UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: January 29, 2007

CBCA 391

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 at the Harold Washington Social Security Center (HWSSC) in Chicago, Illinois. The claim is divided into seven elements. The case comes before us on P&C's appeal from a contracting officer's decision which denied the claim.

Earlier, we granted in part a motion for summary relief which had been filed by SSA. In so doing, we denied the first and third elements of the claim. *P&C Placement Services, Inc. v. Social Security Administration*, GSBCA 16363-SSA, 06-2 BCA ¶ 33,300.

After that decision was issued, we scheduled a hearing on the remaining elements. The hearing was postponed after P&C's counsel represented that for health-related reasons, the company's president -- who was expected to be a key witness -- was unable to attend. SSA then filed two motions -- one for summary relief on the remaining elements of the claim and the other to dismiss the case with prejudice for failure to prosecute.

We grant the motion for summary relief, thereby denying the appeal. We consequently dismiss as moot the motion to dismiss the case for failure to prosecute.

The reader will note that this case has been docketed as CBCA 391, whereas our earlier decision was issued in GSBCA 16363-SSA. On January 6, 2007, pursuant to section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, the General Services Board of Contract Appeals (GSBCA) was terminated and its cases, personnel, and other resources were transferred to a newly-established Civilian Board of Contract Appeals (CBCA). The case remains as it was; the docket number has been changed to reflect the transfer to the new Board.

Undisputed Facts

The following facts were set out as undisputed in our decision which is reported at 06-2 BCA ¶ 33,300. Neither party has taken issue with our characterization of the facts as undisputed. We restate the facts here, eliminating the references to the record (which may be found in the earlier decision).

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. The contract was for the period from June 1, 2001, through May 31, 2002, and contained four one-year option periods. 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).

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."

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."

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.

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.

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.

The contract required P&C to identify key personnel, and the contractor named Joanne Colclasure, RN, and Margaret Gilbertsen, RN, as its key personnel. Beginning in June 2001, P&C provided these individuals to perform work under the contract. 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."

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.

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. (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.

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.

(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. 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.

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.

(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. For the period from January 1, 2002, to "present," P&C sought an adjustment in the contract amount of $22,941.57.

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." (Emphasis added.) P&C also alleged in its complaint that "[n]ot

allowing LPNs, triggered unemployment hearings," with the last word being plural. 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.

(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. 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.

P&C paid its RNs between $22.50 per hour and $24.50 per hour in 2003. 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.

(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." 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. "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." Allegedly, the project officer's actions caused one RN to resign, which in turn caused P&C "to lose revenue and increased administrative costs." 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.

(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.

(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. P&C maintains that its president incurred costs in researching whether the presence of a physician was necessary for the administration of the vaccine.

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." The contractor appears to allege that these costs were related to the dispute about the necessity of the presence of a physician. 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.

(7) P&C also sought $2818.80 for preparation of the cost impact statement itself. The total amount sought was $223,504.07.

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.

On February 10, 2004, the contracting officer denied the claim. 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."

With regard to the remaining elements of the claim, SSA, in its currently-pending motion for summary relief, maintains that P&C "has consistently demonstrated a lack of evidence to support its claims." Respondent's Second Motion for Summary Relief (Second Motion) at 4. With regard to this assertion, SSA urges that certain facts are uncontested and P&C disagrees. In the discussion portion of this decision, we evaluate the parties' positions on these matters.

Discussion

As we explained in our decision on SSA's first motion for summary relief:

> 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).

06-2 BCA at 165,135.

As to element 2, the contention that P&C's unemployment insurance premiums sextupled because the project officer's directive that P&C cease providing LPNs caused the contractor to fire Ms. Er'na Davis, SSA says that P&C has not at any time "suppl[ied] documentation to show how its rate rose from .6% to 3.6% or provide[d] evidence to demonstrate that it was related, in any way, to the nurse's firing." Second Motion at 9. In response, P&C shows that its rate rose from 0.6% to 3.6% during the first quarter of 2003 and then fell back to 2.4% during the third and fourth quarters of that year. Additionally, P&C notes that in its earlier decision, the Board wrote that on this element, "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." 06-2 BCA at 165,136. P&C says that it "is prepared to meet that burden, and should not be deprived of its right to trial simply because such burden is heavy." Appellant's Opposition to Respondent's Second Motion for Summary Relief (Appellant's Opposition) at 7.

The rise and fall of P&C's unemployment insurance premium rate, standing alone, does not prove the three matters which, as we explained, it is P&C's burden to establish. The contractor's statement that it is prepared to meet the burden does not suffice to defeat the motion, either. As the Supreme Court has explained, summary judgment must be entered, "after adequate time for discovery and upon motion" -- both of which are present here --

> against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp., 477 U.S. 317, 322. *See also Ferring B.V. v. Barr Laboratories, Inc.*, 437 F.3d 1181, 1193 (Fed. Cir. 2006) ("Conclusory allegations and attorney arguments are insufficient to overcome a motion for summary judgment.") Because P&C has failed to make the requisite showing that it can establish any of the three matters we identified as essential to proving this element of the claim, we grant SSA's motion for summary relief on this element.

As to element 4, the contention that the project officer's action caused one RN to resign, which in turn caused P&C to lose 193 billable hours with a resulting cost impact of $9910.91, SSA says that the claim is calculated illogically. The contract required P&C to

have a nurse on duty during contract hours, SSA maintains, and it was entitled to bill the agency for hours worked by its nurses, not -- as the contractor has done here -- to bill the agency for hours which were not worked by a nurse. In response, P&C simply reiterates its argument as to entitlement; it does not even address SSA's assertion that the claim is calculated illogically.

Even if P&C can prove that the project officer's action caused an RN to resign, this response is insufficient to defeat the agency's motion. To receive an equitable adjustment from the Government, a contractor must show resultant injury as well as liability and causation. *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991) (citing *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965)). By failing to address SSA's point that the claim is calculated illogically, and by failing to offer justification for its calculation, P&C has not met its burden of showing a rational way of determining the value of whatever injury may have resulted from the project officer's action. We therefore grant SSA's motion for summary relief on this element. 06-2 BCA at 165,136 (granting summary relief as to element 1 of claim because P&C's way of calculating damages "is not a rational measure of increased costs"); *see also Long Lane L.P. v. General Services Administration*, GSBCA 15334, 04-2 BCA ¶ 32,659, *reconsideration denied*, 04-2 BCA ¶ 32,751, *aff'd sub nom. Long Lane L.P. v. Bibb*, 159 Fed. Appx. 189 (Fed. Cir. 2005) (granting renewed motion for summary relief where appellant, after being accorded ample opportunity to present sufficient evidence to avoid denial of appeal on such a motion, failed to make such a presentation).

As to element 5, the contention that P&C is entitled to an adjustment of $68,073.60 to the contract amount for 1021 hours of "additional administrative costs," SSA says that "P&C has not identified how SSA's alleged wrongful actions caused it to incur those hours, nor provided proof that anyone worked them. . . . Significantly, [P&C] has not identified the individual expenses that constitute this very large claim." Second Motion at 6. In response, P&C asserts that SSA has failed to comply with 48 CFR 19.812(c) (2001), which provides:

> To the extent consistent with the contracting activity's capability and resources, 8(a) contractors[1] furnishing requirements shall be afforded production and technical assistance, including, when appropriate, identification of causes of deficiencies in their products and suggested corrective action to make such products acceptable.

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[1] An 8(a) contractor is a firm which was awarded a contract under section 8(a) of the Small Business Act (15 U.S.C. § 637(a)). As to the contract in dispute, P&C was such a contractor.

P&C does not address SSA's assertion that P&C has not provided proof that anyone worked the hours allegedly incurred as a result of the agency's actions and has not identified the individual expenses that constitute this element of the claim. Consequently, we resolve SSA's motion for summary relief as to this element in the same way that we resolved the motion as to element 4: the motion is granted because even if P&C is correct as to entitlement, it cannot prevail since it has not met its burden of showing that there is a valid means of measuring the value of whatever injury resulted.

As to element 6, the contention that P&C incurred increased legal and administrative costs in the amount of $46,020.82 in responding to "unpaid directives," apparently related to the dispute about whether flu vaccine could be administered if a physician was not present, SSA says that P&C's contractual duties were not dependent on the presence of a physician and that the agency did not require, acquiesce in, or accept the benefit of additional work in this regard. In response, P&C maintains that "[i]t is a requirement of state law that nurses operate under written orders and those orders must be issued by a physician," and in support of that position cites a provision of the Illinois Nursing and Advanced Nursing Practice Act. Appellant's Opposition at 5. The provision states:

> "Registered professional nursing practice" includes all nursing specialities and means the performance of any nursing act based upon professional knowledge, judgment, and skills acquired by means of completion of an approved registered professional nursing education program. A registered professional nurse provides nursing care . . . that includes but is not limited to: . . . (4) the administration of medications and treatments as prescribed by a physician licensed to practice medicine in all of its branches [or by any of a number of other licensed health professionals] . . . .

225 Ill. Comp. Stat. Ann. 65/5-10(l) (West 2007).

Evidently, as to this element of the claim, there is a dispute as to a threshold issue which is essentially one of law and not fact. This issue is appropriate for disposition on a motion for summary relief. *Anderson*, 477 U.S. 242, 247-49. While the provision of the Illinois Nursing and Advanced Nursing Practice Act cited by P&C requires that a registered nurse administer medications as prescribed by a licensed physician or other health professional, it does not, contrary to the contractor's interpretation, require that a physician be present while the nurse is administering medications. In this regard, it is instructive to compare the provision with another provision in the Illinois Nursing Act, 225 Ill. Comp. Stat. Ann. 65/15-25, pertaining to certified registered nurse anesthetists. The latter provision permits such a nurse to provide anesthesia services pursuant to the order of a licensed physician or other health professional. It additionally mandates that "[f]or anesthesia

services, an anesthesiologist, physician, dentist, or podiatrist . . . shall remain physically present and be available on the premises during the delivery of anesthesia services unless [certain circumstances are present]." *Id.* 65/15-25(a); *see also* 65/15-25(c); *Pollachek v. Department of Professional Regulation*, 854 N.E.2d 721 (Ill. App. Ct. 2006). If in drafting the Nursing Act, the Illinois legislature had wanted to require that a physician be present when a registered nurse was administering medications, the legislature surely knew how to do so. And it did not write the law in that way.

Because element 6 of P&C's claim is premised on the theory that the contractor was forced to perform additional work as a result of SSA's demand that P&C's nurses administer flu vaccines when a physician was not present, and the agency's demand was consistent with the law P&C says was applicable to the situation, this element, too, fails as a matter of law. We grant SSA's motion for summary relief as to this element.

In our decision on the agency's first motion for summary relief, we reserved judgment on element 7 of the claim, the contention that P&C is entitled to the costs of creating its cost impact statement, until after the parties had addressed the element. As to element 7, SSA says that because the other elements of the claim have no merit, there can be no ground for the contractor's recovering the costs of preparing the statement. P&C responds that the statement contains information that the contracting officer told the contractor to present to have its claim considered. The claim has now been considered and found wanting. We therefore agree with SSA that even if the costs of preparing a valid claim are recoverable, there can be no recovery of those costs here.

Decision

SSA's motion for summary relief is granted. As a result, all of the elements of P&C's claim are denied and the appeal is **DENIED**.

Because the case has now been resolved, we do not need to consider SSA's motion to dismiss for failure to prosecute. That motion is dismissed as moot.

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STEPHEN M. DANIELS
Board Judge

We concur:

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ROBERT W. PARKER
Board Judge

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CATHERINE B. HYATT
Board Judge