STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
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SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2225	Date of Decision: 03/04/04
Appeal Type: [ ] Bid Protest	[X] Contract Claim
Procurement Identification: Under DBM OIT–97-001 TORFP#: DLLR/OIT/ OIM-98-001	
Appellant/Respondent: Information Systems & Networks Corporation Department of Labor, Licensing & Regulation	

Decision Summary:

Equitable Adjustment - Timeliness - The request for a change order in the instant appeal was not a notice of claim and the Appellant timely filed a notice of claim and claim upon receipt of the denial of the requested change order which denial was confrontational and placed Appellant on notice that it must file a claim.

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of Information Systems & Networks Corporation	)	
	)	**Docket No. MSBCA 2225**
Under DBM OIT-97-001 TORFP#:DLLR/OIT/OIM-98-001	)	

APPEARANCE FOR APPELLANT: **Norman H. Singer, Esq.**
Singer & Associates
Bethesda, MD

APPEARANCE FOR RESPONDENT: **Jonathan R. Krasnoff**
Assistant Attorney General
Baltimore, Maryland

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its request for an equitable adjustment and release of retainage and the State's counterclaim related to the captioned contract.

Findings of Fact

1. Appellant is a government contractor that has completed inventory, assessment and remediation services for government agency computer systems in a number of states, relating to Year 2000 (Y2K) compliance.
2. The State of Maryland awarded Appellant an umbrella contract to perform Y2K conversion services. In connection with that award, Appellant entered into a contract with the Department of Budget and Management (DBM), contract number DBM-OIT-97-001, concerning the provision of Year 2000 conversion services (the Master Contract). The Master Contract is dated August 25, 1997.
3. The Master Contract provided for a performance period of July 1, 1997 – June 30, 2002.
4. The Master Contract required Appellant's invoices to be paid no later than 30 days after DBM's receipt of an invoice.

5. The Master Contract required Appellant to retain all records, including time sheets for a period of three years after final payment.
6. The Master Contract excluded Appellant from liability for all consequential damages, even if Appellant was informed of the possibility of consequential damages.
7. As a result of Appellant's relationship with the State through the Master Contract, Appellant received a Task Order Request for Proposals (TORFP) to bid on a Y2K conversion project for the Department of Labor, Licensing and Regulation (DLLR). The TORFP requested a response on both Phase I and Phase II for the DLLR's Y2K conversion program.
8. Phase I involved inventory and assessment for approximately 2000 personal computers (PCs) for DLLR, and Phase II was to involve performance of remediation for the computers inventoried and assessed in Phase I.
9. The TORFP permitted DLLR to issue a separate TORFP for Phase II at the conclusion of Phase I.
10. The deliverables under Phase I were bi-weekly progress reports from Appellant, and a Master Plan for remediation that would incorporate both the inventory and assessment reports of hardware and software of each computer.
11. The nature of the contract to be awarded pursuant to the TORFP was going to be a time and materials contract.
12. Under the terms of the TORFP, the contract to be awarded by DLLR would operate under the terms of the Master Contract.
13. Appellant responded to the TORFP by submitting a technical and a financial proposal. Its proposal regarding Phase I itemized 2091 computers to be inventoried and assessed.
14. As a result of the proposal, Appellant was awarded a Task Order Master Agreement (TOMA), No. DLLR/OIT/OIM-98-001, dated June 8, 1998, to inventory and assess DLLR's computer and communication equipment.

15. The TOMA expressly incorporated the terms of the Master Contract.
16. The TOMA required Appellant to complete its work on or before April 15, 1999.
17. The TOMA provided for a ceiling for Appellant's contract price for completion of Phase I of $2,147,522.00.
18. The TOMA also established the priority of the various contracting documents in the event of any conflict or ambiguity. The Master Contract was to have first priority, but if the terms of the Master Contract did not provide clarity, then the terms contained in the TOMA would govern the parties. If the TOMA did not provide enough guidance on a contractual issue, then the parties were to consult the TORFP, and if that did not suffice to resolve a particular issue, the parties would consult the technical and financial proposal submitted by Appellant in response to the TORFP.
19. The Master Contract provided a date of completion for Phase I of June 30, 2002, long after the date in which the Y2K conversion needed to be completed prior to the end of the millennium. As a result, the Master Contract did not provide the parties with a workable date for the completion of Phase I.
20. Under the terms of the TOMA, its own due date would apply when the date of the Master Contract was inapplicable. The TOMA provided a date of completion for Phase I of April 15, 1999.
21. Once Appellant commenced work as the contractor under the TOMA, the parties had regular meetings to discuss issues and progress relating to performance. Minutes from the meetings were circulated to all attendees. The minutes were generally accurate and contemporaneously reflect the majority of the major issues discussed at the parties' meetings.
22. If a normal attendee of the weekly meetings missed a particular meeting, that attendee would still receive a copy of the minutes from the meeting he/she missed, and could comment on the issues

discussed in those minutes.

23. The parties first meeting (the “kick-off meeting”) occurred on June 12, 1998. It was evident at that time that Appellant had not received accurate information regarding the location and number of PCs, related code and embedded systems from DLLR, all of which was needed to commence work on the inventory.
24. The Director of DLLR’s Office of Information and Management, Mr. Klaus Reichelt, admitted that DLLR did not know exactly how many PCs it had when the TORFP was issued.
25. In a meeting dated June 22, 1998, the parties again revised the schedule for performance due to the need for DLLR to provide more information.
26. In a meeting dated June 29, 1998, the minutes reflect that the due dates for stages within Phase I were further revised due to DLLR’s delay in providing needed information relating to the number and location of its computers in its respective offices.
27. The minutes dated July 20, 1998 confirm that Appellant delivered a formal status report to DLLR. Appellant also indicated during that meeting that it would be working with Attronica as its subcontractor for inventory and assessment of DLLR’s personal computers.
28. It is undisputed that Appellant delivered additional status reports that were satisfactory to DLLR.
29. On July 27, 1998, Appellant asked DLLR to update its PCCOTS (commercial off-the-shelf) inventory matrix because the location of many PCs had still not been provided by DLLR.
30. On August 3, 1998, Appellant introduced its new project manager, Mr. William Reimer. The inventory had not yet begun as of the time of Mr. Reimer’s introduction.
31. DLLR approved every project manager Appellant assigned to oversee and complete Phase I.
32. On August 10, 1998, Appellant announced that it had decided to use Houston Associates, Inc. (Houston) as its subcontractor

under the TOMA rather than Attronica.

33. On August 24, 1998, Appellant executed a subcontract with Houston. The Houston subcontract was to commence August 25, 1998 and continue until work was completed. It was a fixed price labor, indefinite delivery and indefinite quantity contract.

34. The basic intention of the Houston subcontract was to inventory a maximum of 2300 computers.

35. By August 11, 1998, DLLR's representatives estimated that DLLR had only 1900 PCs to be inventoried and assessed. DLLR also requested that Appellant commence inventory on the PCs located in DLLR's two main office buildings located on North Eutaw Street and North Calvert Street in Baltimore, where approximately 1200-1300 PCs were believed to be located.

36. At a meeting on August 17, 1998, Mr. Reichelt was assigned the task of updating DLLR's PC estimate numbers. DLLR was estimating that it had 1800 PCs at that time, but the parties understood that DLLR had still not provided an accurate figure. Mr. Reichelt also requested on behalf of DLLR that Appellant not commence work at the North Calvert Street office until the second week of September.

37. Mr. Reichelt's request meant that the inventory at the North Calvert Street Office would be delayed by several weeks.

38. At a meeting on August 17, 1998, the parties agreed that the project had expanded to require Appellant to use two "tools" for the purposes of assessment: EON to assess hardware, and Viasoft to assess software. The parties had not originally contemplated the use of the Viasoft tool, but DLLR representatives indicated that they wanted the Viasoft tool for its datascanning capabilities. The parties had originally contemplated that Appellant would use a different tool for the software assessment, but that tool would not utilize datascan. As a result, the parties agreed that the new tool would require an

increase in the originally-contemplated estimated assessment time of 30-40 minutes per tool. Appellant estimated that it would double the time needed to assess each machine.

39. At a meeting on August 25, 1998, the parties agreed that delays in the inventory process would require an updated timetable for completion of the inventory.

40. On September 21, 1998, the parties agreed that Appellant had inventoried and assessed 1839 PCs.

41. In a memo from William Reimer, Appellant's Program Manager, to DLLR's Chief Information Officer, Mr. Andy Catts, Mr. Reimer informed Mr. Catts that there had been a delay in the final completion of Phase I because the number of PCs exceeded the number contemplated in the TOMA. Appellant only had licenses for 2000 EON disks. Appellant had to purchase additional EON disks for the hundreds of PCs that needed to be inventoried and assessed above the 2000 originally contemplated by the parties.

42. The October 5, 1998 minutes for the meeting on September 28, 1998 reveal that Appellant had at that time inventoried and assessed 2100 PCs. These minutes indicate that the parties were contemplating a contract change order request due to the increase in PCs. It was contemplated that Appellant would provide DLLR with contract change order request. DLLR also acknowledged that Appellant would need to inventory at least 2400 PCs, including laptops.

43. On October 6, 1998, Mr. Joel Leberknight of DBM sent a letter to Appellant notifying Appellant that the ceiling price under the Master Contract could be increased if: (a) the State "made an intentional decision to add to the level of effort in order to accomplish additional work identified subsequent to award of the task contract;" or (b) "inaccurate or incomplete information was included in the State-prepared TORFP." In either event, Appellant was directed to notify the procurement officer when it had reached 75% of the ceiling, estimate when the ceiling would

be exceeded, and provide a new total cost estimate.

44. Prior to the date of the price ceiling letter, Appellant had already exceeded the ceiling originally contemplated by the parties because the number of PCs inventoried and assessed had already exceeded the contractual amount, and it was still not apparent just how much more the total number would exceed the estimate in the TORFP.

45. DLLR's Chief Information Officer, Mr. Andy Catts, had authority to make a change order request to the Procurement Officer for a change order to increase the ceiling for work done under the TOMA. On May 19, 1999, Mr. Catts unilaterally issued a change order request for CBSI Corporation to complete work on Phase II, and in doing so, admitted that Phase II would involve "over 2,800 PCs at over 40 different locations throughout the State."

46. Appellant delivered the Master Plan (inventory), dated October 28, 1998, on October 30, 1998. At that time, Appellant had completed Phase I for approximately 2700-2800 computers, consisting of 2663 PCs and 100 to 120 additional Pentiums.

47. Appellant submitted a formal contract change order request in a letter dated January 22, 1999 to Ms. Cathy Spanglo, the Procurement Officer. The formal request requested an increase in the ceiling in the amount of $257,337.65. This amount was calculated based upon an additional 695 PCs and servers inventoried and assessed above the amount used by Appellant in its initial response to the TORFP (2,100). DLLR did not provide any response to Appellant's request.

48. Ms. Spanglo testified that she did not see Appellant's request until April of 1999, due to the fact that she was out of the office on medical leave.

49. On February 18, 1999, Appellant's Mr. Bruce McIntosh sent an e-mail to Mr. Catts requesting that Phase I be finalized and closed out, and that the DLLR make some determination on Appellant's previous request to increase the contract ceiling.

DLLR did not respond to this second request.

50. On June 15, 1999, Appellant's Director of Contracts, Mr. James Petersen, submitted Appellant's third request for an increase in the price ceiling. The request was submitted in a letter to Mr. Catts, and noted that DLLR had never responded to Appellant's initial request in January, 1999.

51. In a letter to Appellant's Mr. Petersen dated July 23, 1999 and signed by Ms. Spanglo, DLLR indicated that DLLR would not make any additional payments, either from the 10% retainage or for the additional PCs inventoried and assessed by Appellant. Ms. Spanglo's letter listed several alleged deficiencies with Appellant's performance of Phase I as justification for its decision.

52. Ms. Spanglo admitted that she did not draft most of the letter, and that she had no personal knowledge to support any contention contained in the letter.

53. Other DLLR witnesses who provided information for Ms. Spanglo's letter confirmed that she did not write it.

54. The first allegation in Ms. Spanglo's July 23, 1999 letter concerning nonperformance was the assertion that the Master Plan (inventory) submitted by Appellant was inaccurate. However, that assertion is contested by Appellant.

55. In support of the allegation, DLLR presented testimony from the Executive Director of DLLR's Office of Information and Technology, Mr. Richard Pragel, that he found that five (5) PCs that he checked in October, 1998 had errors in the Master Plan and that if there was a single error concerning one computer (out of approximately 2700) in the Master Plan, then the entire Master Plan would not be a usable product. Appellant testified through Mr. Emanuel Baboumakis, Executive Vice President for Operations, that one should sample approximately 10% of the total number of computers to determine an inventory's accuracy, which in this case would be approximately 270.

56. Mr. Dion Luke, the program director for the Phase II contractor, Complete Business Solutions, Inc. (CBSI), testified that he never actually saw the actual final ISN Master Plan submitted by Appellant.
57. Apparently DLLR never provided CBSI with a copy of the actual final ISN (Appellant) Master Plan, and thus CBSI had no way of knowing if the actual final ISN Master Plan was accurate or not.
58. Ms. Spanglo's second allegation of non-performance concerns the fact that Appellant did not have a full-time, onsite project manager. However, there was no contractual requirement for an onsite project manager.
59. Ms. Spanglo also asserted in her letter that Appellant never provided a soft or electronic copy of its Master Plan, but this assertion was refuted by Mr. Pragel, who testified that this assertion was wrong.
60. Ms. Spanglo asserted that Appellant's performance was deficient because status reports were consistently late. However, the minutes from the weekly meetings of the parties do not support this assertion.
61. Ms. Spanglo also alleged in her letter that Appellant lost code several times in performing Phase I. There is evidence of one or two instances where lost code had to be regenerated, which was accomplished.
62. However, DLLR "didn't treat it (lost code) as a major issue because we saw things were being taken care of and resolved."
63. Ms. Spanglo's letter also stated that Appellant did not follow field service procedures on inventory. Mr. Reimer responded directly to all of DLLR's questions regarding the field service procedure issue in an October 5, 1998 memorandum to Mr. Catts.
64. Ms. Spanglo's letter also alleged that Appellant failed to use assessment tools that provided an indication of risk. Mr. Baboumakis testified based on personal knowledge that the tools did indicate risk, and that the risk was specifically indicated

in the Master Plan. Mr. Reichelt testified that there came a time when Appellant provided information regarding indication of risk.

65. Ms. Spanglo finally alleged that Appellant did not meet milestones and deliverables in a timely manner. This is the subject of dispute.

66. Houston Associates sued Appellant when Appellant did not pay Houston Associates in full due to the fact that Appellant was awaiting payment from DLLR.

67. The litigation coincided with Ms. Spanglo's letter listing alleged deficiencies in performance. In the course of defending itself in an adversarial proceeding, Appellant defended itself against Houston's claims. Appellant did pay Houston for the value of its invoices plus interest. Appellant's position has always been that it had some initial problems with Houston's performance as the subcontractor, but that Appellant was able to correct any deficiencies and ultimately provide a competent and thorough set of deliverables to DLLR.

68. DLLR did not primarily concern itself with issues regarding Appellant's subcontractors, because DLLR dealt with Appellant as the general contractor with whom it had the contract.

69. CBSI was awarded the contract to complete Phase II for DLLR in a document dated January 20, 1999.

70. Although CBSI had apparently not reviewed the final Master Plan, CBSI indicated that there were inconsistencies in the work done by Appellant, and that CBSI should re-do the assessment of the PCs.

71. On April 13, 1999, a CBSI representative e-mailed Mr. Catts to request a $420,000.00 increase in the ceiling price of the Phase II contract to permit CBSI to do PC assessment on DLLR's "over 2,800 PCs."

72. Mr. Catts requested the $420,000.00 increase from the Procurement Officer.

73. On May 20, 1999, DLLR increased the ceiling on CBSI's contract in the amount of $420,000.00.
74. DLLR did not request to see any timesheets from CBSI with respect to the $420,000.00 ceiling increase for its assessment work. CBSI used the same personnel for remediation that they used for the re-assessment work.
75. CBSI was given until October 22, 1999 to re-do the assessment of 1900 computers under its change order executed in May, 1999 to assess 1900 computers with the $420,000.00 ceiling increase.
76. Appellant filed a formal Notice of Claim and claim meeting the requirements of COMAR 21.10.04.02A and B on August 19, 1999, in response to Ms. Spanglo's July 23, 1999 letter, alleging that it was owed a total of $455,544.07 on the Contract, comprised of $198,206.42 in retainage and $257,337.65 as an equitable adjustment.
77. Appellant's amended claim, filed on or about February 2, 2002 as an amended complaint after its appeal was filed with the Board, was prepared by its Chief Financial Officer, who, based upon the invoices, time sheets and number of computers, asserted that Appellant's damages were equal to $603,265.85.
78. The report of DLLR's damages expert, Mr. Mark Bleiweis of Rubino & McGeehin Consulting Group, Inc. (Rubino & McGeehin), substantiated, assuming entitlement and support for out-of-scope work and documentation regarding the amount in the Contract for PC inventory and assessment, $563,851 of the $603,265.85 claimed by Appellant.
79. Mr. Bleiweis did not substantiate a project manager cost based upon a fair estimate of $22,441.00, which was calculated upon an estimated time of twenty (20) hours per week for ten (10) weeks.
80. Mr. Bleiweis also would not substantiate "other direct costs" in the amount of $7,858.00 for travel-related expenses and $822.00 for software and computer supplies.

Decision

Appellant has established by a preponderance of the evidence that it is entitled to an equitable adjustment for at least a portion of its amended claim. With certain minor exceptions, Appellant completed all tasks required of it in the TOMA for Phase I, and performed such tasks well in advance of the date of completion referenced in the TOMA of April 1999. Appellant inventoried and assessed more computers than originally contemplated by the parties. While the TORFP estimated that Appellant would inventory and assess approximately 2,095 PCs, the record reflects that Appellant inventoried and assessed approximately 2,795 PCs, as stated in its Notice of Claim. When DLLR contracted with CBSI to remediate these same PCs, it estimated the number of PCs at over 2,800. As such, there is no genuine dispute over the number of PCs inventoried and assessed, for which Appellant seeks compensation.

DLLR filed a motion challenging the Board's jurisdiction based upon the allegation that Appellant failed to file a timely notice of claim. Under COMAR 21.10.04.02.A, a contractor must file a notice of claim within 30 days of when the basis of the claim is known or should have been known.

A "claim" under COMAR is defined as "a complaint by a contractor or by a procurement agency relating to a contract . . . ." COMAR 21.10.04.01.B(1). The Board has previously recognized that a request for a change order is not notice of a claim. *See* Syscom, Inc., MSBCA 2268, 5 MSBCA ¶ 517 (2002). In defining a "claim" for the purposes of the mandatory disputes clause, COMAR provides:

> As used herein, "claim" means a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract.
>
> A voucher, invoice, or request for payment that is not in dispute when submitted is not a claim under this clause. However, if the submission

> subsequently is not acted upon in a reasonable time, or is disputed as to liability or amount, it may be converted to a claim for the purpose of this clause.

COMAR 21.07.01.06.B(3).

As soon as it became clear that the TORFP vastly understated the number of DLLR's PCs, the parties contemplated a change order to increase the contract ceiling. It was not a matter in dispute for the purposes of the timeliness requirements of COMAR. The issue was discussed at weekly meetings between the parties, and is recorded in the minutes. DLLR knew Appellant was exceeding the scope of the TORFP, and made oral representation assertions at the meeting of September 28, 1998 that a change order to increase the ceiling to recognize the hundreds of additional PCs to be inventoried and assessed would be accepted. After Appellant submitted all of its deliverables under the contract, it submitted a change order request in a letter to Ms. Spanglo dated January 22, 1999. Ms. Spanglo did not respond for several months because she was on medical leave. Until Ms. Spanglo's letter of July 23, 1999 rejecting Appellant's change order request, Appellant had no reason to believe that its change order was in dispute. Appellant timely filed a notice of claim and claim regarding the Procurement Officer's (Ms. Spanglo's) July 23, 1999 rejection of its change order request, which was confrontational and put Appellant on notice that it must file a claim.

We also decline to find that Appellant's claim is barred by the terms of the October 6, 1998 price ceiling letter. The price ceiling letter informed Appellant that it should notify the procurement officer of the need to increase the contract ceiling at the time Appellant had reached 75% of the ceiling, and that Appellant should estimate when the ceiling will be exceeded and what the new total cost estimate should be. However, as of the date of the letter, Appellant had already exceeded the full amount of the ceiling, and there was no conclusive basis upon which to base an estimate as to

the number of additional PCs Appellant would find in DLLR's facilities. Accordingly, the terms of the price ceiling letter were moot from the outset. Appellant reasonably relied on DLLR's assurances that a change order would be granted, and submitted the change order request once it had an accurate figure regarding the amount that the ceiling would need to be increased. There was no "claim" at that time, and thus notice was not an issue reasonably in dispute.

During this appeal process on or about February 2, 2002, Appellant filed an amended complaint seeking to increase its claim to $603,265.85. The Board will deny Appellant's claim for additional compensation beyond the amount of $455,544.07 sought in its Notice of Claim and claim filed on August 19, 1999.

The basis of Appellant's claim for an equitable adjustment was first stated in a January 22, 1999 letter from Appellant's Director of Contracts, Mr. Petersen, to Ms. Spanglo. In that letter, Mr. Petersen stated as follows:

> Information Systems & Networks (ISN) Corporation request and [sic] increase of $257,337.65 in the ceiling price for subject task order. This request will raise the ceiling from $2,147,522 to $2,404,859.69. The request is based upon the fact that there were more personal computers (PCs) and servers than estimated in the RFP and included in ISN's proposal.

The letter included numerical calculations purporting to show that the original contract bid by Appellant factored in 2,100 computers for a total price of $777,570.00, at a "unit cost" of $370.27 per computer assessed. Therefore, according to Mr. Petersen, Appellant claimed the unit cost of $370.27 per computer should be multiplied by 675 additional computers, for a total cost of $257,337.65.

This figure of $257,335.65 was the exact amount included in Appellant's Notice of Claim and claim filed by Mr. Petersen with DLLR pursuant to COMAR 21.10.04.02 on or about August 19, 1999. In that August 19, 1999 Notice of Claim and claim, the nature and basis of

the equitable adjustment sought by Appellant was described as: "ISN is entitled to an increase in the ceiling for variations in estimated quantities." The Notice of Claim and claim further stated that the "increase was based on the difference between the actual number of PCs [2,795] and the number of PC [sic] and servers used in ISN's proposal calculation, 2,100." Since this equitable adjustment claim for $257,337.65 and Appellant's claim for the retainage were the only claims presented to DLLR, they were the only claims that were the subject of the final agency action required by COMAR 21.10.04.04. Therefore, the Recommended Decision of DLLR Secretary John P. O'Connor, the reviewing authority, dated April 2, 2001, addressed only those issues and claims raised before the agency. That agency decision did not directly address or consider any aspect of a claim that alleged that all work done after October 1, 1998 was "out of scope" work.

During the week of January 14, 2002, approximately three years after the conclusion of Appellant's contract with DLLR, and over two years after Appellant filed its original notice of claim, Appellant notified DLLR's cost experts, Rubino and McGeehin, that it now claimed entitlement to an equitable adjustment of $603,265.85, much more than claimed in August, 1999. Appellant indicated to DLLR and its auditors that its claim costs were significantly increased and that it was no longer claiming entitlement based on a "unit cost" or "variation in estimated quantities" theory. According to its allegations in its Amended Complaint, filed with the Board in February, 2002, Appellant claims that all work done after October 1, 1998 was "out of scope" work for which it was not paid. We find Appellant's upward amendment of its alleged costs is significant and different from the original claim presented to DLLR.

The underlying purpose of the notice of claim requirements of COMAR 21.10.04.02 is to put the agency on notice so it can evaluate the nature of the claim, mitigate loss, consider corrective action, determine if there is any entitlement, and set aside money to pay the

claim if it is found to be valid. These are important considerations in a case such as this because the basis of the amended claim is different from the original claim, and the time span between the original claim and the amended claim is significant. Originally, Appellant was simply alleging that it did "more of the same" work that it had contracted to do, i.e. inventory and assess computers. The amended claim, however, is different in alleging that all work, regardless of its character, done after October 1, 1998 is out of scope work which was not intended to be covered in the original contract. The different basis for the equitable adjustment and the increase of the monetary claim on such equitable adjustment request from $257,337.65 to $439,603.28 represent significant changes which we find prejudiced the DLLR's ability to evaluate the claim and set money aside for potential liability. Under such circumstances we could consider whether to dismiss the new claim (i.e. the increase from $257,337.65 to $439,603.28 based on the all out of scope theory) on timeliness grounds under 21.10.04.02, or we could remand to the agency for a decision in accordance with COMAR 21.10.04.03 and .04. However, we will do neither, finding that the amended claim has not been established.

Appellant has produced insufficient evidence to support the amended claim. In essence, Appellant put forth a theory of recovery after the fact because it failed to keep any contemporaneous records of the "extra work" that it, or its subcontractors did. Charles Bonuccelli, Appellant's Chief Financial Officer, acknowledged that the Houston time sheets submitted in support of Appellant's claim did not specify whether the work done was out of scope work. There was no separate cost code on the Houston or Appellant time sheets for out of scope work. Furthermore, the justification for the Appellant manager's time spent on the out of scope work was simply an estimate of the time each person spent on the PC inventory after October 1, 1998.

Appellant's theory of recovery, as stated in the August 19, 1999

Notice of Claim and claim, was based on a charge for each computer over the contracted number.

The second theory of recovery, that all work performed after October 1, 1998 is out of scope, can not be supported by the facts presented in this case. Appellant has not established that October 1, 1998 was the appropriate date to delineate in-scope from out of scope work. Although Mr. Bonuccelli acknowledged that the exact date the number 2,000 or 2,100 was reached is crucial, he did not know what that date was.

As a preliminary matter, Appellant's assertion that it is entitled to an equitable adjustment for assessing any computers beyond 2,000 units is erroneous. Appellant has acknowledged both in testimony and documentary evidence that it exceeded the original amount contracted for when it assessed more than 2,100 not 2,000.

The tally of computers after the 2,100 figure on October 5, 1998, comes from the October 19, 1998 meeting minutes which indicate that 2,487 PCs had been inventoried as of that date. The October 26, 1998 meeting minutes indicate that "DLLR was surprised at the number of PCs being 3,000 +. They only expected ~2500 based upon headcount. ISN [Appellant] will make sure that there are no duplications in the count. Subsequent PC database scan for duplication has reduced the count to less than 2600. The problem was appended letter to the S/N or DLLR inventory number of the PC."

From this evidence, one can draw these reasonable inferences: sometime in mid-October the PC count reached 2,300; and sometime by October 30, 1998, Appellant concluded that the final count was less than 2,600. However, the Board finds that, by December, 1998, the PC count had risen to approximately 2,795. Appellant claims it is entitled to $405,059.53 for out of scope work done mostly by Houston employees over a period of ten (10) weeks, from October 1, 1998 to December 9, 1998. Despite this time frame of approximately ten (10) weeks in which actual work might have been done to assess and inventory several hundred extra computers, Appellant's failure to

keep accurate records of the work directly attributable to the additional computers is fatal to its amended claim for an equitable adjustment as set forth in its amended complaint filed with the Board. However, the Board finds that Appellant has, in fact, established, based on the record, that it inventoried and assessed approximately 2,795 PCs and that a unit cost of $370.27, based on its proposal, is a reasonable cost. This yields a total amount of $257,337.65 for the additional 695 PCs actually inventoried and assessed over the 2,100 PCs reasonably estimated in Appellant's proposal (695 x $370.27 = $257,337.65). Additionally, Appellant seeks release of $198,206.42 in retainage funds relating to the inventory and assessment of the original 2,100 PCs estimated in its proposal.

The equitable adjustment sought in the amended claim is not established. The amount of the equitable adjustment (which the record reflects Appellant is entitled to) is established as $455,544.07, consisting of retainage of $198,206.42 for original contract work performed and $257,337.65 for additional work involving inventory and assessment of an additional 695 PCs.

While the basis for Appellant's August, 1999 claim is well-supported by the record, DLLR's counterclaim fails. DLLR has failed to meet its burden to prove its claim.

Paragraph 22 of the Master Contract required all Y2K service providers to retain all records, including time sheets for a period of three years after final payment. CBSI failed to maintain such records, and therefore there was no contemporaneous document confirming any time spent or cost associated with CBSI's work on Phase I. While DLLR paid an additional $420,000.00 to CBSI, there is insufficient evidence to indicate what work was covered by the $420,000.00, whether the work performed by CBSI was on Phase I, and the amount of time spent on Phase I, if any.

DLLR had the burden of proving its damages by a preponderance of the evidence. DLLR also had the burden of proving that the work CBSI

did on Phase I was necessary. DLLR has not provided evidence sufficient to prove its counter claim.

For the foregoing reasons, and based on the evidence of record, Appellant has established its entitlement to an equitable adjustment of $455,544.07. Pre-decision interest on the equitable adjustment, pursuant to the exercise of the Board's discretion under *Section 15-222* of the *State Finance and Procurement Article* of the *Annotated Code of Maryland*, is awarded from the date of the filing of the claim on August 19, 1999.

Wherefore it is Ordered this day of March, 2004 that Appellant is awarded an equitable adjustment in the amount of $455,544.07 with pre-decision interest at the rate of 10% from August 19, 1999. Post-decision interest shall run from the date of this decision.

Dated:

_____
Robert B. Harrison III
Chairman

I Concur:

_____
Michael J. Collins
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2225, appeal of Information Systems & Networks Corporation under DBM OIT-97-001 TORFP#:DLLR/OIT/OIM-98-001.

Dated:

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Michael L. Carnahan
Deputy Recorder