GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

STRESS MANAGEMENT CENTER, INC.)
) CAB No. D-1174
Under Contract No. JA-SC-CS-70023-01)

OPINION
(*Courtlink Filing ID 1838398*)

The District of Columbia ("District" or "Appellee") moved to dismiss this appeal for failure to state a claim upon which relief can be granted, or, in the alternative, for summary judgment. Stress Management Center, Inc. ("SMC" or "Appellant") filed a pleading titled "Motion to Strike Defendant's Motion for Summary Judgment" which the Board, notwithstanding the pleading's title, has accepted as an opposition to the District's motion. The Board finds that Appellant's Complaint states a cause of action and that there are material facts in dispute. The District's motion is DENIED.

BACKGROUND

SMC timely appealed a final decision of the Contracting Officer dated November 20, 2001, denying its claim for $51,310.00 under Contract No. JA-SC-CS-70023-01 ("Contract"). The Complaint was filed *pro se* by Spencer Cooper, President and Chief Operating Officer of the Appellant.

In October 1997, SMC and the D.C. Department of Human Services ("DHS") entered into the subject contract to provide the Commission on Social Services, Mental Retardation and Developmental Disabilities Administration ("MRDDA") the services of a licensed psychologist for approximately 2,080 hours per year to perform psychological evaluations. The Contract was a firm-fixed-unit-price requirements contract for one year with four one-year renewal options. (Appellee's Statement of Material Facts ("SMF") ¶¶ 3 and 4). The Contract incorporated the Appellant's best and final offer ("BAFO") dated October 6, 1997. (SMF ¶¶ 1 and 5). The Contract defined the "unit price" as "one hour of psychological evaluation services performed by a licensed psychologist." SMF ¶ 4. It is undisputed that the unit price *in the contract as executed* was $32.04 per hour for the base year and first and second option year, totaling $66,641.00 for each year. SMF ¶ 5. The unit price for option years three and four *in the contract as executed* increased to $33.79 per hour, with a total amount for the final two option years of $70,292.00. (SMF ¶¶ 5 and 6). The Appellant's President and Chief Operating Officer Spencer L. Cooper signed both the BAFO and the Contract. (SMF ¶¶ 1 and 5). The District exercised all four options.

Although the Appellant agrees that its president executed the Contract with the stated rates, it asserts that when the President did so he was not aware that his firm's accountant had agreed to reduce the hourly rate by approximately 60% from SMC's original bid of $90 per hour. (Complaint ¶ 4). After signing the contract, Appellant

asserts that it contacted Gordon Barrow, Director of Clinical Services for MRDDA, who "authorized" a change to the compensation rate provided in the contract and agreed to pay Appellant $375 per client evaluation in place of $32.04 per hour. (Complaint ¶ 6). The alleged change results in a substantial increase in the compensation rate to be paid for the contract services, Appellant alleges that it submitted invoices at the increased compensation rate and was paid $375 per client evaluation from commencement of the contract in November 1997 through August 2000. (Complaint ¶ 7). There appears to be no dispute that the alleged change was never incorporated into the contract documents.

Notwithstanding that the increased rate was allegedly implemented in the base year, the documents exercising each of the four options are silent as to any changes. The terms of the option documents, however, are not inconsistent with the increase in compensation rate. The initial contract states an estimated number of unit hours, a fixed unit price and a total price. The amendments exercising the options state only a total price. The total price in each option exercise is identical to the total prices for the option years shown in the original contract. Since the total price is the product of the estimated number of units times the fixed unit price, the fact that the total price is identical to the originally stated total prices does not necessarily indicate that there was not a change in the definition of the unit or the unit price. If the compensation rate increased, but the estimated quantity decreased, the total price could remain unchanged. Without considering the propriety of the alleged change, this is apparently what occurred. Option year 3 (November 2000 through October 2001), for example, was exercised for a total price of $70,292. (AF Tab 6). Although SMC billed at the increased compensation rate, because less work was required than originally estimated, the total billed was only $33,895, well within the total price ceiling. Thus, the fact that the total price was not changed is not dispositive of the issue of whether an increase in unit price was approved.

The final decision of the contracting officer is disingenuous. SMC's claim letter to Mr. Clemmons, the then successor contracting officer, dated July 5, 2001 (Complaint Attachment 1), asserted that the contract had been orally modified and supported this claim by alleging that the modified amount had been paid by the District for the entire base contract, the entire first option year and all but the last month of the second option years, a period of nearly 3 years. The final decision received from Mr. Minor, Mr. Clemmons' successor, appears carefully crafted to avoid consideration of the alleged oral modification. The substantive portion of the final decision begins "An examination of the subject file has disclosed the following:," indicating that only the written file was considered and the alleged oral modification ignored.

Certainly the District was, and is, aware of the amounts invoiced by SMC, and subsequently approved and paid by the District. If the District is to deny that a modification of the payment term was made as alleged by SMC, the District must either deny that the increased payments were made, or explain nearly three years of payments differing from the contract terms. The final decision of the contracting officer does neither. The decision merely states that the contract file shows no modification, a fact not in dispute. Appellant alleges that compensation paid for the contract services reverted to the original contract terms in October 2000. If true, and the contracting officer believed that the reduced compensation was proper, the increased payments for

the first three contract years were erroneously made. In that event, it would have been incumbent upon the contracting officer to timely make a claim to recoup the improper payments. No claim appears to have been made by the District to recover all or part of the funds that the District now apparently claims were erroneously paid.

The District's motion similarly fails to take into account the increased compensation rate allegedly to have actually been paid for the for the first three years. Further, the motion asks the Board to preclude Appellant from offering any evidence of the alleged authorized change and increased payments by asserting the parol evidence rule. The District avers that "[t]he four-corners of the Contract alone should settle the dispute," Motion 7, and asserts that SMC cannot introduce any other evidence as to oral changes to the written payment term. The District's motion states;

> The Appellant attempts to use an alleged oral agreement with the Director of MRDDA to change the amount paid to it under the Contract. Under the parol evidence rule, extrinsic evidence may not be introduced to contradict the written terms of a contract. 17A Am. Jur. 2d Contracts § 402 (2002). Extrinsic or parol evidence which "tends to contradict, vary, add to, or subtract from the terms of a written contract must be excluded." *Holzman v. Fiola Blum, Inc*., 726 A.2d 818 (Md. Ct. Spec. App. 1999); see also, *Afordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 327 (D.C. 2001); *Fistere, Inc. v. Helz*, 226 A.2d 578, 580 (D.C. 1967). This rule applies only to written contracts that have been "duly signed and executed." *Affordable Elegance, supra*, quoting *Gagnon v. Wright*, 200 A.2d 196, 198 (D.C. 1964).

DISCUSSION

The contacting officer's final decision and the pending motion misconstrue Appellant's claim as seeking an "equitable adjustment." Based on that interpretation of the claim, the contracting officer found, and the motion asserts, that the facts alleged do not support a claim. An equitable adjustment is a change in contract terms based on changes in the contractor's cost of performance. Appellant does not make any claim that its performance was any different than expected under the original terms of the contract. The claim asserted by SMC is not for an equitable adjustment. The claim is for payment pursuant to a change in the payment term of the contract made after execution of the contract. Paragraph 6 of the Complaint states ". . . Mr. Barrow authorized a change in the contract amount and agreed to a charge of $375 per client evaluation (not hourly)…." The claim seeks payment at the rate of $375 per evaluation.

The standard of review of Appellee's Motion to Dismiss is straightforward. Dismissal at the Board and under SCR-Civil Rule 12(b)(1) and (6) is proper only where it appears beyond doubt that a Appellant can prove no set of facts that could support the claim. *Schiff v. American Ass'n of Retired Persons*, 697 A.2d 1193, 1196 (D.C. 1997). Accordingly, the factual allegations are viewed in the light most favorable to the appellant and every reasonable doubt concerning those allegations resolved in the appellants favor. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); Fred Ezra Co. v.

Pedas, 682 A.2d 173, 174 (D.C. 1996); *American Ins. Co. v. Smith*, 472 A.2d 872, 874 (D.C. 1984); *Owens v. Tiber Island Condominium Ass'n*, 373 A.2d 890, 893 (D.C. 1977); *Early Settlers Ins. Co. v. Schweid*, 221 A.2d 920, 922 (D.C. 1966).

The Complaint alleges that the original contract was amended by the Director of Clinical Services for MRDDA. It further alleges that this amendment was ratified by payment of the changed amount for nearly 3 years. (Complaint ¶ 18). The District discounts these contentions asserting that the parol evidence rule precludes the Board from receiving evidence as to an oral amendment of the payment term of the contract and thus asks the Board to find that Appellant can prove no set of facts that could support the claim. The District misapplies the parol evidence rule. The parol evidence rule is applicable to exclusion of evidence only of agreements and understandings prior to the integrated written contract. *See,* Restatement, Second, Contracts §213; *Protest of TMG*, P-467, May 13, 1997, 44 D.C. REG. 6814 The Complaint alleges changes in the contract payment term after the contract executed and evidence of the change is thus not precluded by the parol evidence rule.

Appellant has alleged that the written contract was amended and that it has not been paid in accordance with the amended terms. Appellant alleges that the amendment was implicitly ratified by the contracting officer by the written approval of payment of Appellant's invoices. (Complaint ¶ 17). For purposes of the motion to dismiss, the Board must accept the allegation that the contract was amended as true. The Board finds that, if the facts asserted are proved, the allegations state a claim for payment under the contract. The Motion to Dismiss must therefore be denied.

In the alternative, the District asks that the Board grant summary judgment. Summary judgment can only be granted if there are no disputes over facts that might significantly affect the outcome of a suit under the governing law. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248 (1986). For purposes of considering a motion for summary judgment, the facts in the record must be viewed in the light most favorable to the non-moving party. *Colbert v. Georgetown Univ*., 641 A.2d 469, 472 (D.C. 1994) (*en banc*). There is a clear dispute as to whether there was an effective change in the price term of the contract. Appellant's complaint was signed by its president who has personal knowledge of the underlying facts. By signing the complaint, the president has certified that the factual contentions in the complaint are true and have evidentiary support. SCR-Civil Rule 11(b)(3). This certification creates a legitimate dispute of material facts. The Motion for Summary Judgment must therefore be denied.

SO ORDERED.

May 29, 2003

/s/ *Matthew S. Watson*
MATTHEW S. WATSON
Administrative Judge