GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

THE CHELSEA SCHOOL	)	CAB No. D-930
	)	

For the Appellant: Elise J. Rabekoff, Esquire. For the Government: Pollie H. McElroy, Associate Legal Counsel, District of Columbia Public Schools.

Opinion by Administrative Judge Zoe Bush, with Administrative Judges Terry Hart Lee and Jonathan D. Zischkau concurring.

OPINION

This is an appeal by the Chelsea School (Chelsea, Appellant) from the Superintendent, District of Columbia Public Schools' (DCPS) decision denying Chelsea's appeal from the decision of the Procurement Officer, DCPS. Chelsea seeks to recover additional tuition and other related charges for educating students with disabilities during school year 1991-92.

A hearing was held in this matter on May 3 and 4, 1993. Appellant called the following witnesses:

Jack Hundley, Business Manger, The Chelsea School
Dr. Margaret Gray, Executive Director, The Chelsea School

Clement Hauanio, Procurement Officer, DCPS

Dr. Sheila Iseman (rebuttal)
Assistant Director and Coordinator, The Chelsea School

DCPS called the following witnesses:

Hari Butaney, Contract Specialist, DCPS

Dr. Garnet Pinkney, Director
Division of Special Education, DCPS

Gloria Stokes, Coordinator for Tuition, DCPS

Findings of Fact

1. Chelsea is a private, non-profit school in Silver Spring, Maryland for students in grades 1-12 with learning disabilities. (Tr. 15, Hundley; Tr 166-67, 181, Gray; Chelsea Exhibit (Ex.) 6 at 1).

2. Chelsea provides special-education remediation to its students as well as such on-site "related services" as speech and language therapy, occupational therapy, physical therapy, and psychological counseling to students with particular needs for such services. (Chelsea Ex. 6, at 4; Ex. 14).

3. While some of Chelsea's students pay their own tuition and fees, local educational agencies in Maryland, Virginia, and the District of Columbia pay the tuition and fees of almost three-quarters of Chelsea's students. (Tr. 19, 24, Hundley).

4. These students are publicly funded because an administrative or judicial officer has determined that they cannot obtain a public-school education that is appropriate for their special needs and, under the terms of the federal Individuals With Disabilities Education Act (IDEA), local educational agencies must pay their tuition and fees. (Tr. 24, Hundley).

5. For school year 1990-91, DCPS had a contract with Chelsea for the provision of special education and related services for certain disabled DCPS students. (Appeal File Tab 20). The contract contained, among other things, a termination date of September 30, 1991 (Tab 20, pg. 2) and provisions for the payment of a specified rate (Tab 20, Article VIII). The rate as stated in the contract was $12,950.00 per pupil per year. There was also a rate of $1,600.00 for speech therapy; $1,000.00 for occupational therapy; and $1,000.00 for counseling services per pupil per year when required and authorized. (Tab 20, Article VIII).

6. In order to continue these services for school year 1991-92, DCPS sought a revised contract with Chelsea. As a first step in that process, DCPS, by letter dated May 20, 1991, sent to all prospective offerors (including Chelsea) a Request for Proposal (RFP). The RFP sought bids from schools interested in providing special education and related services to DCPS students in varying needs categories. (Appeal File Tab 19).

7. In response to the RFP, Chelsea submitted to DCPS an Application for Approval (Application). (Appeal File Tab 18). The Application appears to have been sent on or about June 18, 1991. (Tab 18, pg. 16). It states, among other things, the types of services which Chelsea will provide (Tab 18, pg. 4) and the rates at which Chelsea proposes to provide those services. (Tab 18, pg. 9).

8. On September 13, 1991, DCPS sent Amendment No. 1 to Chelsea, for its signature. (Appeal File Tab 14).

9. Amendment No. 1, by its terms, states that its purpose is to extend the existing contract (Appeal File, Tab 20) for school year 1990-91 from October 1, 1991 to September 30, 1992. It further states that the contract cost is the same as for school year 1990-91 ($203,250.00) and that with the exception of the extension in time, all other terms of the 1990-91 contract shall remain in full force and effect. (Appeal File Tab 14).

10. On September 20, 1991, Chelsea signed Amendment No. 1 and added language at the bottom thereof which stated, "[c]urrent contract costs for DCPS funded students is $406,300. To be adjusted as approved funded enrollment changes." (Appeal File Tab 13).

11. On September 27, 1991, DCPS signed Amendment No. 1. (Appeal File Tab 13).

12. On November 18, 1991, DCPS sent a letter to Chelsea requesting information in connection with Chelsea's Application. (Appeal File Tab 10).

13. Between September 1991 and February 1992, DCPS officials met several times and performed financial analyses to determine what, if any, increases could be offered to Chelsea and the other schools. (Tr. 274-80, Butaney; Tr. 323-325, Pinkney).

14. On February 12, 1992, DCPS sent a letter to Chelsea which stated that due to the serious shortfalls in DCPS' budget, no rate increases would be granted in the tuition and related fees for school year 1991-92. (Appeal File Tab 8). Attached to the letter was proposed Amendment No. 2 for school year 1991-92 which changed the number of DCPS students to be funded, some provisions for services and certain other things. Article VIII of proposed Amendment No. 2 contained the same per pupil rate as that contained in the contract (Appeal File Tab 20) for school year 1990-91. (Appeal File Tab 8). Chelsea did not sign the proffered Amendment No. 2.

15. Chelsea responded to the February 12, 1992 letter with a letter dated March 11, 1992. (Appeal File Tab 7). This letter had, as an attachment, Chelsea's proposed substitute Amendment No. 2 to be used in lieu of that offered to Chelsea by DCPS in DCPS' February 12, 1992 letter. Chelsea's proposal contained certain changes, the most critical of which is that it provided for a higher per pupil expenditure than that offered by DCPS. (Appeal File Tab 7, pg. 4).

16. The increase in costs proposed by Chelsea for DCPS students had been approved by the State of Maryland for Maryland students. The increase was approximately eight percent (8%), and was consistent with increases over the last ten years which had been approved by Maryland and accepted by DCPS. (Tr. 52-54, Hurdley).

17. In a letter dated March 17, 1992, DCPS advised Chelsea that Chelsea's March 11, 1992 letter and proposed Amendment No. 2 was received and being reviewed. (Appeal File Tab 6). Ultimately, DCPS did not sign Chelsea's proposed Amendment No. 2.

18. Following Chelsea's status inquiry on July 21, 1992 (Appeal File Tab 5), DCPS informed Chelsea, by letter dated August 11, 1992, that no rate increases would be provided for school year 1991-92. Therein, DCPS also advised Chelsea of its appeal rights. (Appeal File Tab 4).

19. Chelsea educated DCPS students throughout school year 1991-92 and did not refuse performance because of the dispute concerning compensation. (Tr. 205-7, Gray).

Position of the Parties

Chelsea contends that it has a contract with DCPS in which DCPS has agreed to pay Chelsea's proposed higher rates for school year 1991-92. According to Chelsea, when Messrs. Butaney and Hauanio signed Amendment No. 1 on behalf of DCPS, they accepted the proposed rate increase (see F.F. 11). Chelsea argues that thereafter, DCPS breached the contract when the Procurement Officer by letter dated August 11, 1992, announced that DCPS would not pay Chelsea's proposed higher rates (see F.F. 17). In the alternative, if there is no express contract here, Chelsea argues that it is entitled to recovery under the theory of quantum meruit. Chelsea asserts that DCPS accepted Chelsea's services for five-and-one-half months before DCPS indicated that it might not pay the rate increase and even after that "encouraged" continued performance. Finally, Chelsea argues that the Board should be guided by the "controlling" case of Fisher v. District of Columbia Public Schools, Civil Action No. 93-1004 (D.C.C. June 4, 1993).

DCPS contends that Amendment No. 1 is complete and binding upon it with the exclusion of the "extra-contractual" language added by Appellant (see F.F. 10). DCPS maintains this position based upon the past contracting history of the parties and the fact that Amendment No. 1 stated that the contract costs were to stay the same as for school year 1990-91 (see F.F. 9). DCPS further contends that Chelsea is not entitled to equitable relief because it was amply compensated for its services and because it has "unclean hands."

DECISION

This case is similar factually and in background to School For Contemporary Education, The Ivymount School, Inc., CAB Nos. D-913 and D-916 (Consolidated), 6 PD 5416 (October 6, 1993), (SCE and Ivymount). There were originally eight separate appellants in that case concerning contracts between DCPS and private schools for handicapped students. In SCE and Ivymount the Board concluded that the parties had not successfully formed an express contract because a price term was never agreed to. Therefore, the Board determined for the parties a price that was fair and reasonable. The instant case is factually distinguishable from SCE and Ivymount only in that here, there was a counteroffer from Chelsea for school year 1991-1992 that was never accepted by DCPS (see F.F. 10-18).

With respect to the negotiations in this case, DCPS issued an RFP which sought bids from schools for special education and related services by letter of May 20, 1991. (F.F. 6). Chelsea's bid or application of June 18, 1991 reflected rates which were higher than those of the previous school year (school year 1990-1991) (see F.F. 7). Chelsea's "offer" of June 18, 1991 was not accepted. Instead, DCPS sent Amendment No. 1 to Chelsea, which extended the existing contract and contract price for school year 1991-1992. (F.F. 8, 9). Chelsea, in turn, did not accept the price terms of Amendment No. 1; but instead inserted language which it intended to again offer approximately an 8 percent increase in rates. (F.F. 10; Tr. 52-57, Hundley). Rather than unambiguously striking the District's $203,250.00 contract cost amount, found in the amendment under a heading entitled "Recap of funds", Chelsea added a footnote to the District's amount which read, "[c]urrent contract costs for DCPS funded students is $406,300.00. To be adjusted as approved funded enrollment changes." (Appeal File Tab 13). Chelsea contends that this language manifested its intent to counteroffer at a higher price.

We find that DCPS never accepted this counteroffer as to the price term. Although DCPS did sign Amendment No. 1 after Chelsea had inserted the language quoted above, DCPS never manifested a mutual assent to the per pupil rates Chelsea says it intended. To this end, the signatory on behalf of DCPS, its procurement officer, testified as follows:

> Q. Mr. Hauanio, referring to the notation with the asterisk footnote on the bottom of Appellant's Exhibit 10, you were asked whether you signed the contract with that footnote in place, and I believe you responded that you did.
>
> Would you please explain why you did.
>
> A. Well, in view of what the cover letter to this amendment said, which was it was basically an extension of time and that we are still working on the cost, and also based on what I just previously explained as to the contents of this amendment, and my explanation of what the recap of funds were intended to do, a recapitulation of something already previously mentioned, it was my evaluation at the time that it did not impact on what we were doing with respect to Chelsea, that we wanted to extend the contract for a time, and that we were working on the amount that would be approved in terms of cost and rates for this particular school year.
>
> Q. So it is your testimony that because, in your opinion, this document did not relate in any way to a change in the cost, you felt that the footnote was insignificant in a sense; it that correct?
>
> A. I did not consider it significant.

(Tr. 245-6, Hauanio). Further, DCPS' actions after signing Amendment No. 1 indicate that DCPS never agreed to the rate increase. Over the next several months DCPS performed financial analyses to see if a rate increase could be agreed to. (F.F. 13). When DCPS determined that it could not afford the higher rates, it apprised Chelsea by letter of February 12, 1992 that it could not agree to higher rates. (F.F. 14). DCPS again tried to reach an agreement with Chelsea concerning lower rates, which offer Chelsea never accepted. (F.F. 14-15). Chelsea again (for the third time) proposed higher rates on March 11, 1992, which proposal DCPS never accepted. (F.F. 15, 17-18).

Under these facts and circumstances we conclude that the parties never agreed to a price term for school year 1991-1992, and that therefore a complete and valid contract never came into being. SCE and Ivymount, 6 P.D. at 5422. There is no overall rule governing negotiated contracts except that a contract, "may be reached in any manner sufficient to form an agreement." Sterling-Kates v. United States, 12 Cl. Ct. 290 (1987). It is the intent of the parties which is determinative, and a contract exists only if the parties mutually intend to be bound. Id. Here, there was no mutual intent to be bound to either the lower rates (proposed by DCPS) or the higher rates (proposed by Chelsea). Where there are a series of offers or counteroffers and no acceptance, negotiations are incomplete, and there is no valid contract. Sterling-Kates; Fidelity and Deposit Company of Maryland v. Harris, 360 F.2d 402 (9th Cir. 1966).

Having determined that we have an incomplete contract with respect to price and completed performance (F.F. 19), we will follow SCE and Ivymount, 6 P.D. at 5422-5423, and determine a fair and reasonable price for the parties.

DCPS rejected the proposed eight-percent increase only because of budget constraints. (F.F. 14; Tr. 325, Pinkney). The proposed eight-percent increase was evaluated by DCPS and was not found unreasonable:

> Q. When Chelsea's proposal was received in your office, it was evaluated by Mr. Butaney, wasn't it?
>
> A. Yes, it was.
>
> Q. And it's correct, isn't it, that Mr. Butaney's evaluation did not raise any question concerning Chelsea's proposed rates?
>
> A. That's correct.
>
> Q. And, in fact, it's true, isn't it, that no one at DCPS, to your knowledge, has every [sic] raised any question about the reasonableness of Chelsea's proposed rates for 1991-92?
>
> A. That's correct.

Q. Just as it's true, isn't it, that, to your knowledge, no one at DCPS ever suggested to anyone at Chelsea that there was any issue concerning the reasonableness of Chelsea's 1991-92 rates?

A. There was no mention, to the best of my knowledge, of a statement to the effect that Chelsea's rates were unreasonable.

(Tr. 234-5, Hauanio). In fact the proposed rate increase is consistent with increases over the last ten years which were accepted by DCPS. (F.F. 16). Further, DCPS' funding shortfall does not render the proposed increase unreasonable. SCE and Ivymount, 6 P.D. at 5424. Thus, we find that Chelsea's proposed increase is reasonable.

Contrary to the assertions of Chelsea on brief, the Memorandum Opinion and Order in Fisher v. District of Columbia is not instructive concerning the issues before us. In that case, there was no written contract at all between Chelsea and DCPS. Additionally, we will not address the DCPS' argument that Chelsea has "unclean hands" based on "the unreasonableness of its beliefs" (Appellee's Brief at pg. 43) because we do not understand DCPS' argument.

Wherefore, based on the foregoing, the appeal is **SUSTAINED.** Chelsea is entitled to recovery in the amount of $80,232.60 for school year 1991-1992.

DATE: April 5, 1994

ZOE BUSH
Chief Administrative Judge

CONCUR:

TERRY HART LEE
Administrative Judge

JONATHAN D. ZISCHKAU
Administrative Judge