ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Coastal Government Services, Inc.	)	ASBCA No. 49621
	)	
Under Contract No. N00140-93-C-CC17	)	

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OPINION BY ADMINISTRATIVE JUDGE REED
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT AND
APPELLANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

The dispute arises under a contract for physician services. The portion of the claim remaining before the Board, in the amount of $236,668.29, and interest pursuant to the Prompt Payment Act (the PPA), all under the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-13 (the CDA), seeks to recover payments under the contract that allegedly were withheld improperly by the Government. In the claim, Coastal Government Services, Inc. (Coastal, CGS, appellant, or contractor) asserts that the contract was for a firm fixed-price based on a specified number of contract physician hours and that the Government failed to pay the full contract price.

In the motions to be resolved here, the Government asks for summary judgment (the motion does not address matters related to the PPA) and CGS seeks partial summary judgment. The Government's motion, at 1-2, posits that a prior Board decision which interpreted a "materially identical" contract, held that CGS is entitled only to payment for services actually performed. *Coastal Gov't Servs., Inc.*, ASBCA No. 49625, 97-1 BCA ¶ 28,888. In its response and cross-motion, appellant argues that the contract under which the present appeal arose has significant factual differences from the contract that governed the Board's previous decision, cited above, thereby negating reliance on that decision.

Coastal also argues it is entitled to further discovery. In its cross-motion, CGS contends that the Government owes the full contract amount for those portions of the contract that are firm fixed-priced based on a constructive termination for the convenience of the Government.

STATEMENT OF FACTS PERTINENT TO THE MOTIONS

The Solicitation and the Contract

1. Contract No. N00140-93-C-CC17 (the contract), was awarded to appellant on 14 June 1993, by the Department of the Navy (the Navy or the Government). The contract provided for obstetrics and gynecology (OB/GYN) physician services to be performed by CGS at the Naval Hospital Portsmouth, VA; Portsmouth General Hospital, Portsmouth, VA; and four branch medical clinics in the Norfolk and Virginia Beach, VA area as further described in the solicitation, appellant's initial offer, and its best and final offer. (Complaint and Answer (C&A), ¶¶ 7; R4, tabs 1A (¶¶ 1, 9), 1B (§§ B, C (¶¶ 1.1.1, 1.5.1, 5.1-5.1.1.2)), 13-14, 45-47; Respondent's Motion for Summary Judgment (Gov't mot.) exs. 6 (¶¶ 1-2, 5, 7-8), 7 (¶¶ 2-3), 8-9; Appellant's Opposition to Respondent's Motion for Summary Judgment and Appellant's Cross-Motion for Partial Summary Judgment (app. mot.) response 1, ex. 2, responses to interrogatory No. 8 and request for production of documents)

2. The contract, as initially awarded, provided for the services of four FTE (full-time equivalent) OB/GYN physicians, plus four optional FTE OB/GYN physicians for the base period of performance, 1 August-30 September 1993, with five optional periods of performance ending on 30 June 1998. The services to be provided by "Doctor #1" on behalf of Coastal were described in the payment schedule, contract line item and sub-line item numbers (CLINs) 0001 through 0001AF, as follows:

CLIN	DESCRIPTION	QTY/UNIT	PRICE	AMOUNT
0001	Doctor #1, period of performance 1 AUG 93 through 30 SEP 93	XXXXXXX	XXXXX	XXXXXX
0001AA	Weekday service, Monday through Friday from 0730 to 1700	408.5 hrs	$130.49	$53,305.16
0001AB	Weekday In-House On-Call	NTE [not to exceed] 54 hrs	$130.90	$7,068.60
0001AC	Weekend In-House On-Call	NTE 16 hrs	$126.97	$2,031.52
0001AD	Optional extended	48 hrs	$104.90	$5,035.20

	weekday service, Monday through Friday			
0001AE	Optional weekday In-House On-Call	22 hrs	N/C [no charge]	N/C
0001AF	Optional weekend In-House On-Call	18 hrs	N/C	N/C

CLINs 0002 through 0008AF, "Doctor #2" through "Doctor #4" and "Option Doctor #1" through "Option Doctor #4," were identical except for the CLIN numerals, hourly prices, and extended amounts. CLINs 0010 through 0017AF, provided for the same services during option period I, 1 October 1993-30 September 1994, albeit with increased numbers of hours to cover the greater time period governed by the option and for different hourly prices. (R4, tabs 1A (¶¶ 1, 9), 1B (§ B), 14 (¶¶ 1, 9); Gov't mot. exs. 8-9; app. mot. response 7)

3. At the end of § B of the contract (the payment schedule), the following appeared:

> NOTICE TO OFFERORS: . . . Line Items . . . described as "Optional extended weekday service, Monday through Friday" shall be exercised in any situation where the physician is required by the OB/GYN Department Head or designee to remain at the hospital beyond his or her regularly scheduled 0730 to 1700 weekday shift in order to provide necessary patient care.
>
> . . . .
>
> *NOTE: THE CONTRACTOR WILL ONLY BE PAID FOR THOSE HOURS ACTUALLY APPLIED TO SERVICE OF THIS CONTRACT CONSIDERING ANY PROVISIONS HEREIN REGARDING VACATION TIME, SICK TIME AND HOLIDAYS.

The text of the latter note is identical to that portion of the contract underlying the previous decision relied upon by the Government in its motion. (*Coastal Gov't Servs.*, 97-1 BCA at 144,046-47; tabs 1B, 14, 45-47; Gov't mot. exs. 1, 8-9; app. mot. response 7) The contract provides for no contractor employee vacation, sick time, or other absence except for the contractual requirement for substitute contract physicians by the contractor.

4. The contract further provided in pertinent part:

SECTION C-1

. . . .

1.1.3
The Contractor shall furnish 4 full time OB/GYN physicians on a regular schedule from 0730 to 1700 hours on Monday through Friday throughout the term of this contract . . . . In addition, OB/GYN medical services may be required at any time during the day or the night, including holidays, and are to be provided on a scheduled in-hospital, on-call basis, 24 hours, 7 days a week.

1.1.4
It is essential that continuity of services be maintained to the maximum degree possible; hence, substitution of Contractor employees shall be kept to the absolute minimum necessary to perform the services required and to provide adequate back-up personnel for any planned or unplanned physician absence not exceeding a period of thirty (30) days.

1.1.4.1
To maximize continuity of patient care the number of physicians providing services to an individual obstetrical patient should be maintained at a minimum. Whenever possible, the same physician should provide prenatal, delivery, and postpartum care.

. . . .

1.3
MODIFICATIONS. The Contracting Officer [CO] will designate and authorize an individual to act as [CO's] Technical Representative (COTR). . . . The COTR exclusively represents the [CO] in all technical phases of the work, but is not authorized to issue Change Orders, Supplemental Agreements, or direct any contract performance requiring contractual modification or adjustment. Changes in the scope of work can only be made by modification properly executed by the [CO]. . . .

. . . .

SECTION C-7

OTHER PROVISIONS

7.1
HOURS OF OPERATION

7.1.1
Regular. The contractor agrees to perform [OB/GYN] services on a regular schedule, eight hours per day, Monday through Friday from 0730 hours through 1700 hours with one hour dedicated to lunch, except for Federally established legal holidays and those occasions where the days [sic] workload and/or procedures may necessitate an extension beyond 8 hours.

7.1.1.1
Extended and Emergency Hours. The contractor shall provide in-house coverage in an "on call" status during periods other than normal working hours, to include holidays and weekends. The contractor will be reimbursed at the hourly rate specified in Section B, Services and Prices. The "on-call" OB/GYN shall be physically present in the Hospital at all times when patients are being actively managed in the labor and delivery unit or in the operating room. "On call" is assigned on a rotational basis among the OB/GYN physicians assigned to the OB/GYN Department. "On call" can be expected to occur approximately every 14 days.

7.1.2
The weekly scheduled OB/GYN Specialty Clinic hours shall be from 0800 hours to 1630 hours, Monday through Friday.

7.1.3
A contractor physician shall not leave a tour of duty without a suitable replacement. He/she must also ensure that continuity of care is provided to the patient regardless of contractually scheduled working hours. He/she shall continue working at the end of the shift until arrival of an appropriate replacement to assume responsibility for patient care.

. . . .

> 7.7.5
> Care shall be provided for all patients presenting for care at any time within the minimum hours of clinic operation. Patients will not be declined care on the basis that their treatment cannot be completed during the minimum hours of clinic operation.
>
> . . . .

(R4, tabs 1B, 14, 45; Gov't mot. exs. 8-9)

5. Concerning optional services, the contract specified as follows, in pertinent part:

> H2 OPTION FOR INCREASED QUANTITY - SEPARATELY PRICED LINE ITEM The Government may require the delivery of the numbered line item(s), identified in the Schedule as an option item, in the quantity and at the price stated in the Schedule. The [CO] may exercise the option incrementally at any time during the course of the contract . . . . Delivery of added items shall continue at the same rate that like items are called for under the contract, unless the parties otherwise agree.
>
> H3 OPTION TO EXTEND THE TERM OF THE CONTRACT (FAR 52.217-9) (MAR 1989)
>
> (a) The Government may extend the term of this contract by written notice . . . .

(*Id.*)

6. The contract, at § I, incorporated by reference typical standard provisions for a fixed-price services contract, including, among others: FAR 52.232-1 PAYMENTS (APR 1984), which provides, as pertinent here, that "The Government shall pay the Contractor . . . for . . . services rendered. . . ." and FAR 52.243-1 CHANGES - FIXED-PRICE - ALTERNATE I (APR 1984).[1] The solicitation included the standard provision found at FAR 52.216-1 TYPE OF CONTRACT (APR 1984), which stated that the Government contemplated award of a firm-fixed-price contract. (R4, tabs 1B, 2, 14, 45; Gov't mot. exs. 8-9)

7. Coastal's offer and best and final offer included the following:

> **2.4 PLAN FOR PROVIDING BACK-UP PERSONNEL**

> This section discusses CGS' plan for providing back-up shift coverage during planned and unplanned absences . . . . CGS . . . will be responsible for implementing our contract management procedures on-site and ensuring appropriate shift coverage as required by this solicitation. We ensure that absences - both scheduled and unscheduled - will be covered by a qualified physician. We also ensure that all necessary coverage will be provided during extended and emergency hours. . . .
>
> **2.4.1 Scheduled Absences**
>
> Scheduled absences will be arranged with [Coastal's] Lead Physician (key person) and [Coastal's] Operations Manager. On the 25th of the previous month, the Lead Physician will provide the COTR with a work schedule that lists physicians [sic] names and the dates and times they will provide services. The Lead Physician will provide the COTR with a list of any changes or scheduled absences to the physician schedule in advance as required. He or she will also notify the COTR of any unexpected changes to the work schedule as they occur, as with short notice absences. . . .
>
> **2.4.2 Unscheduled Absences**
>
> There may be instances when physicians are unavailable to report for a shift. This will occur during illnesses and other unanticipated events such as accidents, personal tragedies, and the like. For these reasons, we will maintain a roster of replacement physicians . . . .

(R4, tabs 46-47)

Contract Performance

8. On Monday, 2 August 1993, a CGS physician (Doctor #1) began performing services under the contract for the base period of 1 August-30 September 1993. A time sheet with separate horizontal rows that paralleled the description of services at CLINs ending in AA-AD,[2] was used by the parties to document hours worked on a separate vertical column for each day of the month. The first of the recapitulation items at the bottom of the time sheet form lists "WEEKDAY SERVICE, MON-FRI 0730-1700," followed by a blank line used for the entry of a number of hours. The other recapitulation items follow the description of services for CLINs ending in AB-AD, each with a similar blank line. The time sheet is backed up, more or less,[3] by time sheets of the two apparent subcontractors that provided physicians. Three other contract physicians began performing services on 4,

9, and 10 August 1993. Doctor #1 did not provide services under the contract after 3 September 1993. Replacement Doctor #1 did not start providing contract services until 15 September 1993. Each of the five CGS physicians completed and submitted the time sheets described above. As each physician began performing services pursuant to the CLINs ending in AA, he or she worked the schedule indicated in the contract, that is, each weekday from 0730 to 1700, more or less,[4] except as noted above. The CGS physicians, on various days, as scheduled (in the case of CLINs ending in AB or AC, on-call) or as acknowledged (in the case of CLINs ending in AD, optional extended weekday) by Government scheduling officers, provided services in accordance with CLINs ending in AB through AD. (Statement of Facts 2; R4, tabs 1F, 31-38, 48-49, 88-89; Gov't mot. exs. 8-9; app. mot. response 17, exs. 1 (¶¶ 3-4, 14), 2 (responses to interrogatory Nos. 6-7))

9. By Modification No. P00001 to the contract, dated 15 July 1993, the Government exercised the option for "Option Doctor #1" and "Option Doctor #2" under CLINs 0005 through 0006AF, for the period 1-30 September 1993. CGS was unable to provide the OB/GYN physician services required by the exercise of the option; consequently, the funding for those services was later revoked. (Statement of Facts 5 (¶ H2); R4, tabs 1C, 79-80, 85; Gov't mot. ex. 8) The Board is aware of no claim for hours under those CLINs.

10. By Modification No. P00003, issued unilaterally on 6 September 1993, the CO changed the regular weekday hours from 0730-1700 to 0700-1630 for CLINs ending in AA. Certain language in § C-7, ¶ 7.1.1 of the contract also was deleted to clarify that the regular weekday was greater than eight hours (as originally specified). (Statement of Facts 4 (¶ 7.1.1), 6 (Changes provision); R4, tab 1E; Gov't mot. exs. 8-9)

11. In Modification No. P00002, dated 14 September 1993, the Government exercised a portion of the option for option period I, covering FTE physician services for the period 1 October 1993-30 September 1994, under CLINs 0010 through 0015AF. (Statement of Facts 5 (¶ H3); R4, tabs 1B, 1D, 14, 45; Gov't mot. exs. 8-9; app. mot. responses 2, 15)

12. On or after 1 October 1993, the parties began using a CGS time sheet that indicated as follows:

Scheduled Hours					On-Call Response/Emergencies		
Date	Time In	Time Out	Breaks	Total Hrs	Time In	Time Out	Total Hrs

Below the heading shown above were seven horizontal rows, one for each day of the week. Each contract physician completed entries for the actual hours worked for each day on which services were provided during 1 October 1993-30 September 1994. Appellant's physicians worked differing numbers of hours, often fewer than 9.5 hours on weekdays. On

some weekdays, a contract physician did not work. For a weekday when less than 9.5 hours was worked or no work was performed, CGS physician explanatory entries included "leave," "sick leave," "vacation," or, most often, no entry. During performance, the form of appellant's time sheet changed; however, the same or similar information and entries were documented. Some subcontractor time sheets used during August-September 1993, continued in use for a time after 1 October 1993. The time sheet described above in Statement of Facts 8, also continued in use. CGS physicians, on various days, as scheduled (in the case of CLINs ending in AB, AC, AE, or AF on-call) or as acknowledged (in the case of CLINs ending in AD, optional extended weekday) by Government scheduling officers, provided services in accordance with CLINs ending in AB through AF. (Statement of Facts 11; R4, tabs 23, 25-28, 39-44, 85-86, 90-101; Gov't mot. exs. 8-9; app. mot. responses 17-18, exs. 1 (¶¶ 3-4, 14), 2 (responses to interrogatory Nos. 6-7))

13. For services provided under CLINs ending in AA-AD, for the base and first option periods, 1 August 1993-30 September 1994, appellant invoiced for and was paid for actual hours worked, only. Contract physician lunch break time was not included for payment. (R4, tabs 15-44, 85; Gov't mot. ex. 6 (¶¶ 10-11); app. mot. responses 17-18; Gov't resp. ex. 6a (¶¶ 20-22))

14. In Modification No. P00004, signed by appellant's President on 10 December 1993, and by the CO on 15 December 1993, the parties agreed to the partial, retroactive exercise of a portion of the hours for optional extended weekday services under CLINs 0001AD, 0002AD, 0003AD, and 0004AD. This allowed for payment of appellant's two invoices, both received by the Government on 13 December 1993, for each of the two months in the base period. (Statement of Facts 8; R4, tabs 1F, 15-16)

The Dispute

15. During performance, the parties disagreed on the interpretation of optional extended weekday service (CLINs ending with AD) and its application to hours worked by physicians prior to or after the regular weekday hours. That contention related to whether such hours should be paid under CLINs ending in AB, weekday in-house on-call services, or CLINs ending in AD. The parties also were at variance concerning whether regular weekday hours (CLINs ending with AA) covered physician services on holidays that fell on a weekday. However, no evidence shows any disputation between the parties during performance concerning payment for actual hours worked during regular non-holiday weekday hours[5] (CLINs ending with AA). (R4, tabs 74, 77-78, 82)

16. In a letter to the CO dated 17 May 1995, counsel for CGS submitted to the CO "a request for equitable adjustment [REA] in the amount of $390,675.82 to recover contract payments improperly withheld [by the Government]." The REA suggested that the contract awarded was for a firm fixed-price for the base performance period of 1 August-30 September 1993, and the first option period of 1 October 1993-30 September 1994;

therefore, CGS was entitled to payment of the entire contract price, regardless of actual contract physician performance. Attached to a subsequent letter from counsel dated 19 June 1995, CGS submitted invoices totaling $390,701.56[6], under CLINs ending AA through AD for the base period and the first option period. (R4, tabs 3, 5)

17. By counsel's letter dated 17 August 1995, CGS submitted a certified claim that mirrored its earlier REA and, in addition, alleged entitlement to interest under the PPA on the invoices submitted on 19 June 1995. The Government received the claim on 21 August 1995. (Statement of Facts 16; C&A (¶¶ 4-5, 24); R4, tabs 8-9)

18. The CO allowed the claim in part and denied the claim in part by his final decision (COD) dated 6 February 1996. The CO determined that CGS was entitled to be paid, under CLINs ending in AA, for contract physician services that were provided during the lunch break allowed by the contract (including taking the break). The amount to which CGS was entitled on that account, according to the CO, was $154,007.53 ($19,450.73 for the base performance period plus $134,556.80 for the first option period). The balance of the claim, in the amount of $236,668.29, and all interest claimed pursuant to the PPA, was denied. (C&A (¶¶ 6, 25); R4, tab 12)

19. CGS appealed the COD to the Board by counsel's "Notice of Appeal and Complaint" dated 28 February 1996. The complaint's *ad damnum*, as pertinent here, seeks payment of $236,668.29, and interest under the PPA. The principal sum allowed by the CO for lunch hours is not disputed.

DECISION

Discovery

Summary judgment is inappropriate when a party has not had an adequate opportunity to discover evidence that is essential to its opposition to show a genuine issue of material fact. *See Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986); *Lockheed Martin Corp.*, ASBCA No. 53226, 01-2 BCA ¶ 31,591 at 156,103.

Appellant suggests that it should be allowed to conduct additional discovery concerning "duty schedules" created by the Navy. In response to appellant's interrogatories and document discovery request, the Navy has identified the Government's scheduling officers in 1993-94, for Coastal's OB/GYN contract physicians as well as for Government physicians. The Navy explained, in its discovery responses, how all such physicians were scheduled for on-call hours on weekdays, holidays, and weekends and noted that a search was underway for records of scheduling by the Navy of physicians for weekday and weekend extended and on-call hours. However, concerning hours worked under CLINs ending in AA,

the Navy's response referred appellant to the terms of the contract. (App. mot. at 24-25; appellant's reply to Gov't resp. at 3)

Appellant characterizes the Government's response as an admission that the Navy was "in charge of and controlled the scheduling of physicians under the Contract." However, Coastal undercuts that characterization in the same paragraph of its motion when it correctly states: "With respect to the 'AA' CLINs, Respondent refers to the Contract, and does not identify the method used by the Navy's scheduling officers to schedule Coastal and military physicians." (App. mot. at 24)

As explained in our decision below, the Navy and Coastal interpreted the contract similarly while it was being performed. Performance of OB/GYN physician services under the AA CLINs was required of appellant, without any additional action by either party, after the contract and options were awarded. To the extent that contract physician schedules were coordinated between the parties, such was the result of decisions by Coastal officials, subcontractors, and/or individual contract physicians, not the Government's scheduling officers. Coastal has mischaracterized the Government's discovery responses. Any "duty schedules" that the Government may uncover in its search for discoverable documents cannot remake appellant's "spin" on the contract, as expressed in the affidavit of Coastal's VP and the motion filings, into a reasonable interpretation of the contract. Such documents neither are relevant to, nor will lead to admissible evidence on the issue for which the Government's motion is granted in part. Board Rule 15; Fed. R. Civ. P. 26(b)(1).

Summary Judgment

A party may obtain summary judgment if no material facts are genuinely disputed and that party is entitled to judgment as a matter of law. To determine whether a material fact is disputed, we construe all reasonable inferences in favor of the non-moving party. We neither weigh evidence to determine the truth of a matter nor resolve factual differences in deciding whether a material fact dispute genuinely exists. *Anderson*, 477 U.S. at 247-50, 255 (1986); *Barseback Kraft AB v. United States*, 121 F.3d 1475, 1479 (Fed. Cir. 1997); *Dairyland Power Coop. v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994); *Jay v. Secretary of DHHS*, 998 F.2d 979, 982 (Fed. Cir. 1993); *Elam Woods Constr. Co*., ASBCA No. 52448, 01-1 BCA ¶ 31,305 at 154,545, *aff'd on recon.* (21 Nov. 2001).

The claim underlying the appeal is a contractor claim for which appellant has the burden of proof. The heart of appellant's claim is its interpretation of the contract that the CLINs, once awarded by the Government, became firm fixed-priced requirements for which the Navy owes the full contract amount whether or not appellant's OB/GYN contract physicians provided services. According to that interpretation, the Navy undertook scheduling of both Government physicians and contract physicians. Appellant contends that even if the contract did not require such scheduling, both parties administered the contract by the use of such schedules well before the dispute arose, thereby giving the contract the

interpretation for which appellant now argues. Therefore, submits CGS, the Navy's failure to schedule contract physicians and thus "use" the hours required by the fixed-price CLINs, does not diminish contractor's entitlement to payment of the full amount awarded.

The Navy, as the moving party under its summary judgment motion, interposes the affirmative defense of issue preclusion, arguing that the issues presented here were resolved unfavorably to appellant in a previous appeal under a different but similar contract. *Coastal*, 97-1 BCA at 144,048-50. As to that defense, the Government has the burden of proof.

The Government may satisfy its burden if it can demonstrate the elements of issue preclusion. CGS, as the non-moving party under the Government's motion, must counter with a showing sufficient to demonstrate a material fact genuinely disputed or that the Government is not entitled to judgment as a matter of law. However, conclusory statements or arguments will not suffice to raise a genuine factual dispute. The non-movant's evidence must be sufficient for a reasonable fact finder, drawing the requisite inferences and applying the preponderance of the evidence standard, to decide the issue in favor of the non-movant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25, 327 (1986); *Anderson*, 477 U.S. at 248-52, 254-55; *Applied Cos. v. United States*, 144 F.3d 1470, 1475 (Fed. Cir. 1998); *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1541 (Fed. Cir. 1993); *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987); *Elam Woods*, 01-1 BCA at 154,545.

Issue Preclusion

Issue preclusion or collateral estoppel is appropriate if (1) the issue to be decided here is identical to one decided in the previous action, (2) the issue was actually litigated in the first action, (3) resolution of the issue was essential to the final judgment in that case, and (4) the parties had a full and fair opportunity to litigate the issue in the previous Board case. *Arkla, Inc. v. United States*, 37 F.3d 621, 624 (Fed. Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995); *Lockheed Corp.*, ASBCA No. 39744, 97-1 BCA ¶ 28,757 at 143,517.

a. Identical Issues

We must first define the issues in the previous case and here by comparing the factual and legal framework presented in each. *Arkla*, 37 F.3d at 624-25; *Lockheed*, 97-1 BCA at 143,517.

As we understand appellant's claim, the primary portion concerns payment for the full quantity of hours under CLINs ending in AA through AD. Appellant asserts that these are fixed-priced payment items. An apparent secondary portion of appellant's claim is that the Government must pay under CLINs ending in AA or AB[7] before invoking the lower-priced CLINs ending in AD.

Appellant argues that the issues to be decided are not identical for two reasons. Concerning the overall claim, appellant submits that the Government administered the contract under the first action differently. Therefore, contends appellant, the contract should be interpreted differently than in the first action.

Regarding the secondary portion of the claim, only, appellant argues that the Government did not exercise any option for extended weekday services under the contract considered in the previous Board decision. However, under the contract here, those services were, to an extent, awarded, provided by appellant, and paid for by the Government.

As to the secondary portion of the claim, only, appellant is correct that the issue of award and use by the Government of lower-priced extended weekday services (CLINs ending in AD under the contract here), prior to use of other CLINs awarded for weekday services (ending in AA and AB under the contract here) was not presented in the previous Board appeal. Optional extended weekday CLINs were not exercised under the contract at issue in that appeal. (*Coastal*, 97-1 BCA at 144,046-47, 144,050 n.2 (CLINs ending in AF in the first action); Statement of Facts 2, 8, 11-15; app. mot. ex. 1 (¶¶10-11))

By reference to the Restatement (Second), Judgments, § 27, cmt. c (1982), we have considered the dimensions of this issue to determine whether it essentially differs from the previous decision. We conclude that the differences go to the essence of the dispute to be resolved. Material factual considerations related to the time of day and/or circumstances during which the physician services were performed, either as regular weekday services, as on-call weekday services, or as optional extended weekday services, may be persuasive. Such matters were not considered in the previous decision. Therefore, the issue here is not identical as the Government's motion relates to optional extended weekday OB/GYN physician services. To that extent, the Government's motion must be denied. *See Arkla*, 37 F.3d at 625 (material factual differences may prevent operation of collateral estoppel).

Appellant primarily submits that the Government administered the contract under the first action differently. Concerning this alleged difference, appellant relies on its Vice President's (VP's) affidavit, which states that the Navy, under the contract here, scheduled Coastal's physicians for all work, including regular weekday service, Monday through Friday, during normal duty hours (CLINs ending in AA). According to the affidavit, if the Government did not "identify a physician on its schedule for a given day or week, that physician was not to report to work." The VP notes that as of the summer or autumn of 1994 (the affidavit is uncertain), Navy medical supervisory personnel did not require substitute contract physicians in the event of absences by Coastal physicians having a duration of two weeks or less. The basis for this relaxation of the contract requirements was that OB/GYN patients should be able to enjoy some measure of continuity of services as envisioned by the contract specifications at § C-1, ¶ 1.1.4. (Statement of Facts 4; app. mot. ex. 1 (¶¶ 2-8))

With respect to services rendered under CLINs ending in AA, the Navy has denied the existence of any scheduling procedure for those services and refers instead to the contract language and requirements. This might appear to present disputed facts; however, appellant's affidavit is not a recitation of facts but is the affiant's interpretation of the Navy's "coordination" procedure concerning available OB/GYN contract physicians, which affiant refers to as "scheduling." The Government's response and the undisputed facts are consistent with the only reasonable interpretation of the contract and with the distinction between "coordination" of available physicians as a matter of managing the medical facilities and "scheduling" or "ordering" as a contractual mechanism for obtaining services.

The VP's affidavit fails to set forth specific facts demonstrating the presence of a genuine issue for trial. Instead, the affidavit presents conclusory allegations that are insufficient to sustain the non-moving party's obligations in the face of a summary judgment motion. *Anderson*, 477 U.S. at 249; *Applied Cos.*, 144 F.3d at 1475.

Perhaps more important, the affidavit is an apparent attempt to construe otherwise unambiguous contract language by resort to extrinsic evidence of the contract's meaning. The Board will not consider such evidence when, as here, the contract has but one reasonable interpretation. *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996); *All Star/SAB Pacific, J.V.*, ASBCA No. 50856, 98-2 BCA ¶ 29,958 at 148,235, *aff'd on recon.*, 99-1 BCA ¶ 30,214 at 149,479.

The previous Board decision turned on an interpretation of identical contract provisions and identical circumstances also found here: (1) the note after § B of the contract, (2) the Payments provision of the contract, (3) undisputed time sheets prepared by appellant's OB/GYN contract physicians, and (4) the lack of availability of appellant's physicians on account of voluntary absences initiated not by the Government but by appellant's OB/GYN contract physicians, which absences were the responsibility of the contractor, not the Government. (*Coastal*, 97-1 BCA at 144,047-50; Statement of Facts 3, 6-8, 12-14).

b. Issue Actually Litigated

The previous decision determined the contract type and proper interpretation following submission of evidence and argument. Each party presented evidence of the contract terms and each contended for its contract interpretation. The identical issue presented here, whether the contract and line items were fixed-priced definite quantities for which the Government owed payment in full, was actually litigated and decided. *In re Freeman*, 30 F.3d 1459, 1466 (Fed. Cir. 1994); *Lockheed*, 97-1 BCA at 143,518, *Coastal*, 97-1 BCA at 144,048.

Appellant seems to suggests that its VP's affidavit is additional evidence not before the Board and not previously litigated. However, as we explained above, the affidavit is an attempt to present an enhancement of the same contract interpretation previously argued by appellant and denied by the Board. The contentions presented by this appeal and the affidavit in particular, are an attempt to avoid non-recovery based on the same contract provisions that were previously litigated. *Coastal*, 97-1 BCA at 144,048-49.

In the context of the claims, the language of the contract is clear and unambiguous, as was indicated in the Board's previous decision based on identical pertinent contract provisions. Appellant was obliged under the contract CLINs ending with AA, to provide full-time equivalent contract physician services, Monday through Friday between specified hours on a regular schedule. The regularity of the schedule and the desirability of continuity of care provided by the contract were reinforced by the admonition in the contract that a "contract physician shall not leave a tour of duty without a suitable replacement." (*Coastal*, 97-1 BCA at 144,046, 144,049; Statement of Facts 1-2, 3 (NOTICE TO OFFERORS), 4 (§§ C-1 (¶¶ 1.1.3-1.1.4.1), C-7 (¶¶ 7.1.1, 7.1.2-7.1.3)), 10) Thus, the contract required regular weekday OB/GYN contract physician services starting and ending at a specified time and continuing between those times uninterrupted with no requirement that such services otherwise be scheduled or ordered separately.

The contract envisioned times when appellant might not be able to provide contract physician services. In straightforward language that is consistent with the Payments provision of the contract, a prominent note at the end of the payment schedule stated that payment would be made only for those hours during which services were provided. This was disputed and resolved in the previous decision. (*Coastal*, 97-1 BCA at 144,046-47, 144,049; Statement of Facts 3 (NOTE), 6)

Further, our reading of the contract is consistent with appellant's pre-dispute offer and the parties' conduct in their performance and administration of the required services, matters also litigated and considered in the previous decision. *Coastal*, 97-1 BCA at 144,047-50. Coastal's offer included a process by which the contractor's lead person would provide notice of planned absences that were scheduled in advance by Coastal and its contract OB/GYN physicians, not by the Government, based on appellant's acknowledged responsibility to provide "shift coverage as required by this solicitation." For unplanned absences, Coastal offered its roster of replacement OB/GYN contract physicians. (Statement of Facts 7) There is no evidence that Coastal relied in its offer on Government scheduling or planning of absences for appellant's OB/GYN contract physicians on the weekdays and times specified as the regular shift.

During performance under the contract, time sheets were completed and submitted showing the actual hours during which OB/GYN contract physician services were performed. Based on the accumulated hours shown on the time sheets, appellant invoiced and the Navy paid. During performance within the start and end dates of the claims (and

thereafter for more than seven months), neither party disputed the notion that CGS would invoice and the Navy would pay for actual hours worked, only. When the Government awarded additional OB/GYN contract physician services under the contract which Coastal could not provide, no request for payment for those unperformed services was submitted by the contractor to the Government. Much the same conduct by the parties was proved and considered in the previous decision. (*Coastal,* 97-1 BCA at 144,049-50; Statement of Facts 8-9, 11-16)

CGS argues that Government medical administration personnel, not contract administrators, scheduled work times for contract physician services. With regard to CLINs ending in AA, such scheduling, even if shown, would be contrary to the clear terms of the contract. Moreover, if the Navy scheduled all work hours, the contract modification that later changed the regular hours for contract physician services under CLINs ending in AA would have been unnecessary. Instead, the contract, by its own terms, "scheduled" contract physicians for work under CLINs ending in AA. Navy medical administration personnel had no authority to deviate from the clear terms of the contract. Viewing the record as a whole, any such "scheduling" by Government medical personnel was, in truth, "coordination" of available contract and Government physicians to assure an appropriate level of medical services during regular weekday duty hours. The contract is equally clear that use of CGS physicians under CLINs ending in AB through AF required "scheduling," or more correctly viewed from a contract administration perspective, "ordering" of optional services. The same matters were decided previously when the Board determined: "it was appellant's failure to have physicians available . . . not the Government's failure to order the services" that caused a shortfall in payments. (*Coastal*, 97-1 BCA at 144,050; Statement of Facts 2, 3 (NOTICE), 4 (§§ C-1 (¶ 1.1.3), C-5 (¶¶ 5.1.3.1-5.1.4.3), C-7 (¶¶ 7.1-7.1.3)), 5 (¶ H2), 7-8, 10, 12, 14)

In litigating the contract type and interpretation, the parties presented and the Board construed matters related to the definite and indefinite quantity portions of the contract. *Coastal,* 97-1 BCA at 144,049. In asserting that the Government scheduled or failed to schedule contract physicians, appellant is seeking to repeat matters actually litigated and decided in the previous decision.

Upon award of the contract for the base period and later for the first option period, the services required by the contract under CLINs ending in AA were a contractor obligation. No further action by the Government was required to procure or direct the performance of those services. By award of CLINs ending in AB through AF, indefinite services became available and could then be ordered at the Government's option when needed and in addition to[8] but without regard for the actual performance of fixed-price services required under CLINs ending in AA. *Coastal,* 97-1 BCA at 144,049.

c. Issue Essential to Previous Judgment

The same interpretation of the contract in the previous action, coupled with the same payment schedule language and payment provision, and where considered with the parties' pre-dispute conduct, were the essential ingredients of the Board's previous decision. Those essentials are present again in this case. *Coastal*, 97-1 BCA at 144,049-50.

Interpretation of the contract is the necessary ingredient to the decision in the previous case and here. It is in no way incidental. *Lockheed*, 97-1 BCA at 143,521. Appellant does not contend otherwise.

d. Full and Fair Opportunity to Litigate

Except to the extent that appellant now offers its VP's affidavit, fully considered above, it does not contend that it lacked a full and fair opportunity to present the same facts and to litigate the same issues in the previous action. That decision denied appellant's claims entirely and was susceptible of appeal to higher judicial authority. We conclude that this condition for issue preclusion is fulfilled.

Constructive Termination for Convenience

Appellant's partial summary judgment motion is based on an alleged partial constructive termination of the contract for the convenience of the Government. The motion addresses the alleged outstanding hours not "ordered" by the Government under CLINs ending in AA (App. mot. at 1, 22).

The Board's interpretation of the contract, explained in the previous decision and above, obviates this contention. Beyond our consideration of contract interpretation issues, appellant has not fleshed out in its motion filings, the apparent suggestion of a retroactive partial termination for convenience by the Government following substantial completion of the performance period for the relevant services. Reliance by CGS on *Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988), and *North Chicago Disposal Co.*, ASBCA No. 25535, 82-1 BCA ¶ 15,488, in the REA and claim, is unpersuasive and has previously been rejected by the Board. *Coastal*, 97-1 BCA at 144,048-50.

SUMMARY

The Government's motion for summary judgment is granted except for those portions of the appeal related to payment for optional extended weekday services under CLINs ending in AD. Appellant's motion for partial summary judgment is denied.

Dated: 29 November 2001

STEVEN L. REED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

[1] The record does not explain why the Government did not incorporate the current provision at FAR 52.243-1 CHANGES - FIXED-PRICE (AUG 1987) ALTERNATE I.

[2] The time sheets used by the parties lack a row for CLINs ending in AE; however, six recapitulation items at the bottom of the form may account for all CLINs ending in AA-AF. In any event, the matter is not disputed by the parties as no documented services were provided under CLINs ending in AE-AF during the base period. (Statement of Facts 8, *infra*; R4, tabs 15-16, 48-49; Gov't mot. at 12; app. mot. responses 17-18)

[3] Discrepancies between the apparent subcontractor time sheets and the time sheets used by the parties have not been controverted between the parties in the motions. (Gov't mot. at 12; app. mot. responses 17-18)

[4] As indicated within Statement of Fact 8, above, the time sheets reveal that, on certain days, one or more physicians did not work. The time sheets also show that contract physicians arrived early and/or departed early on various weekdays. In its offer, appellant planned to provide replacement physicians for such absences. In the

interest of doctor-patient continuity, the Government did not require CGS to provide substitute physicians when a physician experienced a scheduled or unscheduled absence; however, while such absences were allowed, the CO neither excused non-performance nor agreed to pay for hours not performed. (Statement of Facts 4, §§ C-1 (¶¶ 1.1.3-1.3), C-7 (¶¶ 7.1-7.1.1, 7.1.2-7.7.5), 7; R4, tabs 46 (¶¶ 2.4-2.4.2), 47 (¶ 2.4.2); Gov't mot. ex. 6 (¶ 9); app. mot. ex. 1 (¶¶ 6-8); Respondent's reply to app. mot. (Gov't resp.) ex. 6a (¶¶ 13-14, 16))

[5] One of appellant's physicians, on the physician's own behalf, not on behalf of CGS, in about November-December 1993, complained that lunch time not taken (*i.e*., the contract physician continued work through the lunch break) should be paid. The physician stated that no lunch break had been taken on account of workload. The CO had earlier opined, among other things, that appellant's physicians would "not be compensated for the lunch hour." (R4, tabs 74-75, 87) In one case, the Government paid for contract physician hours when those physicians did not work. Then-President Clinton declared an additional Federal holiday in April 1994, on the occasion of former President Nixon's funeral. The contract physicians were available to work on the regular schedule but were precluded by Government action. (R4, tabs 81, 96)

[6] The discrepancy between the amounts in the REA and on the invoices is not explained in the record.

[7] CLINs ending in AC, for weekend services, would seem not to be involved in this issue as they are for mutually exclusive time periods (weekday versus weekend).

[8] The times during which services would be performed under CLINs ending in AB through AF are mutually exclusive from the Monday through Friday duty hours required under CLINs ending with AA. (Statement of Facts 2, 4 (§§ C-1 (¶ 1.1.3), C-7 (¶¶ 7.1-7.1.1.1)))

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 49621, Appeal of Coastal Government Services, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals