GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

UNFOLDMENT, INC.	)	
	)	CAB No. D-1062
Under Contract No. 7KGC09	)	

For the Appellant, Unfoldment, Inc.: Kemi Morton Reed, Esq., and Brian Lederer, Esq. For the District: Andrew J. Saindon and Jennifer L. Longmeyer, Assistants Corporation Counsel, DC.

Order by Chief Administrative Judge Lorilyn E. Simkins with Administrative Judge Matthew S. Watson, concurring.

ORDER ON MOTION TO DISMISS/SUMMARY JUDGMENT

Appellant, Unfoldment, Inc., has filed an amended complaint alleging that its multiyear contract with the District of Columbia Child and Family Services Agency ("CFSA" or "Agency") was improperly terminated. Unfoldment requests award for: outstanding invoices for services during the contract period from July 1, 1997 to November 4, 1998; adjusted invoices; Quick Payment Act interest on late payments and simple interest; costs associated with closing the program from October 28, 1998 to December 28, 1998; unexpired lease payments and associated costs; unexpired vehicle lease payments and insurance costs; repairs caused by damages by CFSA clients, window and door replacement costs ordered by contract monitors; furniture and equipment purchased for the program; and attorneys' fees. The District has moved to dismiss the appeal or in the alternative for summary judgment asserting that there is no cognizable claim upon which relief can be granted based upon the undisputed facts set forth in this appeal, and that there are no genuine issues of material facts in dispute. We dismiss or deny all claims, except for Unfoldment's claim for unpaid invoices and QPA and simple interest.

Background

On July 1, 1997, Unfoldment entered into a one-year, fixed-price, indefinite quantity contract with four one-year options with CFSA to provide Group Home Continuing Foster Care Services to adolescent wards of the District. Unfoldment characterizes this contract as a multi-year contract. The services were to include "board and care, clothing, education, vocational training and guidance to help them reach their maximum potential." (Contract, p.1). The Contract established a maximum contract ceiling amount of $1,728,896.00 and a maximum number of thirty (30) children who could reside in Unfoldment's group homes at any one time. The placement of a minimum number of children was not set forth in the Contract. The per diem rate for each child was set at $157.89. The Contract provides that payment was to be made only for the documented number of children who were in the facility. (Contract, Article XIV).

The first year contract term ended on June 30, 1998, at which time the Agency exercised a partial option extending the contract term through September 30, 1998. On or about September 30,

1998, the Agency extended the Contract by one month, until October 31, 1998. The General Receiver notified Unfoldment in a letter, dated October 28, 1998, that its services would no longer be required, "effective 60 days from the date of this letter." This letter exercised one final option of two additional months until December 28, 1998.

On December 4, 1998, Unfoldment filed an appeal with the Board, setting forth dozens of allegations in a 28-page Complaint. For almost three years after the filing of the initial appeal, no activity took place at the Board while Unfoldment and CFSA pursued settlement discussions. Sometime in October 2000, CFSA, which was operated under a Receivership at the time,[1] paid Unfoldment $236,925.58 as a "partial settlement" of its claim. (Amended Complain, & 10, and Exh.14). A letter from Milton Grady, then-Deputy Receiver of Operations for CFSA, memorializes the payment and describes it as costs associated with the **termination** of Unfoldment's contract. (Emphasis added). Mr. Grady mentions in his letter that he was unable to substantiate all of the claimed costs, that his review included consideration of information forwarded to him on September 27, 2000, and that this payment represented only a partial settlement for the costs which had been substantiated. According to the letter, the $236,925.58 represented payment for proposal preparation costs of $12,000, facility lease termination costs of $23,000, and $201,825.58 for outstanding invoices. Although Mr. Grady's letter invited Unfoldment to present evidence of other costs, no further payments were made and according to both parties further negotiations were unsuccessful.

On October 18, 2001, Unfoldment filed an amended complaint. The 26- page, 107-paragraph Amended Complaint reorganizes Appellant's claims somewhat, but still includes counts which are not cognizable by this Board, and a great deal of material that is irrelevant.

On November 3, 2001, the District filed a motion to dismiss or in the alternative a motion for summary judgment. On December 21, 2001, Appellant filed its opposition to the District's motion. Appellee replied on January 18, 2002. Appellant filed an opposition to the District's reply on February 1, 2002.

Motion to Dismiss / Motion for Summary Judgment

The District has filed a two-pronged motion to which two different, but related, standards apply. In reviewing a motion to dismiss a complaint, the Board looks at only the complaint to test its legal sufficiency. For purposes of reviewing a motion to dismiss, all facts in the complaint are admitted, and we construe all facts and inferences in favor of the appellant. Super Ct. Civ. R. 12(b)(6); *American Ins. Co. v. Smith*, 472 A. 2d 872, 874 (D.C. 1984).

[1]On October 1, 2001, the Receivership ended and authority for the Agency returned to the District government.

In order to be entitled to summary judgment, the moving party has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56(c); *Clyburn v. 1411 K Street Limited Partnership,* 628 A. 2d. 1015, 1017 (D.C. 1993). The record is viewed in the light most favorable to the party opposing the motion. *Colbert v. Georgetown University*, 641 A. 2d 469, 472 (D.C. 1994) (en banc). Once the moving party makes the requisite showing, it becomes incumbent upon the non-moving party to demonstrate that a genuine disputed factual issue exists. *Smith v. Union Labor Life Ins. Co.*, 620 A.2d 265, 267 (D.C. 1993). The party opposing summary judgment must then make an evidentiary showing, via affidavit or otherwise, to demonstrate the existence of a genuine issue for trial. The non-moving party must present definite, competent evidence to rebut the motion. *Raskauskas v. Temple Realty Co.*, 589 A.2d 17, 25 (D.C. 1991). It is not appropriate at this stage of the proceedings to resolve issues of fact, weigh evidence or make credibility determinations. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986).

A. Multi-Year Contract

Before we analyze Unfoldment's claim count-by-count, it's important to clarify the nature of the contract. Unfoldment maintains that it entered into a multi-year contract with CFSA, and implies that CFSA was required to exercise options.

First, Unfoldment claims that the RFP described the contract as a five-year, multi-year contract, and that it must have been a multi-year contract because the Agency required Unfoldment to submit cost and pricing data covering a five year period . (Amended Complaint, p.5). We are unable to confirm Appellant's allegation regarding the RFP since Unfoldment failed to attach a copy of the RFP as an exhibit to its pleadings. Furthermore, the Agency's request for the submission of five years of cost and pricing data was appropriately requested for a one year contract with four one year options. Unfoldment also argues that this is a multi-year contract because the Article XIX is entitled Multi-Year Contract Cancellations. Notwithstanding the title of the cancellation clause, the substance of the clause does not comply with essentials of a multi-year cancellation clause. Article XIX provides that if the Control Board disapproved the contract or if Congress failed to appropriate funds, the Contractor would only be paid for work or services actually performed until the contract was cancelled. On the other hand, Title 27 DCMR § 2001.1 requires that:

> Each multiyear contract shall provide that if the contract is canceled due to unavailability of funds, the contractor shall be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies delivered or services performed under the contract.

This Contract is described as a one year, "Indefinite Quantity Contract with Fixed Unit Pricing." (Contract, Articles XIV and XVI). These clauses, as well as, the lack of any cancellation ceiling, the absence of language regarding the reimbursement for nonrecurring costs, and the statement in Article XIV § C that there are no cost reimbursable items of any kind in the contract, leads one to conclude unequivocally that this was not a multi-year contract.

B. Expiration of Option or Termination

Unfoldment disputes CFSA's unilateral right to let the Contract expire without exercising the option. Based on the contract language, CFSA had no limitations on its right to let the Contract expire. Article XVI, described as the Contract Period, provides:

> 1. The term of this contract shall be from July 1 1997, through June 30, 1998.
>
> 2. The duration of the contract shall be for a period of one year from the date of the contract start. The Child and Family Services Agency may extend the duration of the contract for a period of one year or any portion thereof by written notice to the Contractor before expiration of the contract. The exercise of an option is subject to the availability of funds at the time of the exercise of the option and the approval of the District of Columbia Financial Responsibility and Management Assistance Authority (the Control Board).
>
> 3. The total duration of the contract, including the exercise of any option(s), shall not exceed five (5) years.

The language is clear. The term of the Contract was for one year subject to the District's option. The language is permissive; renewal is uncertain. The Contract placed no limitation on the government's freedom to decline the exercise of its option.

The Contract language which restricts the exercise of an option to the availability of funds does not compel the government to exercise the option in the event that funds are available. This clause is inserted into contracts to comply with the federal Anti-Deficiency clause (31 U.S.C. § 1341) and "does not limit the government's freedom to choose not to exercise the option even if funds were available." *Tri-Continental Industries, Inc*. CAB No. P-297, 39 D.C. Reg. 4456 (Mar. 6, 1992); *Government Systems Advisors, Inc. v. U.S.*, 847 F. 811 (Fed. Cir. 1988).

The Board is also called to decide whether as a matter of law the Contract expired on its own terms, or whether the Contract was terminated. The record includes a letter from the then-Receiver, Ernestine Jones, dated October 28, 1998, notifying Unfoldment that the Agency would not exercise another option, after a two-month, close-out period. It is not material to this issue that Ms. Jones letter states that Unfoldment's services did not meet the needs of the children or mentioned non-compliance with the District's tax laws. Even if she were mistaken in these matters, the Agency still had the right not to renew.

Appellant directs the Board's attention to another Agency letter as providing contradictory evidence to the expiration of the Contract option. Appellant claims that the letter proves that the District terminated the Contract for default. The undated letter from Milton Grady, the then-Deputy

Receiver for Operations, characterizes the settlement payments made to Unfoldment as arising out of a termination of Unfoldment=s Contract. He states: "This letter is to advise you of recent developments pertaining to the review of the costs associated with the termination of Unfoldment's contract. (Contract # 7KGC0). This review included consideration of the information forwarded to my attention on September 27, 2000." Mr. Grady's use of the words "termination of Unfoldment's contract" does not expand or create legal rights for Unfoldment, beyond those that existed on December 28, 1998, when the last option expired. Mr. Grady's letter does not use the words "termination for convenience" or "default termination," terms of art in government contracts, but simply the word "termination" which in standard speech simply means "conclusion." (*Webster's Ninth New Collegiate Dictionary, 1985 ed.).*

More significantly, however, Mr. Grady's letter cannot be used as evidence to prove the merits of the underlying dispute, because it evidences a settlement agreement. The District law is consistent with Rule 408 of the Federal Rules of Evidence, which does not permit the use of offers of compromise or settlement agreements to prove liability for a claim or its amount. *See* S. Graae & B. Fitzpatrick, *The Law of Evidence in the District of Columbia, Rule 408* (1995 Repl.); *Pyne v. Jamaica Nutrition Holding Ltd.*, 497 A.2d 1118 (D.C. 1985). Mr. Grady's undated letter cannot be used as evidence to prove that Unfoldment's contract was terminated for cause or convenience.

C. Specific Counts in the Amended Complaint.

Count One -- Mitigation of Damages

Appellant argues that it is entitled to lost rental income, because CFSA has not removed furniture and client records from Unfoldment=s facilities. Unfoldment claims costs in excess of $800,000 in this regard. As we have stated above, the Contract does not permit cost reimbursement of any kind, and accordingly, this Board is not authorized to award such costs. The Contract never permitted Unfoldment to charge for maintaining these facilities, storing furniture once the contract option expire or for storage of the client files. Unfoldment is not entitled to lost rental income under any of its theories of recovery.

With respect to the case files in Unfoldment=s possession, we direct that CFSA make arrangements to remove these files from Unfoldment=s property within one month of the date of this decision. Article XI of the Contract entitled Records states that "All records will revert to the Receiver after termination of this contract." The responsibility to move the files does not, however, entitle Unfoldment to any sums beyond those that it has already received.

Count Two -- Unpaid Invoices for Services Rendered

Unfoldment acknowledges that CFSA paid it $201,825.58 for outstanding invoices. It claims that the total amount of the invoices was $275,404.23, and further that due to CFSA's delay in payment that it has incurred damages and lost income in an undetermined amount in excess of $100,000. Unfoldment is not entitled to any damages or lost income for CFSA's delayed payment. CFSA states that it was able to verify less than half of the amount Unfoldment claimed. CFSA paid

Unfoldment $201,825.58 for actual invoices. The District claims that CFSA paid Unfoldment for more than it was entitled to. This unadorned statement of the District's is not sufficient to establish the lack of a disputed fact.

With respect to Unfoldment's claim that it is still owed for outstanding invoices, we deny the District's motion for summary judgment. We, however, order Unfoldment to present within 30 days a detailed accounting of what invoices remain unpaid.

Unfoldment also seeks payment for 60% of its available bed space over the 17-month contract period thereby establishing a minimum usage. The contract had no minimum, only a maximum, and the contract only permits payment for the actual number of youth who were placed in Unfoldment's facilities. Accordingly, we grant the District's motion to dismiss Unfoldment's claim for "adjusted invoices."

Count Three -- Close Out Costs

Unfoldment claims that it is entitled to a yet undetermined amount in excess of $100,000 for "close out costs" from October 28 to December 28, 1998. This period corresponds to the 60-day close out period permitted by the General Receiver. In its Opposition, Unfoldment lists close out costs to be among other things lease costs, unexpired leases on automobiles for the program, severance pay, health care benefits, moving and storage costs, legal and administrative costs. None of these costs is recoverable under this Contract. We therefore grant the District's motion for summary judgment for Unfoldment's claim for closing costs.

Count Four -- Contract Termination Costs

The Board has ruled that the contract expired under its own terms, and Appellant is not entitled to any termination costs including initial costs, proposal preparation costs, lost profits and other fees and costs. We therefore grant the District's motion for summary judgment.

Count Five -- Interest Payments

Unfoldment alleges that it is due Quick Payment Act interest and simple interest on late paid invoices. The District challenges Unfoldment's entitlement to any QPA interest because it argues there was a dispute over the amount owed, and it disputes Unfoldment's entitlement to simple interest because it argues that Unfoldment has been paid for all of its work under the Contract. The District has not demonstrated it's entitlement to judgment as a matter of law and accordingly, we deny its motion for summary judgment with respect to interest payments. We are, however, interested in seeing Unfoldment present within 30 days, a detailed formulation of its claim for QPA including a list of invoices, dates of submission, dates of payment and a calculation of interest due.

Count Six -- Refusal to Pay Settlement Costs

Unfoldment alleges that CFSA's refusal to settle Unfoldment's claims and pay settlement costs in a timely manner has caused Unfoldment damages. This is not a claim cognizable under the PPA. This count is dismissed.

Count Seven -- Bad faith and Material Breach of Contract

Unfoldment alleges a multitude of failures by CFSA which it characterizes as bad faith and material breaches. These claims are irrelevant to what is material in this case and the bad faith and material breach of contract claims are dismissed.

Count Eight -- Defamation and Reputation-Plus Claim

This is not a claim cognizable under the PPA. The defamation and reputation-plus claim is therefore dismissed.

Count Nine -- Interference with Unfoldment's Contract

These facts are irrelevant to the issues that are cognizable by this Board. Therefore, this claim is dismissed.

Count Ten – Attorney's fees

Neither the PPA nor the Contract permits the payment of attorney's fees and costs of settlement in the expiration of an option. This claim is therefore dismissed.

D. Disqualification of Counsel

There is one remaining matter which the Board must address and that is the status of Unfoldment's counsel in this matter. The District has requested that the Board disqualify Ms. Reed from representing Unfoldment, because she would most certainly be called as a witness in this matter. Rule 3.7 of the District of Columbia Rules of Professional Conduct provides, in pertinent part:

> (A) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) The testimony relates to an uncontested issue;
> (2) The testimony relates to the nature and value of legal services rendered in the case; or
> (3) Disqualification of the lawyer would work substantial hardship on the client.

The Board finds that exceptions (1) and (2) do not apply to Ms. Reed, and because she has a co-counsel in this matter we find that her disqualification will not work a substantial hardship on Unfoldment. Accordingly, we disqualify Ms. Reed as an attorney in this matter.

E. Further Proceedings

The Board has ruled that Unfoldment has the right to pursue its claim for unpaid invoices and for interest. The Board has given Unfoldment 30 days to present a detailed claim of unpaid invoices, demonstrating what it has not been paid for, and 30 days to develop its QPA and simple interest claim. No other claims which Unfoldment has presented hold any merit.

SO ORDERED.

DATE: March 20, 2002

/s/ Lorilyn E. Simkins
LORILYN E. SIMKINS
Chief Administrative Judge

CONCURRING:

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