BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of D.R. MASON	)	
	)	Docket No. MSBCA 1481
Under DHMH Contract No. 61112	)	

March 23, 1990

Equitable Adjustment - This Board has held that "if a contractor fails to consider or improperly evaluates his costs based on the scope of work at time of bid, he does so at his own risk".

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APPEARANCES FOR RESPONDENT: Romaine N. Williams, Esq.
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OPINION BY MR. PRESS

Appellant[1] timely appeals the denial of its claim for failure to file a written notice of a claim relating to a contract.

Findings of Fact

1. The Health Services Cost Review Commission (HSCRC) of the Department of Health and Mental Hygiene (DHMH) issued an Invitation for Bids for the subject contract to perform on-site audits of hospitals discharge abstract data compared to hospital medical records. (See Rule 4 File, Tab 1).

2. A pre-bid conference was held on March 23, 1989. All bidders were provided an opportunity to attend this pre-bid conference, but D.R. Mason chose not to attend. (See Mason Tr. 42).

[1] Appellant, Ms D.R. Mason, is a sole proprietorship.

3. Appellant submitted the low bid of $20,000.00 on or about May 16, 1989, and was awarded a fixed price contract for the aforementioned amount.

4. A preliminary orientation meeting was held on May 22, 989 between HSCRC staff and staff of Appellant. In attendance were Kurt Price, Deputy Director, of HSCRC, Theresa Johnson from HSCRC and Denise Mason and Bruce Royster from the Appellant's staff. At this meeting one of the specific issues discussed was the personnel Appellant would be using to conduct the on-site audits.

Regarding this issue, Deputy Director Price indicated he preferred that hospital-based coders (i.e. coders employed by the hospital being audited) not be used for this effort. He indicated that using hospital-based coders potentially presented conflict of interest and competitive advantage concerns. Appellant responded that this preference would not be a problem because of the large number of medical record coders who had already been enlisted to complete the audits. The Deputy Director then requested that a list of medical record coding personnel to be used in the performance of the contract and their affiliations with hospitals, if any, be submitted to the HSCRC prior to the actual auditing of any hospital. Appellant indicated that she had no problem with this request.

On May 25, 1989 the Deputy Director sent a letter to Appellant summarizing the points discussed in the May 22 meeting (see Rule 4 file, Tab 6). This letter included a schedule which indicated that on-site hospital audits would commence on July 5, 1989.

Furthermore, the dates shown on the schedule indicated that audits in nine of the ten hospitals would commence by August 7, 1989. In a letter dated June 22, 1989, Appellant indicated that on or about June 27, 1989 she would be confirming the dates set forth in the Deputy Director's letter of May 25, 1989 with Appellant's medical records staff.

Subsequently, in early August, 1989, Appellant contacted the Deputy Director by telephone to indicate that it was having difficulty in completing the contract without using hospital-based medical record coders. Mr. Price reiterated his concerns regarding the conflict of interest and competitive advantage presented by the use of medical record coders in Maryland hospitals, but stated that he would consult with John Colmers, the HSCRC's Executive Director, and with legal staff to explore the potential for relaxing HSCRC's stated preference.

The Deputy Director subsequently called the Appellant and told her she could use hospital based coders in the event that Appellant needed to do so, provided coders were not used from the same hospital being audited or from Maryland hospitals within the same competitive areas. He also indicated that in the event any hospital-based coders would be used, that he should be notified in advance. Appellant still had not provided HSCRC staff with any information regarding the medical records coders used for the on-site audits as requested in the May 22, 1989 meeting.

5. HSCRC staff received correspondence from Appellant on September 11, 1989, entitled "Status Report and Request for Budget

Modification as of September 8, 1989". The "budget modification" portion of this correspondence was comprised of a requested increase to the original contract amount totaling $8,880. As part of the project status report, Appellant provided, for the first time, a list of medical record coders that were used in the auditing of Maryland hospitals. This was after virtually all on-site record reabstraction had been completed.

6. On September 15, 1989 the Deputy Director contacted Appellant by telephone to discuss his preliminary assessment of her request. He indicated that without regard to the merits of her justification for an increase in contract price, the HSCRC staff felt that it was beyond their authority to revise a fixed price contract, especially an increase totaling close to 50%. Implicit in this assessment was HSCRC's belief that without a change in the status of work, HSCRC could not authorize such an increase. Appellant questioned the validity of HSCRC's perceived restrictions and indicated that if HSCRC really wanted to increase the contract amount they could do it.

Appellant also discussed her rationale for making this request indicating that at the May 22, 1989 meeting, the Deputy Director had so strongly suggested that medical records coders with significant coding experience were necessary that Appellant had to go out and essentially "start from scratch" in hiring coding staff. This was the first indication ever provided by Appellant that it viewed the preliminary discussion of the contract (i.e., the May 22, 1989 meeting) as anything other than a discussion of HSCRC's

preferences. Appellant admitted, however, that the May 22, 1989 discussion did not represent specific directives to be adhered to, but reflected a preference on HSCRC's part as to how best to complete the contract. Furthermore, the issue of using non-hospital-based coders was not raised by Appellant as one of the reasons for the budget increase.

The Deputy Director concluded the telephone conversation with Appellant indicating that he would consult with HSCRC's Executive Director and legal staff and would get back to her. On the following Monday, September 18, 1989, he called Appellant to set up a meeting to discuss her request as soon as possible. A meeting was set September 19, but Appellant did not attend this meeting. The meeting was attended by Bruce Royster representing Appellant.

7. At the September 19, 1989 meeting, HSCRC counsel Larry Russell and the Deputy Director discussed with Mr. Royster HSCRC's position regarding Appellant's request for an increase in contract price, i.e., contract modification[2] for alleged use of non-hospital based coders. Mr. Russell reiterated that HSCRC lacked the authority to make a contract modification of this kind. He also discussed the circumstances of Appellant's costs to this point, in performing the contract work, and the remaining tasks necessary to complete the contract work, and the remaining tasks necessary to complete the contract. Mr. Royster was informed that there was virtually nothing

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[2] COMAR 21.01.02.01 (26) "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 re-instatements.

HSCRC could do to alleviate the budgetary problems that Appellant was experiencing, and it hoped Appellant would complete the project as planned.

8. On September 28, 1989 Joel Leiberknight, the procurement officer, informed HSCRC staff that he had received Appellant's written request for a contract modification dated September 25, 1989.

9. On November 13, 1989, the procurement office, after reviewing Appellant's letter of September 25, 1989 requesting additional monies to perform the contract in the amount of $8,880.00, concluded Appellant was requesting a contract/budget modification which constituted a claim. He determined the claim was late and could not be considered pursuant to COMAR 21.10.04.02 because the claim had not been filed within 30 days after the basis of the claim was known or should have been known. (See Rule 4 File, Tab 10). From this final decision Appellant timely appealed to this Board.

Decision

This Board agrees with Appellant's contention that the contract drafted by HSCRC fails to provide sufficient notice of time requirements respecting the filing of a claim as mandated by COMAR 21.10.04.02D. which provides that "each procurement contract shall provide notice of the time requirements of this regulation". HSCRC having drafted the contract was obligated to provide a provision giving notice of the time limitations of this regulation, including the 30 day time limit of COMAR 21.10.04.02A. Mere

reference in the contract to the requirements of COMAR 21.10 does not comply with the direction to provide notice of the time requirements set forth in the regulation. Therefore, in view of the aforementioned, this Board finds the Appellant did not file an untimely claim.

Turning to the merits of Appellant's claim this Board is cognizant that the contract in question was for a fixed price. It is apparent, Appellant misconstrued the desire of HSCRC after attending the meeting of May 22, 1989. Appellant as a reasonable business person was in position to seek clarification of HSCRC's preferences pertaining to the hospital coders, before it unilaterally decided to begin paying the higher hourly rates for coders.

The May 22, 1989, meeting brought the respective parties together to discuss how to next proceed under the contract. (Price Tr. 70). HSCRC submitted a letter to Appellant on May 25, 1989, confirming the points agreed upon - nowhere in that letter was Appellant ordered or directed to use non-hospital based coders. This Board is unable to find in the record any discussion compensating Appellant, beyond the stated fixed price of the contract. Furthermore, we are unable to find any oral agreement, either express or implied through conduct to modify provisions in the contract, notwithstanding a requirement that all changes be in writing. See Martin G. Imbach, Inc., MDOT 1020, 1 MSBCA ¶52 at 24 (1983).

The Board finds that Appellant having concluded it entered into a bad bargain unilaterally took a course of action which has led to financial detriment. Appellant, sought no pre-bid clarification of any of the provisions of the Invitation For Bids nor did it attend the pre-bid conference where it could have sought clarification of any confusion or misunderstanding it had relative to HSCRC's intentions. It is apparent to this Board that Appellant never discussed any increase in the contract price until September 8, 1989 long after the May 22, 1989 meeting.

Furthermore, the Board observes that when a contractor submits a bid in a procurement by competitive sealed bidding it should anticipate any possible higher costs. This Board has held that "if a contractor fails to consider or improperly evaluates his costs based on the scope of work at time of bid, he does so at his own risk". The Driggs Corp., MSBCA 1338, 2 MSBCA ¶194 (1988) at p. 18 citing dominion Contractors, MSBCA 1401, 1 MSBCA ¶69 (1984) at 15. Pettinaro Construction, DOTCAB 1257, 83-1 BCA ¶16536. Having failed to anticipate the higher costs, Appellant must absorb the expense.

For the foregoing reasons, this Board concludes Appellant is not entitled to an equitable adjustment.

In regard to Appellant's request for re-imbursement of attorney's fees, this Board unfortunately is not empowered to order reimbursement. At the time of hearing this Board was apprised of the fact Appellant is a sole proprietor, and had previously signed the contract as an individual. The Board, at the insistence of counsel for HSCRC, required her to obtain an attorney for this

appeal. Certainly, in the interest of fairness to the Appellant, if the Board could order re-imbursement for attorneys fees it would be so ordered.