



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: November 18, 2015

CBCA 3522

EHR DOCTORS, INC.,

Appellant,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

Richard Braman, Vice President of EHR Doctors, Inc., Pompano Beach, FL, appearing for Appellant.

Lucinda E. Davis, Dorothy M. Guy, and Samuel P. Piazza, Office of the General Counsel, Social Security Administration, Baltimore, MD, counsel for Respondent.

Before Board Judges **SOMERS**, **VERGILIO**, and **DRUMMOND**.¹

SOMERS, Board Judge.

The Social Security Administration (SSA) filed a motion for summary relief. SSA argues that the contracting officer properly denied the claim of EHR Doctors, Inc. (EHR) that it accepted a contract modification under duress. For the reasons that follow, we

¹ Judge Anthony S. Borwick, a member of the panel originally assigned to this appeal, retired prior to the issuance of the Board's decision. Judge Candida S. Steel was selected at random as a replacement panel member. Subsequently, Judge Candida S. Steel also retired prior to the issuance of the Board's decision. Judge Jerome M. Drummond was selected at random as a replacement panel member.

grant respondent's motion for summary relief, finding that appellant has failed to show duress. The appeal is denied.

Findings of Fact²

On February 1, 2010, SSA and EHR entered into contract no. SS00-10-60029, which, in combination with other contracts awarded by SSA, would enable the agency to set up a computerized process for electronically obtaining and utilizing medical records of applicants for Social Security disability benefits. The contract called for EHR, through its subcontractor, Oroville Hospital (Oroville), to provide a computerized process for 1000 medical records. In return, SSA would pay EHR \$1,000,000.

SSA structured this contract around three performance milestones. Only the first is relevant here. Milestone 1 required EHR to submit a sample continuity of care document (CCD) and a verified certification of an electronic health record application. Upon completion of each milestone, SSA would pay EHR a fixed percentage of the contract price.

The contract called for EHR to complete milestone 1 by June 22, 2010; EHR did not do so. EHR alleges that Oroville failed to fulfill the terms of its subcontract with EHR by not providing medical records needed to complete milestone 1. EHR claimed it failed to meet milestone 1 because of Oroville's failure to complete required certifications and verifications, the hospital's inability to provide the number of medical records it represented that it could, and Oroville's refusal to grant EHR access to its system to conduct its own content verification.

On July 19, 2010, SSA issued a cure notice to EHR. The cure notice provided EHR thirty days to deliver a sample CCD from an acceptable medical provider and a revised project plan by August 18, 2010. The notice stated that EHR could submit the sample CCD from its original medical provider, Oroville, or a new medical care provider or providers. The notice further instructed EHR to submit a completed content checklist for any new medical provider(s) fifteen calendar days prior to the sample CCD due date of August 18, 2010, and advised that SSA would review the content checklist to determine whether EHR's proposed new provider(s) was an acceptable substitute. The letter concluded that failure to comply with the cure notice could result in contract termination.

² A general background may be found in an opinion earlier issued by the Board involving the same appeal, in which the Board granted in part respondent's motion to dismiss, or, in the alternative, for summary relief. *EHR Doctors, Inc. v. Social Security Administration*, CBCA 3522, 14-1 BCA ¶ 35,630.

Following the issuance of the cure notice, EHR selected Midland Memorial Hospital (Midland) as its new source of medical records. EHR estimated that Midland could provide 850 to 950 medical records. After evaluating EHR's request, SSA determined that Midland's estimated volume was substantially less—32.6% less—than Oroville's. Subsequently, SSA conducted its own review of Midland and estimated that Midland could provide a transaction volume of 677 medical records. Based on this estimate, SSA accepted Midland as the new provider, subject to a contract price reduction to \$677,000. SSA's proposed price was in keeping with the unit price extrapolated from the original contract for \$1,000,000 for a transaction volume of 1000 records.

On September 1, 2010, SSA stated EHR could approve a volume different from 677 if EHR provided verification. However, EHR did not submit any information to SSA that would justify a different transaction volume. Instead, EHR asked whether it could add a second medical provider to increase the transaction volume to 1000 or more. SSA gave EHR until September 3, 2010, to submit a content checklist for an additional facility, but EHR did not submit a proposal or content checklist for a second provider.

On September 2, 2010, EHR stated it wanted to continue with Midland at the original contract price of \$1,000,000, noting the "significantly greater availability" of medical/clinical data Midland offered. After further consideration, SSA proposed a new contract price of \$750,000 based on the "more robust" medical content in Midland's records as compared to Oroville's. Although EHR claims now that it was reluctant to agree to the contract modification,³ it accepted SSA's proposal without reservation. By e-mail message dated September 14, 2010, Richard Braman of EHR notified the SSA contracting officer of EHR's acceptance:

Pursuant to the call we had yesterday and our conversation with our attorney yesterday evening, EHR Doctors, Inc., accepts the SSA's proposed changes. We feel it is in our mutual best interests to put this dispute behind us and move forward. Please forward the contract modification so that we may execute it and move forward. We are ready to put these difficult circumstances behind us and get working on a more positive note.

See Appeal File, Exhibit 4, pt. 1 at 26. Thereafter, the parties signed a bilateral contract modification that substituted Midland for Oroville and reduced the contract price from \$1,000,000 to \$750,000. By August 29, 2011, EHR had been paid in full.

³ By an e-mail message also dated September 2, 2010, EHR indicated to SSA that it should consider in its evaluation of Midland three additional, non-price factors that, "when combined, are significantly more important than price."

By letter dated March 11, 2013, SSA's Office of Acquisition Support notified EHR that it was closing out this contract. The letter requested that EHR inform SSA of any outstanding claims, and provided two options at the bottom of the letter: (1) a box followed by the statement, "There are no outstanding claims," and (2) a box followed by the statement, "The following claims/invoices are outstanding." EHR marked the second box and included the following statement:

The original contract award was in the amount of \$1,000,000. SSA forcibly made a \$250,000 modification to the contract with no justification and under the threat of termination. [EHR] accepted [the] modification under duress. Contractor seeks to recover \$250,000 from SSA.

Respondent's Motion for Summary Relief, Exhibit A.

On June 25, 2013, EHR filed a notice of appeal to the Board. However, because EHR had not properly submitted a certified claim to SSA for a contracting officer's decision prior to filing its appeal, the Board dismissed the appeal for lack of jurisdiction. *See EHR Doctors, Inc. v. Social Security Administration*, CBCA 3426, 13 BCA ¶ 35,371. On July 9, 2013, EHR submitted a certified claim for \$250,000, which SSA denied.

On September 5, 2013, EHR appealed the contracting officer's decision denying its July 9, 2013, claim. By decision dated June 11, 2014, the Board granted SSA's motion to dismiss count 1 of the complaint. *See* 14-1 BCA at 174,492-93. The Board denied SSA's motion for summary relief as to count 2, in which EHR alleged that it had accepted the modification under duress. *Id.* at 174,493-94. The Board found that EHR had raised genuine issues of material fact. The parties subsequently engaged in discovery.

In its renewed motion for summary relief, submitted on September 11, 2015, SSA again argues that EHR has failed to establish any element of its duress claim and that, even if the Board finds duress, EHR has belatedly asserted—and therefore waived—this claim. EHR submitted a brief in opposition on September 22, 2015, and SSA submitted a reply brief on October 9, 2015. The parties presented oral arguments during a telephonic conference held on October 30, 2015. The parties reiterated the arguments advanced in their pleadings and motions.

Discussion

I. Standard of Review

SSA argues that EHR has failed to establish any element of its claim that it accepted the contract modification under duress and that SSA is therefore entitled to judgment as a matter of law. We have previously explained the well-established rules applicable to motions 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 justiciable inferences must be drawn in favor of the nonmovant.

EHR Doctors, Inc., 14-1 BCA at 174,493 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

On a motion for summary relief, the moving party's burden of demonstrating the absence of genuine issues of material fact may be discharged by showing the absence of evidence in support of the nonmoving party's case. *See* Fed. R. Civ. P. 56(c)(1)(B) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."); *Celotex Corp.*, 477 U.S. at 323 ("The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof.").

Here, SSA is entitled to summary relief if it can establish that EHR, the nonmoving party, has failed to adduce evidence sufficient to support EHR's claim of duress. In *Systems Technology Associates v. United States*, 699 F.2d 1383, 1387 (Fed. Cir. 1983), the United States Court of Appeals for the Federal Circuit set forth the test for establishing duress:

- (1) One side involuntarily accepted the terms of another.
- (2) Circumstances permitted no other alternative.
- (3) The circumstances were the result of coercive acts of the opposite party.

Id. at 1387. As the Federal Circuit further explained:

Economic pressure and even the threat of considerable financial loss are not duress. Economic duress may not be implied merely from the making of a

hard bargain. The mere stress of business conditions will not constitute duress where the defendant was not responsible for the conditions. Some *wrongful conduct must be shown*, to shift to defendant the responsibility for bargains made by plaintiff under the stress of financial necessity.

Id. (quoting *Johnson, Drake & Piper, Inc. v. United States*, 531 F.2d 1037, 1042-43 (Ct. Cl. 1976) (emphasis the Federal Circuit's) (internal citations and quotation marks omitted)). Importantly, the test "focus[es] . . . on the coercive nature of the act as dispositive of its 'wrongfulness'" and "looks more closely at" the extent to which the "will of the party coerced" was "defeat[ed]." *Id.*

II. Analysis

a. EHR Voluntarily Accepted SSA's Terms

EHR presents no evidence that it involuntarily accepted the contract modification. Instead, "the record establishes a process of negotiation, not a process by which the terms of the modification were imposed on appellant against its will by the coercive acts of respondent." *Corners & Edges, Inc. v. Department of Health & Human Services*, CBCA 693, et al., 08-2 BCA ¶ 33,961, at 168,021 (finding no duress where parties "calmly discussed" the issue of excess service hours under the contract and contractor later accepted the Government's reduced price proposal). When it failed to meet the first milestone under the original contract, EHR requested that SSA allow EHR to substitute Midland for Oroville as the medical records provider, based on the transaction volume EHR estimated that Midland could provide. SSA, after its own evaluation of the hospital, determined Midland could provide a reduced transaction volume and offered to accept Midland subject to a commensurate contract price reduction. SSA indicated EHR could justify an increase in the contract price in one of two ways: (1) by verifying Midland's ability to provide a greater number of records or (2) by locating an additional provider. EHR neither provided the requested verification nor submitted a proposal for an additional facility. EHR did, however, point to the superior medical/clinical content Midland could provide. SSA agreed with EHR's assessment and accordingly offered a contract price of \$750,000 to reflect the content's superior value.

EHR concluded the negotiations when it accepted SSA's proposal in a message in which it stated, "EHR Doctors, Inc., *accepts* the SSA's proposed changes. We feel it is *in our mutual best interests* to put this dispute behind us and move forward. *Please forward the contract modification so that we may execute it* and move forward." (Emphasis added.) Thereafter, without objection, EHR signed the bilateral modification and performed. When EHR accepted SSA's proposal, it "neither demurred nor otherwise

made [the Government] aware of the reservations it now purports to have had about contracting on this basis.” *DKW Construction, Inc. v. General Services Administration*, CBCA 438, 08-1 BCA ¶ 33,755, at 167,094 (2007) (finding no duress where contractor voluntarily accepted Government’s time and materials contract after Government rejected contractor’s initial firm-fixed price proposal). Nor has EHR proffered any evidence that SSA “overreached or exerted undue pressure in any way in [their] dealings.” *Id.* Thus, contrary to its assertion, the record reveals EHR voluntarily accepted SSA’s proposal after a period of negotiation following the July 19, 2010, cure notice.

b. EHR Failed To Take Advantage of Other Alternatives

Similarly, EHR presents no evidence that it had no other alternatives under the circumstances when its obligations to perform under the contract remained. As noted above, SSA gave EHR two options in lieu of a termination for default or of executing the contract modification for \$750,000 - either verify Midland’s ability to provide more medical records or utilize an additional provider. EHR did neither because, in its view, “[t]here was no reason for EHR to find another medical provider at its expense, as Midland was a suitable, superior replacement.” Appellant’s Response to Respondent’s Motion for Summary Relief and Supporting Memorandum of Law (Appellant’s Response). *Cf. Spalding & Son, Inc. v. United States*, 24 Cl. Ct. 112, 148-49 (1991) (finding valid duress claim where contractor’s acceptance of modification “was not the result of hard arm’s-length bargaining, but rather, . . . the result of an unconscionable ultimatum that left [contractor] with little, if any, choice” in light of the Government’s conduct). Thus, the evidence shows that EHR had alternatives. It simply elected not to pursue them.

c. EHR Fails To Show Coercive Acts by SSA

Finally, EHR presents no evidence of coercive conduct by SSA. EHR asserts, among other things, that SSA’s “wrongful threats of termination” amount to coercive conduct by the agency. However, a plaintiff’s bare claim of coercion by threat of default, when the basis for default is supported by the record, is insufficient to prove duress. *McLain Plumbing & Electrical Service, Inc. v. United States*, 30 Fed. Cl. 70, 83 (1993). To show coercive acts, EHR must establish SSA’s actions were either: “(1) illegal, (2) a breach of an express provision of the contract without a good faith belief that the action was permissible under the contract, or (3) a breach of the implied covenant of good faith and fair dealing.” *Lynchval Systems Worldwide, Inc. v. Pension Benefit Guaranty Corp.*, CBCA 3466, 14-1 BCA ¶ 35,792, at 175,067 (citing *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1330 (Fed. Cir. 2003)).

While “[a]n act the Government is empowered to take under law, regulation, or contract may nevertheless support a claim of duress if the act violates notions of fair dealing by virtue of its coercive effect,” *Systems Technology Associates*, 699 F.2d at 1387-88, EHR has failed to adduce any evidence that SSA acted in bad faith in issuing the cure notice. Given that it does not dispute that it failed to achieve the first milestone under the original contract, EHR cannot establish that SSA’s issuance of the cure notice was invalid. Though EHR alleges it was “held hostage” by the cure notice, “if justified, the *valid* warning of termination for default constitutes no more than the insistence on those rights guaranteed by the contract.” *McLain Plumbing*, 30 Fed. Cl. at 83 (finding Government’s threat of default did not amount to impermissible coercion). By issuing the cure notice, SSA acted within its rights under the contract.

Decision

After discovery and the development of the record, EHR has failed to make a sufficient showing on the essential elements of its claim of duress. Accordingly, SSA is entitled to judgment as a matter of law. The agency’s motion for summary relief is granted. Therefore, the appeal is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

JEROME M. DRUMMOND
Board Judge