ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Coastal Government Services, Inc.	)	ASBCA No. 50283
	)	
Under Contract No. N00140-94-C-CC61	)	

APPEARANCE FOR THE APPELLANT: Kenneth A. Martin, Esq.
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APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Robert G. Janes, Esq.
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Fleet & Industrial Supply Center Norfolk
Detachment Philadelphia

OPINION BY ADMINISTRATIVE JUDGE YOUNGER

In this appeal under a contract to staff a hospital emergency room and ambulatory care clinic, appellant contends that respondent breached the duties of cooperation and noninterference by publicly disclosing, in response to a question, that respondent would not be exercising a renewal option, as a result of which appellant incurred extra costs due to staff resignations. Respondent argues that the alleged disclosure did not constitute a breach, and that, in any event, the conduct complained of is barred by a release. Only entitlement is before us. We deny the appeal.

FINDINGS OF FACT

1. Effective 8 March 1994, respondent awarded appellant Contract No. N00140-94-C-CC61 to furnish emergency medicine and ambulatory care at the Naval Hospital, Jacksonville, FL. Appellant's business is supplying physicians and other medical personnel to a site for the Government (tr. 1/23, 124). The contract scope of work was divided into five lots. Each lot included both emergency and ambulatory care. Lot 1 consisted of a base period from 1 July 1994 to 30 September 1994, and lots 2 through 5 consisted of four option years thereafter. (R4, tab 1 at 170-76) The contract contained various standard clauses, including: FAR 52.217-8 OPTION TO EXTEND SERVICES (AUG 1989) and FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989), which had "thirty days" inserted in paragraph (a) and "forty-eight months" inserted in paragraph (c). (*Id.* at 314, 319)

2. By Modification No. P00006, effective 1 October 1994, respondent exercised the first option under the contract, for the period 1 October 1994 to 30 September 1995 (R4, tab 1 at 158-59).

3. In the fall of 1994, respondent's Bureau of Medicine and Surgery (Bureau) internally considered staffing the emergency room at the hospital entirely with active duty military personnel when the first option year expired (app. supp. R4, tabs 1, 2). Respondent did not advise or consult appellant as it evaluated this staffing choice (tr. 1/26, 80). The Bureau's consideration was prompted by a need to place increasing numbers of uniformed emergency room physicians necessary to meet wartime requirements (tr. 1/128-31, 166-67).

4. When it reached a decision, the Bureau faxed to the hospital's commanding officer, Dr. Vertrees Hollingsworth, a memorandum dated 1 February 1995 stating that it had decided "to replace contracted [emergency room] physicians with Navy physicians" and nurses by 30 September 1995, but to retain the ambulatory care portion of the contract (app. supp. R4, tab 4 at 1-2; tr. 1/153, 156-57). We find that Dr. Hollingsworth learned that the Bureau's decision was final by receipt of the fax on 1 February 1995 (tr. 1/143-44).

5. Following receipt of the Bureau's decision, Dr. Hollingsworth assembled a task force, which later began meeting in March. That group was to prepare a transition plan to assure uninterrupted staffing of the emergency room, which experienced 125 to 140 patient visits per day, to meet patients' needs (tr. 1/90, 106, 109; *see also* app. supp. R4, tab 15). He and the contracting officer thereafter met with appellant's project manager and others on Friday, 3 February 1995, and informed them of the decision (1/83-86, 144, 165-68). At the meeting, appellant's project manager stated that "if this word leaks out, we're going to have some significant problems in retaining staff" (tr. 1/167), to which Dr. Hollingsworth did not respond (tr. 1/167; *see also* tr. 1/92). Appellant's contracts with its physicians contained a 60 day notice requirement in the event that they resigned, while other staff had a two week notice requirement (app. supp. R4, tab 7; tr. 1/171).

6. It is undisputed that, on the following Monday, 6 February 1995, Dr. Hollingsworth participated in a monthly orientation for new hospital employees and, during his portion of the presentation, answered questions from the audience, as was his practice (tr. 1/144-45). As described in a memorandum from the contracting officer's representative of the same date:

> During Command Orientation the C.O. was asked about the E.R. contract conversion back to the military. The C.O. said it would be effective 1 Oct 95. Two Coastal Gov't Svcs. employees were in the orientation at the time. They came back to the E.R. and informed more C.G.S. staff.

(App. supp. R4, tab 5; G. ex. 1 at 1, 2) We find no evidence that the employee's question was solicited. We further find that Dr. Hollingsworth's response did not contain anything that was either untruthful, gratuitous or other than informational. Dr. Hollingsworth testified, and we find, that he responded as he did based upon his perception of his moral obligation (tr. 1/100). His "only operating theory was that I had to be honest with my troops," whom he "viewed . . . as part of the management solution to problems" (tr. 1/85, 102; *see also* tr. 1/86-87, 94). While Dr. Hollingsworth could have responded that he was "not at liberty to say," he did not want to obfuscate or lie, and had only once declined to answer a question when a direct response would implicate national security (tr. 1/86, 91-92, 142-43, 146, 148, 150-51). He knew of nothing in the contract "that would tell me what I could say or not say" (tr. 1/147).

7. We find that the conversion had been rumored in the hospital since the previous December (tr. 1/111). While the project manager testified that, had the emergency room physicians learned of the respondent's decision in August 1995, "[w]e could have held them to that 60 day notice [requirement] that they signed in their contracts" (tr/1/171; *see* finding 5), we do not find it credible that the information could have been withheld for six months. Instead, we find credible Dr. Hollingsworth's testimony that at the time of the orientation he "considered [the Bureau's decision] already fairly well known. I told [appellant's] management. Most of my senior staff knew about it. I figured everybody in the hospital would know by the end of the day" (tr. 1/146; *see also* tr. 1/90, 110-11, 2/53-55).

8. It is undisputed that, over the two months following the Bureau's decision and Dr. Hollingsworth's response at the orientation, appellant experienced staff resignations in the emergency room (app. supp. R4, tabs 10 at 2, 14, 16, 17, 20; tr. 1/114-18, 175, 177)

9. By letter to the contracting officer dated 9 February 1995, appellant asserted that Dr. Hollingsworth's response at the orientation "interferes with [appellant's] ability to meet its current shift obligations" under the contract, inasmuch as appellant's "physicians and other personnel have begun seeking alternative employment." (Compl., ex. E) Appellant further asserted that, to overcome the resulting staff shortages, it would be compelled to hire *locum tenens* physicians at premium rates and pass the unspecified increased costs on to respondent. Typically, *locum tenens* physicians are hired to fill short term needs and are more expensive than permanent physicians (tr. 1/120-21). Appellant also offered respondent the opportunity to supplement appellant's staff with military physicians, and requested a response as soon as possible. (Compl., ex. E at 1)

10. By letter dated 16 February 1995, the contracting officer formally notified appellant that respondent "intends to convert the emergency room portion of the [contract] to a facility utilizing all Government personnel." The contracting officer also requested that appellant provide a preliminary proposal "for the anticipated contract costs to provide [ambulatory care clinic] services only" (app. supp. R4, tab 11). At trial, respondent stipulated that, in this letter, he did "not ask for proposals for any costs associated with the

emergency room based on the conversion" (tr. 2/31). The contracting officer testified that his letter was "not worded as well as it could be, . . . but . . . , with the timing of it so soon after [appellant's] 9th of February letter . . . , I believed this was my response to put [appellant] on notice to give me [all of the] costs involved to delete an [emergency room]" (tr. 2/29; *see also* tr. 2/15).

11. The contracting officer testified, and we find, that following his 16 February 1995 letter, "[t]he effective date of everything that [we] are negotiating is 1 October" 1995 (tr. 2/16), after the events and costs at issue here. By letter to the contracting officer dated 10 March 1995, appellant submitted its preliminary proposal "to provide Ambulatory Care Clinics . . . services . . . for the period 01 October 1995 thru 30 September 1996 and two option periods" (compl., ex. J at 1). Thereafter, by letter to appellant dated 21 June 1995, the contracting officer requested a "quotation for a modification to the current contract . . . from EMAC services to Ambulatory Care Clinic Services only" (compl., ex. K). Appellant responded by letter dated 21 August 1995 with a quotation for the specified services "for the period 01 October 1995 thru 30 September 1996 and two option periods" (compl., ex. L at 1). By letter to the contracting officer dated 28 September 1995, appellant also furnished the contracting officer with a response to his request for revisions to the 21 August 1995 quotation, reiterating that the quotation "is for the period 01October 1995 thru 30 September 1996 and two option periods" (compl., ex. M at 1).

12. The parties entered into Modification No. P00013, effective 1 October 1995, changing the contract to delete emergency room services and to provide for ambulatory care clinic services only (R4, tab 1 at 20-21, 173-75). Paragraph E of Modification No. P00013 read as follows:

> The Contractor, for itself and its successors, assigns, releases and forever discharges the Government of and from all manner of actions, causes of actions [sic], suits, precedings [sic], debts, dues, judgements [sic], damages, claims and demands whatsoever in law or equity or under administrative procedures against the Government which the Contractor ever had, now has and may have for or by reason of any matter or thing or cause whatsoever arising out of contract N00140-94-C-CC61, Modification P00013. This document contains the complete agreement of the parties. There are no other collateral agreements, either written or oral. Any changes to this modification must be in writing and signed by both parties.

(*Id.* at 21) At trial, respondent "concede[d] that the release language could have been more clearly worded to clearly wipe out this potential claim" (tr. 1/18).

13. We find the testimony that the parties discussed the present claim before execution of the modification unpersuasive. Respondent's negotiator for the modification was one Wilfred Healie (tr. 2/8, 33), but he did not testify, and the contracting officer did not participate in the discussions with appellant (tr. 2/18). Respondent did not locate a price negotiation memorandum (tr. 2/18-19). By contrast, appellant's chief financial officer testified that she and Mr. Healie "were talking strictly about 1 October '95 forward, nothing concerning our prior notice on February 9th of that same year with respect to our claim on the ER services" (tr. 1/50; *see also* tr. 1/43, 51-52).

14. By letter to the contracting officer dated 16 November 1995, appellant's chief financial officer opined that "[t]he modification does not preclude [appellant] from recovering its increased costs incurred prior to P00013 as outlined in [the] . . . letter to you, dated February 9, 1995" (compl., ex. O). Thereafter, by memorandum to the file dated 22 November 1995, appellant's chief financial officer memorialized a telephone conversation with Mr. Healie on or about that day. She stated that she clarified her letter by explaining to Mr. Healie that the disclaimer in the modification

> did not apply to . . . [appellant's] recovery of increased costs related to the conversion from contract staffing in the ER to military staffing. . . . [Mr. Healie] stated that he understood there was a pending claim for . . . ER staff. In addition, the basis of the claim was outlined in [appellant's] letter of 09 February 1995.
>
> [Mr. Healie] said he was clear on the meaning of my letter and would pass it on to [the contracting officer].

(App. supp. R4, tab 39) By letter to appellant's chief financial officer dated 22 November 1995, the contracting officer stated that paragraph E of the modification "constitute[s] a release from all claims associated with the change" to ambulatory care clinic services only (compl., ex. P).

15. By letter to the contracting officer dated 8 May 1996, appellant submitted a certified claim for $750,093.59, which was said to arise from respondent's breach of its implied duties of non-hindrance and cooperation by respondent's failure to consult appellant between the Fall of 1994 and 3 February 1995 regarding plans to replace contracted emergency physicians with Navy physicians, and by Dr. Hollingsworth's response at the orientation (R4, tab 2 at 2, 5; *see also* findings 4, 6). Thereafter, the contracting officer denied appellant's claim by decision dated 15 August 1996 (R4, tab 3). This timely appeal followed. At trial, appellant explained that "the case hangs on the change which occurred before [Dr. Hollingsworth's] announcement, but the announcement is what precipitated the staff to leave when they did" (tr. 2/49).

DECISION

A. Release

Conceding that the claimed costs relating to Dr. Hollingsworth's announcement "were neither proposed nor otherwise addressed" in the negotiation of Modification No. P00013, respondent nonetheless argues that the release in the modification unambiguously precludes recovery of those costs. Respondent maintains that the only time that appellant broached the issue was in its 9 February 1995 letter (*see* finding 9), to which the contracting officer replied in his 16 February 1995 letter (*see* finding 10), but heard nothing further until the following November (*see* finding 14). Respondent also insists that the contracting officer had no discussions with appellant's chief financial officer until after the November 1995 letter. (Government's Post-Hearing Brief at 6-8) For its part, appellant contends that the parties did not intend that Modification No. P00013 would bar appellant's claim. Appellant urges the modification dealt only with the period from 1 October 1995 onward, related to ambulatory care services only, and did not reference conversion of the staffing of the emergency room. Appellant insists that the parties treated ambulatory care services and emergency room staffing as separate items in negotiating the modification. (Appellant's Post-Hearing Brief at 3)

The parties have treated accord and satisfaction and release interchangeably, but we do not regard the issue to be whether a "substituted performance [was] accepted by the claimant as full satisfaction of the claim." *CTA, Inc.*, ASBCA No. 47062, 00-2 BCA ¶ 30,947 at 152,752. Rather the issue is whether appellant released its claim to alleged costs arising from the Bureau's decision and Dr. Hollingsworth's response to the question at the orientation by executing the modification.

We conclude that appellant's present claim is not barred by paragraph E of the modification. We reach this conclusion for two principal reasons.

First, the terms of the modification do not plainly bar the present claim. In paragraph E, appellant released any claim "arising out of contract N00140-94-C-CC61, Modification P00013" (finding 12). We agree with respondent's concession at trial that "the release language could have been more clearly worded to clearly wipe out this potential claim" (*id*.).

Second, we look to extrinsic evidence, inasmuch as the terms of the release do not plainly bar the claim. "Release or waiver of claims is basically a matter of intention." *Maintenance Engineers*, ASBCA No. 23131, 81-2 BCA ¶ 15,168 at 75,073. We have consistently construed releases by reference to the surrounding circumstances to give effect to the parties' intentions. *E.g., Hunt Building Corp.*, ASBCA No. 50083, 97-1 BCA ¶ 28,807 at 143,700; *Varaburn Ltd. & Lin Heng Engineering Ltd., A Joint Venture*, ASBCA No. 22177, 82-1 BCA ¶ 15,744 at 77,926. In this regard, we have given the

parties' contemporaneous actions "great weight" in determining their intentions. *Maintenance Engineers*, *supra*, 81-2 BCA at 75,073.

The surrounding circumstances fail to establish that the parties released the present claim. It is true that appellant stated in its 9 February 1995 letter that it was incurring unspecified increased costs (finding 9), but the contracting officer's 16 February 1995 letter was not responsive in that it did "not ask for proposals for any costs associated with the emergency room based on the conversion," as respondent stipulated (finding 10). Thereafter, as the contracting officer testified, "[t]he effective date of everything that [we] are negotiating is 1 October" 1995, *after* the period of incurrence of the costs claimed here (finding 11). The evidence that the parties discussed the present claim before the modification is unpersuasive (findings 13).

B. Cooperation and Noninterference

On the merits, appellant focuses upon two events, contending that it is entitled to recover the costs incurred as a result of respondent's interference, noncooperation, and constructive change "arising from [1] the conversion of the emergency room and [2] the 6 February 1995 announcement." (Appellant's Post-Hearing Brief at 3) Appellant urges that Dr. Hollingsworth's response at the orientation caused an immediate impact on appellant's continued ability to perform its contract by precipitating resignations and disruption. Appellant also contends that the disclosure that an option would not be exercised was premature and extraordinary, causing appellant to incur extra costs. Appellant stresses that, if it had had the opportunity to control the timing of the announcement that further options would not be exercised, it could have used the notice requirements in its employment contracts to retain staff. (Appellant's Post-Hearing Brief at 31-32) In its defense, respondent asserts that appellant cites no cases "remotely on point" and that cases in which breaches of the two duties have been found involve "some egregious Government conduct, or misconduct, some clearly unreasonable if not dishonest behavior." (Government's Post-Hearing Brief at 11) Respondent insists that its conduct here cannot be so characterized.

The applicable principles are well settled. As we said in our previous decision on respondent's motion for summary judgment, "respondent's implied duty to cooperate is 'to do what is reasonably necessary to enable the contractor to perform.' *SEB Engineering, Inc.*, ASBCA 39728, 94-2 BCA ¶ 26,810 at 133,352." *Coastal Government Services, Inc.*, ASBCA No. 50283, 99-1 BCA ¶ 30,348 at 150,088. Determination of a breach of the duty requires a reasonableness inquiry. "The nature and scope of that responsibility is to be gathered from the particular contract, its context, and its surrounding circumstances." *Commerce International Company, Inc. v. United States*, 338 F.2d 81, 86 (Ct. Cl. 1964). By contrast to the affirmative duty to cooperate, the implied duty of noninterference is a negative obligation that "'neither party to the contract will do anything to prevent performance thereof by the other party or that will hinder or delay him in its performance.'" *Lewis-Nicholson, Inc. v. United States*, 550 F.2d 26, 32 (Ct. Cl. 1977) quoting *George A.*

Fuller Co. v. United States, 69 F. Supp. 409, 411 (Ct. Cl. 1947); *Nanofast, Inc.*, ASBCA No. 12545, 69-1 BCA ¶ 7566 at 35,049.

We conclude that respondent did not breach the implied duties of cooperation and noninterference by either the Bureau's decision or Dr. Hollingsworth's disclosure. We reach this conclusion for three principal reasons.

First, we reject the proposition that respondent breached either duty in reaching its decision not to exercise further options for emergency room care. As stated in this portion of the claim, the breach lay in a "failure to consult" appellant, but, as stated in appellant's brief, the breach is said to result from "the conversion of the emergency room." (Appellant's Post-Hearing Brief at 3; *see* findings 3, 4, 12, 15) At trial, appellant explained that its case hung "on the change which occurred before [Dr. Hollingsworth's] announcement" (finding 15).

With respect to the first formulation, while respondent did not consult appellant (finding 3), "[t]he exercise of an option is within the broad discretion of the Government." *Plum Run, Inc.*, ASBCA Nos. 46091 *et al.*, 97-2 BCA ¶ 29,193 at 145,230. Appellant points to no contractual or other duty requiring that appellant be included in respondent's decision. The standard option clauses in the contract (*see* finding 1) impose no such duty. With respect to the second formulation, the record also fails to establish that respondent violated a duty in the decision to forego further option years.

Second, we reject the argument that Dr. Hollingsworth's response breached the duty of cooperation. Measuring the facts of record against the reasonableness standard, *Commerce International, supra*, 338 F.2d at 86, we cannot say that the response itself, considered in isolation, was unreasonable. The question that elicited the response was unsolicited (finding 6). The terms of the response were truthful, and contained nothing that was gratuitous or other than informational (*id*.). We have not been persuaded that alternative terms, such as that Dr. Hollingsworth was "not at liberty to say," were contractually mandated.

Appellant nonetheless insists that it is entitled to breach damages because of the context of the response. That is, appellant stresses that it was deprived of the "opportunity to prepare and to control the timing of the announcement" and that, had it been allowed to do so, it "could have retained [its] staff under notice restrictions in their employment agreement[s]." (Appellant's Post-Hearing Brief at 31-32) Appellant's project manager opined that, had disclosure been withheld for 6 months, until August, appellant could have held its emergency room physicians to the 60 day notice requirement (*see* finding 7). On this record, we reject this argument as little more than wishful thinking. Rumors of conversion had been afloat in the hospital since December 1994 (*id*.). The Bureau reached its decision, and Dr. Hollingsworth communicated it to appellant, at the beginning of February 1995 (findings 4, 5). The Bureau's decision was "already fairly well known" by the

time of the orientation on 6 February 1995 (finding 7). Most of the senior staff were aware of the decision when Dr. Hollingsworth responded to the question (*id*.); the inference from the fact that an employee knew enough to ask Dr. Hollingsworth "about the E.R. contract conversion" (*see* finding 6) is that a good deal was known about the decision below the senior staff level as well. Dr. Hollingsworth had assembled a transition task force, which began meeting the next month (finding 5).

We also find no merit to appellant's stress on its project manager's warning at the 3 February 1995 meeting that "if this word leaks out, we're going to have some significant problems in retaining staff" (*id*.). The duty to cooperate, like the duty not to interfere, "does not require the Government to do whatever a contractor demands." *American Combustion, Inc.*, ASBCA No. 43712, 94-3 BCA ¶ 26,961 at 134,245.

Third, we reject the argument that Dr. Hollingsworth's response breached the duty of noninterference. The parties' contentions regarding the breach of this implied duty are essentially the same as those advanced regarding the duty to cooperate. We again conclude that the terms of Dr. Hollingsworth's response, considered in isolation, did not hinder appellant's performance. In addition, the response, considered in context, did not hinder appellant's performance.

CONCLUSION

The appeal is denied.

Dated: 20 March 2001

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

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. 50283, 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