BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ARA Health Services, Inc. d/b/a Correctional Medical Systems	)	
	)	Docket No. MSBCA 1703
Under DPS7CS Contract No. 8804 00	)	

January 13, 1994

Contract Modification - Contract modification is permitted under the General Procurement Law and properly entered into modifications are enforceable in the absence of fraud, mistake, duress, coercion or undue influence.

Where the contract has a fixed rate per capita of payment and also provides for price adjustment to this rate related to an accepted index, the price adjustment must reflect the correct index information so that price adjustments will not be based upon publication errors.

Contract-Interpretation - Contracts are interpreted under the objective test. Contract clauses will be read together with effect given to each clause to interpret the intent of the parties.

Equitable Adjustment - Pre-decision Interest - Pre-decision interest is discretionary. This Board has generally allowed interest where necessary to make the contractor whole, considering all of the circumstances of the contract claim.

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OPINION BY MR. MALONE

This is a timely appeal from a final decision of the Department of Public Safety and Correctional Services (DPS&CS) Division of Corrections (DOC) Procurement Officer's denial of Appellant's contract claim. Prior to the hearing one of the counts alleged by Appellant namely; Count VI Miscellaneous Withholding ($35,000.00)

was withdrawn by Appellant and dismissed by this Board.

The Board having heard testimony, received evidence and argument of counsel addresses the remaining issues.[1]

Findings of Fact

1. The DOC issued a "Request for Proposal 8804-00, DOC Health Care Services" (RFP) dated September 12 1988, which solicited bids from contractors to provide health care program for inmates committed to the care of the DOC.

2. CMS submitted a "Response to Solicitation to Contract 8804-00" (Response to Solicitation) on or about October 14, 1988, and was awarded the contract.

3. ARA Health Services, Inc. d/b/a Correctional Medical Systems ("CMS") and the DPS&CS DOC entered into a contract dated November 22, 1988, designated as DPS&CS Contract No. 8804-00 ("the Contract").

4. Under the contract, the DOC was obligated to pay CMS for the health care services and products CMS provided.

5. The DOC structured the contract so that the contractor would be paid a fixed price per inmate for various types of medical care. The price per inmate was a fixed rate, which rate was set forth for each region.

6. Appellant was to be paid each month by submission of an invoice. Appellant was paid the fixed amount[2] stated for Primary Care Services (PCS) for each region specifically; Baltimore Region $213,583.00, Eastern Region $151,378.00, Hagerstown Region $208,995.00, and the Jessup Region $345,424.00 Appellant would also invoice monthly for Secondary Care Services (SCS) by taking the Average Daily Population (ADP) and multiplying it against the fixed rate for each region specifically; Baltimore Region $24.33, Eastern Region $17.08, Hagerstown Region 17.08, and the Jessup Region $24.71. Appellant would bill a management fee for each region monthly specifically; Baltimore Region $64,206.00, Eastern Region $42,466.00, Hagerstown Region $66,474.00, and the Jessup Region $106,063.00 The Appellant also monthly billed for operating costs by multiplying the ADP by the fixed rate per region specifically; Baltimore Region $15.41, Eastern

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[1]The parties stipulated as to quantum for each Count in the event the Board found entitlement, as well as numerous stipulations as to the facts in this appeal.

[2]Fixed price contract are permitted under COMAR 21.06.03.B.

Region $13.27, Hagerstown Region $13.55, and the Jessup Region $14.93.

7. The contract also provided for numerous other reimbursements to the contractor for certain specific conditions. For example, the contractor was to be reimbursed for equipment costs per the fixed rate per region.[3] The contract also provided reimbursement to the contractor for 100% of the price of eligible AIDS related, hospital service costs, but only after the contractor spent more than the total of all payments due to the contractor for all SCS. The contract also required the contractor to pay under operating costs;

> "-Direct costs incurred by the contractor in providing a health care program under this contract.
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> Operating costs include, but are not limited to, the costs for pharmaceuticals; prosthetics; laboratory testing; equipment repair; ambulance transportation; equipment maintenance; malpractice insurance, when the invoice from the insurer is 100% attributable to this contract; transportation costs approved in advance by the Division for persons whose compensation is provided for under Primary and Secondary Care Services rendered on-site in the region; and consumable supplies.
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> Operating costs do not include salaries, personnel benefits, taxes, rental of space, costs associated with conventions and meetings, calls to the Contractor's office outside the facilities encompassed by this contract, equipment costs, legal fees, general liability insurance and other overhead or indirect expenses."

Operating costs also included all pharmaceuticals and other health care supplies, eyeglasses, laboratory testing, AIDS medication and many other listed items.

8. In effect, the contract did not envision an administration of the contract by billing of actual costs but rather relied on the fixed rates for the most part. Consequently, while the actual costs of the contractor for each activity of health

[3]The fixed rate for equipment was zero (0) for all regions.

care were available, there was no requirement to review the material since compensation was generally based on the fixed rates per region.

9. The contract provided that during the monthly invoice procedure monies in deposit could be withheld in the event the parties could not resolve billing conflicts[4]. The contract also provided that if the DOC had a claim against the contractor it could under section 05.09.01.03.01,

> "Deduct the amount of the claim from any money due the contractor or available for the contractor's use.
> 02. Bill the contractor for the amounts owed the Division
> 03. Take an alternative action permitted in this contract
> 04. Take such other action as the Division and the contractor agree upon."

The parties, rather than take a confrontational approach to resolving invoice disputes, generally would meet and review problem areas settling the issues by some agreed upon method.[5]

10. Shortly after Appellant began work there was an unanticipated increase in the intake of prisoners. This increase was substantially greater than the representations made in the RFP and consequently Appellant claimed excess costs for excess intake. For example, the contractor was to have staff available at male reception in Baltimore for 25 physical exams per day, when in fact the intake was substantially greater than 25 per day. While the contract generally outlined medical care services it only, to a limited degree, specified what medical activities were required per inmate leaving the determination for needed care to the contractors medical staff. In effect,

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[4] The parties referred to these amounts as actual exceptions. Actual exceptions could also be described as claimed, verified, variances or variances including adjustment depending on various negotiations and settlements for each category.

[5] The accounting methods used were guided by reasonable agreement. The amount of recorded information is vast and the cost to review each entry prohibitive. Generally, the parties relied on sampling but also reviewed historical cost to negotiate a settlement.

the contractor bid based on representations that the inmate population would have intakes per year and a number of releases which would reflect the prior trends.

11. Myles Carpeneto, the Procurement Officer for the DOC, had prepared the RFP for the contract. The staffing numbers for the RFP were prepared by the Office of Health Care Services. The figures in the RFP for the Intake Physical Examinations at the Maryland Reception, Diagnostic, and Classification Center ("MRDCC") and the Maryland Correctional Institute for Women ("MCIW") were prepared by the DOC and/or the DPS&CS ("the Department"). The RFP provided for up to 6,125 intake physical examinations annually at MRDCC and reported 366 examinations for Fiscal Year 1987 at MCIW.

12. During the first year of the contract, the number of intake physical examinations was higher than the number of anticipated male intakes and reported female intakes in the RFP for Fiscal Year 1987. By Fiscal Year 1990, the intake population had increased to over 10,000 annually, an unanticipated growth. CMS provided documentation to the DOC which it claimed demonstrated increased numbers of intake physical examinations and the higher medical costs of new inmates. The documentation provided by CMS was reviewed by the DOC. The DOC agreed, in the course of negotiations for Modification C, that new inmates incurred higher secondary care costs than the stable inmate population. The DOC concurred with CMS at the time of the modification that a modification to the contract was reasonable and necessary. The DOC decided at the time of the modification that a modification to the contract was in the best interests of the State.

13. Acting Commissioner Elmanus Herndon, Assistant Commissioner Frank Mazzone, Sue Dooley, DOC Director of Finance, and Myles Carpeneto negotiated Modification C with John Hilburn, Area Vice-President of CMS, and Brad Steigemeier, Area Controller for CMS. The DOC personnel were authorized to negotiate a modification to the contract with CMS.

14. The DOC held internal meetings to discuss the issues regarding Modification C. The DOC negotiated the issues concerning Modification C with CMS over an extended period of time, including operating and secondary care cost components for receptions, the rate to be paid for the male and female excess intakes, and how often CMS would be reimbursed.

15. CMS sought to increase staffing and compensation for secondary and operating cost components for receptions. CMS and the DOC executed Modification B which increased the staff performing intake physical examinations to accommodate the increased number of intake physical examinations. In the course of the negotiations with the DOC, CMS agreed to waive its request for additional compensation for secondary care costs; that request was based on its contention that there were increased secondary care costs associated with increased receptions.

16. Myles Carpeneto drafted Modification C. Myles Carpeneto negotiated changes to the draft Modification C with Brad Steigemeier. Modification C was executed by Acting Commissioner Herndon for DOC on July 13, 1990, and John Hilburn for CMS on May 14, 1990, and was witnessed by Myles Carpeneto. Acting Commissioner Herndon had authority to execute Modification C. Modification C was approved by the Board of Public Works on June 27, 1990. Modification C provided for reimbursement to CMS in the amount of $132.31 for each additional male intake physical examination over the first 6,125 examinations and $306.48 for each additional female intake physical examination over the first 336 examinations in a one year period ("Excess Intakes").

17. Modification C to the contract was arrived at as a result of negotiations between DOC and CMS.

18. The Legislative Audit Report of January 23, 1992 estimated[6] that $620,799.00 in payments for intake physicals under Modification C, for the period between January 1, 1989 and September 30, 1991, were for items paid for under other portions of the contract.

19. During the course of negotiating Modification C, CMS provided to the DOC, among other documentation, a list of Intake Costs. The list of Intake Costs set out the various services to be provided to inmates at the time of intake, some of which were "weighted" and "averaged" to reflect the provision of the service to less than every inmate. Agency Document Submission Vol. IV, Tabs T-1 through T-6. The legislative auditors reviewed the list of Intake Costs (Vol. IV, Tab T-1) and identified items for which they concluded there were duplicate payments under other portions of the contract. The items which the legislative auditors stated were duplicate payments are set out in an Exhibit, along with the amounts paid during the period in question for each.

20. The parties stipulate that the calculations of the amounts paid for the items identified in the Exhibit are correct, but CMS does not stipulate that these amounts represented overpayments or amounts which the DOC was entitled to withhold.

21. Each item identified by the legislative auditor is an item identified in the contract as an item CMS was obligated to provide for the standing inmate population prior to the execution of Modification C. Each item identified on the second page of the Exhibit as (HIV costs), is an item which is compensated under Modification H, which provided for certain HIV services.

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[6] The auditor simply disallowed the money paid under Modification C without any review of medical costs actually billed and paid by CMS. In many ways the methods used by the auditor would generally be found in a cost based contract audit rather than the fixed price contract here subject to review since record tracking of actual costs would not be focused upon by the parties in administering this contract.

22. The legislative auditors concluded that the monies paid CMS for the Excess Intakes were already paid as operating costs. The Secretary subsequently determined that the Legislative Auditor's calculations supported the DOC's withholding related to intake physical examinations. In the decision, the Secretary concluded that the Legislative Auditor's calculations provided a basis to find that the DOC overpaid CMS $620,799.00.

23. The decision to enter into Modification "C" was not based solely on an evaluation of intake costs. DOC reviewed a history of similar costs previously performed by CMS at another prison, Grateford, which reflected an average premium cost over stable[7] inmates for intake prisoners of $165.00 per capita. DOC personnel then to further test CMS's suggestion furnished them with the actual costs for 90 intake prisoners and 90 stable prisoners. This sample reflected $591.00 cost per intake prisoner per year verses $280.00 cost per stable prisoner per year supporting a similar increase in costs experienced at Grateford. DOC personnel in further negotiations received a list of intake costs reflecting costs $347.38[8] for males and $808.73 for females. After further negotiations the parties settled on $132.31 per male intake over 515 per month, and $306.48 per female intake over 28 per month. DOC personnel by negotiation reduced substantially the increase sought by CMS and also resolved other substantial areas of dispute. The method which finally resolved the dispute used the intake costs analysis instead of either a historic costs or sampling technique. DOC personnel using their experience in the field chose the intake cost technique

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[7] A stable inmate is one who has been in prision for over three (3) months. CMS argued that after three months of medical care, the prisoner becomes stable and his previously poor physical condition improved resulting in fewer medical costs per month.

[8] These costs also include mark-up for management expense in addition to actual medical costs.

as the method most fiscally advantageous to the State to settle several disputes. The record supports the reasonableness of this method to fix a cost increase rate for excess intakes over that projected by the parties. While a superficial review of this calculation might suggest the possibility of duplicate billing, there is no evidence in the record duplicate billing actually occurred.

24. The DOC entered into Modification "B" effective March 1, 1990 to provide staff for 40 intake physical exams per day to compensate the Appellant. Appellant argued to DOC that not only the number of intakes but also the physical condition of the intakes had increased the cost burden beyond the expectation of the contract. The contract made no differentiation between intakes and inmates as to compensation under the fixed price formula of the contract. The contractor had to provide the additional medical services regardless of their physical condition. The contractor, to persuade DOC another modification was needed, prepared a sample[9] of actual intake and inmate medical costs. The sample costs reviewed by the parties showed that intakes incurred more medical costs than stable inmates who had already been given the benefit of medical care in prision. The sampling technique used by the parties was not performed to be scientifically valid, however only as an agreed method to attempt to resolve the claim of Appellant. DOC was persuaded after on-going arm-lengths negotiations that additional compensation should be paid for the unexpected increase and poor physical condition of intakes.

25. The parties then began negotiation on how to set a price to reflect this cost. The DOC was persuaded by Appellant that the poor physical condition of intakes required medical test,

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[9] The DOC chose a list of 90 intake prisons and 90 stable (i.e. had been prisoners over 3 months) inmates for CMS to evaluate.

eyeglasses, dental work, AIDS medication, shoes, and pharmacy needs beyond the original forecasts of the RFP. Many of the items upon which the excess intake cost adjustment was based were items the contractor was already obligated to provide under the original contract prices. Despite this, DOC formally entered into Modification C.

26. Modification of the Health Services contract between the State of Maryland Department of Public Safety and Correctional Services Division of Correction and ARA Health Services, Inc. effective June 1, 1990, which modification was designated as 8804-00C ("Modification C"); the result of this Modification was to pay the contractor for each additional male intake physical examination over the first 6,125 exams and each additional female intake physical examination over the first 336 exams. This reflects an increase in rate for excess intakes not the actual cost of any particular medical procedure.

27. Clearly, the DOC personnel administering the contract acted based upon the unexpected rise in intakes. DOC acknowledging their generally poor physical condition resulted in an increase of medical costs beyond that expected when the contract was entered into. While the method of pricing the excess intake rate give the appearance of the potential for duplicative payments, there is no evidence in the record that any specific medical costs was paid twice by DOC. This approach to resolve the issue given in Modification C is one of many that could have been used. On January 23, 1992 a legislative audit alleged $620,799.00 in excess payment[10].

28. In regards to AIDS medication, Section 04.03.02.01 of the contract between CMS and DOC provides:

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[10] The Legislative Auditors did not review any of the actual medical costs records. The auditor concluded since the potential existed for duplicative payments then all of the payments were duplicative.

The cost for the medication AZT, also known as Retrovir, and the cost for any newly developed medication for AIDS/ARC patients which is approved for use by the appropriate federal government agencies after the beginning date of the initial term of this contract shall be considered as a Secondary Care Services cost rather than as Operating Cost.

Section 05.08.04.03 of the contract provides:

The Division will reimburse the contractor for 100% of the price of eligible AIDS related, disaster related and major disturbance related hospital services costs. In order for hospital services costs to be considered eligible, all of the following conditions must be met:

05.08.04.03.01 The contractor expends for all Secondary Care Services during the term of this contract more than the total of all payments due the contractor by the Division for Secondary Care Services as stated in ATTACHMENT VI;

02. The potentially eligible hospital services costs are not eligible for reimbursement under another part of this contract;

03. The total amount of the potentially eligible hospital services costs does not exceed the overexpenditure incurred by the contractor for Secondary Care Services during the term of this contract.

04. The potentially eligible hospital services costs were incurred either:

05.08.04.04.04.A. In order to treat one or more inmates whose ailments were diagnosed by the hospital as being AIDS related, or

B. In order to treat one or more inmates whose injuries were not self-inflicted and which were sustained as a result of a physical assault during a major disturbance, or

C. In order to treat ten or more inmates as the result of a disaster.

29. It had been the understanding of CMS, even before contract 8804-00 was executed, that the high cost of AZT was part of

the AIDS costs for which the DOC would reimburse the contractor under Section 05.08.04.03 of the contract, however, that oral understanding was not sufficient here to constitute an amendment to the contract until Modification H.

30. In CMS' Response to Solicitation to Contract 8804-00, CMS articulated the understanding of the parties in the solicitation phrased as follows: "The cost of AZT or any reasonable substitute used in the treatment of HIV positive inmates will be included in the secondary costs section of the pricing proposal. If costs in the Secondary Care section exceed the stated limit, these costs will be submitted to the DOC for reimbursement."

31. Modification H provides, in pertinent part:

> 5. In ARTICLE 04, delete 04.03.02.01 and in its place put the following:
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> "04.03.02.10. AIDS MEDICATION
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> 01. Until July 1, 1990, the cost for the medication AZT, also known as Retrovir, and the cost for any newly developed medication for AIDS/ARC patients which is approved for use by the appropriate federal government agencies after the beginning date of the initial term of this contract shall be considered as a Secondary Care Services cost rather than as Operating Cost.
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> 02. Beginning July 1, 1990, the Division will reimburse the contractor for 100% of the cost of AZT and of any other similar medications developed for the treatment of AIDS patients which are approved for use by the appropriated federal government agencies."

32. Nothing about 04.03.02.10.02 changed in any way the actual course of conduct between CMS and DOC with regard to payments for AIDS medication for the period prior to July 1, 1990.

33. For the period from January 1, 1989 to June 30, 1990, the DOC reimbursed CMS $135,446.00 for AIDS medication under Section 05.08.04.03 of the contract. The medication was provided at correctional facilities.

34. Appellant also persuaded DOC that it should be compensated for 100% of AIDS medication and related costs. The contract

clearly provided that AIDS medication would only be 100% compensable if Appellant's actual expenditures exceeded the contract limitations, otherwise the contractor was required to pay the cost of AZT and other AIDS related medications under the original contract fixed rates. Despite the clear and unambiguous language of the contract the DOC and Appellant had a pattern of conduct where Appellant was paid 100% of these costs. In order to formalize their understanding they entered into Modification "H" on April 1, 1991 which provided for payment of AZT and similar medication for AIDS retro-actively from July 1, 1990. The parties did not address the excess payments for AIDS medication under the contract prior to July 1, 1990, which amounted to $135,446.00. Again DOC recognized that the poor physical condition of intakes resulted in excess AIDS medication costs for which the contractor should receive extra compensation, however, only retro-actively to July 1, 1990. The contract provides for this type of flexibility if the DOC agreed. The record reflects as the result of on-going arms length negotiations the parties formally modified the contract.

35. The contract also provides that in calculating the compensation to Secondary Care Services Per Capital Limitation (SCSPCL) for each renewal period of the contract would be based upon the Equivalent Inpatient Day Percentage Change (EIPDPC) which was defined as;

> "The projected annual percentage change in the cost for an Equivalent Inpatient Day (EIPD) of services for the fiscal year in which the present term of the contract ends at the hospital(s) named below in this definition. This figure is contained in the Disclosure for Hospital Financial and Statistical Data, published annually by the Maryland State Hospital Services Cost Review Commission, under the headings 'McCready,' 'University MD Hospital,' and 'Washington County.'"

36. This provided an easy and automatic procedure; if the contract was renewed, to adjust the fixed rates given in the original contract. The parties renewed the contract and relied upon

the percentage increase published by the Maryland State Hospital Services Cost Review Commission (HSCRC) in the Disclosure for Hospital Financial and Statistical Data on February 7, 1990 being 106.55% EIPDPC for the Eastern Region adjustment. Subsequently, to the surprise[11] of both parties this published figure was determined in error and the correct undisputed adjustment was revealed to be 15.2%. This error resulted in an excess payment to the contractor of $240,495.76.

37. During the 1991 legislature session, the House Appropriations Committee ("the Legislative Committees") were concerned with cost containment issues in general and with the DOC's large budget in particular.

38. The Legislative Committees directed the General Assembly's Division of Audits to audit the performance of the DOC's Inmate Health Services Program, and report back before the Interim Legislative Session. The audit was performed in or around November and December, 1991, covering the period from January 1, 1989 through September 30, 1991.

39. On January 24, 1992, the Department of Fiscal Services of the Maryland General Assembly forwarded a performance audit report of the Division of Correction - Headquarters ("Audit Report") to Secretary Bishop L. Robinson. The purpose of the Audit Report was to assess the State's inmate health care system. The Audit Report recommended that the DOC attempt to recover a series of what it termed "overpayments" to CMS.

40. On April 8, 1992, the Commissioner of the DOC, Richard A. Lanham, Sr., wrote to Walter J. Schriver, the President of CMS, informing him that the DOC would withhold $1,055,136 from payment of CMS' March 1992 invoice. The Commissioner, relaying on the Audit Report, informed CMS in his April 8,

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[11] While the parties were generally surprised to see such a large increase, there was no reason to suspect the number was in error.

1992 letter, that the DOC would "recover" a total amount of $1,055,136 from CMS with respect to intake physical examinations ($620,799), secondary care ($239,562), AIDS medication ($135,466), invoicing issues ($35,000)[12], and a certain contract settlement between CMS and the DOC ($24,329)[13].

41. The DOC did withhold this money from the April, 1992 invoice for the month of March, 1992, submitted by CMS pursuant to the contract. The DOC withheld this money based upon various recommendations in the Audit Report. DOC held $1,055,136 from payment of the invoice for March, 1992 as the DOC intended to "dispute" the invoice pursuant to COMAR 21.02.07.03.C.

42. CMS filed a contract claim on May 7, 1992 with regard to the withholding of the $1,055,136 from the invoice for March, 1992. Secretary Robinson prepared the Contract Claim Decision ("Decision"), which was dated November 20, 1992. Secretary Robinson denied in part and granted in part CMS' contract claim with regard to the withholding of $1,055,136 from the March, 1992 invoice.

43. In the Decision, the Secretary stated that the DOC was using the invoice for March, 1992 as a mechanism for disputing payments made to CMS. In the Decision, the Secretary cited, in part, COMAR 21.02.07.03.C as authority for the DOC's withholding the amount claimed. In the Decision, the Secretary stated that the DOC had withheld funds from the invoice for March, 1992 in compliance with COMAR 21.02.07.03.C. In the Decision, the Secretary asserted a statutory basis for withholding payment based on the March, 1992 invoice in Md. State Fin. & Proc. Code Ann. § 7-222 (1988). Section 7-222 and COMAR 21.02.07.03.C are the only provisions cited in the Decision as authority for the withholding of funds from CMS' March, 1992 invoice. CMS was a concerned party within the

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[12] This claim has been withdrawn.

[13] This figure has been adjusted to $7,644.55.

contemplation of COMAR 21.02.07.02.C.

44. On February 24, 1992, Commissioner Lanham wrote to Walter J. Schriver, President of CMS, and notified him of the recommendation contained in the Audit Report that the DOC recover $620,799 from CMS for duplicate payments allegedly made by the DOC to CMS. The next written notification sent by the DOC to CMS was the Commissioner's letter of April 8, 1992, in which he notified CMS that $1,055,136.00 would be deducted from payment of the invoice for March, 1992.

45. Following the Legislative Audit Report, DOC challenged $7,664.55[14] resulting from contract settlement overpayments.

46. The parties had on-going disputes as to certain items on the monthly invoices. In order to resolve these items the parties agreed to do an actual field review of the physical records themselves for a two month period. The parties agreed, in advance, that after reviewing these sample records on a "line by line" basis they could agree on an overall error rate which could be use to adjust all payments inferring that the rate of error would substantially reflect the correct amount to be paid. Since the contract did not require any specific formate for audit this method was agreed upon and used. The parties in one instance used 57.6% error rate to adjust contract payment. The parties had other numerous side agreements as to various disputed payments one of which gives rise to the $7,664.52.

47. The Appellant's forces had used Registered Nurses (RN) in one instance to perform work of Licensed Practical Nurses (LPN). Since RN's are more qualified than LPN's Appellant believed this fulfilled contract staff requirements. This resulted, however, in the denial by DOC of approximately $13,302.62 worth of LPN time. The LPN time was shown as an exemption on the parties work papers. The DOC had originally denied

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[14] The Legislative Auditor had used a figure of $24,329.00 for this item.

payment of RN substitution for LPN but later agreed the RN staff met the contract provisions and allowed payment. This "side agreement" was not reflected in the contract settlement papers. The Legislative Auditors (LA) unaware of this treated the $13,302.62 as an excess payment,[15] multiplied it by the agreed error rate 57.6% and denied the claim $7,662.31[16].

48. It is important to note that there was no contractually defined method or standard accounting practice required to resolve the disputes of the parties. The parties in good faith to execute the intent of the contract used various formula and methods to resolve disputes. While the Board makes no finding as to the soundness from a statistical or scientific view of these methods we do find they were entered into during arms-length negotiations in full view of the available facts at the time. Additionally, the methods used by the Legislative Auditor were based upon the time allowed, resources and other practical considerations which also reflect accepted accounting practices.

49. The Appellant filed its claim on May 2, 1992 which was denied on November 20, 1992 and timely appealed to this Board.

Decision

A. Count I, Lack of Authority to Withhold Payment.

The contract provided an express authority for DOC to withhold monies pending a claim against the contractor. Also, the factual allegations by Appellant fail to meet the minimum standard under State Finance and Procurement Article §15-104 since the DOC correctly asserted a claim[17] against the contractor. What remains

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[15] As an actual exception claimed by CMS.

[16] Actually LA denied $24,329.00 of which the Procurement Officer allowed $16,666.76 and had adjusted for a $2.24 previous DOC math error.

[17] State Finance and Procurement Article §15-105 states that,

Interest not payable

of Count I will be treated as a claim for pre-decision interest under the General Procurement Law and State Finance and Procurement Article §15-222, at the end of this decision.

B. Count II Intake Physical Examinations.

The parties in good faith and after arms-length negotiations properly and formally modified the original contract with Modification "C". There is no evidence in the record to support a finding that any undue influence, fraud, duress, coercion or mistake resulted in the contract change. Modifications to the contract are permitted and were properly approved as part of the ordinary and necessary give and take which is the day-to-day work of contract administration.

DOC contends that there is no consideration to support the Modification C. The Board finds this reasoning misplaced. The record clearly supports the DOC action in light of negotiations and the possibility that an equitable adjustment would be sought in light of the change in circumstances reflected by the increase in the intake population, among other adjustments.

Nothing in the record suggest evidence exists that double payment was made. Modification C does not, in fact, provide for any specific medical treatment. Modification C is only an adjustment to the rate paid for intakes over a specified level. None of the parties negotiated, promised or contracted to provide a monthly invoice based on actual costs incurred. Rather a per

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A unit is not liable under §15-104 of this subtitle for interest:

(1) unless within 30 days after the date on the State's check for the amount on which the interest accrued, the contractor submits an invoice for the interest;

(2) if a contract claim has been filed under Subtitle 2 of this title;

(3) accruing more than 1 year after the 31st day after the unit receives an invoice; or

(4) on an amount that represents unpaid interest. (SF §§ 11-132, 11-135; 1988, ch. 48, §2.).

capita and fixed rate method was employed. This method and adjustment is consistent with the overall objectives of the contract.[18]

Contract modification is permitted under the General Procurement Law. COMAR 21.01.02.01 (26) defines it as,

> "Contract modification" means any written alteration in the specifications, delivery point, date of delivery, contract period, price, quantity, or other provision of any existing contract, whether accomplished in accordance with a contract provision, or by mutual action of the parties to the contract. It includes change orders, extra work orders, supplemental agreements, contract amendments, or reinstatements."

The contract is governed by Maryland Law as recited in Article 09 of the contract. The contract also expressly provides for modifications under article 10.

While it is preferred that modifications be in writing, signed and properly approved they can be upheld based on the mutual action of the parties to the contract. See, TDI Corporation, MSBCA 1474, 3 MICPEL 244 (1990) and COMAR 21.01.02.01 (26).

Written modifications are expressly allowed and can in some cases be based on the conduct of the parties. See Martin G. Imbach, Inc., MDOT 1020, 1 MICPEL 52 (1983) The Driggs Corporation, MSBCA 1338, 2 MICPEL 194 (1988).

In the absence of fraud, mistake, duress, coercion, or undue influence, modifications entered into by the parties will be upheld by this Board.

The General Procurement Law by statute and regulation encourages and requires the parties to attempt to resolve their disputes prior to filing claims resulting in appeals.[19]

Contract Modifications "C" and "H" were correct and appropriate actions taken by the parties under the General Procurement Law during the administration of the contract. This Board rejects the

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[18] See COMAR 21.06.03.01B.

[19] See State Finance and Procurement Article §15-218.

notion that contract modifications can be set aside where the possibility exists the contract could have been administered in a different manner[20].

The objective test of contract interpretation will be applied to enforce clear and definite contract requirements. Frulin - Colnon Corporation and Horn Construction, Co., Inc., MDOT 1001, 1 MICPEL 1 (1979). The law in Maryland is clear that "...[t]he written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the parties at the time they entered into the contract, unless the written language is not susceptible of a clear and definite understanding, or unless there is fraud, duress or mutual mistake." Ray v. William G. Eurice & Bros., 201 Md. 115, 93 A.2d 272 (1952), Kasten Construction Co., Inc. v. Rod Enterprises, Inc., 268 Md. 318, 301 A.2d 12, 17 (1973).

The standard for interpreting a written contract was determined to be that meaning which would be attached to the written language by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the contract. In determining whether a particular meaning was reasonable, the contract will be read as a whole with effect given to each clause. Granite Construction Company, MDOT 1011, 1 MICPEL 8 (1981).

There being no legal or factual basis to set aside Modification C the Board finds entitlement for Count II in the amount of $620,799.00.

C. Count III Secondary Care Services Rate.

The facts are not disputed. The parties agreed to a renewal provision to increase the rate of secondary care costs as the published EIPDPC would be given by HFSD. The rate of 106.55% was erroneously published instead of the correct rate of 15.2%.

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[20] The Legislative Auditor testified other methods to resolve the dispute for excess intake costs would have been more appropriate.

Fixed-price contract provisions with indexed price adjustments are permitted under COMAR 21.06.03B where this type of contract obtains the best value in the time required and at the lowest cost or price or greatest revenue to the State. Factors to be considered are type and complexity of the procurement, difficulty of estimating performance costs, administrative costs, urgency, and length of the contract among others. COMAR 21.06.03.01 B.(4) expressly differentiates fixed-price contracts from other types based on cost data accounting system requirements.

> "(4) Except for a firm fixed-price contract, no contract type may be used unless the procurement officer determines that the contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific type of contract contemplated and that the contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles and that determination is approved by the appropriate Department."

DOP used the fixed-price contract in-part since the complexity and accounting cost of tracking each actual medical expense was prohibitive and, therefore, the contractor's accounting system was not required to track cost data as it would have been for a cost based contract. COMAR 21.06.03.02 defines the types of fixed-price contracts permitted which includes fixed-price contract with price adjustment.

> .02 Types of Fixed-Price Contracts.
>
> A. Definitions.
>
> (1) "Firm fixed-price contract" means a fixed price contract that provides a price that is not subject to adjustment because of variations in the contractor's cost.
>
> (2) "Fixed-price contract" means a contract which places responsibility on the contractor for the delivery of the product or the complete performance of the services or construction in accordance with the contract terms at a price that may be firm or may be subject to contractually specified adjustments.

(3) "Fixed-price contract with price adjustment" means a fixed price contract that provides for variation in the contract price under special conditions defined in the contract, other than customary provisions authorizing price adjustments due to modifications.

B. Application.

(1) Fixed-Price Contract Generally. A fixed-price contract is appropriate for use when the extent and type of work necessary to meet State requirements can be reasonably specified and the cost can be reasonably estimated, as is generally the case for construction or standard commercial products. A fixed-price type of contract is the only type of contract that can be used in competitive sealed bidding.

(2) Firm Fixed-Price Contract. A firm fixed-price contract should be used whenever prices which are fair and reasonable to the State can be established at the outset. Bases upon which firm fixed prices may be established include:

(a) Adequate price competition for the contract;

(b) Comparison of prices in similar prior procurements in which prices were fair and reasonable;

(c) Establishment of realistic costs of performance by utilizing cost or pricing data and identifying uncertainties in contract performance; or

(d) Use of other adequate means to establish a firm price.

(3) Fixed-Price Contract with Price Adjustment. When a fixed-price contract with price adjustment is used, the formula or other basis by which the adjustment in contract price can be made shall be specified in the solicitation and the resulting contract. Adjustment allowed may be upward or downward only or both upward and downward. Examples of conditions under which adjustments may be provided in fixed-price contracts are:

(a) Changes in the contractor's labor agreement rates as applied to the industry or areawide;

(b) Changes due to rapid and substantial price fluctuations, which can be related to an accepted index;

(c) In requirements contracts, when a manufacturer's general price change alters the base price (such as a change in a manufacturer's published price list or posted price to which a fixed discount is applied

pursuant to the contract to determine the contract price) and that change affects the contractor."

The contract ties the price adjustment to a fixed index. Clearly the parties intended to be bound only to the correct index information. It would be not only unreasonable but unconscionable to require compensation based upon a publication error.

The Board is not persuaded by Appellant's arguments as to ambiguity, contra proferentum, unforeseen circumstances, mutual mistake or unilateral mistake. The parties made no mistake and the contract provision is clear and unambiguous. There is no need to reform the contract or resolve issues of mistake since it was the error of a third non-party to the contract which underlies this issue.

Appellant cites D.J.'s Upholstery, Inc. v. Western National Mutual Ins. Co., 505 N.W. 2d 379, 380 (MINN. App. 1993). An insurance company made an error in computing its workers compensation premiums and upon discovery of its error re-billed at the correct rate. The rate was erroneously provided by a third party, Minnesota Workers Compensation Insurers Association (MWCIA). The Court in Minnesota held the insurer could not retro-actively rebill in light of its own unilateral mistake, since the contract unambiguously prohibited changing experience modifications factors retroactively and consequently the Court did not address a reasonable expectation analysis. This contract contains no express prohibition and therefore, reliance on this case fails in a factual comparison with the case before this Board. The reasonable expectation was that the correct number would be published by EIDP.

Additionally, reliance on Maryland Port Admin. v. Brawner Contracting Co., 303 Md. 44 (1985) is misplaced since clearly the Court found the mistake was a unilateral error by the contractor itself made in the course of its bid.

Other theories presented by Appellant fail on similar reasoning such as equitable estoppel since DOC did not make the representation of the rate, the rate was presented by EIDP, and both parties innocently relied on the rate as correct.

Appellant also cites Capital Savings & Loan Association v. Przbylowicz 83 MICH. App. 404, 268 N.W. 2d 662 (1978) where a loan was obtained at a fixed amount, interest rate and term reciting a standard monthly amortized payment. Subsequently, the monthly payment was discovered to be an amount incorrect to repay the loan. The Court would not correct the error sitting in equity since the savings and loan made the error and was in a superior position of knowledge and control finding that the resulting hardship was also the bank's to bear. Again, a unilateral mistake by a party to the contract factually distinguishes this ruling.

The Board finds that only the correct rate applies. The mistaken information relied upon by the parties cannot be the basis of a windfall to the Appellant. Wherefore, the Board denies entitlement for Count III of $239,562.00.

D. Count IV AIDS Medication.

This Board will enforce the plain and unambiguous language of the contract under the objective test of contract interpretation, reading the document together with effect given to each clause to interpret the intent of the parties. Frulin-Colnon Corporation and Horn Construction Co., Inc., MDOT 1001, 1 MICPEL 1 (1979). The original contract did not provide for the excess payment to Appellant for 100% AIDS medication costs incurred from January 1, 1989 through July 1, 1990. Modification H clearly changed the payment method for AIDS medication, but only from July 1, 1990 forward. When Modification H was entered into it could have been retro-active back to January 1, 1989 or earlier, but it was not. This shows a clear decision not to pay for AIDS medication for expenses incurred from January 1, 1989 through July 1, 1990 except

as provided under the original terms of the contract[21]. Appellant argues that there was a pattern of conduct which is superior to the express terms of the contract upon which entitlement can be found. We disagree. The plain language of the contract controls and we deny entitlement under Count IV, from January 1, 1989 to July 1, 1990. The parties clearly had in mind the issue when formalizing their prior conduct and did not negotiate to include this $139,446.00.

E. Count V Contract Settlement.

The method agreed to by the parties to resolve contract payment settlement was reasonable and permitted under accepted accounting methods. The contract permits settlements of disputed amounts during the normal administration of the contract. This was reviewed by an auditor not familiar with the agreements already made by the parties and therefore, the $7,664.55 for LPN services rendered is due to the Appellant applying their settlement agreements. The Board finds entitlement in the amount of $7,664.55.

F. Count VI, has been withdrawn by Appellant and is dismissed with prejudice.

G. Count VII Bad Faith.

The Board merges Count VII into the Counts above collectively where entitlement has been found.

H. Pre-decision Interest, Attorney's fee and claim preparation fees.

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[21] The parties stipulated as to quantum for Count IV of $139,446.00 based upon the Legislative Audit report dated January 23, 1992 for the period January 1, 1989 through June 30, 1991.

The record fails to state if the actual AIDS medication cost exceed the SCS cost rate cap under the original contract section 05.08.04.03. It is interesting the L.A. did not challenge the efficacy of Modification H which provided additional compensation for services already required under the contract, where such a challenge was made on precisely the same basis for Modification C. The record does not offer a reason for this inconsistency in audit technique.

Attorneys fees are not generally awarded under the General Procurement Law, (See, Spruell Development Corporation, MSBCA 1203, 1 MICPEL 92(1984) nor claim preparation fees. (See: Hensel Phelps Construction Co., MDOT 1016, 1 MICPEL 44, Fruin - Colnon Corporation and Horn Construction Co., Inc., MDOT 1025, 2 MICPEL 165(1987).)

Consequently Appellant's requests for attorney fees and claim preparation fees are denied.

The award of pre-decision interest is discretionary. State Finance & Procurement Article §15-222. This Board has generally allowed interest where an amount certain was due on a date certain or otherwise necessary to make the contractor whole under the General Procurement Law. (See Harman's Associates, MSBCA 1517 et al., 3 MICPEL 301 (1992) Court of Special Appeals of Md. #491 filed Dec. 8, 1993 Opinion by Wilmer, C.J. and I.W. Berman Properties v Porter Brothers, Inc., 276 Md. 1, 344 A.2d 65(1975).

Here, DOC knew or should have known by the May 7, 1992 contract claim the amount due. Wherefore, the Board finds entitlement for pre-decision interest at 10% from May 7, 1992 to January 13, 1994 the date of this decision calculated as follows;

ENTITLEMENT AWARDED BY COUNT

Count II	$620,799.00
Count V	$ 7,644.55
Total	$628,463.55

10% per year $62,846.35	÷ 365 days	= $172.18 Per Diem
616 days x $172.18		= $106,062.88
Total Entitlement Plus Pre-decision Interest		= $734,526.43

Wherefore, it is this 13th day of January, 1994 Ordered that $734,526.43 be paid to CMS plus judgment interest until paid.

Dated: 1/13/94

Neal E. Malone
Board Member

I concur:

Robert B. Harrison III
Chairman

Sheldon H. Press
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 1703, appeal of ARA Health Services, Inc. d/b/a Correctional Medical Systems under DPS&CS Contract No. 8804-00.

Dated: January 15, 1993

Mary M. Priscilla
Recorder