UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: October 25, 2012

CBCA 2708

MJL ENTERPRISES, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Mark R. Berry of Peckar & Abramson, Washington, DC, counsel for Appellant.

Edith M. Bowman and Kristi M. Glavich, Office of Regional Counsel, Department of Veterans Affairs, Detroit, MI, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **VERGILIO**, and **SHERIDAN**.

DANIELS, Board Judge.

On June 22, 2009, the Department of Veterans Affairs (VA) contracted with MJL Enterprises, Inc. (MJL) to perform construction work on the inpatient mental ward of the VA health care facility in Ann Arbor, Michigan. MJL claims that it is entitled to be paid $962,216.45 for forty separate categories of costs which it describes generally as attributable to delays caused by and extra work directed by the VA. The contracting officer denied the claim, and MJL appealed the decision to the Board.

The VA has moved for summary relief. According to the agency, the contractor seeks through its claim additional compensation for sixteen bilaterally signed modifications to the contract (called "supplemental agreements" (SAs)), an additional matter relating to partition

and door changes, and sales tax paid to the State of Michigan. The agency maintains that as a matter of law, none of these matters merits payment. The VA urges that further compensation for work performed pursuant to the SAs is precluded by a release which says that the agency's payment covers all costs associated with the work, the partition and door work was not directed or approved, and the Michigan sales tax paid by the contractor is not reimbursable because there is no reasonable basis to believe that the contractor's purchases were exempt from the tax.

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). Assessed against these standards, the VA's motion must be denied.

Supplemental agreements

As the VA points out, each SA contains the following provision:

> CONTRACTOR'S STATEMENT OF RELEASE
>
> The consideration represents a complete equitable adjustment for all costs, direct and indirect, associated with the work and time agreed to herein, including but not limited to all costs incurred for extended overhead, supervision, disruption or suspension of work, labor inefficiencies, and this change's impact on unchanged work.

The Court of Appeals for the Federal Circuit has held that where the language of a contract modification unambiguously releases the Government from further liability for changed work, no additional compensation may be paid. *Bell BCI Co. v. United States*, 570 F.3d 1337 (Fed. Cir. 2009). The VA contends that the language included in the SAs is an unambiguous release, so its inclusion precludes additional payment.

MJL makes three arguments in opposition to this conclusion. First, the contractor says that the release covers only "costs . . . associated with the work and time agreed to herein," not "costs associated with this change" or "costs attributable to the facts or circumstances giving rise to this change," which include VA-caused delays.

Second, MJL notes that, as held by the Court of Claims (a predecessor to the Court of Appeals for the Federal Circuit):

> There are, of course, special and limited situations in which a claim may be prosecuted despite the execution of a general release. For instance, where it is shown that, by reason of a mutual mistake, neither party intended that the release cover a certain claim, the court will reform the release. . . . Similarly, where the conduct of the parties in continuing to consider a claim after the execution of the release makes plain that they never construed the release as constituting an abandonment of the claim, or where it is obvious that the inclusion of a claim in a release was attributable to a mistake or oversight, or where fraud or duress is involved, the release will not be held to bar the prosecution of the claim.

J. G. Watts Construction Co. v. United States, 161 Ct. Cl. 801, 806-07 (1963) (citations omitted). The contractor presents, through declarations of its construction program director and its subcontractor's project manager, evidence that neither party intended that the release cover the claimed amounts related to the SAs: The contracting officer directed the contractor to remove, from the amounts requested for the changed work, costs for delays allegedly caused by the agency; and she also told the contractor that there were other ways to recoup delay costs.

Third, MJL urges that even if we were to grant the motion, we could afford the VA only partial summary relief because the claim includes thirty-eight separate items (in addition to the two we discuss below), and some of them (or portions of some of them) relate to costs which are not directly linked to any of the SAs.

The declarations submitted by MJL are sufficient for us to conclude that genuine issues of material fact exist as to the intended scope of the releases. We need not decide at this time whether the language of this provision of the SAs unambiguously releases the VA from further liability, since even if it does, if it does not reflect the parties' intentions at the times it was agreed to, we will have to reform it. *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 11-2 BCA ¶ 34,799. Additionally, we conclude that because we cannot divine at this point in the proceedings which portions of the thirty-eight claim items are related to the sixteen SAs and which portions (if any) are not, we cannot grant summary relief on this matter. We deny the motion insofar as it addresses the SAs.

Partition and door work

The contract includes specifications that designate certain walls and doors to be fire-rated. On July 22, 2010, after the project was under way, the VA issued Bulletin #5, which requested prices for installing additional fire-rated walls and doors. MJL provided a

proposal. The contracting officer did not accept the proposal and says that the work described in the bulletin was never added to the contract and was never performed. Consequently, according to the VA, the contractor may not recover costs related to Bulletin #5.

MJL notes that the contract incorporates by reference Federal Acquisition Regulation (FAR) clause 52.236-7, "Permits and Responsibilities (Nov 1991)." This clause provides, in pertinent part, "The Contractor shall, without additional expense to the Government, be responsible for . . . complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work." The declaration of the subcontractor's project manager states that the doors which were required by Bulletin #5 to be fire-rated were also required by the applicable fire code to be fire-rated. The declaration states further that the subcontractor mandated that those doors be fire-rated and believes that fire-rated doors were installed. Thus, according to MJL, whether the contracting officer accepted the contractor's proposal for additional work prescribed by Bulletin #5 or not, that work had to be performed and the contractor must be compensated for it.

Again, material facts are in dispute. To resolve the dispute as to this matter, we will have to determine whether work additional to that prescribed in the contract's specifications was performed. We will also have to determine, based on evidence to be presented later, which walls and doors are required by the specifications to be fire-rated, and whether applicable fire codes required that additional walls and/or doors be fire-rated. If we find that the facts are as MJL describes, we will have to address as well an issue mentioned by neither party: was the ambiguity created by the inconsistency between the specifications and the code requirements (imposed in the contract through FAR clause 52.236-7) latent or patent? If the ambiguity was latent, recovery will be possible; if it was patent, the contractor may not recover. *See States Roofing Corp. v. Winter*, 587 F.3d 1364, 1372 (Fed. Cir. 2009); *Turner Construction Co. v. United States*, 367 F.3d 1319, 1321 (Fed. Cir. 2004); *Metric Constructors, Inc. v. National Aeronautics & Space Administration*, 169 F.3d 747, 751 (Fed. Cir. 1999). Summary relief is inappropriate as to the matter of the partition and door work.

Michigan sales tax

The contract incorporated by reference FAR clause 52.229-3, "Federal, State and Local Taxes (Apr 2003)," which includes this subsection:

> (h) The Government shall, without liability, furnish evidence appropriate to establish exemption from any Federal, State, or local tax when the Contractor requests such evidence and a reasonable basis exists to sustain the exemption.

MJL's construction program director says in his declaration that beginning on October 29, 2009, he made several requests of the contracting officer for evidence appropriate to establish exemption from Michigan sales tax on materials the contractor purchased for this project.

The parties agree that under Michigan law, a contractor is generally considered to be the consumer of all materials it uses to fulfill its contract and therefore must pay tax on the materials it purchases. The parties further agree that Michigan law provides exemptions to this general rule for contractors who buy materials for the purpose of constructing, altering, repairing, or improving real estate for certain other parties, among which are "nonprofit hospitals." The parties disagree, however, on the question of whether the VA health care facility where MJL performed its work is a "nonprofit hospital," as that term is understood in Michigan law.

The VA says that the facility is not such a hospital. It relies on Revenue Administrative Bulletin 1999-2, which was issued by the Michigan Department of Treasury in April 1999. This bulletin explains that to qualify for the exemption, a hospital –

> must meet a four-part definition . . . :
>
> 1) the hospital must be a separately organized institution or establishment;
>
> 2) the hospital must have as its primary purpose the provision of acute or intensive healthcare and nursing;
>
> 3) the hospital must provide these services to persons requiring them; and,
>
> 4) the hospital must not be operated for profit and no benefit from the real estate inures to individuals or private shareholders.

The VA concludes that as a federal agency, its hospital facilities are not "nonprofit hospitals" under this definition.

MJL urges that the VA facility is a nonprofit hospital under Michigan law. It calls to our attention section 4w of the Michigan General Sales Tax Act, which provides:

> (1) For taxes levied after June 30, 1999, a sale of tangible personal property to a person directly engaged in the business of constructing, altering, repairing, or improving real estate for others to the extent that the property is

> affixed to and made a structural part of a nonprofit hospital . . . is exempt from the tax under this act.
>
> . . . .
>
> (3) As used in this section:
>
> (a) "nonprofit hospital" means 1 of the following:
>
> (i) That portion of a building to which 1 of the following applies:
>
> . . . .
>
> (B) Is owned or operated by a governmental unit in which medical attention is provided.

Mich. Comp. Laws Ann. § 205.54w (West 2007).

Whatever Michigan law may have said prior to June 30, 1999 – and Revenue Administrative Bulletin 1999-2 was issued prior to that date – it is clear the VA hospital facility is "owned or operated by a governmental unit in which medical attention is provided." Therefore, unless Michigan law defines "governmental unit" to exclude federal governmental units – and neither party has argued that it does – the VA hospital facility in Ann Arbor is now a "nonprofit hospital" under Michigan law, and a sale to MJL of materials to be used in construction work on that facility should have been exempt from Michigan sales tax. The VA had no reasonable basis for refusing to furnish evidence appropriate to establish exemption from that tax when MJL requested that evidence. The VA's motion for summary relief as to this matter is denied.

Decision

The agency's motion for summary relief is **DENIED**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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JOSEPH A. VERGILIO	PATRICIA J. SHERIDAN
Board Judge	Board Judge