

ULTIMATE LABORATORIES, INC.

CONTRACT NO. V247P-0073

VABCA-6641

VISN #7

AUGUSTA, GEORGIA

Josephine L. Ursini, Esq., Virginia Beach, Virginia, for the Appellant.

Dennis Foley, 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 KREMPASKY
ON
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

Respondent, Department of Veterans Affairs (VA or Government) has moved for a judgment as a matter of law denying Appellant's, Ultimate Labs, Inc. (Appellant or ULI) timely appeal of the termination for cause of Contract No. V247P-0073 (Contract). The Contract was a commercial items, requirements contract for prescription eyeglasses to be supplied to six VA medical facilities in Alabama, Georgia, and South Carolina.

We have before us the RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, APPELLANT'S RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT and RESPONDENT'S REPLY, which will be cited as: (MOTION, p. __), (REPLY, p. __), and (RESPONSE, p. __), respectively. The MOTION includes an Attachment containing the copies of orders issued under the Contract, which will be cited as: (MOTION, Att.). In addition to the above, the record before us includes the pleadings (cited as COMPLAINT, para. __ and ANSWER, para. __ and the Appeal File consisting of 19 numbered exhibits (cited as R4, tab __).

FINDINGS OF MATERIAL FACT FOR THE PURPOSE OF RULING ON THE MOTIONS

On March 26, 2001, the VA and ULI executed Contract Number V247P-0073. Under the Contract ULI agreed to supply prescription eyeglasses to the six VA facilities comprising Veterans Integrated Services Network Number Seven (VISN 7). Those six (6) facilities were: VA Medical Center Augusta, Georgia (VAMC Augusta); VA Medical Center Birmingham, Alabama (VAMC Birmingham); Central Alabama Veterans Healthcare System (CAVHCS); VA Medical Center, Charleston, South Carolina (VAMC Charleston); VA Medical Center, Dublin, Georgia (VAMC Dublin); and, VA Medical Center, Tuscaloosa, Alabama (VAMC Tuscaloosa). The Contract was a requirements contract with a base year from April 1, 2001 to March 31, 2002, with two (2) one-year options and an estimated value of \$887,615 for the base year of the Contract. (R4, tab 2)

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 commercial item, supply, requirements contracts, including the following clauses

relevant to this appeal:

CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS,
FAR 52.212-4 (MAY 1999)

ORDERING, FAR 52.216-18 (OCT 1995)

DELIVERY-ORDER LIMITATIONS, FAR 52.216-19 (OCT 1995)

REQUIREMENTS, FAR 52.216-21 (OCT 1995)

OPTION TO EXTEND THE TERM OF THE CONTRACT, FAR 52.217-
9 (MAR 2000)

(R4, tab 2)

The Contract STATEMENT OF WORK contains the following relevant provisions:

16. PERFORMANCE, DELIVERY, INSPECTION AND
ACCEPTANCE

....Delivery of eyeglasses shall be made to the designated address of the veteran or contracted ordering facility, *as indicated on the order received by the contractor.*

17. Contractor must provide a system of records that will track each eyeglasses order from the time and date of receipt of order until date complete order is received by veteran beneficiary. *Shipments to be made by Certified Mail Return Receipt Requested, Priority Mail, etc., to insure timely receipt within 7 days.* Contractor will provide these records with each billing cycle. Contractor must submit with their proposal their written plan for tracking orders.

(R4, tab 2) [emphasis added]

On April 5, 2001, the VA Contracting Officer (CO), Ms. Suzanne L. Jene, conducted a post award meeting, attended by representatives of ULI and VA contract administration/ordering personnel for the covered VISN 7 facilities, and prepared minutes reflecting the matters covered at this meeting. The minutes reflect the parties' detailed discussion of Contract requirements and the VA's representation that, in most instances, VAMC Charleston, VAMC, Augusta and VAMC, Birmingham would require ULI to deliver eyeglasses directly to veterans. In this regard, the minutes also reflect that ULI informed the VA that it had "a contract with an Express Service Company which has a tracking number assigned to each delivery." There was additional discussion concerning specific details of ordering and delivery procedures for eyeglasses delivered directly to veterans. ULI took no exception to delivery of eyeglasses directly to veterans at this meeting. (R4, tabs 1, 3)

Between May 11, 2001 and May 25, 2001, VAMC Augusta ordered 37 pairs of eyeglasses, with instructions to deliver all 37 pairs directly to veterans. Contrary to these delivery instructions, ULI delivered all 37 pairs of eyeglasses directly to VAMC Augusta. Orders issued in this time period by the other VISN 7 facilities directed delivery to the facility. (R4, tabs 10, 19, MOTION, Att.)

On May 11, 2001, in a telephone conversation between ULI and the VA, ULI indicated that, when it submitted its proposal that led to the Contract, it thought the majority of the eyeglasses would be delivered directly to the VAMCs. ULI contended that VAMC Augusta was compromising patient care by requiring ULI to deliver eyeglasses directly to veterans. The VA responded by citing the Contract provisions permitting the VA to specify eyeglass delivery to patients. The VA further responded that: (1) it was not unusual for VA facilities to have the eyeglasses sent directly to patients; and, (2) ULI's question in this

regard was untimely since it had not challenged or otherwise taken issue with Contract delivery provisions prior to the January 3, 2001 closing date for receipt of proposals. (R4, tabs 2, 9)

In a May 11, 2001, letter to the VA, ULI stated, in part:

I wish to again state that it has never been Ultimate Laboratories' understanding or agreement that delivery of eyeglasses pursuant to purchase order would be made primarily and in most circumstances directly to the home of the ultimate veteran user. As I have stressed, I believe direct delivery from lab to user is bad practice and is not consistent with good health practice and represents substandard optometric care. In structuring our proposal, Ultimate Laboratories understood from representatives of the [VA] that delivery of eyeglass orders would be foremost and primarily to the ordering [VA] facility. Only in isolated instances would delivery be made directly to the ultimate veteran user. In turn, the [VA] facility would make physical delivery to the ultimate user allowing for adjustment, dispensing, verification and explanation of use of the prescription. For example, it is poor patient care to send a bifocal prescription directly to an elderly patient without verifying the bifocal height and fit of the glasses, as an improperly fit pair of bifocal glasses could cause an elderly patient to trip and fall with an end result of a broken hip. Our reading of the Statement of Work, specifically paragraph 16, is consistent with our understanding, which understanding was supported by our discussions with representatives of the [VA]. Ultimate Laboratories would not have entered into an arrangement of direct delivery, which again we believe is contrary to prevailing good health care practices. Based on discussions with Dr. Norden, Chief [VA] Optometrist, he agrees with our position. As you are aware, we are currently in receipt of [VA] orders of eyeglasses. *Pursuant to its agreement with you, Ultimate Laboratories stands ready, willing, and able to fulfill these*

orders in a timely fashion, making delivery directly to the [VA] ordering facility. Ultimate Laboratories will not, however, make the delivery of these orders to the ultimate veteran user unless the situation warrants an exception.

(R4, tab 10) [emphasis added]

The VA responded with a Cure Notice, dated May 21, 2001, stating:

You are hereby notified that the Government considers Ultimate's lack of performance, i.e., not shipping eyeglasses directly to the veterans, unacceptable under the Contract. This Cure Notice is based on the May 11, 2001, telephone conference between VA and Ultimate, and the May 11, 2001, follow-up letter that Ultimate issued to VA. In the letter, you informed us that Ultimate will not abide by paragraph sixteen (16) of the Contract which requires Ultimate, if VA so directs, to deliver ordered eyeglasses directly "to the designated address of the veteran" At no time during the Solicitation/Award phase did the Contracting Officer, who is the only VA designee in this instance possessing authority to issue clarifications, inform Ultimate that it would be primarily shipping VA's eyeglass orders directly to the VA facility/facilities, as opposed to the veterans' addresses. Ultimate's belief that it would be primarily shipping the orders to the VA facility appears to be based on an incorrect assumption that Mr. Jeffrey Sachs, [Ultimate's] Government Sales Coordinator, made. Mr. Sachs, in fact, did indicate during the aforementioned telephone conference that his assumption was related to his experiences pertaining to deliveries/shipments for other unrelated prior Solicitations. Each Solicitation and resulting Contract has its own terms, conditions and requirements, so Ultimate should not compare the instant Contract with others for purposes of making assumptions. In addition, if Ultimate felt that there were improprieties in the Solicitation, under Federal Acquisition Regulation (FAR) § 33.103(e), Ultimate should have raised it/them prior to January 3, 2001, closing date for receipt of proposals. Ultimate failed to do so. Please be advised that as of May 14, 2001, VA has informed the participating VA

facilities under the Contract to procure the veterans' eyeglasses from an alternate source, pending Ultimate's response to this Notice. To the extent that the Contract allows, VA will charge any excess cost back to Ultimate. Lastly, since you stated in your May 11, 2001, letter that Ultimate will not perform in accordance with the said Contract terms, you are hereby given ten (10) calendar days from receipt of this notice to inform us in writing unequivocally if and how you plan to deliver to the veterans' addresses, when VA requires, per the Contract's terms. Failure to provide VA with this written request within the ten (10) calendar days will necessitate the Government's termination of the Contract for Cause, per FAR § 52.212-4(m), Contract Terms and Conditions -- Commercial Items; Termination For Cause.

(R4, tab 12)

Mr. Bruce Mitchell, General Counsel for Compbenefit Corporation, a ULI subsidiary, by letter of May 30, 2001, responded to the Cure Notice on ULI's behalf. Mr. Mitchell stated:

In your Cure Notice dated May 21, 2001, you assert that Ultimate's failure and/or unwillingness to make direct shipments of eyeglasses to veterans to be in breach of its obligations under its contract with the [VA], specifically paragraph 16. Further, it is asserted that Ultimate has informed the [VA] that it will not abide by paragraph 16 of the contract. This is simply not the case. In Ultimate's correspondence of May 11 to you, it was clearly stated that Ultimate stands ready, willing and able to meet its contractual obligations under the [VA] contract, including that of paragraph 16. However, Ultimate does not believe that paragraph 16 provides for direct delivery to the Veteran as the routine, primary method of delivery. Only subsequent to the award of [the] contract to Ultimate did Ultimate come to understand the [VA's] interpretation of paragraph 16 requiring direct shipments to Veterans as a primary source of delivery. This interpretation of paragraph 16 is inconsistent with the [VA's] prosthetic rules and regulations, specifically paragraph 12, page 5(1) of "Handbook 1173.12", which

provides, in part, that “delivery of eyeglasses directly to the beneficiary home address should be authorized only when direct delivery is in the best interests of the beneficiary.” Given the clear standards provided in the Handbook, as well as good health practices (which we believe the policy is based), Ultimate reasonably understood and interpreted paragraph 16 to mean that delivery of eyeglass orders would be foremost and primary to the ordering VA facility. (I would also add this is inconsistent with historical delivery requirements of the [VA] within eyeglass vendors). Only in isolated instances would delivery be made to the ultimate Veteran user where special circumstances warranted. Ultimate’s understanding of paragraph 16 required no need for “clarification” of this provision. At no time during the bidding process did Ultimate have an understanding of the [VA's] intended implementation of paragraph 16. Had the [VA] intended to deviate from its own policies and procedures as set forth in its Handbook, as well as acceptable standards of care, the burden should be on the [VA] to make its intent clear. It is unreasonable now to impose upon Ultimate a need to seek clarification of an interpretation of a provision where the interpretation would place the [VA] in direct violation of its own rules and regulations . . . *Again, Ultimate stands ready, willing, and able to discharge its duties under the contract as reasonably interpreted.*

(R4, tab 14) [emphasis added]

On June 4, 2001, the VA terminated the Contract for cause. The termination notice cited ULI’s failure to deliver eyeglasses directly to patients as a breach of the Contract. In addition, the letter cites ULI’s express refusal to comply with the Contract delivery requirements.

(R4, tab 15)

DISCUSSION

That the Contract permitted the VA to order eyeglasses with delivery to be made directly to a veteran, that the VA issued such orders, and that ULI refused to perform such orders, is not in dispute. The only issue we need resolve is whether, as a matter of law, ULI was excused from its obligation to perform the orders requiring delivery of eyeglasses directly to a veteran.

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. *Sabbia Corporation*, VABCA No. 5858, 99-2 BCA ¶ 30,463; *Saturn Construction Company*, VABCA No. 3229, 91-3 BCA ¶ 24,151, *aff d.*, 991 F.2d 810 (Fed. Cir. 1993) (Table). 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 non-movant. *Saturn Construction*, 91-3 BCA ¶ 24,151; *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). The existence of a genuine, triable issue of material fact cannot be established by a non-movant simply challenging a fact or by an unsupported conclusion. The non-movant must show, by pointing to some part of the record or additional evidence, that material facts differ significantly from the way the movant has presented them and upon which a reasonable fact finder, drawing inferences in favor of the non-movant, could decide in favor of the non-movant. *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. v. United States*, 6 F.3d 1539 (Fed. Cir. 1993).

The VA poses four alternative arguments in support of the MOTION. First, the Government argues that the Contract is clear and admits only the interpretation that the Contract permits the VA to order eyeglasses for direct delivery to veterans and ULI is obligated to make such deliveries. Second, the VA argues that ULI waived any right to question the Contract delivery terms by not questioning those terms prior to the closing date of the solicitation from which the Contract arose. The VA's third argument involves ULI's invocation of Veterans Health Administration Handbook 1173.12, *Prescription Optic And Low Vision Devices* (Handbook), to explain its failure to deliver the VAMC Augusta ordered eyeglasses directly to the designated veterans. The VA rejects any notion that the Handbook circumscribed its right to specify the delivery point of eyeglasses ordered under the Contract because the Contract expressly permits VAMC Augusta to specify direct delivery and because the Handbook was not part of the Contract. The VA also asserts that, if the Handbook applied to the Contract, it is in conflict with the Contract terms and creates a patent ambiguity in terms of eyeglass delivery. Because it failed to inquire about this patent ambiguity prior to award of the Contract, ULI cannot prevail on its interpretation of the Contract Delivery terms.

ULI asserts that there is a dispute of material facts concerning whether the eyeglass orders issued by VAMC Augusta complied with the Handbook and whether ULI was required to perform non-Handbook complying orders. Characterizing the VAMC Augusta orders as "illegal", ULI contends that the termination for cause was improper because the VAMC Augusta failed to make a proper determination that direct delivery was "in the best interest of the beneficiary." Based on this, ULI asserts it had a valid Contractual expectation

that all orders issued under the Contract would be in compliance with the Handbook. ULI cites us to our decision in *Better Health Ambulance Service*, VABCA No. 5475, 00-1 BCA ¶ 30,630 where we denied a MOTION FOR SUMMARY JUDGMENT, in part, because of disputed factual issues related to the application of state law to the manner of the contractor's performance. ULI analogizes *Better Health Ambulance Service* to this case by asserting that an evidentiary hearing is necessary to determine whether VAMC Augusta complied with Handbook policies.

Whether or not VAMC Augusta complied with the Handbook is not material to the resolution of this dispute. The Handbook is not incorporated into the Contract and, despite ULI's allegations denoting it as a "regulation", there is no evidence that the Handbook is anything other than an expression of internal, VA policies and procedures. It is well settled that internal policies and procedures create no contractual rights or obligations that can be enforced by a Government contractor. The Contract is simply a supply contract in which the VA purchases prescription eyeglasses from ULI. The Contract neither provides for ULI to be the arbiter or enforcer of VAMC Augusta's optometric care decisions nor permits ULI to decide on how delivery of the supplies will be effected based on ULI's judgment on the propriety of the VA's delivery directions based on the Handbook's provisions. Consequently, the situation in this case is distinguishable from *Better Health Ambulance Service* and the factual determination of whether VAMC Augusta properly implemented the Handbook is not material to the determination of the propriety of the termination for cause. *ERG Consultants, Inc.*, VABCA Nos. 3223, 3345-46, 92-2 BCA ¶ 24,905; *McDonnell Douglas Corp.*, ASBCA No. 46266, 99-1 BCA ¶ 30,152; *TPI International Airways, Inc.*, ASBCA Nos. 41375, 44357, 96-2 BCA ¶ 28,602, *aff'd*. 135 F.3d 776 (Fed. Cir. 1998) (Table).

There is no dispute that the VA has made a *prima facie* case supporting the termination for cause. The Contract entitled VAMC Augusta to order eyeglasses for direct delivery to designated veterans; it ordered thirty-seven pairs of eyeglasses; and, ULI refused to deliver the eyeglasses to the designated veterans. Thus, ULI assumes the burden to prove that its failure to deliver the eyeglasses was excusable. *Adams Construction Company, Inc.*, VABCA No. 4669, 97-1 BCA ¶ 28,801; *Nitro Electrical Corp.*, VABCA No. 3777, 95-1 BCA ¶ 27,492.

Based on the material facts here, there is no basis to find that ULI was excused from performing its Contractual obligations. Although mentioned by neither party, the controlling issue of law in this case is whether ULI had an obligation to continue performance while it disputed the wisdom of direct delivery of eyeglasses. Subparagraph (d) DISPUTES of the CONTRACT TERMS AND CONDITIONS--COMMERCIAL ITEMS clause states:

This Contract is subject to the *Contract Disputes Act of 1978*, as amended (41 U.S.C. 601-13). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal, or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, *Disputes*, which is incorporated herein by reference. *The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.*

[emphasis added]

Under FAR 52.233-1, absent a material breach by the Government, the impracticability or impossibility of proceeding with performance, or lack of clear direction by the Government, a contractor is obligated to continue performing a

contract. *ERG Consultants, Inc.*, 92-2 BCA ¶ 24,905; A. N. Xepapas, AIA, VABCA No. 3087, 91-2 BCA ¶ 23,799; *Technocratica*, ASBCA Nos. 46006, *et. al.*, 94-2 BCA ¶ 26,606; *Max M. Stoeckert v. United States*, 391 F.2d 639 (Ct. Cl. 1998); NASH AND CIBINIC, ADMINISTRATION OF GOVERNMENT CONTRACTS, at 939-952 (3rd ed. 1995).

Other than an unsupported allusion in the RESPONSE to a potential violation of a state law by delivering directly to a veteran, ULI provides no justification for its refusal to perform as directed. In the absence of such justification, ULI's decision to abjure its performance obligation is a breach of the Contract and ULI's failure to deliver the VAMC Augusta order as directed provides sufficient basis to find the termination for cause to be proper.

DECISION

For the foregoing reasons, Respondent's, Department of Veterans Affairs MOTION FOR SUMMARY JUDGMENT is **GRANTED**. The appeal of Ultimate Laboratories, Inc. under Contract No. V247P-0073, VABCA-6641, is **DENIED**.

DATE: **November 26, 2001**

RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur:

JAMES K. ROBINSON
Vice Chairman

PATRICIA J. SHERIDAN
Administrative Judge