

**MONTGOMERY ROSS FISHER, INC.
& H. A. LEWIS, INC., A JOINT
VENTURE**

CONTRACT NO. V691C-1248H

VABCA-3696

**VA MEDICAL CENTER
LOS ANGELES, CALIFORNIA**

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OPINION BY ADMINISTRATIVE JUDGE KREMPASKY

Respondent, Department of Veterans Affairs ("VA" or "Government") has filed a Motion for Summary Judgment seeking to enforce an oral settlement of this appeal. Appellant, Montgomery Ross Fisher, Inc. and H. A. Lewis, Inc., A Joint Venture ("MRF"), contests the VA's Motion on the basis that the parties' settlement agreement to resolve this appeal was premised on a mistake of fact and that enforcement of the settlement agreement would be unconscionable.

This appeal arises out of Contract No. V691C-1248H ("Contract"), for the Renovation of Domiciliary Buildings 214 and 215 at the West Los Angeles, California VA Medical Center ("VAMC, West Los Angeles"). The appeal is from a deemed denial by the VA Contracting Officer ("CO") of MRF's claim for an equitable adjustment of \$7,597 for Field Change Order ("FCO") 4K for the rerouting of a conduit for a new transformer in Building 217. The appeal was docketed on June 2, 1992.

The record before the Board consists of the Complaint and Answer; the Government's Motion for Summary Judgment, including 5 attached exhibits (cited as "MSJ Exh. G-__"; and, Appellant's Opposition to the Government's Motion which also includes six exhibits (cited as "MSJ Exh. A-__"). The record also includes the Consolidated Appeal File submitted by the parties (cited as "R4, tab __") consisting of 132 exhibits.

**FINDINGS OF FACT FOR THE PURPOSES OF RULING
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT**

The following findings of fact are made for the purposes of this decision only.

The Contract was awarded to MRF on September 30, 1987, for the original contract price of \$11,600,000. The Notice to Proceed was issued on November 17, 1987; the Contract was to be complete 1080 days from the Notice to Proceed date. (R4, tab 1)

In Request for Information ("RFI") No. 204, dated August 14, 1990, MRF requested direction concerning a discrepancy with the existing route of an electrical conduit and the location of a required new transformer to which the conduit was to connect. The VA responded to RFI No. 204 on August 15 and 29, 1990, with direction to reroute the conduit. On October 10, 1990, the VA Senior Resident Engineer, acting within the scope of the authority delegated to him by the Contracting Officer, unilaterally issued FCO 4K in the amount of \$7,300 for the conduit rerouting. The Government cost estimate for the work was \$7,377. FCO 4K indicated that the Contract price had been increased by \$7,300 "for fiscal purposes" and directed MRF to submit a cost proposal for the conduit work within 30 days. (R4, tab 18)

By letter dated March 2, 1992, MRF forwarded its price proposal for FCO 4K in the amount of \$7,597. The amount of the proposal was developed by MRF's estimator and was not based on any submission from MRF's electrical subcontractor, EMI Electric, Inc. ("EMI"). (MSJ Exh. A-1, A-2).

The VA's counsel, by a January 11, 1993, facsimile transmission, forwarded an offer to MRF's counsel to settle 35 appeals arising out of the Contract. Included in this offer was an offer to settle the appeal in VABCA No. 3696 for a total of \$7,377. The offer to settle VABCA No. 3696 included \$6,706 for the claim of MRF's electrical subcontractor and \$671 for MRF's "fee" and was expressly approved by the VA's Contracting Officer. (MSJ Exhs. G-1, G-5)

Having received no response to its January 11 offer, the VA, by letter dated February 24, 1993, asked MRF to respond to the Government's offer, including the offer to resolve VABCA No. 3696. (MSJ Exh. G-2)

MRF's counsel responded to the VA's settlement offer by facsimile transmission on March 10, 1993. MRF's response, in part, stated that it accepted the VA's offer to resolve VABCA No. 3696 for the amount offered by the VA. As stated in his declaration supporting Appellant's opposition to the Government's motion, MRF's principal responsible for the settlement negotiations, Mr. Herbert A. Lewis, authorized counsel to accept the offer to settle VABCA No. 3696 based on his cursory review of the summary sheet of MRF's original proposal for FCO 4K. This summary included an amount claimed by MRF for the work of its electrical subcontractor, EMI Electric, Inc. ("EMI") (who is the real party in interest in this appeal) for the Building 217 conduit rerouting work. (MSJ Exhs. G-3, A-1, A-2)

The parties conducted a settlement conference, attended by the counsel and principals for each party, including Mr. Lewis and Mr. Joshua Rubin, a principal of EMI, on June 21, 1993, for the purpose of finally resolving numerous appeals arising under the Contract, including this appeal. The subject of VABCA No. 3696 was broached at the conference by Mr. Rubin. At that time, counsel for both parties represented to Mr. Rubin that VABCA No. 3696 was settled and that there was no need for further discussion. Mr. Rubin made no further comment or inquiry about VABCA No. 3696. Consequently, the prior settlement in VABCA No. 3696, although acknowledged, was not specifically discussed at the settlement conference. Mr. Lewis' settlement conference notes characterize VABCA No. 3696 as having been "settled by stipulation."

(MSJ Exhs. G-4, A-1)

Consistent with several Joint Status Reports submitted to the Board by the parties, the Board, upon the parties' request, by Order dated May 25, 1993, had suspended proceedings in the numerous appeals arising out of the Contract to facilitate the parties' settlement discussions. Based on the parties' declared intention in the Joint Status Reports to prepare a written Stipulation of Settlement, the Board's May 25 Order included a direction to submit a written stipulation of settlement with the Joint Motion for Judgment. Therefore, the parties contemplated that any settlement agreements reached would be memorialized in writing in the form of a Stipulation of Settlement to support the Joint Motion for Judgment and to facilitate payment of the anticipated judgment to be received from the Board.

The parties filed their Joint Motion for Judgment on Stipulated Settlement relating to 57 appeals arising under the Contract on July 20, 1993; the Board, in turn, issued its Order Entering Judgment on July 27, 1993. The appeal in VABCA No. 3696 was not included in either the parties' Motion or the Order Entering Judgment.

On July 13, 1993, Mr. Lewis met with Mr. Rubin to resolve outstanding issues between MRF and EMI. At that time, Mr. Rubin informed Mr. Lewis that EMI's cost proposal for FCO 4K was \$42,028.70. In reviewing MRF's original proposal for FCO 4K, Mr. Lewis determined that MRF's original claim to the VA had been based on an estimate prepared by MRF's estimator and that EMI, prior to July 13, 1993, had not submitted a cost proposal for FCO 4K. Upon EMI's presentation of its cost proposal, counsel for MRF, under Mr. Lewis' instruction, contacted VA counsel by telephone on July 14, 1993, and retracted MRF's prior "acceptance" of the Government's offer to settle VABCA No. 3696. (MSJ Exhs. A-1, A-3)

On July 22, 1993, EMI's counsel formally submitted EMI's claim for FCO 4K to MRF. Mr. Lewis responded, by letter to EMI's counsel dated July 23, 1993. In his response, Mr. Lewis stated that he was returning the claim without action because it was incorrectly prepared. In addition, Mr. Lewis, characterizing EMI's cost proposal as "fallacious", questioned its validity. (MSJ Exhs. A-4, A-5)

DISCUSSION

We will grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Saturn Construction Company*, VABCA No. 3229, 91-3 BCA ¶ 24,151, *aff'd. per curiam*, 991 F.2d 810 (Fed. Cir. 1993) (unpublished decision).

There are no material facts relevant to the Government's Motion in dispute. Therefore, our inquiry is directed to whether the Government, based on the undisputed facts, is entitled, as a matter of law, to a judgment enforcing the parties' agreement to settle VABCA No. 3696.

The VA, relying exclusively on our holding in *Elkhorn Construction Co.*, VABCA No. 1493, *et al.*, 84-2 BCA ¶ 17,435, asserts that MRF's acceptance of the VA's offer to

settle VABCA No. 3696 and the parties' subsequent mutual oral reaffirmation of their agreement at the settlement conference constituted an enforceable express oral contract notwithstanding the fact that the parties intended, as directed by the Board, to execute a formal, written Stipulation of Settlement memorializing the agreement. Consequently, the VA contends that it is entitled to a judgment enforcing the oral settlement as a matter of law.

MRF does not contest that it orally agreed to settle VABCA No. 3696; nor, is it contested that the parties' agreement to resolve VABCA No. 3696 included the understanding that settlement of this appeal would be implemented by a Stipulation of Settlement supporting a Joint Motion for Entry of Judgment to be submitted to the Board. However, MRF contends that the agreement to settle VABCA No. 3696 resulted from its unilateral mistake of fact concerning the value of EMI's claim and that this mistake of fact entitles it to rescind its acceptance of the VA's offer. In addition, MRF asserts that it is entitled to rescission because enforcement of the its agreement to accept payment of \$7,377 to settle VABCA No. 3696, in view of EMI's claim of \$42,028.70, would be "unconscionable."

The VA correctly asserts that under *Elkhorn*, the parties' oral agreement to settle VABCA No. 3696 is binding and enforceable. We found in *Elkhorn* that the enforceability of an otherwise valid and binding oral settlement agreement could not be defeated by the parties' failure to execute a written Stipulation of Settlement formalizing the agreement. Critical to our holding in *Elkhorn* was our finding, under the facts present there, that the oral Stipulation of Settlement fulfilled all of the elements necessary for a binding contractual agreement. Based on the undisputed facts and the parties representations here, it is clear that these same elements were fulfilled in the agreement to settle VABCA No. 3696. However, the Board in *Elkhorn* recognized that it may have been compelled to reach an opposite result by *SCM Corp. v. United States*, 219 Ct. Cl. 459, 595 F.2d 595 (1979) if the applicable regulations controlling the result in *SCM* had been present in the case before it.

In *SCM Corp.*, the Court of Claims, the predecessor court to the Court of Appeals for the Federal Circuit, held that a settlement agreement resolving a dispute arising out of a Department of the Army contract constituted a contract modification. Contract modifications, the court held, were required to be executed in writing on a Standard Form 30 by the then current Armed Services Procurement Regulations ("ASPR"). In the face of this regulatory requirement, the Court stated:

Oral understandings which contemplate the finalization of the legal obligations in a written form are not contracts in themselves. When legal obligations between the parties *will be deferred* until the time when a written document is executed, there will not be a contract until that time. *See RESTATEMENT OF CONTRACTS* § 26 (1932). *See also CORBIN ON CONTRACTS* § 30 (1963). Under the regulations [ASPR], Government funds were not obligated until the execution of standard form 30. The parties were well aware of the fact that only the written contract modification could finalize their agreement. No commitments in the oral understanding to act in any way by either party were to be consummated until

execution of the supplemental agreement. Whether the parties had reached a clear understanding of the terms of the settlement makes no difference and we specifically intimate no decision on that issue. We thus conclude that neither party was bound by its negotiations until standard form 30 was executed. *SCM Corp.*, 219 at 464, 595 F.2d at 598 [emphasis in original]

We should note, however, that the court in *SCM* carefully pointed out that it was not ruling on the more general issue of enforceability of oral contracts with the Government. *SCM Corp.*, 219 Ct. Cl. at, 464, 595 F.2d at 598.

The United States Court of Appeals for the Federal Circuit, in *Mil-Spec Contractors, Inc. v. United States*, 835 F.2d 865 (Fed. Cir. 1987), after reviewing the Federal Acquisition Regulation ("FAR"), 48 CFR Chap. 1, mandating that contract modifications be written, found the effect of the FAR requirements to be the same as the ASPR requirements considered by the Court of Claims in *SCM*. The *Mil-Spec* court, citing *SCM* and the applicable FAR language, held that oral settlements of claims under a Federal procurement contract are ineffective, noting that: "SCM fully supports, if it does not compel, our conclusion that the oral agreement to settle Mil-Spec's claim for \$6,367 was not an effective modification of the contract until both parties had signed a written modification agreement --which the contractor never did." *Mil-Spec*, 835 F.2d at 869.

We are confronted with the issue of whether the parties' oral settlement is a contract modification; if the settlement is a contract modification, as defined by the FAR, it governed by the holding of *Mil-Spec*. If it is not a modification, then, as discussed above, the oral settlement agreement is binding and enforceable.

The case at bar involves the same FAR provisions as those extensively quoted and confronted by the *Mil-Spec* court. That court, citing *SCM Corp.*, found that the provisions of FAR 2.101 (including bilateral modifications within the definition of a contract and defines contract as written instrument), FAR 43.101 (contract modifications defined as written changes to a contract), and FAR 43.103(a) (bilateral modification defined as a contract modification signed by both parties) read collectively resulted in the parties' oral settlement of the contractor's equitable adjustment claim being unenforceable. The Court concluded: "The oral agreement was a modification of the contract, since it increased the amount the government would pay for the work Mil-Spec had done." *Mil-Spec*, 835 F.2d at 866-67

The Court of Appeals for the Federal Circuit in *Texas Instruments Inc.*, 922 F.2d 810 (Fed. Cir. 1990), addressed the issue of the enforceability of oral contract modifications and upheld the enforceability of an oral agreement establishing the price of certain unpriced line items in a contract. Although it specifically recognized the continuing validity of *Mil-Spec*, the *Texas Instruments* Court, nevertheless, permitted the enforcement of an oral agreement on the price of several unpriced contract line items. The Court based its holding on applicable contract terms and regulations and distinguished the circumstances present in *Texas Instruments* from *Mil-Spec* by determining that the negotiation of prices for the unpriced contract line items did not constitute a contract modification. Therefore, the Court concluded, *Mil-Spec* did not preclude the enforcement of the oral negotiated price agreements since there was no

regulatory provision requiring that such pricing agreements be reduced to writing. *Texas Instruments*, 922 F.2d at 814.

SCM, *Mil-Spec*, and *Texas Instruments* all involved oral settlements of claims or proposals for equitable adjustments arrived at in the normal course of contract administration prior to appeal. See also *Centennial Leasing v. General Services Administration*, GSBCA No. 11451, 93-1 BCA ¶ 25,350. Here, however, as in *Elkhorn*, we are dealing with the settlement of litigation. In our view, in the absence of controlling law or regulation, an agreement to settle litigation under the jurisdiction of the Board is not a contract modification within the meaning of the FAR. Consequently, we are not bound by *Mil-Spec*'s formalistic dictates with regard to the necessity that agreements for contract modifications be reduced to writing in a form specified by an applicable regulation in order to be enforceable.

The 9th Circuit in *United States v. Bissett-Berman Corp. et al*, 481 F.2d 764 (9th Cir. 1973) confronted circumstances similar to those present in this case. In *Bissett-Berman*, the Government appealed the District Court's grant of the defendant-appellee's motion for summary judgment in the Government's breach of contract, tort, and admiralty suit. The suit arose out of a contract between the Department of Navy and Bissett-Berman for the installation at sea of a Government-owned hydrophone array. During contract performance, the hydrophone array was lost at sea. The Government instituted the action in District Court following a contract dispute and appeal to the Armed Services Board of Contract Appeals ("ASBCA") relating to the loss of the hydrophone array. The appeal was dismissed by the ASBCA with prejudice pursuant to the parties' Stipulation of Settlement filed with the board. The District Court based its judgment in favor of Bissett-Berman, in part, on the Stipulation of Settlement filed in the ASBCA proceeding.

In both the District Court and Court of Appeals actions, the Government argued that the Stipulation of Settlement was a nullity because such a settlement could only be effectuated by a contract modification properly executed under applicable procurement regulations. Citing the sources and extent of the ASBCA's authority and the judicial nature of ASBCA proceedings, the Court of Appeals upheld the lower court's ruling concerning the conclusive effect of the settlement of the appeal before the ASBCA, stating:

The [District] trial court did not regard the Stipulation of Settlement as simply a contract modification, nor do we. It may have had an effect on a dispute arising out of a contract, but it was in fact and in law the settlement of claims in litigation before an administrative body constituted by law to make an adjudication.

Bissett-Berman, 481 F.2d at 769.

We concur with 9th Circuit's well-reasoned analysis in *Bissett-Berman Corporation*. Holding the Board and the parties before us hostage to the minutiae of FAR forms and procedures for contract modifications in the settlement of appeals would eviscerate our authority, and obligation, to control our docket and to oversee, encourage, and implement the settlement of contract appeals properly in litigation before the Board. Thus, the

parties' oral agreement for the settlement of the appeal in VABCA No. 3696 is a binding and enforceable agreement.

Even if we were to find that a "writing" was required to bind MRF to the settlement of VABCA No. 3696, the facsimile offer and acceptance exchanged by the parties' counsel would satisfy any requirement for a written agreement. *Robinson Contracting Co., Inc. v. United States*, 16 Cl. Ct. 676 (1989). The fact that the offer and acceptance were not executed by MRF's principal or the CO does not defeat the enforceability of the agreement. Both counsel were acting with the express knowledge of their clients; furthermore, the principals and their counsel in litigation are entitled to rely on the actions of opposing counsel even where the CO has the sole authority to bind the United States. *Bissett-Berman*, 481 F.2d at 768.

Having found that the parties entered into an express agreement for the settlement of the appeal in VABCA No. 3696, we turn to MRF's contentions that the agreement to settle VABCA No. 3696 should be rescinded because MRF based its acceptance of the VA's offer on its unilateral "ministerial error" and that enforcement of the agreement in this circumstance would be unconscionable.

A party seeking reformation or rescission of contract based on a unilateral mistake must demonstrate both that the mistake resulted from a clear arithmetic or clerical error or misreading of contract requirements and that the other party knew or should have known of the mistake at the time of contract formation. A party's unilateral error of judgment will not support contract reformation or rescission. *United States v. Hamilton Enterprises, Inc.*, 711 F.2d 1038 (Fed. Cir. 1983); *The Faulkner Corporation*, VABCA No. 2998, 90-1 BCA ¶ 22,507.

Thus, MRF must demonstrate that: 1) it made a mistake; 2) the mistake was clerical or arithmetic (there is no issue relating to misreading Contract requirements here); and, 3) that the Government knew or should have known of the mistake in order to rescind its agreement settling VABCA No. 3696. The "mistake" asserted by MRF arose only upon EMI's submission, subsequent to MRF's acceptance of the Government's offer, of its claim to MRF. MRF argues that Mr. Lewis' cursory review of the 1992 proposal for FCO 4K to simply verify the amount of the proposal was a "ministerial" act resulting in MRF's mistake as to the amount claimed by EMI for the FCO 4K work.

MRF asserts that it can be relieved of the consequences of its unilateral "ministerial" errors. Although it offers no precedent or other basis for doing so and without defining the term, MRF apparently presumes that "ministerial" errors are the same as clerical or arithmetic errors. Mr. Lewis, in January 1993, reviewed the summary cover of its proposal for FCO 4K submitted to the VA the previous year in determining to accept a VA offer \$200 less than MRF's proposal. This review, even if it could be characterized as "ministerial", was neither a clerical nor arithmetic error. Moreover, if MRF made a mistake concerning the price of FCO 4K, the mistake was made in March 1992, nearly eighteen months after FCO 4K was issued, when MRF decided to submit a proposal for FCO 4K based its own estimates without receiving a proposal from EMI. Since Mr. Lewis was the author of the proposal submitted to the VA, he is presumed to know the basis on which it was prepared. The fact that, in January of 1993, he only reviewed the cover summary of his March, 1992 proposal, does not eliminate the fact that the proposal

amount in March 1992 was the result of MRF's exercise of its business judgment to seek additional funds from the VA on the basis of its, not EMI's, estimate of the costs associated with FCO 4K.

Consequently, any MRF mistake in accepting the VA's offer to settle VABCA No. 3696 was a unilateral mistake of judgment for which it is not entitled to rescission of the agreement. We should also note that MRF makes no assertion, nor is there any evidence, that the VA was or should have been aware of the mistake. In fact, the evidence is to the contrary. The VA's estimate for FCO 4K was \$7,377, the amount of its offer; MRF's proposal was \$7,597. Clearly, MRF has not met its burden to demonstrate that the VA knew or should have known that MRF's agreement to the sum of \$7,377 was a mistake or that EMI would submit a claim to MRF for over six times the amount at which MRF had valued its work.

Even though we have found that MRF's unilateral mistake of judgment will not support rescission of the settlement agreement, we must also deal with the issue of whether enforcement of the agreement would be unconscionable. Where the factors permitting rescission of a contractual agreement due to a unilateral mistake are not present, such relief may still obtain based on the theory of unconscionability. John Cibinic, Jr. & Ralph C. Nash, Jr., *Administration of Government Contracts, 2nd Edition*, 239-48 (1985) MRF asserts that the VA should not be permitted to "get something for nothing" by the enforcement of its agreement to settle VABCA No. 3696. In MRF's view, it would be unconscionable to permit the VA to pay only \$6,838 (the amount for the EMI portion of the FCO 4K work) in the face of EMI's claim of over \$42,000 for the work.

The application of the theory of unconscionability to Federal contracts, requires proof that the Government has somehow taken an unfair advantage of the contractual relationship. *Fan, Inc.*, GSBCA Nos. 7836, 8715, 91-1 BCA ¶ 23,364. In this case, the VA's and MRF's independent estimates of the value of FCO 4K are within \$220 of each other; this fact strongly suggests that the parties were on equal footing in reaching the settlement amount and that the reasonable value of the work for FCO 4K is embodied within the estimates. EMI's cost proposal was submitted subsequent to the settlement meeting at which EMI was present, nearly two years after FCO 4K was issued. The fact that EMI's cost proposal was over six times the amount estimated by the both MRF and the Government for EMI's work does not, absent some indication of validity, necessarily result in the conclusion that the VA took unfair advantage in the parties' negotiation of the settlement.

MRF has propounded what may be characterized as a theory of "speculative unconscionability" by grounding the purported unconscionability of its settlement on a cost proposal by its s