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CONDUENT STATE HEALTHCARE LLC, Petitioner, v. DISTRICT OF COLUMBIA DEPARTMENT OF SMALL AND LOCAL BUSINESS DEVELOPMENT, Respondent.	Case No.: 2017-DSLBD-00003

ORDER GRANTING MOTION FOR SUMMARY ADJUDICATION

I. INTRODUCTION

Petitioner Conduent State HealthCare LLC (Conduent), filed a hearing request (the Request) challenging Respondent District of Columbia Department of Small and Local Business Development's (DSLBD) Notice of Penalty. The Notice of Penalty fined Conduent $244,115.83 for its willful failure to meet its contractual obligation to subcontract twenty-five percent (25%) of contract No. CW26966 (the Contract) to Certified Business Entities (CBEs) for FY 2017, and its failure to submit timely quarterly reports to DSLBD. DSLBD has filed a Motion for Summary Adjudication (the Motion), and Conduent has filed an Opposition (the Opposition).

This Order grants summary adjudication in favor of DSLBD. The undisputed evidence, considered in the light most favorable to Conduent, establishes that Conduent willfully failed to meet its contractual obligation to subcontract twenty-five percent (25%) of the Total Contract

Value (TCV) to CBEs for FY 2017.[1] Moreover, Conduent did not request, nor did the District of Columbia Government (the District), including DSLBD, waive Conduent's contractual obligation to subcontract twenty-five percent (25%) of the TCV to CBEs for FY 2017.

II. BACKGROUND

Conduent operates the District's Medicaid Management Information System (MMIS). The MMIS is a federally mandated operations subsystem that provides information services to Medicaid recipients and providers, among other functions. The contract between Conduent and the District, along with its subsequent modifications and extensions, required Conduent to subcontract twenty-five percent (25%) of the TCV to CBEs within the District during FY 2017. Conduent was also obligated to submit quarterly reports to DSLBD for compliance monitoring purposes. Conduent failed to do either. Consequently, DSLBD issued a Notice of Penalty to Conduent on October 5, 2017. On October 26, 2017, Conduent filed an appeal with OAH.

III. PROCEDURAL HISTORY

On October 26, 2017, Conduent filed with the Office of Administrative Hearings (OAH) an appeal, and requested a hearing, regarding a Notice of Penalty it received from DSLBD.

On December 5, 2017, I held status conference. During the status conference the possibility of mediation was discussed. On December 12, 2017, the parties filed a Joint Request for Mediation. On December 15, 2017, the case was referred for mediation. On January 25, 2018, I was notified that mediation was unsuccessful. On March 9, 2018, I scheduled an evidentiary hearing for May 22, 2018. On April 4, 2018, DSLBD filed a Motion for Summary

[1] Because I have concluded that Conduent willfully failed to subcontract 25% of the TCV to CBEs in FY2017, I need not decide whether Conduent failed to timely submit quarterly reports to DSLBD for FY2017.

Adjudication, and on April 25, 2018, Conduent filed a response to the Motion. On April 25, 2018, DSLBD filed a Motion *in Limine*, and on May 9, 2018, Conduent filed an Opposition to the Motion. On May 11, 2018, I issued an Order converting the evidentiary hearing scheduled for May 22, 2018, into a motions hearing to hear oral argument on the Motion for Summary Adjudication and the Motion *in Limine*. At the May 22, 2018 Motions Hearing, I scheduled an evidentiary hearing for June 28, 2018. On June 6, 2018, DSLBD filed a Consent Motion to Continue the evidentiary hearing. I granted the Motion and continued the hearing to July 19, 2018. On July 5, 2018, I canceled the hearing scheduled for July 19, 2018, pending a ruling on DSLB's Motion for Summary Adjudication and Motion i*n Limine*.

IV. MATERIAL FACTS NOT IN DISPUTE[2]

The following facts are material facts to which I find no genuine dispute, and that I rely on to make the decision in this case.[3]

1) In 2006, Conduent State Healthcare, LLC was known as ACS State Healthcare, LLC. Declaration of Monica Hariri (Harri Decl.) at Ex. A.

2) In 2012, Conduent changed its name to Xerox State Healthcare, LLC. See Hariri Decl. at Ex B.

3) In 2017, Conduent acquired its current name. Hariri Decl. at Ex C.

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[2] Because I have granted DSLBD's Motion for Summary Adjudication, the Motion *in Limine* is moot.

[3] Although Conduent noted objections to several facts, those objections only involved wording, which were not substantive challenges to the facts. Otherwise, Conduent challenged the dollar amount allocated to one identified CBE, DataNet Systems. The difference in the disputed amount raised the TCV to be subcontracted to CBEs for FY 2017 from 10% to 15%, but has no bearing on the outcome of this decision.

4) The District of Columbia requires that respondents to government procurement solicitations be either CBE-certified or commit to subcontracting that meets a certain CBE threshold. Declaration of Rickey L. Capers (Capers Decl.) at ¶ 11.

5) All states, including the District, are required by the federal government to operate a Medicaid Management Information System (MMIS). Capers Decl. at ¶ 12.

6) In 2006, the District issued a Request for Proposals (RFP) for the Contract, seeking a private entity to operate its MMIS. Hariri Decl. at Ex D.

7) That RFP contained the following requirement:

> 25% of the total dollar value of this contract has been set-aside for performance through subcontracting with business certified by … the Department of Small and Local Business Development … as local business enterprises, disadvantaged business enterprises, resident-owned businesses, local business enterprises with their principal offices located in an enterprise zone, small business, or longtime resident business. … Once the plan is approved by the contracting officer, changes will only occur with the prior written approval of the contracting officer and the Director of DSLBD. Hariri Decl. at Ex D, ¶ 12.

8) Another provision of the RFP stated:

> The willful breach by a contractor of a subcontracting plan for utilization of local, small, or disadvantage businesses in the performance of a contract, the failure to submit any required subcontracting plan monitoring or compliance report, the deliberate submission of falsified data, may be enforced by the DSLBD through the imposition of penalties, including monetary fines of $15,000, or 5% of the total amount of the work that the contractor was to contract to local, small, or disadvantaged businesses, whichever is greater, for each such breach, failure, or falsified submission. See Hariri Decl. at Ex D, ¶ 12.

9) On the very first page of its proposal to the District, Conduent stated, "[t]o demonstrate our commitment to the District government, [Conduent] is partnering with a number of Local, Small, and Disadvantaged Business Enterprises … in order to meet the 25% requirement as stated in RFP Section M4.1.1." Hariri Decl. at Ex E, at ¶ 1.

10) Also in its proposal, Conduent stated:

> The [Conduent] solution is comprised of a joint team and includes a number of [CBEs] to support the ongoing operational activities for the DC Medicaid. DataNet Systems Corporation provides technical support for the new DC MMIS and Web portal solutions. ... [Business Promotions Consultants] supports our Provider Relations Department through staffing the call center, provider outreach and training functions. Kidd International, Inc. provides courier services, mailroom, claims entry, and edit resolution support to the [Conduent] team. Toucan Printing & Promotional Products, Inc. publish the Medicaid newsletters and print envelopes, forms, program brochures and other materials as needed throughout the operational periods. The proposed [Conduent] sub-contractor staff supporting the DC MMIS contract, except Toucan Printing & Promotional Products, Inc., is located in the ACS facility at 750 First Street, NE, Washington, DC. [Conduent's] Management team will provide management and direction for the [CBE] staff. *Id.* at 86.

11) On September 10, 2007, Conduent and the District entered into the Contract. Hariri Decl. at Ex A.

12) Section J.2.8 of the Contract incorporated by reference the entirety of the RFP No. POP-2006-R-007, which included the requirement to subcontract 25% of the TCV to CBEs. *Id.*

13) During the initial term of the Contract, through FY 2014, the District did not inquire with Conduent as to whether it was meeting its CBE subcontracting requirement, nor did the District issue any penalties to enforce the CBE subcontracting requirement. Capers Decl. at ¶ 13.

14) At the end of the initial contract term, Conduent and the District agreed to extend the Contract by another two years, through to the end of FY2016. Hariri Decl. at Ex F.

15) The TCV on the extended FY2015-16 term was valued at $38,721,447. Hariri Decl. at Ex. G.

16) For FY2015-16, the parties made no modifications to Conduent's obligation to subcontract 25% of TCV to CBEs. Hariri Decl. at Ex F.

17) A quarter of the TCV for the extended FY2015-16, the portion which was to be contracted to CBEs, was $9,680,361.75. Hariri Decl. at Ex. G.

18) From FY2015 through FY2016, Conduent subcontracted a total $7,563,400 to CBEs. *Id.*

19) On September 30, 2016, DSLBD issued a Notice of Penalty fining Conduent for failing to meet its subcontracting requirement for that two-year extension. *Id.*

20) In the September 30, 2016, Notice of Penalty, DLSBD stated: "[Conduent] shall provide an updated contracting plan for the coming Option Period; and quarterly expenditure reports…". Notice of Penalty pg. 2.

21) On October 11, 2016, Conduent filed an appeal of the September 30, 2016, Notice of Penalty with the Office of Administrative Hearings.

22) The matter was subsequently settled by Conduent and the District without litigation.

23) Upon completion of the extended FY2015-2016 two-year term, the District again renewed the Contract with Conduent, extending the time during which Conduent was to operate the District's MMIS through FY2017. Hariri Decl. at Ex J.

24) The base period of performance on the extended FY2017 term pursuant to this extension was valued at $19,529,266.40. Hariri Decl. at Ex K.

25) Conduent's 25% subcontracting requirement for FY2017 was set at $4,882,316.60. *Id.*

26) Conduent originally submitted a Subcontracting Plan stating that it would subcontract 35% of the TCV in 2017 to CBEs. Hariri Decl. at Ex L.

27) Upon Conduent's request, DSLBD agreed to reduce the CBE requirement to 25%. Hariri Decl. at Ex M.

28) Conduent did not provide Q1 and Q2 FY2017 quarterly reports on their CBE subcontracting until July 31, 2017, well into the fourth quarter of the fiscal year. Hariri Decl. at Ex N

29) For FY2017 Conduent subcontracted only $3,016,793.07 to CBEs, which represents approximately 15% of the FY 2017 TCV. Declaration of Glenda Goodwin (Goodwin Decl.) at Ex B.

30) For FY2017 Conduent paid its four CBE subcontractors as follows: Business Promotions Consultants $1,341,338.89, MDT Rush $55,485.00, DataNet Systems $1,470,762.76, and Korak $149,206.98. Capers Decl. at ¶ 14.

31) On October 5, 2017, DSLBD issued the Notice of Penalty, finding that Conduent had failed to meet the CBE subcontracting requirement for FY2017. Hariri Decl. at Ex. K.

32) In the October 5, 2017, Notice of Penalty, DSLBD stated:

> DSLBD finds that Conduent's failure to subcontract $4,882,316.60 to CBEs, and Conduent's failure to submit quarterly reports on time are willful breaches of Conduent's subcontracting plan. Based on the calculation of section M.4.8 [of the RFP which is incorporated into the CW26966 contract], DSLBD hereby assesses a penalty of $244,115.83 (subcontract requirement of $4,882,316.60 x 5%) on Conduent. Conduent is hereby ordered to make payment of this amount to DSLBD within 30 days.

V. LEGAL STANDARD FOR SUMMARY JUDGMENT AJUDICATION

The rules of this administrative court provide that a party may request that an Administrative Law Judge decide a case summarily, without an evidentiary hearing so long as

the motion includes sufficient evidence. OAH Rule 2819. The summary judgment standard set forth in the Super Ct. Civ. R. 56(c) provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The District of Columbia Court of Appeals described the substantive standard for entry of summary judgment in *Behradrezaee v. Dashtara*, 910 A.2d 349, 364 (D.C. 2006):

> Summary judgment is appropriate only if no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *GLM P'ship v. Hartford Cas. Ins. Co.*, 753 A.2d 995, 997-998 (D.C. 2000) (*citing Colbert v. Georgetown Univ.*, 641 A.2d 469, 472 (D.C. 1994) (*en banc*)). 'A motion for summary judgment is properly granted if (1) taking all reasonable inferences in the light most favorable to the nonmoving party, (2) a reasonable juror, acting reasonably, could not find for the non-moving party, (3) under the appropriate burden of proof.' *Kendrick v. Fox Television*, 659 A.2d 814, 818 (D.C. 1995) (quoting *Nader v. de Toledano,* 408 A.2d 31, 42 (D.C. 1979)).

Although the moving party has the burden of demonstrating the absence of a genuine issue of material fact, "[o]nce the movant has made such a prima facie showing, the nonmoving party has the burden of producing evidence that shows there is 'sufficient evidence supporting the claimed factual dispute ... to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Kendrick v. Fox Television*, 659 A.2d at 818 (*quoting Nader v. de Toledano*, 408 A.2d at 48.

Applying this standard to the facts here, I conclude there is no genuine issue as to any material fact and that DSLBD is entitled to judgment as a matter of law.

VI. CONCLUSIONS OF LAW

Two major issues are raised in the parties Motion and Opposition for Summary Adjudication:

A. Whether Conduent willfully breached its subcontracting plan by failing to subcontract 25% of the TCV of the Contract to CBEs for FY 2017.

B. Whether the District Government, including DSLBD, Waived Conduent's Obligation to subcontract 25% of the TCV of the Contract to CBEs for FY 2017.

I have decided these issues as follows:

A. Conduent's Failure to Adequately Subcontract to CBEs Constitutes a Willful Breach of the Contract.

D.C. Official Code § 2-218.48(c), states:

"A contractor that is found to have breached a subcontracting plan for utilization of certified business enterprises shall be subject to the imposition of penalties, including monetary fines."

D.C. Official Code § 2-218.63(a)(1), states:

"It shall be a violation of this subtitle and penalties shall be assessed if the Department determines that a beneficiary ... fails to comply with the requirements set forth in sections 2346, 2348, 0r 2349(a).

Section M.4.8 of MMIS RFP POTO-2006-R-0077 and the Contract, states:

"The willful breach by a contractor of a subcontracting plan for utilization of local, small, or disadvantaged businesses in the performance of a contract, the failure to submit any required subcontracting plan monitoring or compliance report, or the deliberate submission of falsified data may be enforced by the DSLBD through the imposition of penalties, including monetary fines of $15,000 or 5% of the total amount of the work that the contractor was to subcontract to local, small, or disadvantaged businesses, whichever is greater, for each such breach, failure, or falsified submission."

There is no dispute that Conduent failed to subcontract 25% of the TCV of the Contract to CBEs for FY2017. However, Conduent argues that it did not willfully to do so because it made a "good faith effort" to comply. But, Conduent's interpretation of willful is not consistent with D.C. law. "In civil or administrative proceedings, willful conduct is most often defined simply as that which is intentional, rather than inadvertent or accidental." *Hager v. D.C. Dep't of Consumer and Regulatory Affairs*, 475 A2.2d 367, 368 (D.C. 1984). Moreover, "[w]hile the evidence need not show intent to do harm, it must demonstrate a conscious indifference to consequences likely to cause harm." *Mannan v. D.C. Bd. of Medicine*, 558 A. 2d 329, 335 (D.C. 1989).

In *Hager*, the property owner defendant claimed he did not "willfully" violate statutory warranties relating to residential property. *Id* at 368. He conceded that he acted intentionally, but claimed that he could not be found to have "willfully" violated the warranties unless he had acted in "bad faith" or with "moral culpability." *Id.* The administrative law judge disagreed with the property owner, and the Court of appeals affirmed. *Id.* The Court of Appeals stated that "[g]enerally, [willful] conduct means 'no more than a person charged with a duty knows what he is doing. It does not mean that in addition, he must suppose that he is breaking the law." *Id.*

Like *Hager*, Conduent "knew what [it] was doing when it failed to subcontract 25% of the TCV to CBEs during FY2017. *Hager*, 475 A.2d at 368. In fact, in the Opposition, Conduent acknowledges that it pursued a course of conduct that was inconsistent with its obligation to subcontract 25% of the TCV to CBEs. Specifically, Conduent averred in the Opposition that major business operations took place and continue to take place outside of the District, including its data centers. Opposition at pp. 6-7. Conduent also acknowledged use of a computer program that somehow impacts its ability to use CBEs. Opposition at 7. By its actions, it is clear that

Conduent designated only certain limited roles or services to contract to CBE subcontractors. Conduent's operational decisions were intentional, and as such its failure to meet its CBE subcontracting goal for FY2017 was a natural consequence of its purposeful decisions. Moreover the breach in this case was a material breach, as Conduent was required to pay $4,882,316.60 to CBEs for FY2017, and only paid $3,016, 793.03, which represented a shortfall of $1,865,523.57 from the 25% requirement.

Significantly, Conduent does not cite any controlling decision by the D.C. Court of Appeals in illustrating the meaning of "willful" under District law. And the case it relies upon, *United States ex rel. Tran v. Computer Scis. Corp.*, 53 F Supp. 3d 104, 116 (D.D.C. 2014) is taken out of context and not on point.

In *Tran*, the Court interpreted a federal regulation, implementing the federal Small Business Act, which contained a "good faith" qualification of the word "willful" in its text. *Id.* at 116. Specifically, the regulation stated that "[f]ailure to make a good faith effort to comply with the subcontracting plan." *Id.* (quoting 48 C.F.R. § 19.701). The Tran court was required by the plain language of the federal regulation to read a "good faith" requirement into the "willful" standard. I cannot find any reason why D.C. law on the definition of "willful" should be superseded by a federal regulation that has nothing to do with this litigation. If anything, the fact the federal regulation saw a need to qualify the term "willful" with a "good faith" requirement shows that the term does not naturally have that reading.

This is not a case where a contractor failed to meet its obligation to subcontract a percentage of the contract to CBEs because it unintentionally or inadvertently subcontracted to a subcontractor posing as a CBE. To the contrary, this is a case where the contractor, after being

fined in 2016 for failing to meet its contractual obligation to subcontract 25% of the TCV to CBEs, committed the same breach in the following fiscal year. There can be no clearer evidence that Conduent acted intentionally, and not accidentally, or inadvertently, in failing to subcontract 25% of the TCV in FY2017 to CBEs. In fact, Conduent does not suggest otherwise, but rather asserts that its failure to subcontract 25% of the TCV in FY2017 to CBEs was by design, and with the consent of the District. As discussed below, this court rejects Conduent's argument that the District waived Conduent's obligation to subcontract 25% of the TCV in FY2017 to CBEs. Thus, I conclude as a matter of law that Conduent's actions constituted a "willful" breach of the Contract.

B. The District Government, including DSLBD, did not Waive Conduent's Obligation to Subcontract 25% of the TCV to CBEs for FY 2017.

In the Opposition, Conduent asserts that the parties' conduct in the years leading up to DSLBD's 2016 issuance of a penalty altered the Contract. Essentially, Conduent is arguing that the parole evidence rule applies to the Contract. However, it is well settled that "where a document is facially unambiguous, its language should be relied upon as providing the best objective manifestation of the parties' intent." *Segal Wholesale, Inc. v. United Drug Serv.*, 933 A2d 780, 784 (D.C. 2007). In *D.C. Wash. Hosp. Ctr.*, 722 A2d at 332, 342 (1998) the District of Columbia Court of Appeals stated "[w]here language is clear and unambiguous, its language is relied upon in determining the parties' intention."

Under the Contract, the language requiring Conduent to subcontract 25% of the TCV to CBEs is clear and unambiguous, and it is clear Conduent understood this obligation. When Conduent bid on the Contract it assured the District that it could meet the 25% CBE

subcontracting goal, and went through great pains to convince the District that it was set-up to do so. Specifically, in response to the Request for Proposal (RFP) for the Contract, Conduent stated, "[t]o demonstrate our commitment to the District government, [Conduent] is partnering with a number of Local, Small, and Disadvantaged Business Enterprises... in order to meet the 25% requirement as stated in RFP Section M.4.1.1." Later in its proposal, Conduent stated that [t]he Conduent solution is comprised of a joint team and includes a number of [CBEs] to support the ongoing operational activities for the DC Medicaid." Conduent then proceeded to list all of the CBEs that it would use to meet the 25% CBE goal.

Based upon Conduent's representations, and its agreement to subcontract 25% of the TCV to CBEs, the District selected Conduent as its private contractor to operate its MMIS. Despite Conduent's clear understanding of its obligations under the Contract, Conduent now claims that its subcontracting requirements became ambiguous because the District did not penalize it for its failures to meet its contractual obligation to subcontract 25% of the TCV to CBEs during the initial term of the Contract. This argument is without merit. In September 2016, Conduent agreed to and executed the contract extension for FY2017. DSLBD had already issued the Notice of Penalty for FY2015-16, which placed Conduent on notice of the District's interpretation of the contract and its expectations for future performance. Nevertheless, Conduent signed the extension without objecting to the subcontracting requirement or attempting to nullify the obligation. Instead, Conduent petitioned DSLBD not to increase the subcontracting requirement for CBEs to 35%, but rather maintain it at the 25% TCV level. Conduent's actions leave no doubt that it understood that the requirement to subcontract 25% of the TCV was in effect for FY2017, and that there was no waiver of the requirement. Thus, as a matter of law, I conclude that the Contract's terms for FY2017 were not waived or amended.

Therefore, it is this **8th** day of **May 2019**:

ORDERED, that Respondent DSLBD's motion for summary adjudication is **GRANTED;** and it is further

ORDERED, that the Notice of Penalty issued on October 5, 2019, is **AFFIRMED**; and it is further

ORDERED, that this case is **DISMISSED WITH PREJUDICE;** and it is further

ORDERED, that the reconsideration and appeal rights of any party aggrieved by this order are attached.

Samuel McClendon
Administrative Law Judge

After an administrative law judge has issued a Final Order, A party may ask the Administrative Law Judge to change the Final Order and may also file an appeal. There are important time limitations described below for doing so.

HOW TO REQUEST THE ADMINISTRATIVE LAW JUDGE TO CHANGE THE FINAL ORDER

Under certain limited circumstances and within certain time limits, a party may file a written request asking the administrative law judge to change a final order. OAH Rule 2828 explains the circumstances under which such a request may be made. Rule 2828 and other OAH rules are available at www.oah.dc.gov and at the Office of Administrative Hearings (OAH).

A request to change a final order does not affect the party's obligation to comply with the final order and to pay any fine or penalty. If a request to change a final order is received at OAH **within 10 calendar days** after the date the Final Order was served (**15 calendar days** if OAH mailed the final order to you), the period for filing an appeal with the District of Columbia Court of Appeals does not begin to run until the Administrative Law Judge rules on the request. **A request for a change in a final order will not be considered if it is received at OAH more than 120 calendar days after the date the Final Order was served (125 calendar days** if OAH mailed the Final Order to you).

HOW TO FILE AN APPEAL

Pursuant to D.C. Official Code § 2-1831.16(c)-(e), an appeal may be filed with the District of Columbia Court of Appeals. A Petition for Review and six copies must be filed with the court at the following address

Clerk
District of Columbia Court of Appeals
430 E Street, NW, Room 115
Washington, DC 20001

The Petition for Review (and required copies) may be mailed or delivered to the court, and must be received there within 30 calendar days of the mailing date of this Order, pursuant to D.C. App. R. 15(a)(2). There is a $100 fee for filing a Petition for Review. Persons who are unable to pay the filing fee may file a motion and affidavit to proceed without the payment of the fee when they file the Petition for Review. Information on petitions for review can be found in Title III of the Court of Appeals' Rules, which are available from the Clerk of the Court of Appeals, or at www.dcappeals.gov.

IMPORTANT NOTICES:

1. **The amount of a lawfully imposed fine cannot be modified or reduced on appeal. D.C. Official Code § 2-1831.16(g).**
2. **Filing an appeal does not stay (stop) the requirement to comply with a Final Order, including any requirement to pay a fine, penalty or other monetary sanction imposed by a Final Order. If you wish to request a stay, you must first file a written motion for a stay with the Office of Administrative Hearings. If the presiding Administrative Law Judge denies a stay, you then may seek a stay from the Court of Appeals or the Board as appropriate.**

Certificate of Service:

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I hereby certify that on 5-8, 2019 this document was served upon the parties named on this page at the address(es) and by the means stated.

Clerk/Deputy Clerk