplemental agreement (SA #4). The Contract modifications added a total of \$76,787 to the Contract price, a 9.9% increase. In addition, the Contract modifications added a total of 37 days to the Contract completion time resulting in a revised Contract completion date of January 25, 1999.

Each of the 12 supplemental agreements, representing \$69,440 of the total Contract price increase and 35 days of the total additions to the Contract completion time, included the following provision:

This modification represents a complete equitable adjustment for all costs, direct and indirect, associated with the work and time agreed to herein, including but not limited to, all costs incurred for extended overhead, supervision, disruption or suspension of work, labor inefficiencies, and this change's impact on unchanged work.

In addition, the price of SA Nos. 1-12 included amounts for profit and overhead computed in accordance with the terms of limitations contained in the Contract CHANGES provisions.

By letter dated February 25, 1999, RSCI submitted a claim of \$25,719.59. The total amount claimed consisted of a claim of \$17,176.41 for 37 days of additional job site costs to which overhead, profit and labor burdens are added. RSCI job site expense claim included amounts for:

- Project Manager Salary;
- Project Manager Vehicle Expense;
- Project Superintendent Salary;
- Project Superintendent Vehicle Expense;
- Field Office;
- Temporary Telephone;
- Dumpster Service;
- Project Storage Unit;
- Job Assigned Equipment;
- Fuel;
- Project Manager Labor Burden;
- Project Superintendent Labor Burden;
- Overhead @ 10%; and,
- Profit @ 10%.

RSCI also claimed \$8,543.16 for corporate general and administrative (G&A) expenses which it computed by applying the RSCI audited G&A rate of 11.12% to the total value of the Contract changes that it had computed at \$76,827. In its claim letter RSCI, cites the negative financial and scheduling impact of the “multiplicity” of changes it experienced on the Contract.

The CO denied RSCI’s claim by Final Decision dated April 8, 1999. In the Final Decision, the CO cited the language of SA Nos. 1-12 and the terms of the Contract supplemental CHANGES clause as precluding recovery of the types of costs claimed by RSCI. This appeal resulted.

RSCI executed a Contract final payment “Release of Claims Pursuant To FAR 52.232-5” on April 15, 1999. RCCI excepted the claims relevant to this appeal from the release.

## DISCUSSION

We will grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The moving party carries the burden of showing that there is no genuine issue of material fact; all doubts over whether a genuine factual dispute exists will be resolved in favor of the nonmovant. *Saturn Construction Company*, VABCA No. 3229, 91-3 BCA ¶ 24,151, *aff'd sub nom, Saturn Construction Company v. VA Medical Center, Allen Park, Mich.*, 991 F.2d 810 (Fed. Cir. 1993); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Our role in deciding a motion for summary judgment is to determine whether a genuine triable issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A nonmovant may not establish the existence of a genuine, triable issue of material fact simply by challenging a fact or by an unsupported conclusion. The nonmovant must present sufficient evidence, by pointing to some part of the record or other evidence, indicating that the facts differ significantly from the way the movant has presented them and upon which a reasonable fact finder, drawing inferences in favor of the nonmovant, could decide in favor of the nonmovant. In our consideration of a motion for summary judgment, we initially determine if there are material facts in dispute; we will weigh neither facts nor evidence. Only when there are no material facts in dispute do we look at whether the movant is entitled to judgment as a matter of law. *Centex Bateson Construction Co.*, VABCA Nos. 5166 *et. al.*, 97-2 BCA ¶ 29,196; *Fire Security Systems, Inc.*, VABCA No. 3086, 90-3 BCA ¶ 23,235; *Hengel Associates*, VABCA No. 3921, 94-3 BCA ¶ 27,080; *C. Sanchez and Son, Inc.*, 6 F.3d 1539 (Fed. Cir. 1993).

The Government maintains there are no disputed material facts regarding SA Nos. 1-12 and that, because of the limitations on profit and overhead in the

VAAR CONTRACT CHANGES, CHANGES-SUPPLEMENT (FOR CHANGES COSTING \$500,00 OR LESS) clause, RSCI has no Contractual entitlement to any additional overhead or profit. RSCI responds that it never intended, as evidenced by the February 25, 1999 claim letter, the exceptions taken on the final payment release and Ms. Record's Affidavit, to release its rights to claim for the "overall effect" of the changes reflected in SA Nos. 1-12 on the Contract work as a whole or to claim for the "cumulative effect" of the changes. From this, RSCI asserts:

There are genuine issues of material fact in dispute with respect to the validity of any alleged release which accompanied pro forma change orders and supplemental agreements on a piecemeal basis.

The language of the accord and satisfaction agreements contained in SA Nos. 1-12 is clear, unambiguous and comprehensive. It is undisputed that RSCI executed each SA, that the work described in each SA was performed, and that the VA paid RSCI for the work. The four prerequisites of an accord and satisfaction are well settled: 1) Proper subject matter; 2) Competent parties; 3) A meeting of the minds; and, 4) Consideration. *Brock & Blevins Co. v. United States*, 343 F.2d 951, 955 (Ct. Cl. 1965) (citing *Nevada Half Moon Mining Co. v. Combined Metals Reduction Co.*, 176 F.2d. 73, 76 (10<sup>th</sup> Cir. 1949), *cert. denied*, 338 U.S. 943 (1950); *Mil-Spec Contractors v. United States*, 835 F.2d 865, 867 (Fed. Cir. 1987); *Fire Security Systems, Inc.*, VABCA No. 3086, 90-3 BCA ¶ 23,235 at 116,593.

There are no material facts relating to the above prerequisites in dispute here. The only indication of RSCI's "intent" when it executed the SAs is Ms. Record's unsupported assertion in her affidavit that she never "understood" that the "releases" in the SAs would preclude RSCI from pursuing claims for losses resulting from the number and extent of Contract changes. This bare

assertion is not a “fact” placing the existence of the meeting of the minds of the parties into dispute. There is no objective evidence contemporaneous to the execution of the SAs in the record supporting a conclusion that there was no meeting of the minds with regard to the costs now claimed. Consequently, RSCI’s conclusory and unsupported assertion is nothing more than a statement of subjective intent and is not a material “fact.” Thus, we will give effect to the clear language of the accord and satisfaction agreements. *Saturn Construction*, 91-3 BCA ¶ 24,151; *ED. Zueblin, A.G., v. United States*, 44 Cl. Ct. 228 (1999); *Barmag Barmer Maschinefabrik, AG v. Murata Machinery, Ltd.*, 731 F.2d 831 (Fed. Cir. 1984).

Each of the accord and satisfaction agreements evidenced in each of the SAs has been fully executed and performed. Therefore, there is an accord and satisfaction on the additional work and additional performance time encompassed within the SAs and RSCI has discharged the VA from any further obligation to pay additional costs relating to the SAs. *McLain Plumbing & Electrical Service, Inc. v. United States*, 30 Fed. Cl. 70 (1993).

We note that, even in the absence of an accord and satisfaction, the costs claimed by RSCI would be precluded by the terms of the Contract. The VAAR CHANGES-SUPPLEMENT clause prescribes the percentage of the direct costs of a change that may be charged for overhead and profit and defines the type of costs that are included within the definition of overhead to which the percentage limitations are applied. The costs identified by RSCI in its claims are all costs included within the scope of the clause definition as being included within the limited overhead percentage that had been applied to the direct costs of the changes in establishing the price of the SAs. *See* VAAR 852.236-88(e) and (j).

Moreover, the VAAR CHANGES-SUPPLEMENT clause limits the overhead costs recoverable as an equitable adjustment for additional performance time resulting from changes to a contract. Since RSCI's claim for equitable adjustment with regard to the SA's is solely for costs identified in the clause related to additional performance time, the price of the SA's delimits RSCI's recovery for those costs. *Santa Fe Engineers, Inc. v. United States*, 801 F. 2d 379 (Fed. Cir. 1986); *Coates Industrial Piping, Inc.*, VABCA-5412, 99-2 BCA ¶ 30,479.

### DECISION

For the foregoing reasons, the Respondent's MOTION FOR PARTIAL SUMMARY JUDGMENT in the appeal of Record Steel and Construction, Inc., VABCA-5966, under Contract No. V531C-298, is **GRANTED**. The appeal of Record Steel and Construction, Inc., VABCA-5966, as the appeal relates to any costs in connection with each accord and satisfaction agreement in Supplement Agreements 1-12 to Contract No. V531C-298, is **DENIED**.

DATE: **May 31, 2000**

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RICHARD W. KREMPASKY  
Administrative Judge  
Panel Chairman

We Concur:

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GUY H. MCMICHAEL, III  
Chief Administrative Judge

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JAMES K. ROBINSON  
Administrative Judge