UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING PUBLICLY RELEASED IN REDACTED FORM ON OCTOBER 18, 2023

DENIED: September 29, 2023

CBCA 6995

INTER-CON SECURITY SYSTEMS, INC.,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Phillip R. Seckman of Dentons US LLP, Denver, CO; and Lisette S. Washington of Dentons US LLP, Chicago, IL, counsel for Appellant.

Ioana Cristei, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **KULLBERG**, **O'ROURKE**, and **CHADWICK**.

O'ROURKE, Board Judge.

Inter-Con Security Systems, Inc. (Inter-Con or appellant) seeks damages related to its settlement of disability discrimination charges filed by former employees who were disqualified from performing as court security officers for the United States Marshals Service (USMS). The parties filed cross-motions for summary judgment. Because we find that the plain language of the two contracts at issue supports the agency's position and that the agency did not breach the implied duty of good faith and fair dealing, we grant respondent's motion, deny appellant's motion, and deny the appeal.

Statement of Facts

The parties filed a lengthy joint statement of undisputed facts. The Board sets forth here only the facts and background necessary to decide each motion.

The Contracts

USMS enters into contracts with private security companies that provide court security officers (CSOs) to federal courthouses. While on duty, CSOs are deputized as Special Deputy United States Marshals with firearms and arrest powers. Due to the physical demands of the position, which include protecting against potentially life-threatening activities, the contracts require CSOs to meet specified physical and medical qualifications. This case involves a dispute over eight CSOs who were medically disqualified.

USMS awarded appellant two indefinite-delivery, indefinite-quantity contracts to provide CSOs for district courts in the Second and Ninth Federal Judicial Circuits, respectively, in September 2013. The contracts were nearly identical.[1]

Physical and Medical Requirements for CSOs

Section C.9.5 contained the physical and medical standards that each CSO was required to meet. Compliance with these standards was the responsibility of the contractor. Per contract section C.9.1, "[w]hen recruiting or considering applicants to perform under this contract, the Contractor shall ensure that the individual can withstand the physical demands of the position," such as "frequent and prolonged walking, standing, running, sitting, and stooping without assistance," as well as the ability "to subdue violent or potentially violent people." The statement of work cautioned that "light duty post assignments are not available under this contract."

In addition to the physical standards, both contracts contained seven pages of medical requirements that CSOs had to meet or risk disqualification. Contract section C.9.1.3 emphasized that "the medical condition of the CSO workforce [was] critical to the overall safety of the Judiciary." Contract section C.9.1.5 further advised:

> Each CSO, including CSO applicants, shall meet the medical standards outlined below. Failure to meet any one of the required medical and/or

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[1] Both contracts had the same statement of work. All references to section C of the contract pertain to both contracts.

> physical qualifications shall disqualify an individual from performing as a CSO under this contract. The Contractor shall not allow any individual to perform under this contract until the individual's qualification status has been determined by the Federal Occupational Health (FOH)[2] and a written approval has been granted by the Chief, [Office of Court Security].

The medical standards listed in section C.9.5 employed bright-line tests as well as qualitative assessments to determine whether a CSO was medically qualified to perform under the contract. For example, the standards for vision and the cardiovascular system were, respectively:

> Corrected distant visual acuity required is 20/30, or better, as measured with both eyes viewing (binocular). Complete loss of vision in one eye is disqualifying. Corrected distant visual acuity required is /125, or better, in the worst eye. Ability to distinguish basic colors, as well as shades of color, is required. Normal peripheral vision is required.
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> . . . .
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> Cardiovascular System - Any condition that significantly interferes with heart function shall be disqualifying. Examples of conditions that shall be disqualifying are hypertension with repeated readings that exceed 150 systolic and 90 diastolic, symptomatic peripheral vascular disease and severe varicose veins."

Standards for hearing consumed four pages of each contract and provided detailed instructions for assessing functional hearing with and without the use of hearing aid equipment. Additional medical assessments covered speech, respiratory function, endocrine and gastrointestinal issues, nervous system disorders, hernias, musculoskeletal issues, and any other diseases or conditions that interfered with the full performance of duties.

Medical Examinations

To determine compliance with the physical and medical standards identified in each contract, each CSO had to pass an initial medical examination and annual exams for each year of performance. In April 2015, the contracts were modified to change the frequency of medical examinations from once a year to every two years. The modifications re-emphasized

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[2] See the discussion of FOH below.

the significance of the medical fitness of the CSO workforce, stating, "If the CSO fails to complete and pass the biennial examination, the CSO shall be rendered disqualified and the Contractor shall prohibit the individual from performing under this contract."

Consistent with terms in sections C.9.2 and C.9.3 of the contracts, the contractor was responsible for arranging medical examinations of CSOs and applicants. "The Contractor shall establish and maintain designated licensed physicians to perform and document medical examinations for all CSOs on behalf of their company. At a minimum, the Contractor shall designate two (2) licensed physicians for each city in a given District where CSOs are assigned." "The Contractor shall require all CSOs and each CSO applicant to complete a comprehensive medical form, CSO Form 229, *Certification of Medical Examination for Court Security Officers* . . . and undergo a medical examination by a designated examining physician." "The Contractor shall require the examining physician to record the CSO's . . . medical results on the CSO Form 229 when the examination is being administered and sign the form after completion of the examination." "The information stated on the CSO Form 229, including any required additional information, e.g., print-outs or reports of lab data, EKG, vision and hearing test records, a summary of the applicant's treatment plan, etc., shall be legible, truthful, complete and precise, *in order for FOH to render a sound medical determination.*" (Emphasis added). Corrections to the form were strictly prohibited.

Medical Qualification Determinations

USMS has, since 2012, had an interagency agreement with FOH, part of the Department of Health and Human Services (HHS), to conduct medical qualification determinations pursuant to the contracts. USMS reimbursed FOH for these services. The contracts contained nineteen references to the roles and responsibilities of FOH in the medical qualification determination process, beginning with FOH's receipt and review of the CSO Form 229. Per sections C.9.3.3 and C.9.3.4, "Upon receipt of the CSO Form 229, the FOH will review the form for completeness. If the CSO Form 229 is considered complete, the CSO Form 229 will be evaluated to render a qualification determination." If the form was not complete, due to illegible information, missing or incomplete documentation, or conflicting or questionable information, it had to be returned to the contractor for correction or completion. The contractor had to "resubmit the [updated] CSO Form 229 to the FOH within 30 days of the exam date."

Additional terms relevant to the process were included in sections C.9.3.5 through C.9.4.5. "The USMS will receive a medical review record directly from FOH documenting their findings. If the FOH initial review can determine . . . that the individual is clearly medically qualified or disqualified, the USMS will inform the Contractor in writing." "If . . . FOH is unable to make *a final medical determination* or it is necessary to clarify or prove

that a disqualifying condition has been corrected or eliminated, the FOH will issue a 'deferred' determination . . ." (Emphasis added). "After reviewing all of the medical documentation, *FOH will determine whether the individual meets the medical standards as outlined in this contract*. FOH will notify the Government of their findings and the USMS will then notify the Contractor in writing of the final determination." (Emphasis added). "The individual shall not resume CSO duties until *the FOH makes a final medical determination* that the individual is medically qualified." (Emphasis added).

Medical Disqualification and Subsequent Termination of CSOs

Between 2014 and 2017, FOH issued medical determinations that temporarily or permanently disqualified eight CSOs. FOH disqualified three CSOs for failing to meet cardiovascular system standards. Five CSOs were disqualified based on other conditions, including [redacted].[3] Inter-Con ultimately fired the medically disqualified CSOs who, in turn, sued Inter-Con in federal and state court alleging violations of the Americans with Disabilities Act and state anti-discrimination laws.

Inter-Con settled with the former employees, then submitted a certified claim to the contracting officer for $1,703,811.89 in settlement payments and attorney fees. In its claim, Inter-Con alleged that USMS (1) breached the express terms of the contract by disqualifying CSOs who were physically capable of handling the job, and (2) breached the implied duty of good faith and fair dealing by exposing Inter-Con to discrimination suits.

The contracting officer denied the claim in its entirety. Inter-Con timely appealed to the Board. Following discovery, the parties filed cross-motions for summary judgment based on their respective interpretations of the contracts.

Discussion

In deciding cross-motions for summary judgment, "[w]e ask whether one party or neither party 'is entitled to judgment as a matter of law based on undisputed material facts.'" *International Development Solutions, LLC v. Department of State*, CBCA 6400, et al., 21-1 BCA ¶ 37,925, at 184,185 (quoting Board Rule 8(f) (48 CFR 6101.8(f) (2022))). The legal standard is well established. *E.g.*, *Vivid Technologies, Inc. v. American Science &*

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[3] Some applicants were ultimately disqualified because they failed to follow up with the required paperwork after being temporarily disqualified. Others were disqualified based on failing to meet a medical standard.

Engineering, Inc., 200 F.3d 795, 806 (Fed. Cir. 1999); *Grand Strategy, LLC v. Department of Veterans Affairs*, CBCA 6795, 21-1 BCA ¶ 37,895, at 185,744. Here, the parties agree on all material facts. Our decision rests on interpreting the two contracts. *See Mission Support Alliance, LLC v. Department of Energy*, CBCA 6476, et al., 22-1 BCA ¶ 37,998, at 184,527.

Inter-Con alleges that USMS breached the contracts "by improperly adopting medical disqualification determinations and tests that were based on unreasonable and arbitrary interpretations of relevant medical qualification standards under the contracts" and by "fail[ing] to independently determine whether the medical disqualification determinations were based on reasonable and proper interpretation and application of the medical qualification standards established by the contracts. Appellant's Motion for Summary Judgment at 19, 28. Inter-Con further alleges that USMS breached the implied duty of good faith and fair dealing. *Id.* at 42.

USMS Had No Independent Duty to Review Medical Qualification Determinations

We disagree that USMS had a contractual duty to verify FOH's qualification determinations independently. We consistently apply the "plain meaning" of contracts as written. *See, e.g*., *P.K. Management Group, Inc. v. Secretary of Housing & Urban Development*, 987 F.3d 1030, 1033 (Fed. Cir. 2021). The contracts state unambiguously that FOH, not USMS, has authority to make final medical qualification determinations for each CSO. We see no provision requiring USMS to scrutinize FOH's medical qualification determinations or allowing USMS to override or disregard FOH. Instead, USMS's role in this process is administrative or ministerial in nature, processing FOH's determinations once they are made.

Even if we thought that the nature of the approval required by the Office of Court Security in section C.9.1.5 was at all unclear, we must read the contracts as a whole. *See Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965). Other terms shed light on the nature of the approvals at issue. The contracts contain numerous other provisions that require obtaining approval from USMS, including approval for background investigations, uniforms, routine reports, training, staffing, and authorizing a CSO to commence performance. These reviews are largely administrative and require no medical expertise. The contracts placed USMS in the same administrative, non-medical role when it received FOH's medical qualification determinations. USMS did not breach any contract requirements when it simply notified Inter-Con that CSOs were medically disqualified by FHO rather than making its own medical determinations.

Inter-Con's Interpretation of Qualification Standards Conflicts with Plain Language

Inter-Con argues, alternatively, that the contracts merely required that CSOs "be in good physical condition and not have any physical conditions that would prevent completing job duties." Appellant's Motion for Summary Judgment at 11. Inter-Con contends that the eight medical disqualifications at issue were unreasonable and arbitrary because the disqualified CSOs could perform their duties as evidenced by years of past performance. *See id.* at 28. We find this interpretation to be a reimagining of the contract. Inter-Con not only asks us to read into the contracts an overarching medical qualification standard that does not exist but also to ignore multiple pages of specific physical and medical standards. "An interpretation that gives meaning to all parts of the contract is to be preferred, over one that leaves a portion of the contract useless, inexplicable, void, or superfluous." *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004); *see Hol-Gar*, 351 F.2d at 979. The contracts do not permit the use of a CSO's past performance to meet current qualification standards. They specifically require that CSOs medically requalify every two years and provide for out-of-cycle medical qualification determinations should circumstances warrant.

Inter-Con further argues that administering medical tests that were not specifically identified in the contracts resulted in unreasonable and arbitrary applications of the qualification standards. Appellant's Motion for Summary Judgment at 8. As set forth above, the physical and medical qualification standards employed both bright-line tests and qualitative assessments. Such flexible language afforded broad discretion to the examining physician and, ultimately, to FOH to determine whether a CSO or applicant had a disqualifying condition. We read these provisions as would any "reasonably intelligent person acquainted with the contemporaneous circumstances." *Electronic Data Systems, LLC v. General Services Administration*, CBCA 1552, 10-1 BCA ¶ 34,316, at 169,505 (2009); *see Hol-Gar*, 351 F.2d at 975. The provisions, together, undermine Inter-Con's assertions that unspecified tests resulted in arbitrary and unreasonable actions under the contracts. To the extent that Inter-Con may be challenging the reasonableness of contract terms themselves, we view the argument as essentially an untimely, post-award bid protest. *See Kloepfer Inc. v. Department of Transportation*, CBCA 7456, 23-1 BCA ¶ 38,419, at 186,697–98. Inter-Con was bound by the terms of its contracts which became enforceable upon award. *See Whittaker Electronic Systems v. Dalton*, 124 F.3d 1443, 1446 (Fed. Cir. 1997).

USMS Did Not Breach the Implied Duty of Good Faith and Fair Dealing

Inter-Con argues that even if the Board were to conclude that USMS did not breach the contract by adopting FOH's medial determinations, "the implied duty of good faith and fair dealing . . . requires that USMS proceed in a manner that is consistent with Inter-Con's

reasonable expectations" under the contract. Appellant's Motion for Summary Judgment at 43. It is true, of course, that every contract contains an implied duty "to refrain from interfering with another party's performance or from acting to destroy another party's reasonable expectations regarding the fruits of the contract." *Bell/Heery v. United States*, 739 F.3d 1324, 1334–35 (Fed. Cir. 2014). To be reasonable, however, an expectation giving rise to the duty " has to be connected . . . to the bargain struck in the contract." *TranBen, Ltd. v. Department of Transportation*, CBCA 5448, 17-1 BCA ¶ 36,635, at 178,430 (citing *Metcalf Construction Co. v. United States*, 742 F.3d 984, 994 (Fed. Cir. 2014)). Here, the bargain between USMS and Inter-Con expressly authorized FOH to make medical qualification determinations and allowed USMS to adopt those determinations. That is what happened. Performing in a manner consistent with contract requirements cannot breach a duty. The Board cannot change "the contract's discernible allocation of risks and benefits" to conform to one party's alleged expectations. *Metcalf*, 742 F.3d at 991, *quoted in R&G Food Services, Inc. v. Department of Agriculture*, CBCA 3487, 16-1 BCA ¶ 36,559, at 178,057. USMS, for its part, did not employ the CSOs and had no reasonable basis in the contracts to expect that Inter-Con would terminate medically disqualified employees, be sued by them, or settle the lawsuits. Inter-Con shows no breach or breach damages.

Decision

Respondent's motion for summary judgment is **GRANTED**. Inter-Con's motion for summary judgment is **DENIED**, and its appeal is **DENIED**.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

We concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge