RAYFORD ENTERPRISES, INC.

CONTRACT NO. V528C-776 **VABCA-6881-6883**

VA MEDICAL CENTER
BUFFALO, NEW YORK

Kevin M. Cox, Esq., The Firm of Joseph A. Camardo, Jr., Auburn, New York, for the Appellant.

Stacy North Willis, Esq., Trial Attorney; ***Charlma J. Quarles, Esq.,*** Deputy Assistant General Counsel; and ***Phillipa L. Anderson, Esq.,*** Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE KREMPASKY
ON
CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Respondent, Department of Veterans Affairs (VA or Government) has moved for a judgment as a matter of law denying three of Appellant, Rayford Enterprises, Inc.'s, (Appellant or Rayford) appeals resulting from a deemed denial of its claim for an equitable adjustment of $105,223.49 under Contract No. V528C-776 (Contract). Appellant opposes the Government's MOTION and cross

moves for a judgment that it is entitled to receive delay damages. The Contract, negotiated pursuant to Section 8(a) of the SMALL BUSINESS ACT, was for installation of above ceiling trays or pathways for telephone cable at the Department of Veterans Affairs Medical Center in Buffalo, New York (VAMC Buffalo).

We have before us the Government's MOTION FOR PARTIAL SUMMARY JUDGMENT, Appellant's OPPOSITION TO RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, which will be cited respectively as: (MOTION, p. __) and (RESPONSE, p. __); the Government elected not to file a REPLY to Appellant's response to its MOTION. The MOTION includes three Attachments, which will be cited as: (MOTION, Att. _) and the RESPONSE includes two Attachments, which will be cited as: (RESPONSE, Att. _). We also have the Government's OPPOSITION TO APPELLANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT and Appellant's REPLY, which will be cited as: (CROSS-RESPONSE, p.__), and (CROSS-REPLY, p. __), respectively. In addition to the above, the record before us includes the pleadings (cited as COMPLAINT, para. ___ and ANSWER, para. __ and the Appeal File consisting of 94 numbered exhibits (cited as R4, tab ___).

In its MOTION, the VA seeks a judgment denying the appeals in:

> VABCA-6881, Extended/Unabsorbed Burden: $37,142.60
> VABCA-6882, Lost Overhead and Profit: $48,340.23
> VABCA-6883, Profit on added work, G/A and Extended Unabsorbed Burden: $7,419.56.

Appellant, in its CROSS-MOTION seeks a judgment sustaining the appeal in VABCA-6882. Neither the MOTION nor the CROSS-MOTION include the appeal in VABCA-6570, Added Work/Proposal Preparation, within its scope.

Both entitlement and quantum are before the Board.

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

The VA awarded Rayford the Contract on August 7, 1996 in the amount of $834,457. The Notice to Proceed with the work was issued on October 2, 1996, which established the original Contract completion date as March 31, 1997. The Contract work included partial demolition of ceilings, ceiling reconstruction, cable tray installation and painting at VAMC Buffalo. By two supplemental agreements, the Contract completion date was extended to August 25, 1997 and the Contract price increased to $993,402. In response to Rayford's request, the VA unilaterally extended the Contract completion date to September 26, 1997. (R4, tabs 4, 19-21, 45-46, 58)

The Contract work was the first, site preparation, phase of a project to replace the telephone system at VAMC Buffalo. It involved the installation of the above ceiling infrastructure required for the installation of telephone cabling which was to be installed by another contractor. (R4, tabs 4, 59)

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

> SUSPENSION OF WORK, FAR 52.212-12 (APR 1984)
> OTHER CONTRACTS, FAR 52.236-8 (APR 1984)
> DIFFERING SITE CONDITIONS, FAR 52.236-26 (APR 1984)
> CHANGES, FAR 52.243-4 (AUG 1997)
> CHANGES – SUPPLEMENT (FOR CHANGES COSTING $500,000 OR MORE), VAAR 852-236-88(a) (JUN 1987)
> CHANGES – SUPPLEMENT (FOR CHANGES COSTING $500,000 OR LESS), VAAR 852-236-88(b) (JUN 1987)

(R4, tab 4)

On September 17, 1997, as Rayford's Contract work was nearing completion, the CO requested Rayford's proposal for a change to the Contract to install 2,206 exposed, surface mounted cable pathways (surface pathways) running from the cable trays to the voice/data telephone outlets. The Contracting Officer (CO), Cherie Widger-Kresge, received Rayford's proposal for the surface pathway work in the amount of $655,081 on September 26, 1997. (R4, tabs 58, 60-68)

Rayford's Contract work was completed and accepted by the VA on October 1, 1997. As directed by the CO, Rayford submitted an application for payment of the unpaid remainder of the Contract price ($17,129) less $100 "retainage" on October 9, 1997. The purpose of retention of the $100 was to keep the Contract administratively "open" for the purpose of processing the proposed surface pathway change proposal. (R4, tab 66, MOTION, Att. 1)

In late-November 1997, VAMC Buffalo determined that it did not have sufficient appropriated funds available to it for the surface pathways Contract change. The CO communicated this determination to Rayford by letter on December 1, 1997. In this letter, the CO represented to Rayford that funds appropriated in Fiscal Year (FY) 1996 were not available to fund the Contract change and that funds appropriated in FY 1997 and the then current FY 1998 could not be used for this purpose. Ms. Widger-Kresge also requested Rayford's final, "close-out", invoice and the documentation necessary to formally and finally terminate the Contract relationship. (R4, tabs 67-68)

Rayford responded to this request on December 5, 1997 by letter from its counsel asserting that the VA could use FY 1998 funds for the Contract change and that, as a qualified contractor under Section 8a of the SMALL BUSINESS ACT, it was entitled to receive the Contract change as a benefit of that program.

Rayford's counsel followed the December 5 letter with a detailed legal memorandum supporting the notion that the VA could use FY 1998 appropriations to fund the surface pathways change. (R4, tabs 69-70)

The CO took the position, in a February 11, 1998 response to the letters by Rayford's counsel, that she could not legally modify the Contract to include the surface pathway work because such a modification would be a "cardinal" change. Ms. Widger-Kresge's conclusion was based on the extent of the surface pathway work as evidenced by Rayford's proposed price to perform the work in relation to the original Contract price. In light of that conclusion, the CO again asked Rayford to submit a final invoice and a Release of Claims so that the Contract could be closed-out. Responding a week later, Rayford's counsel asserted that the surface pathway work was not a cardinal change and that Rayford was entitled to a Contract modification for the work. (R4, tabs 72-73)

On February 20, 1998, Rayford filed a bid protest with the General Accounting Office (GAO) protesting the VA's February 11 letter and asking that GAO direct the VA to modify the Contract to include the surface pathway installation. Reciting that not awarding a modification for additional work is a matter of contract administration not within its jurisdiction, the GAO, in ***Rayford Enterprises, Inc.***, Comp. Gen. B-279302, dismissed the protest on February 25, 1998. (R4, tabs 74, 76)

In a March 27, 1998 letter to Rayford, Ms. Widger-Kresge reiterated her position that the VA could not legally modify the Contract to include the surface pathway work, informed Rayford that the VA would be issuing a solicitation for the work and again asked for Rayford's final invoice for the Contract work. On

April 27, 1998, the VA issued an Invitation for Bids for the surface pathway work to which Rayford responded on May 28, 1998. The VA awarded Rayford the contract for the work on June 26, 1998 in the amount of $329,600. The solicitation was a small business set-aside. (R4, tab 76; MOTION, Att. 3)

The VA again requested Rayford's, Contract close-out invoice and documentation on July 9, 1998. By a November 30, 1998 letter, the VA recited that, on July 30, 1998, it processed Rayford's invoice responding to the VA's July 9 request and paid Rayford $90 of the $100 still remaining to be paid because Rayford had indicated its intent to file a claim under the Contract; the VA asked Rayford to submit its claim by December 14, 1998. (R4, tabs 81, 83)

Still insisting that it was entitled to receive the benefit of a modification of the Contract for the surface pathway work, Rayford submitted a request for equitable adjustment under the Contract to the VA on December 24, 1998 in the amount of $105,223.49. Having no response from the VA, Rayford converted the request for equitable adjustment to a claim with an appropriate certification received by the CO on September 9, 1999, as follows:

> Added Work/Proposal Preparation (VABCA-6570): $12,321.11
> Extended/Unabsorbed Burden (VABCA-6881): $37,142.60
> Lost Overhead and Profit (VABCA-6882): $48,340.23
> Profit on added work, G/A and Extended Unabsorbed Burden (VABCA-6883): $7,419.56.

The CO responded to the claim on November 17, 1999 by offering to consider paying Rayford its cost of preparing the change proposal. Rayford responded on August 29, 2000 with an offer to completely resolve its claim upon the VA's payment of $87,883.29. The VA failed to either respond to this counteroffer or issue a final decision and Rayford appealed. (R4, tabs 85, 87-93)

CONTENTIONS OF THE PARTIES

The Government contends that there are no material facts in dispute and that the VA had no legal obligation to modify the Contract to include installation of the surface pathways. Even if there were some obligation for the placement of the work with Rayford through a Contract modification, the VA asserts that Rayford is not entitled to recover lost overhead and profit.

Rayford opposes the Government's MOTION and asserts that there are material facts in dispute concerning whether the Contract specifications were defective because they did not include the surface pathway work. If the facts show, in Rayford's view, that the specifications were defective, the Government was not free to put the surface pathway work out to bid.

In its CROSS-MOTION, Rayford avers that there is no dispute that the VA delayed the final close-out of the Contract from the date Rayford completed the Contract work, October 1, 1997, to March 27, 1998, the date the VA informed Rayford that it was going to put the surface pathway work to bid and requested Rayford's final invoice for the $100 retained from the Contract price and its RELEASE OF CLAIMS. Rayford maintains that its Contract work was suspended and that it is entitled, as a matter of law, to recover delay damages for the entire October 1, 1997 to March 27, 1998 period.

DISCUSSION

We will grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The moving party carries the burden of showing that there is no genuine issue of material fact; all doubts over whether a genuine factual dispute exists will be

resolved in favor of the non-movant. ***Sabbia Corporation***, VABCA No. 5858, 99-2 BCA ¶ 30,463; ***Saturn Construction Company***, VABCA No. 3229, 91-3 BCA ¶ 24,151, *aff'd. sub nom*, ***Saturn Construction Company v. VA Medical Center, Allen Park, Mich.***, 991 F.2d 810 (Fed. Cir. 1993) (Table); ***Celotex Corp. v. Catrett,*** 477 U.S. 317, 323 (1986).

Our role in deciding a motion for summary judgment is to determine whether a genuine triable issue of material fact exists. The existence of a genuine, triable issue of material fact cannot be established by a non-movant simply challenging a fact or by an unsupported conclusion. The non-movant must show, by pointing to some part of the record or additional evidence, that material facts differ significantly from the way the movant has presented them and upon which a reasonable fact finder, drawing inferences in favor of the non-movant, could decide in favor of the non-movant. ***Centex Bateson Construction CO.***, VABCA No. 5166 *et. al.*, 97-2 BCA ¶ 29126; ***Fire Security Systems, Inc.***, VABCA No. 3086, 90-3 BCA ¶ 23,235; ***Hengel Associates***, VABCA No. 3921, 94-3 BCA ¶ 27,080; ***C. Sanchez and Son, Inc. v. United States***, 6 F.3d 1539 (Fed. Cir. 1993); ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242 (1986)

We here confront cross motions for summary judgment. The Board need not grant judgment to one of the parties in this circumstance. We will independently evaluate each motion under the standards set forth above. The fact that the parties' positions are inherently contradictory does not preclude our granting either of the motions and does not relieve us of the obligation to draw inferences as to the existence of disputed material facts in favor of the non-movant on each motion. ***Agency Construction Corp.***, VABCA Nos. 4559, 4560, 96-2 BCA ¶ 28,611; ***Mingus Constructors, Inc. v. United States***, 812 F.2d 1387 (Fed. Cir. 1987).

The relevant, material facts here are both simple and uncontested. As awarded, the Contract required the installation of cable trays for use by a follow-on contractor who would install the telephone system at VAMC Buffalo. In order to have a functioning telephone system, it was also necessary to install surface pathways to carry the telephone cables from the cable trays installed under the Contract to the locations of the instruments and equipment to be serviced by the telephone cables. This surface pathway work was not part of the work specified in the Contract.

The VA requested Rayford's proposal to perform the additional, surface pathway work; however, the VA ultimately decided to obtain the installation through a new contract rather than by a modifying the Contract. The reason why the VA elected to solicit a new contract for the surface pathway work is immaterial to the issue of Rayford's entitlement to a Contract modification for the work in light of the CHANGES and OTHER CONTRACTS clauses in the Contract. It was totally within the discretion of the VA to decide how it would accomplish the additional surface pathway work. Rayford simply had no legal entitlement to receive the surface pathway work as part of its Contract performance and, therefore, cannot recover the breach damages it claims. ***Bridgewater Construction Corp.***, VABCA No. 2935, 91-3 BCA ¶ 24,274; ***The Hunkin Conkey Construction Company. v. United States***, 461 F.2d 1270 (Ct. Cl. 1972).

In a disjointed argument, Rayford leaps from a wholly unsupported characterization of the Contract as negligently prepared or "defective" because the surface pathway work was not included in the Contract specification to the unwarranted conclusion that it was entitled to a Contract reformation. From all this, we are to conclude that the issue of whether the Contract was defective is material and that, as a consequence, we are precluded from granting the VA's MOTION.

Rayford reaches its defective specification conclusion by cobbling the VAMC Buffalo engineering office's justification supporting its request that the CO seek a change proposal from Rayford for the surface pathway work to a deposition statement by the CO that she and the engineering office were unaware of the total effort necessary to prepare for the installation of a new telephone system and did not realize that installation of the surface pathways was not part of the Contract as awarded. From this tenuous construct, with little explanation and no support in the record, Rayford further concludes that the VA concedes that the Contract was "negligently prepared." It is entitled to a reformation, Rayford asserts, because it and the VA were mistaken in entering into the Contract because they did not know the surface pathway work was not included. In support of its reformation theory, Rayford cites us to an irrelevant and inapposite 1927 Court of Claims case (***Heid Brothers v. United States***, 63 Ct. Cl. 392) where the Court permitted reformation in an obviously friendly suit to resolve a clerical error in the drafting of the written contract dealing with a pricing term of a contract to which the Government and contractor had both agreed. Appellant conveniently leaves out any explanation of how the VA's "negligent" or "inadvertent" error in not including the surface pathway work (work Appellant initially proposed to perform for a price in excess of $655,000, and for which it ultimately contracted to perform for $329,600) in the Contract becomes a mutual mistake or entitled Rayford to reformation of the Contract to add work, which Rayford acknowledged was not included in the Contract requirements.

The issues of what VAMC Buffalo thought was or should be in the Contract, whether the VA should have included surface pathway work in the Contract, the reason for the VA's decision to advertise for installation of the surface pathways or whether any of this reflects an error or mistake by VA

planners or contracting personnel in establishing the work included in the Contract are neither relevant nor material to determining whether Rayford has any entitlement to the damages it now claims.

Rayford rests its CROSS-MOTION on the notion that it "was in a total work stoppage awaiting the decision from the Government as to how it was going to fix the problem created by its defective specifications" from October 1, 1997 to March 27, 1998. (CROSS-REPLY, p. 5) We note that Appellant bases its opposition to the Government's MOTION on the existence of disputed material facts concerning whether there was a defective Contract specification because the surface pathway work was not included. We have already dismissed the idea that the surface pathway work not being included in the Contract was a defect in the specification. Moreover, the idea that Rayford was in a "work stoppage" for 182 days is belied by the undisputed facts relevant here.

As Rayford acknowledges, the Contract work was 100% complete and accepted by the VA on October 1, 1997; Rayford billed the VA for the balance of the Contract price save for $100 on October 9, 1997. The Contract was administratively still "open" but no work remained to be performed by Rayford. To prevail on its claim to entitlement to damages for delay, Rayford must find that entitlement in a remedy granting Contract clause. A review of the Contract CHANGES, SUSPENSION OF WORK and DIFFERING SITE CONDITIONS clauses, makes it clear that Rayford is entitled to an equitable adjustment for delay only if some Government action unreasonably extended completion of the Contract. Thus, Rayford must point to undisputed facts that an action for which the VA is liable caused the delay of completion of the Contract after October 1, 1997 and that this delay resulted in additional costs for Rayford. ***Clover Builders, Inc.***, VABCA Nos. 2033, 2034, 88-2 BCA ¶ 20,629; ***Dawson Construction Co., Inc.***, VABCA No. 3306-

3310, 93-3 BCA ¶ 26,177; *aff'd sub nom* ***Dawson Construction Co. v. Brown***, 34 F.3d 1080 (Fed. Cir. 1994).

The contractual relationship between the VA and Rayford was essentially over on October 1, 1997 since only the ministerial acts of a close-out invoice, payment of the nominal remaining amount of the Contract balance and completion of release documentation remained to be accomplished. Rayford points to no facts that would entitle it to an equitable adjustment for delay within the terms of the relevant Contract clauses and favors us with no authority supporting its entitlement to "delay" damages on a contract where performance was complete prior to the beginning of the alleged period of delay.

Rayford asserts that it was on "stand-by" as it awaited the VA's decision on the surface pathways work and that, because its bonding capacity was completely tied-up in the October 1997 to March 1998 period, it was unable to obtain any "replacement work." (CROSS-REPLY, p. 5) Rayford provides no evidence to support this assertion and the fact that it was able to bid on the VA's surface pathway solicitation indicates that Rayford's ability to compete for business was not hindered while the final Contract close-out was pending. Moreover, the CO requested a final close-out invoice on December 1, 1997, less than two months after Rayford invoiced for payment of the Contract balance. Rayford was the reason the Contract was not closed-out by persisting in its demand that it was entitled to an equitable adjustment for the surface pathway work, an entitlement, as we have held here, to which there was no basis in law or fact. At best, any delay in the close-out of the Contract was concurrent and not compensable.

DECISION

For the foregoing reasons, the Respondent, The Department of Veterans Affairs' MOTION FOR PARTIAL SUMMARY JUDGMENT is **GRANTED;** Appellant, Rayford Enterprises, Inc.'s CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT is **DENIED**.

Accordingly, the Appeals of Rayford Enterprises, Inc., under Contract No. V528C-776, VABCA-6881, 6882, 6883, are **DENIED**.

DATE: **May 30, 2002**

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RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur:

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GUY H. MCMICHAEL III
Chief Administrative Judge

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MORRIS PULLARA, JR.
Administrative Judge