

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION FOR SUMMARY RELIEF GRANTED IN PART: June 1, 2006

GSBCA 16363-SSA

P&C PLACEMENT SERVICES, INC.,

Appellant,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

Thomas D. Rosenwein of Gordon, Glickman, Flesch & Rosenwein, Chicago, IL,
counsel for Appellant.

Clary Hanmer, Office of the General Counsel, Social Security Administration,
Baltimore, MD, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **PARKER**, and **HYATT**.

DANIELS, Board Judge.

P&C Placement Services, Inc. (P&C) claims that the Social Security Administration (SSA) owes it \$223,504.07 under a contract for the provision of nursing services. SSA has moved the Board to grant it summary relief from P&C's appeal of the contracting officer decision which denied the claim. We grant the motion in part.

Undisputed Facts

The following facts are adapted from Respondent's Statement of Undisputed Facts, as modified to include only portions of the statement which are not challenged in appellant's response to it.

On May 30, 2001, SSA awarded to P&C contract number 0600-01-55002, for nursing services at the Harold Washington Social Security Center (HWSSC) in Chicago, Illinois. Appeal File, Exhibit 1 at 1 of contract. The contract was for the period from June 1, 2001, through May 31, 2002, and contained four one-year option periods. *Id.* at 2 of contract. SSA exercised the options for the first option period (June 1, 2002, through May 31, 2003) and the second option period (June 1, 2003, through May 31, 2004). *Id.* at modifications #1, #2.

The contract required P&C to provide both general and occupational health nursing services and emergency occupational health nursing services. Included among the first category was assistance in the performance of clinical activities such as "administer immunizations, inoculations, allergy treatments and medications in the Health Unit; perform first aid for minor burns, cuts, bruises and sprains; and obtain patient histories." Also among the first category's tasks were "ensur[ing] that medications, selective supplies (syringes, etc.), medical records and files are maintained in secure, locked storage" and "[p]rovid[ing] informal training classes or sessions to Government employees at the HWSSC or at any other location within the Chicago metropolitan area, as directed by the Government Project Officer." Appeal File, Exhibit 1 at 2-3 of contract.

The contract required P&C to "furnish qualified nurses as required to insure full coverage at the Health Unit from 6:00 AM to 6:00 PM daily, Monday through Friday, excluding Federal holidays." P&C had to provide one registered nurse (RN) on a full-time basis (eight hours per day). "Additionally, the contractor [had to] provide any other nurse(s) necessary to provide full coverage during scheduled break and lunch periods and during the full-time RN[']s off work hours. The additional nurse(s) may be either full-time or part-time RNs or Licensed Practical Nurses (LPNs), at the contractor's discretion." Appeal File, Exhibit 1 at 6 of contract.

The contract included, for each contract year, one hourly price for providing RN services and another for providing LPN services. The price for RN services was higher than the price for LPN services in each contract year. For the initial contract period, the hourly prices were \$34.63 for RN services and \$29.58 for LPN services. For the first option year, the hourly prices were \$38.09 for RN services and \$32.54 for LPN services. For the second option year, the hourly prices were \$41.09 for RN services and \$35.79 for LPN services. Appeal File, Exhibit 1 at 4 of contract.

The contract stated that the Department of Labor had issued a wage determination to cover the wages and health and welfare benefits to be paid to RNs and LPNs who performed services under the contract. The wage determination applicable at the beginning of the contract required that each “Registered Nurse I” be paid at least \$16.26 per hour and that each “Licensed Practical Nurse I” be paid at least \$12.14 per hour. The wage determination also required that \$1.92 be paid per hour for health and welfare benefits for each of the nurses. Appeal File, Exhibit 1 at 13 of contract, Exhibit 4.

P&C’s president, Patricia A. Maddox, understood when P&C offered to perform the contract that the contract required the provision of “[b]asic registered nurse one” services. Respondent’s Motion for Summary Relief (Motion), Exhibit 1 at 31.

The contract required P&C to identify key personnel, and the contractor named Joanne Colclasure, RN, and Margaret Gilbertsen, RN, as its key personnel. Appeal File, Exhibit 1 at 5 of contract. Beginning in June 2001, P&C provided these individuals to perform work under the contract. Respondent’s Statement of Undisputed Facts ¶ 17. The contract permitted the provision of substitutes for the key personnel when the individuals named “are unable or unavailable to perform the required work on any given day.” Appeal File, Exhibit 1 at 7-8 of contract.

The contract did not provide for a physician to direct the nurses or to work with the nurses. Indeed, it made no mention of a physician’s presence in the Health Unit. Respondent’s Statement of Undisputed Facts ¶¶ 24-25.

The contract stated that performance of P&C’s work “shall be subject to the technical direction of the Project Officer.” The contract identified the project officer as Sonya Peques. Appeal File, Exhibit 1 at 6-7 of contract. (Her last name is spelled “Pegues,” however, throughout the parties’ filings and in most of the appeal file documents.) “Technical direction must be within the general scope of work stated in the contract.” If the contractor believed that any instruction or direction issued by the project officer was not authorized, it could ask the contracting officer “to modify the contract accordingly.” If the contracting officer took action and the contractor disagreed with that action, the contractor could initiate a dispute. *Id.* at 7 of contract.

On November 10, 2003, P&C submitted a “cost impact statement” to the contracting officer. In the cost impact statement, P&C sought adjustments to the contract amount on seven separate bases, which we call elements of the claim and which are set out in numbered paragraphs below. Appeal File, Exhibit 32.

(1) In the cost impact statement, P&C alleged that in July 2001, the SSA project officer had directed the contractor to cease providing LPN services after August 2001. Appeal File, Exhibit 32 at 2. P&C stated:

As part of its bid process on contract Number 0600-01-55002, P&C used LPNs to the maximum amount allowable under the law. When P&C was informed by Ms. Pegues, the Government Technical Director, that P&C could no longer provide LPNs, the Government's actions severely impacted P&C's bottom line. LPNs were more plentiful and cheaper to hire. The inability to provide these personnel hurt P&C, as did the fact that the escalating costs in a market where the demand for RNs was at an all time high. SSA never compensated P&C for the increased costs incurred due to this change.

Id. at 2-3. P&C claimed that the impact of the project officer's directive was as follows: For the initial contract year (beginning on June 1, 2001, and ending on May 31, 2002), 1385.75 hours were worked by RNs which could have been worked by LPNs, and multiplying this number of hours by the difference in hourly rates between RNs and LPNs, and adding markups for general and administrative expenses, an adjustment of \$14,151.28 was due. Similarly, the figures for the first option period were 1616 hours and an adjustment of \$14,802.29, and the figures for the second option period through October 31, 2003, were 753.75 hours and an adjustment of \$8321.40. *Id.*, Attachments A-C.

(2) In the cost impact statement, P&C alleged that because of the project officer's directive, the contractor had to fire Ms. Er'na Davis, an LPN, and that as a consequence of the ensuing unemployment hearing involving Ms. Davis, the rate charged P&C for unemployment insurance premiums sextupled. Appeal File, Exhibit 32 at 3; Motion, Exhibit 1 at 217-18. For the period from January 1, 2002, to "present," P&C sought an adjustment in the contract amount of \$22,941.57. Appeal File, Exhibit 32, Attachment D.

In its complaint, however, P&C alleged that in following the project officer's directive, it "told the LPN(s) that it had on staff that . . . *they* would no longer be allowed to work at the HWSSC." Complaint ¶ 33 (emphasis added). P&C also alleged in its complaint that "[n]ot allowing LPNs, triggered unemployment hearings," with the last word being plural. *Id.* ¶ 39. Additionally, P&C President Maddox has acknowledged that during the period when the contract with SSA was in effect, she fired other employees – key personnel Joanne Colclasure and Margaret Gilbertsen for not following protocol or for failure to make her aware of issues, Dawn Monk for issues involving her arrival for scheduled shifts, and Marge Bunnell because she had a conflict with an SSA employee named Jackie. Motion, Exhibit 1 at 200-04.

(3) In the cost impact statement, P&C alleged that the work performed by nurses under the contract should have been classified as Registered Nurse II (occupation code 12312), rather than Registered Nurse I (occupation code 12311). P&C said that it was concerned that if the Department of Labor were to determine that the nurses were performing Registered Nurse II duties, but were being paid at Registered Nurse I rates, “the contractor places itself in harm[']s way and faces possible penalties and fines.” As a result, the contractor said, it had to pay nurses at a higher rate than anticipated. Appeal File, Exhibit 32 at 4-5. For the period from June 1, 2003, through October 31, 2003, multiplying the number of hours worked by RNs by the difference in hourly rate between \$60 and the contract rate of \$41.09, P&C sought an adjustment in the contract amount of \$36,463.40. *Id.*, Attachment E.

P&C paid its RNs between \$22.50 per hour and \$24.50 per hour in 2003. Respondent’s Statement of Uncontested Facts ¶ 51. The range was \$22 to \$25 per hour during the period from contract inception to the date on which the cost impact statement was submitted to the contracting officer. Motion at 8 (referencing Exhibit 3 thereto).

(4) The contract required that “[a]ll technical directions shall be issued in writing by the Project Officer or shall be confirmed by him/her in writing within 5 working days after issuance.” Appeal File, Exhibit 1 at 7 of contract. In the cost impact statement, P&C alleged that a major issue during contract performance was the project officer’s refusal to put directions in writing. The project officer’s failure to put directions in writing was a particular problem, according to the contractor, because nurses are accustomed to operating under written orders. *Id.*, Exhibit 32 at 6-7. “The Government’s inability to follow procedures as outlined in its own contract increased the contractor’s administrative costs as the contractor was forced to accept the increased administrative responsibilities in order to retain personnel and comply with other rules and regulations.” *Id.* at 7. Allegedly, the project officer’s actions caused one RN to resign, which in turn caused P&C “to lose revenue and increased administrative costs.” *Id.* P&C maintained that it lost 193 billable hours “due to loss of RN caused by Govt interference,” with a resulting cost impact of \$9910.91. *Id.*, Attachment F.

(5) In the cost impact statement, P&C sought an adjustment of \$68,073.60 to the contract amount for 1021 hours of “additional administrative costs.” Specifically, P&C alleged that it spent 300 additional hours during the initial contract period, at a rate of \$52 per hour; 345 additional hours during the first option year, at a rate of \$56 per hour; and 376 hours during the second option year to “present,” at a rate of \$58 per hour. Appeal File, Exhibit 32, Attachment G.

(6) In September 2003, an SSA employee who was a colleague of the project officer told P&C to accept delivery of flu vaccine. P&C’s president and the contracting

officer then engaged in a discussion about whether P&C's nurses could administer the vaccine in the absence of a licensed physician. Appeal File, Exhibit 12. P&C maintains that its president incurred costs in researching whether the presence of a physician was necessary for the administration of the vaccine. Motion, Exhibit 1 at 230-32.

In the cost impact statement, P&C alleged that it had "increased legal and administrative costs due to the inability to rely upon the Government." Appeal File, Exhibit 32 at 10. The contractor appears to allege that these costs were related to the dispute about the necessity of the presence of a physician. *Id.* at 8-10. P&C sought \$46,020.82 for "unpaid directives." The invoices involved in this matter were dated June 4, 2003 (\$1413.27); June 4, 2003 (\$1854.62); June 30, 2003 (\$12,797.31); July 8, 2003 (\$1007.86); August 7, 2003 (\$3328.16); August 14, 2003 (\$4265.77); September 26, 2003 (\$4265.77); September 28, 2003 (\$7567.92); and October 30, 2003 (\$1850.00). The remainder of the total consists of markups for general and administrative expenses and profit. *Id.*, Attachment H.

(7) P&C also sought \$2,818.80 for preparation of the cost impact statement itself. Appeal File, Exhibit 32 at Attachment I. The total amount sought was \$223,504.07. *Id.*, Attachment J.

On January 30, 2004, P&C submitted to the contracting officer a certification of its November 16, 2003, cost impact statement, designated the statement as a claim, and requested a decision on it. Appeal File, Exhibit 37.

On February 10, 2004, the contracting officer denied the claim. Appeal File, Exhibit 39. The contracting officer reasoned as described below, with numbered paragraphs corresponding to the elements of the claim. P&C does not accept the reasoning, but we set it out in the interest of making clear the stated justification for the denial.

(1) As to the directive to preclude use of LPNs, whether such a directive was ever issued has not been shown, but if it was, it had no cost impact because P&C properly billed for RN services at the contract rate for those services and was properly reimbursed at that rate.

(2) As to the increased unemployment insurance premiums, all personnel costs, including unemployment insurance premiums, are the contractor's responsibility.

(3) As to the alleged misclassification of nurses, the scope of work was included in the original solicitation and contract and should have been addressed prior

to award of the contract. Further, the rate of \$60 per hour proposed for Registered Nurse IIs is unsupported.

(4) As to costs allegedly incurred because of the project officer's interference, the project officer has presented a different version of the occurrences and the allegations have not been substantiated.

(5, 6) As to alleged additional administrative costs, "[t]he amounts claimed . . . are not supported by any documentation other than your narrative. The hours and rates identified appear to be arbitrary figures that do not relate to any supportable evidence." Further, as to any time P&C devoted to researching whether a physician had to be present for nurses to administer flu vaccine, the contractor assumed this task voluntarily and was not directed to assume it by any SSA employee.

(7) The cost impact statement "is for the most part totally unsupported by the documentation provided."

Id.

Discussion

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The purpose of summary relief is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue. *Vivid Technologies, Inc. v. American Science & Engineering, Inc.*, 200 F.3d 795, 806 (Fed. Cir. 1999).

Under these standards, we can grant summary relief for SSA on the first element of P&C's claim. The contractor alleges that pursuant to direction from SSA's project officer, after August 2001, it provided RN services at times when, under the contract, it could have provided LPN services. The contract did permit P&C to provide LPN services during as many as four hours on each workday – it required nursing services to be provided for twelve hours per day and required that eight of those hours be worked by an RN, thus leaving four to be worked by "either full-time or part-time RNs or Licensed Practical Nurses (LPNs), at the contractor's discretion." Thus, if SSA directed that only RNs could perform work at the Health Unit, that was a change to the contract. For the purpose of resolving SSA's motion, we will assume that, as alleged by P&C, such a directive was issued. The impact of this change, however, cannot be the one asserted by the contractor.

The contract contains, for each contract year, one hourly price for providing RN services and another, lower hourly price for providing LPN services. When P&C provided RN services when it might have wished to provide LPN services, it billed and was paid for RN services instead of the less-costly LPN services. This impact of the requirement for RN services exclusively has already been felt. It is conceivable that the contractor might have incurred an additional impact: if its profit margin was greater for LPN services than it was for RN services, the change would have decreased the profit margin for total hours worked. That is not what P&C claims, however. The contractor maintains instead that it is entitled to be paid the difference between RN and LPN rates for the hours which, but for the change, could have been worked by LPNs. This amount – particularly when viewed as an addition to the payment already received for RN services at RN hourly rates – is not a rational measure of increased costs.

We also note that P&C's quantum claim, even if it were valid in theory, is overblown. The number of hours which could have been worked each year by LPNs was approximately one thousand – four hours per day times 250 days. (The contract required the provision of nursing services five days per week, over a fifty-two week period, less ten federal holidays. At least eight hours on each of those days had to be worked by RNs.) P&C's claim encompasses 1385.75 hours during nine months of the original contract period (when about 750 hours might have been worked by LPNs), 1616 hours during the first option period (when about 1000 hours might have been worked by LPNs), and 753.75 hours during the first five months of the second option period (when about 417 hours might have been worked by LPNs).

We also grant summary relief as to the third element of the claim, which alleges that the nursing services were misclassified under the contract as Registered Nurse I, rather than Registered Nurse II. P&C's president believed when submitting the company's offer which led to the contract that the contract called for basic RN I services. P&C does not contend that the services described in the contract were different from the services which it was actually required to provide. Instead, the contractor argues confusingly, "At the time in which the contract was awarded it did appear that the nursing services were basic services, however during the course of the contract the Appellant discovered that the nursing services were not nursing services." Appellant's Opposition to Respondent's Motion for Summary Relief at 24. This hardly qualifies as a basis for the assertion of misclassification. Furthermore, the wages which P&C paid its nurses at the outset and throughout the life of the contract were greater than the minimum wages required by applicable Department of Labor wage determinations for RN IIs. *See* Appeal File, Exhibits 4-6. Consequently, even if a misclassification had occurred, a reclassification would not have forced P&C to pay higher wages. There is no basis for an assertion that anything SSA did caused P&C to increase its costs for wages.

As to the remainder of the issues raised in P&C's claim, however, we are unable to grant SSA's motion for summary relief. It is true, as SSA maintains, that P&C has not yet presented to the Board evidence sufficient for us to grant the appeal as to these matters. On SSA's motion for summary relief, however, the burden is not on P&C to demonstrate that it should prevail, but rather, on SSA to demonstrate that as a matter of law, P&C cannot prevail. The agency has not met this burden.

As to the second element of the claim – the allegation that the project officer's alleged directive caused P&C to fire LPN Er'na Davis and that as a result of the ensuing unemployment hearing, P&C's unemployment insurance premiums sextupled – P&C will ultimately have large burdens to meet. It will have to prove that the directive was issued; that as a consequence of the directive, it could not place Ms. Davis in another position; and that its unemployment insurance premiums sextupled solely because of the hearing on her application for unemployment benefits. Meeting the burden will be especially difficult because P&C fired at least four other employees during the period when the contract with SSA was in effect, and the contractor will have to prove that its premiums increased solely because of the firing of Ms. Davis and not because of any or all of the other firings as well. SSA has not demonstrated, however, that as a matter of law, these proofs cannot be made.

The fourth, fifth, and sixth elements of the claim all allege that actions taken by SSA personnel caused P&C to expend considerable money to perform additional administrative duties. What these duties were, and to what they were additional, are not evident in either the claim or the parties' filings on the motion for summary relief. Ultimately, it will be P&C's burden to clarify these matters. A particularly troubling aspect of these elements is that every contractor must anticipate expending some resources on administrative matters relating to every contract, and P&C has not yet delineated which resources fell into this category and which were caused by excessive, unexpected, and unreasonable agency demands. To the extent that the sixth element relates to the dispute between the contractor and the agency regarding the necessity for a physician to be present in order for flu vaccine to be administered, it is surely invalid in part because the dispute began in September 2003, but most of the invoices for allegedly additional work were submitted prior to that month. Nevertheless, on the basis of the uncontested facts set forth by SSA, we cannot conclude that as a matter of law, any of the remainder of these elements of the claim must be denied.

The parties have not addressed in the motion and the opposition thereto the seventh element of the claim, reimbursement for the expenses allegedly incurred by P&C in preparing its cost impact statement. As long as a portion of the claim remains to be resolved, we will leave this element for later, after the parties have addressed it.

Decision

The **MOTION FOR SUMMARY RELIEF** filed by the respondent, SSA, is **GRANTED IN PART**. P&C's appeal is denied as to the first and third elements of its claim. Although the contractor faces a difficult burden in proving entitlement to recovery as to the other elements, SSA has not established as a matter of law that those elements cannot be proven. We therefore deny the motion in part.

STEPHEN M. DANIELS
Board Judge

We concur:

ROBERT W. PARKER
Board Judge

CATHERINE B. HYATT
Board Judge