BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF COLLECTION AND RECOVERY, INC.	)	
	)	Docket No. MSBCA 2326
Under MVA Contract #V-HQ-99104-S	)	

July 15, 2004

Equitable Adjustment — Termination For Convenience — Costs incurred during a period of suspension of contract performance that precedes termination of the contract for convenience may be recoverable to the extend that such costs are documented and shown to be reasonably necessary to enable the contractor to resume performance should the suspension be lifted.

APPEARANCE FOR APPELLANT: Gary M. Anderson, Esq.
Laurel, Maryland

APPEARANCE FOR RESPONDENT: Jonathan Acton, II
Assistant Attorney General
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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim for an equitable adjustment following the termination of its contract for convenience.

Findings of Fact

1. The Motor Vehicle Administration (MVA) on July 1, 1999 awarded Contract No. V-HQ-99104-S to Appellant for the removal of license plates (tags) from vehicles with suspended registrations due to lapse of insurance. By letter dated July 2, 2001, the MVA suspended performance of the work for convenience.
2. Thereafter, on February 6, 2002, the MVA determined to terminate the Contract for convenience pursuant to COMAR 21.07.01.12A, and Appellant timely appealed that determination to this Board.[1]
3. That appeal (docketed by the Board as MSBCA 2270) was dismissed by the Board for lack of jurisdiction by decision dated September 17, 2002, which decision is incorporated

[1]The Respondent's Procurement Officer issued a determination dated February 5, 2002 finding it was in the best interest of the State to terminate the tag recovery Contract with Appellant so as to avoid disruption of a program that was proceeding satisfactorily with a different contractor under an emergency procurement.

herein by reference. The grounds for the Board's decision were that Appellant had not filed a termination claim as required by COMAR 21.07.01.12A.[2]

4. Appellant filed what purported to be a termination claim with the Respondent on or about September 13, 2002.
5. By letter to Appellant dated October 8, 2002, the Procurement Officer requested that the claim be submitted in proper form: certified with verified amounts and charges from each creditor. A copy of COMAR 21.07.01.12A(2)"(3) was enclosed with the letter.
6. By letter to the Procurement Officer dated October 15, 2002, Appellant's President inquired as to what certification was necessary.
7. By letter dated October 23, 2002, the Procurement Officer advised Appellant's President that the MVA would require, in addition to documentation he already had for each claim, the date an expense was incurred, the exact goods or services rendered, date of delivery, contact information for the vendor, and a copy of each invoice or explanation of why it is not available. The Procurement Officer noted that at this stage Respondent was not insisting on statements under oath from Appellant's creditors regarding charges for goods and services provided and that such goods and services provided were for the tag recovery project.
8. Appellant filed an amended claim dated October 30, 2002 for $366,448.81 with certain supporting documentation. No written documentation other than that provided with the amended claim was forthcoming until discovery following the docketing of the subject appeal (MSBCA 2326).
9. The Procurement Officer issued a final decision dated January 31, 2003, denying the claim for lack of documentation in all cases and, in some cases, because the claim was allegedly barred by statute, by regulation, by terms in the Request for Proposals (RFP), or by provisions in the Contract.
10. Appellant appealed this decision to the Board on February 10, 2003. As a preliminary matter at the hearing of the appeal on March 17, 2004, the parties agreed to submit the matter on the written record and supplied the Board with documents produced during discovery.

Decision

Whether Appellant is entitled to an equitable adjustment for the termination of the Contract for convenience will be determined by reference to COMAR 21.07.01.12A(2), the "long form" Termination for Convenience clause, which is reproduced in Appendix A, and by the Board's analysis of the appropriateness of compensating Appellant for costs incurred during the period of suspension prior to the termination.

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[2]Paragraph 13.0 of the Contract with Appellant incorporated the "General Conditions for Service Contracts" by reference, including paragraph 34B, which is the short form of the mandatory Termination for Convenience clause (*see* Appendix A). Under that clause, the provisions of COMAR 21.07.01.12A(2) govern the rights and obligations of the parties on termination for convenience.

COMAR 21.07.01.12A(2)"(3) provides in pertinent part that, upon termination for convenience, the contractor shall, within a year of the termination, unless that time is extended by the procurement officer, submit a termination claim to the procurement officer for determination. COMAR 21.07.01.12A(2)"(7) provides that only after a timely termination claim has been submitted to and determined by the procurement officer is there a right of appeal to the Board of Contract Appeals under the Disputes clause set forth in COMAR 21.07.01.06.

The claim consists of several components or sub claims set forth in the October 30, 2002 amended claim submission as follows:

Termination Claim
Contract # V-HQ-99104-S

Description of Debt	Amount	Detail	Holder of Debt
Office Lease	$9,600.00	12 months rent Aug 2001 to July 2002	Cider Barrel, Inc.
Office Utilities	$2,205.52	Utilities Aug 2001 to June 2002	Cider Barrel, Inc.
Office Supplies	$5,370.20	Office Supplies	Staples
Office Supplies	$2,145.59	Office Supplies	Office Depot
Copier Lease	$3,712.50	Balance on Leased copier contract	Pitney Bowes
Copier Service	$700.00	Balance on Service Contract	Pitney Bowes
Mailing Equip Lease	$26,955.00	Leased property 45 months remaining	National Leasing
Kimberly Carter Loan	$79,060.00	Loan including Interest as of July 19 2002	Kimberly Carter
Blackwell settlement	$4,000.00	Settle lawsuit against MVA and C and R	Blackwell
Attorney's Fee	$4,200.00	Original filing of Appeal	Joe Woolman
Herb Leininger Loan	$25,000.00	Balance remaining from May 1999 Loan	Herb Leininger
President's Salary	$110,000.00	Salary for maintaining company business	Bill Coleman
Server Rental	$51,000.00	13 months rental @ $3,000 per month	Company
TRTS software rental	$42,500.00	13 months rental @ $2,500 per month	Company
	$366,448.81		
This total does not include Attorney's fees for Timothy Gunning, our current Attorney			

As an initial matter, we observe that the RFP which led to the award of the subject Contract to Appellant provided that the awardee comport itself in a certain way. On June 29, 2001, the Procurement Officer made the following determination regarding Appellant's conduct:

> **I. SCOPE**
>
> The Motor Vehicle Administration (MVA) is charged with verifying motor vehicle insurance coverage and identifying uninsured motorists. Transportation Article 17-106 (d)(3) authorized the Motor Vehicle Administration (MVA) to contract with private agents to recover Maryland license plates (tags) when vehicle registration has been suspended as a result of insurance

violations. Through a competitive procurement process, the MVA entered into a five (5) year contract with the firm known as Collection and Recovery, Inc. The contract became effective July 1, 1999.

II. FINDINGS OF FACT

Given the nature of the work performed under this contract, the contract identifies certain standards of conduct which are required in order to bring credit both to the tag recovery agency and to the MVA. For example, Page 26 of the RFP, Clause F., Code of Conduct and Prohibited Acts states in part, "Each owner, officer and employee of the Private Tag Recovery Agency assigned to perform or while performing serviced under this contract shall:

> Item #2. Conduct themselves in such a manner as to bring credit both to themselves and to the MVA;
>
> Item #3. Conduct themselves in a reasonable manner so as to avoid confrontations which may lead to personal injury or embarrassment to the MVA; ..."

In accordance with the attached District Court charging documents, the Administration is informed that Charles William Coleman, President of Collection and Recovery, Inc. was charged with the following violations of Article 27 of the Maryland Criminal Code.

> Section 287 - Possession of crack cocaine
> Section 286 - Possession with intent to distribute crack cocaine
> Section 287 - Possession of heroin
> Section 287A - Possession of paraphernalia

III. RECOMMENDATION

In accordance with the Code of Maryland Regulations (COMAR) Title 21, State Procurement Regulations, specifically, COMAR 21.07.01.16, **Suspension of Work**, which states, "The procurement officer unilaterally may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the State."

> In consideration of the nature and severity of the charges, the Procurement Officer with the concurrence of the Agency Head has evaluated the District Court charging documents (public record) and finds such to be of sufficient basis for an immediate Suspension of Work for the convenience of the MVA.
>
> Upon resolution of the charges, the MVA shall re-evaluate this suspension and take appropriate action.

The issue raised by this action by MVA is the reasonableness of Appellant's incurring cost relative to the Contract during the period of suspension, the notice of suspension which followed the above determination advising that Appellant would not be compensated for any work performed after receipt of the notification.[3] Appellant is a small company. The employees number five (5), Appellant's President and four (4) other employees who oversee the activities of approximately thirty (30) tag collection agents apparently operating as independent contractors. The record reflects that Appellant's President played a critical role in the operations of Appellant under the Contract. The criminal charges set forth above in the Procurement Officer's June 29, 2001 determination are serious and could clearly have led to incarceration and consequent inability to perform under the Contract.

On the other hand, the Respondent in its Answer to Appellant's Complaint admitted the following:

> 5. The MVA admits the suspension was to continue at least until the resolution of his criminal charges, at which time his situation would again be reviewed and appropriate action taken ... (Text deleted).
>
> 6. The MVA admits that on September 28, 2001, Coleman pleaded guilty in Anne Arundel County circuit court to a conspiracy charge of possessing of crack cocaine with intent to distribute, with the other charges being dismissed under terms of a plea bargain ... (Text deleted). The MVA also admits that in Maryland the crime of conspiracy is a misdemeanor.
>
> 7. The MVA admits that judgement against Coleman was stayed December 5, 2001, under Md. Ann. Code, art. 27, § 641, and he was placed on supervised probation for 1 year, required to complete any drug and alcohol counseling and undergo random urinalysis as prescribed by the Department of Parole and Probation.

[3]The period of suspension commenced upon written notification of the suspension being hand delivered to Appellant on July 2, 2001.

> 8. The MVA admits that criminal counsel for Coleman requested immediate reinstatement of the tag recovery contract on his behalf once the criminal charges were settled without a conviction ... (Text deleted).

Respondent denied, however:

> ... that an Alford plea of guilty to a charge of possession of cocaine with intent to distribute, followed by probation before judgement — conditioned on supervised probation for a period of 1 year with drug and alcohol counseling and random drug test — is necessarily a "favorable disposition" under the Code of Conduct and Prohibited Acts specified in the Tag Recovery Agreement.

Weighing the evidence of record on the propriety of termination versus reinstatement, the Board finds that the admissions set forth above in Respondent's Answer concerning the disposition of criminal charges do not, as argued by Appellant, reflect a favorable disposition under the Code of Conduct and Prohibited Acts specified in the Tag Recovery Agreement. We further find that the February 6, 2002 termination of Appellant's Contract for convenience on the basis of the disposition of the charges was justified.

However, the presumption of innocence in a criminal proceeding combined with the affirmative statement in the notice of suspension that the State would reevaluate the suspension upon resolution of the charges leads the Board to conclude that, during the period of time between the July 2, 2001 suspension through disposition of the criminal charges on December 5, 2001 and the February 6, 2002 termination of the Contract for convenience, Appellant was entitled to the reasonable belief that should the Appellant's President be acquitted of the charges against him or that such charges be otherwise resolved in his favor the Respondent would restore it to the Contract upon Respondent's re-evaluation of the suspension.

As noted by the counsel to MVA in an agency submission to the Board in connection with Appellant's appeal in MSBCA 2270:

> Coleman [Appellant's President] had, meanwhile, appeared in Anne Arundel County circuit court on September 28, 2001, and entered an "Alford plea" of guilty to possession of crack cocaine with intent to distribute. At his sentencing December 5, 2001, judgement was stayed and the guilty finding stricken under Md. Ann. Code, art. 27, § 641, on the conditions Coleman receive one (1) year of supervised probation, successfully complete drug and alcohol counseling, undergo random urinalyses through the Department of Parole and Probation, and pay $355 in court costs ... (Text deleted).

The MVA learned of the outcome from a letter written December 21, 2001, by Mr. Karceski ... (Text deleted). In his letter, Mr. Karceski stated that probation before judgement was not a conviction and asked that Coleman "be allowed immediate reinstatement to that [Tag Recovery] contract under the same terms and conditions that were in effect on the day the suspension was issued." The letter came one week after the MVA had notified Cotton & Krahling of its intent to exercise the first renewal option, and four days after acknowledgment by Cotton & Krahling.

Termination

The contracts with Collection And Recovery, Inc., and with Cotton & Krahling both incorporated identical General Terms and Conditions. Paragraph 34B in each gave the MVA the right to terminate either one for convenience. The reinstatement request from Collection and Recovery forced the MVA to choose between the two.

At the time of the reinstatement request, six months would remain under the one-year renewal option from July 1, 2001, with Collection and Recovery. The six months preceding had been marked by a sudden disruption in service, an emergency procurement, the rejection of a non-responsive bidder, and an expedited transition to a new contractor. Under Cotton & Krahling, the Tag Recovery Program was operating satisfactorily. The prospect of yet another transition back to Collection And Recovery for six months before the contract could be re-bid was not seen as in the best interest of the State.

On the other hand, staying with Cotton & Krahling under its renewal option for six months did serve the best interests of the State. It would permit the Administration to continue with the agents and bond already in place. It would avoid an additional interruption in Tag Recovery Services. There would be no diversion of MVA personal to oversee yet another transition. If the program continued to run smoothly, a year would pass before the contract must be re-bid. Accordingly, the Procurement Officer issued a Determination on February 6, 2002, to terminate for convenience Contract No. V-HQ-99104-S with Collection and Recovery, Inc., rather than Contract No. V-HQ-02029-S with Cotton & Krahling, as in the best interests of the State under COMAR 2107.01.12A ... (Text deleted).

Thus, based on the comments of MVA counsel, it appears that there was a possibility during the period of suspension that Appellant might be reinstated but that administrative convenience and concern to avoid disruption drove the decision not to reinstate Appellant. It also appears from the record that Mr. Coleman reasonably relied on such possibility of reinstatement in preserving the ability of his company to resume tag collection operations. Accordingly, such costs as Appellant reasonably incurred during this period (from the date of suspension July 2, 2001 through the date of resolution of charges December 5, 2001 and up to the date of termination on February 6, 2002) to stand ready, willing and able to commence performance should the suspension be lifted will be allowed — assuming proof thereof. *Compare* Delle Data Systems, Inc., MSBCA 2146, 5 MSBCA ¶493 (2001).

We will deal with the various components of the claim in the order as set forth in Appellant's October 30, 2002 amended claim submission reproduced above at pp. 3–4.

In evaluating the components of Appellant's amended claim, the Board has taken into consideration several factors.

First, Appellant is a small business (COMAR 21.01.02.01) formed by Mr. Coleman to compete for the above captioned Contract. The record reflects that Mr. Coleman does not have any formal business education. He has owned a few used furniture stores, and most recently, before forming Appellant, he held managerial positions for two to three years in a taxicab and limousine company in Bethesda, Maryland. Mr. Coleman is not a high school graduate; however, he does have a Maryland GED. The record further reflects that Mr. Coleman is the only officer of the Appellant (Chairman and President) and that he made all management decisions for the Appellant. The Appellant has only four other employees in addition to Mr. Coleman. Together, Mr. Coleman and these four employees oversaw the activities of approximately thirty (30) tag collection agents who received 1099's and apparently functioned as independent contractors.

Second, the Appellant was selected as the tag recovery agency for MVA in a procurement by competitive sealed proposals subject to approval by the Department of Budget and Management and the Board of Public Works. The Appellant's performance of the initial one-year Contract period with a $600,000 not to exceed limit was satisfactory leading to its being renewed twice by MVA pursuant to four one-year renewal options exercisable at the MVA's unilateral discretion. The suspension issued early in the second renewal period was based on criminal charges against Mr. Coleman and not on Appellant's performance.

Third, the record reflects that Appellant, which operated out of Mr. Coleman's residential rental home did not have a sophisticated accounting and record keeping system.

We shall now review the individual components (or sub claims) of the October 30, 2002 amended claim.

Description of Debt	Amount	Detail	Holder of Debt
Office Lease	$9,600.00	12 months rent Aug 2001 to July 2002	Cider Barrel, Inc.

With respect to the office rent claimed amount of $9,600.00 for twelve (12) months from August, 2001 to July, 2002, the record reflects the following. The premises are located at 20320 Frederick Road, Germantown, Maryland 20876. There is no written lease. The property in question was used by Appellant's President as a personal residence on a month-to-month basis prior to Appellant's formation and award of the Contract. After entering into the Contract, Appellant's President ran the business out of the residence, and, after the suspension notice was received, Appellant continued the month-to-month arrangement with the landlord, Cider Barrel, Inc. The record contains a letter dated July 10, 2002 from Mr. William E. Cross, President of Cider Barrel, Inc., stating that Appellant had leased the property since 1996 and that there was an overdue rental balance of $9,600.00 for the period August, 2001 through July, 2002. The record also reflects that a Ms. Kimberly Carter,[4] who was one of Appellant's agents, lived in the premises rent free.

The monthly rent was stated to be $800.00, and the matter was discussed under oath by Appellant's President at his deposition on October 15, 2003. The record reflects that Cider Barrel, Inc. agreed to defer rental payments in August, 2001 until Appellant could rectify its income deficiencies. We find that the amount of rent charged Appellant is reasonable for business purposes to perform the requirements of the tag recovery program under the Contract. However, Appellant's President and Ms. Carter, one of Appellant's agents, also lived rent free on the premises. Employing a jury verdict approach, *see* Orphanos Contractors, Inc., MSBCA 1849, 5 MSBCA ¶410 (1996) at pp. 16–19, we shall reduce the amount of monthly rent by $400.00 to account for residential use by Appellant and Ms. Carter. The period for which we have determined that Appellant may be entitled to an equitable adjustment is the period of suspension from July 2, 2001 to February 6, 2002. For the six months that rent was owed (August, 2001 through January, 2002) during the period of suspension, we award an equitable adjustment of $2,400.00 (6 x $400.00 = $2,400.00) for rent owed by Appellant to its landlord, Cider Barrel, Inc.

Description of Debt	Amount	Detail	Holder of Debt
Office Utilities	$2,205.52	Utilities Aug 2001 to June 2002	Cider Barrel, Inc.

The office utilities involved are those connected to the utility bills for the period August, 2001 through June, 2002. As with the rent, Cider Barrel agreed to defer payment of the utility bills in August, 2001 until Appellant could rectify its income deficiencies. We find that the utility bill charges for the period August, 2001 through June, 2002 are reasonable and related to performance of the Contract. However, as with the rent we will apply a jury verdict approach to that portion of the utility bills reflecting usage during the period of suspension, July 2, 2001 to February 6, 2002, to account for the personal use of the premises by Appellant's President and Ms. Carter.[5] Therefore, we shall reduce the amount Appellant seeks by half to account for

[4]This is the same Ms. Carter who, as discussed below, allegedly loaned Appellant (with interest as of July 19, 2002) the amount of $79,060.00.

[5]We also observe that the record does not reflect the component parts of the utility bills. Therefore, we do not know if electricity for air conditioning was included and whether heat was gas or oil. Nevertheless, an amount of $2,205.52 for eleven months of utilities usage, particularly considering daytime business use of the premises, does not seem unreasonable.

personal use of the premises as a residence as distinct from business use. This leaves a total remaining for consideration of $1,102.76. The utility bill charges cover eleven months, from August, 2001 to June, 2002. The number of months eligible for consideration for utility payments is six (6), from August, 2001 to February, 2002. The record does not reflect the actual utility charges on a monthly basis. We will further reduce the amount Appellant seeks by half to take into account that the period of suspension from July, 2001 to February, 2002 covers only six months of the eleven months covered by the utility bill arrearage, August, 2001 through June, 2002, and that we do not have monthly billing records detailing the utility charges. This further reduction reduces the amount of the utility charges remaining for consideration to $551.38, and we award this amount as an equitable adjustment for the unpaid utility bills.

Description of Debt	Amount	Detail	Holder of Debt
Office Supplies	$5,370.20	Office Supplies	Staples

According to Mr. Coleman, the office supplies involved were all purchased prior to July 2, 2001 and, to the extent used, were used in connection with the captioned Contract. The amount claimed includes finance and late charges. However, there is no breakdown provided by Appellant for the type of items purchased, nor is there any description thereof. While it is clear that some office supplies would have been needed to perform under the Contract, it is not possible to determine from the record what items were purchased and the price thereof. Accordingly, the claim for office supplies purchased from Staples is denied.

Description of Debt	Amount	Detail	Holder of Debt
Office Supplies	$2,145.59	Office Supplies	Office Depot

As with the office supplies purchased from Staples, Appellant asserts that all the supplies purchased from Office Depot were purchased prior to the July 2, 2001 suspension date and, to the extent used, were used in connection with the captioned Contract, Appellant's only contract with MVA. The amount claimed includes finance and late charges. However, there is no breakdown provided by Appellant for the type of items purchased, nor is there any description thereof. While it is clear that some office supplies would have been needed to perform under the Contract, it is not possible to determine from the record what items were purchased and the price thereof. Accordingly, the claim for office supplies purchased from Office Depot is denied.

Description of Debt	Amount	Detail	Holder of Debt
Copier Lease	$3,712.50	Balance on Leased copier contract	Pitney Bowes

This claim involves a lease for a copy machine from Pitney Bowes. It appears from the record that a copy machine would have been reasonably necessary in performance of the Contract requirements. The lease was a three-year lease that commenced in May, 2000 and expired in May, 2003. Appellant made no payments under the lease after July 2, 2001, and, according to the deposition testimony of Appellant's President, Appellant sold the copier for $1000.00 to a third party after Pitney Bowes had declined to take the copier back and had written off the machine. Accordingly, it appears from the record that Appellant incurred no loss attributable to the copy machine lease, and this claim is denied.

Description of Debt	Amount	Detail	Holder of Debt
Copier Service	$700.00	Balance on Service Contract	Pitney Bowes

This claim involves a full-service maintenance plan on the leased copy machine from Pitney Bowes to run concurrently with the lease, May, 2000 – May, 2003. The plan provided for a monthly charge of $25.00 and a cost of 1.3 cents per copy. The Board is not able to determine from the record whether any portion of the $700.00 was paid during the period July 2, 2001 – February 6, 2003, how the $700.00 is calculated, and what the present status of the debt is. Accordingly, this claim is denied.

Description of Debt	Amount	Detail	Holder of Debt
Mailing Equip Lease	$26,955.00	Leased property 45 months remaining	National Leasing

This claim involves a lease for mailing equipment. From the deposition testimony of Appellant's President, we determine that the amount of this claim is reduced to $10,782.00 based on quarterly payments of $1,797.00 for six quarters from June, 2001 to February, 2003 when the lessor accepted return of the equipment from Appellant. We find that the equipment was necessary in the performance of the Contract as it was used to mail out notices to vehicle owners whose tags were suspended prior to removal of the tags from the vehicles. However, the period for which Appellant may be entitled to an equitable adjustment is the period of suspension July 2, 2001 – February 6, 2002. This involves only two and one third quarters rather than six quarters. We shall award an equitable adjustment for the lease of this equipment based on the quarterly payments of $1,797.00 for two and one third quarters, which amounts to $4,193.00 (calculated on the basis of the seven months involved in the two and one third quarters at the monthly rate of $599.00). Accordingly, we award an equitable adjustment of $4,193.00 attributable to the rental of mailing equipment during the period of suspension.

Description of Debt	Amount	Detail	Holder of Debt
Kimberly Carter Loan	$79,060.00	Loan including Interest as of July 19 2002	Kimberly Carter

This claim concerns alleged loans totaling $70,000.00 to Appellant from one of its agents, Ms. Kimberly Carter, between November, 2000 and May, 2001. Documentation consists of a Promissory Note dated 11 May 2001 and a statement from Ms. Carter that she loaned Appellant the money. Appellant has failed to establish that any proceeds from this loan were actually used to support Appellant's business operations during the period of suspension, July 2, 2001 – February 6, 2002. Accordingly, this claim is denied.

Description of Debt	Amount	Detail	Holder of Debt
Blackwell Settlement	$4,000.00	Settled lawsuit against MVA and C and R	Blackwell

This claim concerns a law suit, allegedly arising out of performance of the Contract, filed against Appellant and MVA. Appellant allegedly settled the matter in December, 2001 and paid $4,600.00 (amended upward from $4,000.00 to $4,600.00 during the deposition of Appellant's President on October 15, 2003) in settlement monies in May, 2002, after MVA had been dismissed from the suit. The RFP and the Contract provide that MVA be held harmless from suits against it as a result of performance by Appellant of the work under the Contract. The RFP and the Contract also provide that Appellant shall not indemnify the State for negligence of the State or its agents and employees. In discovery responses, Appellant states that it committed no acts of negligence and that the lawsuit involved a corrections officer who was in the process of serving notice that vehicular tags were to be returned or taken. The Board assumes that the corrections officer was working for the Appellant and not for the Respondent and that the settlement was solely on the Appellant's behalf. This seems to be bourne out by the deposition testimony of Appellant's President, whose theory of why he was entitled to reimbursement from MVA for the amount of the settlement was that MVA had unfairly terminated the Contract. He did not dispute that he was required to hold MVA harmless in the event of lawsuits arising out of Appellant's performance of the Contract. We find from the evidence that the lawsuit arose out of Appellant's performance of the Contract and that Appellant was required to hold MVA harmless pursuant to the terms of the Contract. Accordingly, the claim is denied.

Description of Debt	Amount	Detail	Holder of Debt
Attorney's Fee	$4,200.00	Original filing of Appeal	Joe Woolman

This claim concerns legal fees of Joseph R. Woolman, III, Esquire for services performed by Mr. Woolman related to Appellant's claim before the Board of Contract Appeals in MSBCA 2270. Pursuant to COMAR 21.09.01.19E,[6] costs incurred in litigation by or against the State are unallowable.[7] We further note that, pursuant to Section 15-221.2 of the State Finance and

[6]The applicable provisions of COMAR 21.09 Contract Costs Principles and Procedures are to be used as guides in the pricing of termination for convenience settlements.

[7]The provisions of COMAR 21.07.01.12A(2)"(2)(e), (2)"(5)(b), and (2)"(5)(c) do not apply to legal fees incurred in litigation before the Board of Contract Appeals. The provisions deal with third party claim issues, not involving litigation before this Board under the disputes provision of the General Procurement Law and COMAR.

Procurement Article, Annotated Code of Maryland, attorney's fees in connection with appeals before this Board are only allowed under limited circumstances in contract disputes involving construction contracts. This contract dispute does not involve a construction contract. Accordingly, this claim is denied.

Description of Debt	Amount	Detail	Holder of Debt
Herb Leininger Loan	$25,000.00	Balance remaining from May 1999 Loan	Herb Leininger

This claim involves the balance remaining on an alleged loan from Mr. Herbert Leininger which is described in Appellant's claim filed with the Procurement Officer as follows:

> The loan from Herb Leininger was provided to the company in May of 1999 just prior to the above contract being initiated. The loan was initiated to ensure that the company had ample reserve funds available to service the contract immediately upon issuance. The loan was for $30,000, with a onetime interest charge of 20%, and was to be paid on demand. $11,000 was paid to Herb Leininger, and he had requested that the company pay him the balance of the loan nearer the end of the contract term, in order for him to consider using the loan to purchase stock in the company. The loan was consummated on a handshake, and there was no promissory note issued.

The record fails to reflect that the alleged transaction has any relationship to maintenance of the Appellant's viability during the period of suspension. Accordingly, the claim is denied.

Description of Debt	Amount	Detail	Holder of Debt
President's Salary	$110,000.00	Salary for maintaining company business	Bill Coleman

This claim involves the salary of Appellant's President and Chairman, Mr. Charles William Coleman. As noted above, Appellant is a small company with five employees, including Mr. Coleman, its President. Mr. Coleman played a critical role in the Appellant's operations under the Contract. Mr. Coleman is the founder of Appellant, which was founded in 1997 for the purpose of participating in the tag recovery program. He is the Appellant's only officer. The Appellant claims that Mr. Coleman is entitled to $110,000.00 in salary for 2001. Mr. Coleman testified at his deposition that he has no written employment agreement with Appellant. Mr. Coleman testified that he was paid $98,000.00 in 1999 and $108,000.00 in 2000. He further testified in this regard that as owner of Appellant he decided that $110,000.00 would be a fair salary for 2001. From the record, the Board is unable to determine whether the salary is on a calendar or some fiscal year basis. We will use the salary for 2000, $108,000.00, whether on a calendar or fiscal year basis, to derive a monthly salary. By dividing $108,000.00 by twelve (12)

we derive a monthly salary of $9,000.00. The Contract involved the collection of approximately 2000 sets of tags monthly, with a not to exceed limit to be paid to Appellant of $600,000.00 for twelve months. The Contract was renewed in 2000 and in 2001 by the MVA pursuant to four one-year renewal options provided by the Contract. We thus conclude that the Appellant's performance under the Contract was satisfactory until the Contract was suspended on July 2, 2001. The Appellant was only paid under the terms of the Contract for tags recovered and related work. However, the Board has determined that Appellant is entitled, assuming proof thereof, to costs reasonably incurred during the period of suspension to stand ready, willing and able to commence performance should the suspension be lifted. Given the critical role that Mr. Coleman played in performance under the Contract for Appellant, we find that a salary for Mr. Coleman of $9,000.00 per month during the period of suspension is a necessary cost and that such amount is reasonable and allowable under COMAR 21.09.01.16 dealing with compensation for personal services. Accordingly, we sustain the claim for a salary for Appellant's President for a seven month period July, 2001 – February, 2002 at $9,000.00 per month, for a total of $63,000.00.

Description of Debt	Amount	Detail	Holder of Debt
Server Rental	$51,000.00	13 months of rental @3,000 per month	Company (Appellant)
TRTS software rental	$42,000.00	13 months of rental @2500 per month	Company (Appellant)

These claims for server rental and software rental will be considered together. The server and software involve the Electronic Case Tracking System known as "TRTS". The Contract provides in relevant part that:

> Collections and Recovery, Inc. shall establish and maintain an automated/electronic case tracking system [TRTS] accessible through the MVA network environment, on a Personal Computer provided by MVA. The system design shall be Year 2000 compliant and approved by the Administration in advance of implementation. The system will become the property of MVA. Additional features to the case tracking system such as an Interactive Voice Response functionality and/or internet access with the software may be provided by Collections and Recovery, Inc. at their expense.

The Appellant seeks $51,000.00 for rental of the server located at MVA. According to Mr. Coleman's testimony, Appellant purchased the server in June of 1999 for $5,000.00. The $51,000.00 rental was based on Mr. Coleman's determination that such amount was appropriate for Appellant to charge for thirteen months rental — June, 2001 – July, 2002. Appellant seeks an additional rental amount of $42,000.00 for the system software from June, 2001 to July, 2002. According to Mr. Coleman, Appellant paid a total of $48,000.00 for the purchase ($30,000.00 in June, 1999) and continuing maintenance of the software. Mr. Coleman further testified that he had no lease agreement regarding either the server or the software with MVA.

During the period of suspension the Appellant may be compensated for expenses incurred in maintaining the system of which the server and software are a part. We are unable to determine from the record how many months Appellant paid for the maintenance of the software, which maintenance charges Mr. Coleman testified totaled $18,000.00. The period of suspension was from July 2, 2001 to February 6, 2002. This seven month period we shall assume represents one quarter of the number of months that Appellant incurred expense to maintain the software purchased in June of 1999. However, there is no written documentation that Appellant paid the software vendor to maintain the software. At a minimum, and notwithstanding Appellant's testimony, we would expect some written documentation of the maintenance charges in order to support the request for an equitable adjustment. Lacking any such documentation the claim as presented by Appellant is denied. There is likewise no record concerning any maintenance costs involving the server during the period of suspension, and the server claim as presented by Appellant is thus also denied.

However, the Termination for Convenience clause, at A(2)"(2)"(f) and (g) (*see* Appendix A), suggests that after receipt of a notice of termination for convenience the contractor may be entitled to credit for certain property which, if the contract had been completed, would have been required to be furnished to the State, through the sale or transfer of such property at the time of termination. We believe application of such a credit is appropriate under the facts herein.

We are unable to determine from the record what monetary value should be attached to the server and the software at the time of termination on February 6, 2002. The server and software obviously were of some value to MVA, and, in order to give effect to the credit principle, we will assign a nominal value of $1,000.00 for the server and software as of February 6, 2002 when ownership of such property vested in MVA pursuant to the Termination for Convenience clause.

In summary, we find Appellant is entitled to an equitable adjustment of $71,144.38, broken down as follows:

Amount	Holder of Debt	Description of Debt
$ 2,400.00	Cider Barrel, Inc.	Rent
$ 551.38	Cider Barrel, Inc.	Utilities
$ 4,193.00	National Leasing	Mailing Equipment
$63,000.00	Charles W. Coleman	Salary
$ 1,000.00	Appellant	Credit for case tracking equipment
$71,144.38		

The Board in its discretion determines that it is not appropriate to award pre-decision interest. Post-decision interest shall run from the date of this decision.

Wherefore, it is Ordered this 15th day of July, 2004 that the appeal is sustained, and Appellant is awarded an equitable adjustment of $71,144.38.

Dated: July 15, 2004

Robert B. Harrison III
Chairman

I Concur:

Michael W. Burns
Board Member

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 2236, appeal of Collection and Recovery, Inc. under MVA Contract #V-HQ-99104-S.

Dated: July 15, 2004

Michael L. Carnahan
Deputy Recorder

.12 Termination for Convenience.

A. Except as provided in §B, mandatory provision for all contracts. One of the following clauses is preferred: ...

(2) Alternate Clause — Termination for Convenience (long form).

"(1) The performance of work under this contract may be terminated by the State in accordance with this clause in whole, or from time to time in part, whenever the State shall determine that such termination is in the best interest of the State. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work is terminated and the time when such termination becomes effective.

"(2) After receipt of a Notice of Termination, and except as otherwise directed by the procurement officer, the Contractor shall:

(a) stop work as specified in the Notice of Termination;

(b) place no further orders or subcontracts for materials, services or facilities, except as may be necessary for completion of the portion of the work under the contract as is not terminated;

(c) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination;

(d) assign to the State, in the manner, at times, and to the extent directed by the procurement officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the State shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;

(e) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the procurement officer, to the extent he may require, which approval or ratification shall be final for all the purposes of this clause;

(f) transfer title and deliver to the State, in the manner, at the times, and to the extent, if any, directed by the procurement officer, (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (ii) the completed or partially completed plans, drawings, information, and other

property which, if the contract had been completed, would have been required to be furnished to the State;

(g) use its best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by the procurement officer, any property of the types referred to in (f) above; provided, however, that the Contractor (i) may not be required to extend credit to any purchaser, and (ii) may acquire any such property under the conditions prescribed by and at a price or prices approved by the procurement officer; and provided further that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the State to the Contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the procurement officer may direct;

(h) complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and

(i) take any action that may be necessary, or as the procurement officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the State has or may acquire an interest.

The Contractor shall submit to the procurement officer a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the procurement officer, and may request the State to remove them or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the State shall accept title to these items and remove them or enter into a storage agreement covering the same; provided, that the list submitted shall be subject to verification by the procurement officer upon removal of the items, or if the items are stored, within forty-five (45) days from the date of submission of the list, and any necessary adjustment to correct the list as submitted shall be made before final settlement.

"(3) After receipt of a Notice of Termination, the Contractor shall submit to the procurement officer his termination claim, in the form and with certification prescribed by the procurement officer. This claim shall be submitted promptly but in no event later than one (1) year from the effective date of termination, unless one or more extensions in writing are granted by the procurement officer, upon request of the Contractor made in writing within the one-year period or authorized extension thereof. However, if the procurement officer determines that the facts justify such action, he may receive and act upon any such termination claim at any time after the one-year period or any extension thereof. Upon

failure of the Contractor to submit his termination claim within the time allowed, the procurement officer may determine the claim at any time after the one-year period or any extension thereof. Upon failure of the Contractor to submit his termination claim within the time allowed, the procurement officer may determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall thereupon pay to the Contractor the amount so determined.

"(4) Subject to the provisions of paragraph (3), the Contractor and the procurement officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit on work done; provided, that such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount. Nothing in paragraph (5) of this clause, prescribing the amount to be paid to the Contractor in the event of failure of the Contractor and the procurement officer to agree upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts that may be agreed upon to be paid to the Contractor pursuant to this paragraph.

"(5) In the event of the failure of the Contractor and the procurement officer to agree as provided in paragraph (4) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the procurement officer shall pay to the Contractor the amounts determined by the procurement officer as follows, but without duplication of any amounts agreed upon in accordance with paragraph (4):

(a) for completed supplies or services accepted by the State (or sold or acquired as provided in paragraph (2)(g) above) and for which payment has not theretofore been made, a sum equivalent to the aggregate price for the supplies or services computed in accordance with the price or prices specified in the contract, appropriately adjusted for any saving of freight or other charges;

(b) the total of:

(i) the costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but exclusive of any costs attributable to supplies or services paid or to be paid for under paragraph (5)(a) hereof;

(ii) the cost of settling and paying claims arising out of the termination of work under subcontracts or orders, as provided in paragraph (2)(e) above, which are properly chargeable to the terminated portion of the contract (exclusive of amounts paid or payable on account of supplies or materials delivered or services furnished by subcontractors or vendors before the effective date of the Notice of Termination, which amounts shall be included in the costs payable under (i) above); and

(iii) a sum, as profit on (i) above, determined by the procurement officer to be fair and reasonable; provided, however, that if it appears that the contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (iii) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and

(c) the reasonable cost of settlement accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to this contract.

The total sum to be paid to the Contractor under (a) and (b) of this paragraph shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the State shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Contractor as provided in (5)(a) and (b)(i) above, the fair value, as determined by the procurement officer, of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the State or to a buyer pursuant to paragraph (2)(g).

"(6) Costs claimed, agreed to, or determined pursuant to (3), (4), (5) and (11) hereof shall be in accordance with COMAR 21.09 (Contract Cost Principles and Procedures) as in effect on the date of this contract.

"(7) The Contractor shall have the right of appeal, under the clause of this contract entitled "Disputes," from any determination made by the procurement officer under paragraph (3), (5), or (9) hereof, except that if the Contractor has failed to submit his claim within the time provided in paragraph (3) or (9) hereof, and has failed to request extension of the time, he shall have no right of appeal. In any case where the procurement officer has made a determination

of the amount due under paragraph (3), (5), or (9) hereof, the State shall pay to the Contractor the following: (a) if there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the procurement officer, or (b) if an appeal has been taken, the amount finally determined on such appeal.

"(8) In arriving at the amount due the Contractor under this clause there shall be deducted (a) all unliquidated advance or other payments on account theretofore made to the Contractor, applicable to the terminated portion of this contract, (b) any claim which the State may have against the Contractor in connection with this contract, and (c) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the Contractor or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the State.

"(9) If the termination hereunder be partial, the Contractor may file with the procurement officer a claim for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices. Any claim by the Contractor for an equitable adjustment under this clause shall be asserted within ninety (90) days from the effective date of the termination notice, unless an extension is granted in writing by the procurement officer.

"(10) The State may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of this contract whenever in the opinion of the procurement officer the aggregate of such payments shall be within the amount to which the Contractor shall be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the Contractor to the State upon demand, together with interest computed at the prime rate established by the State Treasurer for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the State; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition, or a later date as determined by the procurement officer by reason of the circumstances.

"(11) Unless otherwise provided for in this contract, or by applicable statute, the Contractor shall — from the effective date of termination until the expiration of three years after final settlement under this contract — preserve and make available to the State at all reasonable times at the office of the Contractor but without direct charge to the State, all his books, records, documents and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or, to the extent approved by the procurement officer, reproductions thereof."