BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF DELLE DATA	)	
SYSTEMS, INC.	)	
	)	Docket No. MSBCA 2146
Under DHR, BCDSS	)	
Contract No. BCDSS/IMA 97/031	)	

September 5, 2001

Equitable Adjustment - Readiness to Perform - A contractor may be entitled to an equitable adjustment for work not actually performed if it is able to establish that: (1) it stood ready, willing and able to perform as required by the contract; (2) was not able to perform due to breach of the contract by the State and (3) incurred expense in excess of what it otherwise would have incurred as a result of these circumstances (i.e., 1 and 2).

APPEARANCE FOR APPELLANT: Bradley A. Thomas, Esq.
Albert M. Williams, Jr., Esq.
Washington, D.C.

APPEARANCE FOR RESPONDENT: Turhan E. Robinson
Steven D. Keller
Assistant Attorneys General
Baltimore, MD

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals its claim for damages arising out of alleged breaches of contract committed by the Respondent, Baltimore City Department of Social Services (BCDSS), concerning Appellant's Contract involving the "welfare to work" initiative. The Board denies Respondent's second Motion for Summary Disposition based on timeliness grounds that was filed after the close of discovery and this opinion on the merits follows.[1]

Findings of Fact
Background

1. In response to federally mandated welfare reform initiatives, under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) the Respondent issued in April of 1997 a request for proposal (RFP) seeking offers from vendors to administer "welfare to work" training and job placement services for persons residing in Baltimore City.

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[1] The Board previously denied an earlier Motion for Summary Disposition based on timeliness grounds by interlocutory decision dated March 2, 2000.

2. In response to that RFP, the Appellant submitted its proposal on April 22, 1997. After a period of negotiation and re-evaluation, the parties hereto entered into a "pay for performance" contract under which the Appellant was to receive welfare recipients (customers), prepare them with the skills needed to enter the job market, place them in gainful employment and monitor their progress for up to six months after job placement. The Contract, which set forth a commencement date of June 19, 1997, was executed on July 16, 1997 and was to terminate on June 30, 1999.

3. In exchange for the services to be rendered by the Appellant, the Respondent was to pay the Appellant incrementally for each customer served based on certain defined "payout points."

4. Specifically, the Appellant was to receive $972.00 when a customer completed the job training phase (payout point one); an additional $1,457.00 when a customer had been placed in a position of employment (payout point two); another $972.00 when a customer had maintained gainful employment for thirteen (13) weeks (payout point three); and another $1,457.00 when a customer had maintained gainful employment for twenty-six (26) weeks (payout point four). It was further provided in the Contract that upon completion of the job training (payout point one) phase, the Appellant had a total of nine additional months to assist a customer through the remaining three payout points.

5. The Appellant was required to operate a job training facility and to maintain a staff for training, job placement services and customer tracking throughout the course of the Contract.

6. As noted above the Contract between the parties was a pay for performance contract. It was anticipated that a total of 160 screened and qualified customers would be trained and placed in employment by Appellant over the course of the Contract. However, as explained in Finding of Fact Nos. 20 and 33 these numbers representing goals and the assumption of the number of the 160 persons placed in jobs who would reach payout point three was reduced to 140 and the number of that 140 who would reach payout point four was reduced to 130. Therefore, Appellant projected a minimum total payout based on these numbers of $714,130.00. However, the not-to-exceed price of the Contract was $777,285.00 to account for the possibility that all 160 customers would progress through all four payout points.

Appellant's Contentions

7. The Appellant argues in this appeal that it performed as required under the Contract, incurring costs for job readiness training, job placement and customer tracking. Appellant further alleges that Respondent committed numerous breaches which individually and/or collectively prevented the Appellant from realizing the benefit of the bargain. We shall now discuss these breaches that Appellant alleges the Respondent committed.

8. Appellant alleges it received no customers from BCDSS until October 1997 and that the customers it first served it recruited itself. The Board finds that Appellant began serving customers in September of 1997 (whether referred by BCDSS or recruited by Appellant) and thus that Appellant's operation under the Contract commenced in September of 1997. The absence of customers until September, 1997 effectively shortened the time allotted for Appellant to service its customers as originally envisioned by the RFP by three months, from twenty-five months to twenty-two months.

9. As a result of the alleged delay in referral of customers, Appellant asserts that it was forced to incur start up costs several times. Appellant alleges that start up costs included, but were not limited to, office space rent, moving expenses, storage expenses, hiring staff expenses, office supplies, employment advertising, training and retraining staff, staff salaries, travel and telecommunication costs. Appellant alleges these start up costs were first incurred in May, 1997, for an anticipated June start up of classroom training, and again in June in anticipation of a July start. These same expenses, Appellant alleges were incurred again in July in expectation of starting up in August, in August for a planned September start and in September for the alleged October classroom training start up.

10. As indicated in the RFP and as delineated in applicable federal and state welfare legislation, individuals with certain defined "barriers" were exempt from "welfare to work" requirements. Included in the definition of barriers were drug and/or alcohol addiction, mental illness and physical disability. Respondent was contractually bound not to send exempt clients to Appellant for participation in Appellant's program.

11. Appellant alleges that Respondent breached the contract by sending customers who were exempt to Appellant. Allegedly included in such referrals were pregnant women, drug and substance abusers, and mentally ill individuals.

12. Appellant in its proposal, proposed servicing customers from all geographic regions of Baltimore City. In the pre-proposal conference, Respondent stated that it would provide vendors with customers from all over the city unless the vendor requested referrals be limited to a specific area. Appellant alleges that rather than drawing customers from all over the city, Appellant's customers were drawn exclusively from some of the hardest to serve areas of the city. Specifically, of the fifteen Family Investment Program Centers (FIP's) out of which the Respondent operated, only three served as sources of customer referrals to Appellant. The areas from which Respondent drew Appellant's referrals were allegedly areas plagued by high crime, drugs and other adverse conditions and that, therefore, a high percentage of those referrals came to Appellant with disqualifying barriers making them more difficult and costly to service and less likely to become successful job placement candidates.

13. As discussed in more detail below, the Contract and applicable law and regulation provide for the imposition of monetary sanctions under certain circumstances. Appellant alleges that after notification by Appellant, BCDSS failed as required by the RFP to sanction customers who did not cooperate with Appellant's training and job placement efforts or who, after being placed in gainful employment, failed to maintain that employment for at least six months.

14. Appellant asserts that Respondent failed to sanction delinquent customers and that such failure to sanction undermined Appellant's program by taking away the incentive for compliance on the part of customers, the direct result of which was that Appellant incurred ongoing operating expenses in standing ready, willing and able to provide services to customers who never returned to complete the program.

15. Appellant next argues that the Respondent breached the Contract by allegedly removing customers from Appellant's program without Appellant's knowledge or consent. It was intended that vendors such as Appellant would have sufficient time and opportunity for their customers to reach all payout points under the contract. There was no time limit for vendors to place customers in employment. Once a customer was employed, the vendor would report this fact to BCDSS and would track the employment of the customer for up

to nine months.

16. The parties anticipated that, from time to time, customers, during or after receiving job training, would voluntarily leave their employer, be fired from their jobs or drop out of their assigned vendors' training programs. Respondent issued directives advising that Respondent would re-refer such customers back to the same vendor. Appellant alleges that Respondent instead of re-referring Appellant's customers back to Appellant sent them to other vendors, and, in some cases, enrolled them in Respondent's own internal jobs program and closed their cases and that this was confirmed by the "WOMIS"[2] reports generated by Respondent to track customer placement. According to Appellant the result of such referrals to other vendors or to the BCDSS internal job program is that Appellant incurred costs to train and place customers and to maintain a level of readiness for tracking and retention without any possibility of reaping economic benefit from those efforts with respect to persons referred to other vendors.

17. Appellant alleges that Respondent neglected its contractual responsibility by not informing Appellant through the status change notice process[3] or any other method that it had closed at least ninety-five of Appellant's customer cases. Appellant asserts that the first time Appellant was informed that any of its cases had been closed was through customer tracking reports it requested from BCDSS issued in March of 1999. Appellant's argument continues that it was therefore required to stand willing and able to meet the needs of at least ninety-five customers whom Respondent knew, or should have known, were never coming back to Appellant's program to Appellant's financial detriment.

18. Under the terms of the Contract Appellant was to maintain classroom training facilities for a period of fifteen months during which Respondent was to make monthly referrals of customers. Each month during that period of time, Appellant was to train those referrals and prepare them to enter the job market. It was anticipated by Appellant that an average of 10.7 customers per month would enter and complete readiness training and be placed in gainful employment. Following this performance plan, 160 customers were expected to reach payout points one and two during the first fifteen months of the Contract. At that point, Appellant was expected to shut down its classroom training facilities and scale back its operations, and corresponding operating costs, to perform tracking and retention services over the final ten months of the Contract. It was further anticipated that during the tracking and retention period, 140 of the 160 job placed customers would succeed in reaching payout point three (thirteen weeks of employment) and 130 of those 140 would reach payout point four (twenty-six weeks of employment). Appellant projected a minimum total payout under that plan of $714,130.00.

19. Appellant alleges that Respondent failed to make the appropriate number of barrier free referrals during the fifteen month initial phase of the Contract and that in an apparent effort to compensate, Respondent continued to make initial referrals for nine additional months. As a result, Appellant asserts it was forced to bear the expense of maintaining classroom training for a total of twenty-four months (exclusive of its alleged start up costs for the May - October, 1997 time period discussed above).

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[2] WOMIS is BCDSS's automated system for tracking customers' work activities and managing and monitoring direct job placement contracts.

[3] The status change note was a form used to identify changes in a customer's status. Respondent revised the status change notice to provide a specific box to check off to advise vendors if the customer's case was closed.

20. As noted above, the Contract was to terminate on June 30, 1999. However, on June 25, 1999, Respondent issued a memorandum permitting Appellant to submit invoices for enrolled individuals who reach payout points after the June 30, 1999 date through May of 2000. Appellant argues that this action constituted a contract extension through May of 2000 because the memorandum specified that Appellant could place customers in employment through August, 1999. Appellant argues that for customers placed in jobs in August 1999, Appellant would be expected to complete the nine month period of tracking and retention through May 2000. Assuming aruendo that the memorandum represented a contract extension such extension did not provide for any increase in funding to compensate Appellant for any additional costs that may have been involved in extending the contract for eleven months beyond its original end date of June 30, 1999.

    Consistent with termination of the Contract on June 30, 1999, Appellant was removed from and denied access to WOMIS in June of 1999. The Board finds that the Contract terminated on June 30, 1999. It is clear, however, that Appellant would be permitted to submit written invoices for thirty (30) day classroom training, job placement, and thirteen and twenty-six weeks tracking and retention services for customers after June 30, 1999.

21. As a result of the alleged breaches of the Contract by the Respondent as set forth above (Finding of Fact 7-20) Appellant asserts that it incurred damages totaling $222,215.00 by performing or standing ready, willing and able to perform in the face of such alleged breaches.

22. As discussed further below, the State disputes the various allegations and assertions by the Appellant of breach of contract as set forth above and paints an entirely different picture of the events leading up to the Appellant's claim. The Board finds that the record fails to materially support the various allegations of breach of the Contract by Respondent as set forth above.

General "Welfare to Work" Considerations

23. Under PRWORA and the State implementing statues, public assistance is temporary. Adults are subject to a five-year lifetime limit on the receipt of assistance defined as Temporary Cash Assistance or TCA. Md. Ann. Code, Art. 88A, §51(a); COMAR 07.03.03.07K. In addition, recipients must be engaged in a "work activity" unless they are found to be exempt under the law. Md. Ann. Code, Art. 88A, §48(b)(3) & (4); COMAR 07.03.03.07I. Work activities include employment, and also training to enable an individual to become employed, job search activities, and activities to remove barriers to employment.

24. If a TCA recipient does not meet a mandatory work requirement, the person can be sanctioned. Maryland law has only one possible sanction for failure to cooperate with work programs; termination of the entire TCA grant to the entire family. During most of the term of the Contract, a family of three could receive a maximum of $388 per month in TCA benefits. At the time that the request for proposals was issued, a family of three could receive only $377. For purposes of this appeal, there are two important aspects of this sanction. First, because the sanction only affects the TCA grant, a customer who is not receiving TCA cannot be sanctioned. Typically, once a TCA recipient is employed, the family exceeds the income requirements for the program and is no longer eligible for

TCA and the customer's TCA case is closed.[4] Thus, an employed customer could not be sanctioned unless that customer became unemployed and chose to reapply for TCA benefits. This is important because Appellant sought sanctions for certain employed customers who could not be sanctioned at the time sanctions were sought. Once a customer is employed, Appellant's tracking and retention obligations continued (as well as Respondent's obligations to pay Appellant when certain payout points are reached), but sanctioning the customer while the customer was employed was no longer a legal option.

Second, because the penalty is so severe, the General Assembly has legislated procedural safeguards. Before a sanction can be imposed, the caseworker must investigate the reasons for non-cooperation and a conciliation process must occur. Md. Ann. Code Art 88A, §50(f); COMAR 07.03.03.15C. This conciliation process must last a minimum of 30 days. Id. If the recipient meets the work requirements, the sanction will not be imposed. A sanction cannot be imposed simply because a vendor requests it.

25. One of the strategies employed by BCDSS to achieve financial independence for TCA recipients is to provide direct job placement services through contractors. During the time period relevant to this appeal, BCDSS had seven such contractors, including the Appellant.

26. As set forth in the Request for Proposal, under these contracts, BCDSS case managers would refer TCA recipients known as customers to vendors (contractors) after screening them for barriers to employment.[5] The vendors were to provide up to one month of classroom training to prepare the customer for the job market. The vendor would also assist the customer in obtaining employment. Once the customer was employed, the vendor would report this fact to BCDSS and would track the employment of the customer for up to nine months.

27. Contractors, including the Appellant, were paid based solely upon the results they achieved. A contractor who exceeded its goals was paid more, up to the not-to-exceed amount in its contract. Likewise, a contractor who achieved less, was paid less. As set forth in the RFP, and as discussed above in Finding of Fact Nos. 4 and 18, the Contract had four payout points. The first was for successful completion of 80 hours of training in the vendor's program. For Appellant, this was typically a 20 hour-per-week classroom training program over a four-week period. However, the time could be extended on a case-by-case basis. The second payout point was for obtaining full-time unsubsidized employment for the customer. In order for Appellant to be credited with achieving this goal, the customer's compensation for this employment must be anticipated to be the greater of (1) 30 hours per week at minimum wage, or (2) an amount sufficient to make the family ineligible for TCA benefits. However, a vendor received credit for payout

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[4] Employment of Appellant's customers was countable under the Contract only if the customer's earned income was high enough to make the customer ineligible for TCA benefits.

This is a relatively easy condition to satisfy because most employment would render a customer ineligible for TCA. The benefit amount for a recipient is the allowable amount for the family minus net countable income. COMAR 07.03.03.12E(1). Count-able income includes earned income less certain disregards. A family of three receiving the earned income disregard of 26% and the maximum child care disregard of $200 per month would be ineligible if it received more than $795 per month in earned income. See COMAR 07.03.03.12E(5). If the family had other sources of income or fewer child care expenses, the maximum that the family could earn before losing TCA would be lower.

[5] If a barrier to employment was identified, the customer stayed with BCDSS and received appropriate services to overcome the barrier.

point two regardless of the vendor's role in actually obtaining the job for the TCA customer. For example, customers might find a job opening on their own or might receive assistance from a community agency. If the customer obtained employment before completing the classroom component, the contractor could invoice the agency for the second payout point immediately, and for the first payout point after 80 hours of employment. The third payout point was the completion of 13 weeks of employment within a 6-month period. The employment was not required to be continuous or with the same employer. The fourth payout point was for 26 weeks of employment completed within 9 months. Once again the employment was not required to be continuous or with the same employer.

<u>Tracking</u>

28. Appellant's proposal included goals for the various payout points. The RFP required the vendor to estimate the number of customers completing training. Appellant's proposal was to have 160 customers reach payout point one; all 160 customers reach payout point two; 140 reach payout point three; and 130 customers reach payout point four.[6] These numbers were not guaranteed, but were Appellant's goals.

29. The payment structure created an incentive for contractors to successfully train customers, to assist the customers in maintaining employment, and to track their progress. Tracking was, of course, vital to the vendor because half of the vendor's compensation, payout points three and four, depended upon keeping the customer employed. It was in the interest of the vendor to both document ongoing employment (which might be with several employers) and to assist a customer who lost a job in reestablishing employment. Tracking involved contacts, generally by telephone, both with employers and with the customers themselves. Appellant's proposal included the following on tracking:

> *After client is employed the employment recruiter will continue to correspond with the client on a bi-weekly basis for 6 months after being placed in employment. This post employment follow-up will allow DDS to track the progress of the clients. DDS staff will visit the worksite. We will correspond with the employer to assure that they are performing at the required performance level. The employment counselor will carefully monitor the clients attendance, performance, and overall acceptance to the work routine, and business environment.... Because of our careful tracking and constant correspondence with the client, we will be able to better detect any potential employment problems, and diffuse them before it results in employment firing, or other employment problems. Post employment counseling also allows us to continue to motivate the client to continue to work and strive to reach their ultimate career goal while making them more independent.*

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[6] The RFP stated that the expected outcomes for each vendor were that 75% who completed training would become employed, 90% of those employed would remain employed for 13 weeks, and 85% of those employed would remain employed for 26 weeks. Appellant's proposal was to employ 100% of those completing training, but retain a lesser percentage of those individuals in employment for the required periods.

However, these employment tracking efforts set forth in Appellant's proposal did not always succeed during Appellant's performance under the Contract.
A BCDSS tracking report dated March 29, 1999[7] that Appellant had requested BCDSS to prepare involving 157 customers revealed deficiencies with Appellant's tracking efforts. First, of the 157 customers that Appellant asked BCDSS to track, Appellant had already fully invoiced BCDSS for 19 of them. In addition, sixteen customers were receiving TCA benefits, were not in another work activity, and could be served by Appellant. Twenty customers were still listed in WOMIS as being in Appellant's program because Appellant had never changed this designation. Appellant had access to this information but chose to ask BCDSS to track the customers. Ninety of the customers that Appellant asked BCDSS to track had had their TCA cases closed. The majority of these, 50, were closed because the customer was employed. For several others the tracking was inconclusive, but for 6 it was determined that BCDSS had imposed a sanction.

Term of Contract

30. As noted above, Appellant alleges that the term of the Contract was extended through May of 2000. Appellant's Contract had an effective date of June 19, 1997, was approved by the Board of Public Works on July 16, 1997, and was signed by the Respondent Department (DHR) on July 16, 1997. The Contract expressly states that performance "shall continue until agreed upon services are completed, but in any case no later than June 30, 1999." Prior to the expiration date of the Contract, Respondent sent Appellant two memoranda. The first, dated June 3, 1999, from the Director of BCDSS, reminded Appellant that the Contract, "will expire on June 30, 1999, and will not be extended." The memorandum went on to clarify the situation after that date:

> The expiration date identifies the date that a contractor's work must cease. Thus, all of the DSS's assistance in finding employment for TCA customers must cease by the Contract expiration date. However, DDS can continue to invoice BCDSS for enrolled individuals who reach additional payout points after the June 30, 1999 Contract expiration date.

The second memorandum, dated June 25, 1999, from the Respondent's contracts manager, Mr. Gary Lockett, repeated this information and specified that invoicing could continue through May 31, 2000.
These memoranda did not constitute an extension of the Contract, which could only be extended by written amendment properly approved. Appellant's President, Ms. Toby Cooper, testified that she considered the Contract "amended" notwithstanding that she had signed no amendment. While the RFP referred to a 25 month contract, both the Contract signed by the parties and the RFP itself clearly provided for an expiration date of June 30, 1999.

[7] The Board believes that this is the second tracking report issued to address errors in the first report provided to Appellant in early March, 1999. These reports are referenced in Finding of Fact 17 above.

As noted in both memoranda from Respondent, the purpose of allowing invoices beyond the Contract expiration date was to accommodate the possibility that a customer would reach payout points after the end of the Contract period. In fact, Appellant ultimately submitted only one invoice after June 30, 1999. That was Invoice 24 dated September 21, 1999, naming 12 customers (for a total of eighteen payout points), in the amount of $21,861.00, erroneously set forth in the invoice as $19,917.00. With respect to the costs claimed by Appellant for allegedly standing ready, willing and able to provide Contract services approximately $98,570.00 of such costs were claimed to have been incurred subsequent to June 30, 1999.

Contract Price

31. The Contract price has also been an issue of contention. The RFP instructed offerors to propose both the number of customers to be served by each offeror and the price per customer. Appellant proposed to serve 160 customers through the first two payout points, and a decreasing number thereafter, for a total proposed price of $714,130.00. The not-to-exceed price on Appellant's Contract was a higher figure of $777,285.00. This higher price was inserted by Respondent to account for the possibility that all 160 customers could progress through all four payout points.

32. Appellant submitted 24 invoices for services allegedly provided under the Contract. Twenty-three were dated before the June 30, 1999, termination date set forth in the Contract. The 24th invoice was dated September 21, 1999.

Over all, and excluding multiple billings for the same customer, Appellant invoiced Respondent as follows:

Payout Point	Number	Amount Per Customer	Total
1	180	$ 972	$174,960
2	133	$1,457	$193,781
3	112	$ 972	$108,864
4	97	$1,457	$141,329
			$618,934

The total of all 24 invoices is $674,795, over $55,000 higher, due to occasional multiple invoicing or duplicate billing of the same customer at a given payout point.[8] Additionally, there is a dispute over documentation as to certain of the customers concerning whether the payout point claimed was actually reached.[9] For example, Invoice 24, Appellant's last

[8] Appellant sets forth its position at pages 9-10 in its Post Hearing Reply Brief regarding the Respondent's focus on "Duplicitous/Invoicing." The Board has been advised that invoices one (1) through fifteen (15) and invoice Twenty (20) are at issue in this appeal and represent invoices where Appellant is representing that customers reached pertinent payout points. With respect to invoices sixteen (16) through nineteen (19) and twenty-one (21) through twenty-four (24), Appellant asserts or alleges that these invoices included not only customers who reached payout points under Appellant's program but also customers who Appellant determined had reached payout points after they had been improperly removed from Appellant's Program and customers who Appellant contends would have reached payout points had they not been improperly removed from Appellant.

[9] Such disputes are the subject of other appeals before the Board presently in suspense because the Appellant, a corporation, does not have an attorney to represent it in those appeals as required by Maryland law.

invoice dated September 21, 1999 seeks payment for 18 payout points: two customers at payout point 1, three customers at payout point 2, seven customers at payout point 3, and six customers at payout point 4, for a total of $21,861. As to this invoice, Respondent submits that it disallowed 8 payout points totaling $9,231 for lack of verification, disallowed 6 payout points totaling $7,772 as previously paid and made payment for two customers at payout point 3 and two customers at payout point 4, for a total of $4,858. However, Appellant has not cashed this check nor a check for $4,367 representing the next to last payment by the State.

Referral of Customers

33. Under the Contract, Respondent's primary obligation is to refer to Appellant a sufficient number of customers eligible for services so that Appellant is able to reach the goals set forth in its proposal. The record reflects that Respondent met that obligation. Appellant's goal under the Contract was to have 160 customers successfully complete the classroom training portion of the program. In fact, Appellant ultimately invoiced Respondent for 180 such completions (payout point 1). The record also reflects that these referrals only included a small number of customers (as discussed further below) that were returned to Respondent because they were ineligible for the program because of barriers to employment.

34. Customers normally come to direct job placement vendors such as Appellant by referrals from case managers at BCDSS district offices. Respondent gave each customer a "work appointment letter" when first referred to an assigned vendor. This is the only contractually approved source of customers for Appellant's program. Each offeror was to specify in its proposal the capacity of its program. Appellant specified 160 customers, or approximately 11 per month. In order to achieve this number, it was necessary for the agency to refer a greater number to the Appellant, to account for various sources of attrition, including those who fail to appear at a site, those who drop out for various reasons, and those who are discovered to have legitimate barriers to employment which means that they cannot be required to participate in a work program. A model prepared by BCDSS shows 29 referrals per month by BCDSS of which 14 would be interviewed by Appellant. Of the 14, two would be expected to be returned to BCDSS for services, one would drop out, and 11 would participate for 30 days, entitling Appellant to invoice BCDSS for the first payout point.

In fact, Appellant's referrals were set at a high amount. The Standard Operating Procedure (SOP) for Appellant, a BCDSS document prepared in conjunction with Appellant, states that the quota for referrals is 35 per month. A May 19, 1998 memorandum from Mr. Gary Lockett also reflects that referrals had been set at 35 per month. Appellant's President, Ms. Cooper, recalled that referrals may have been set at 39 per month at sometime.

35. While Respondent had a duty to refer sufficient numbers of customers, Appellant had a duty to accept all of those who did not have barriers to employment.

Ms. Cooper acknowledged and elaborated upon this policy in her testimony concerning her understanding at the pre-proposal conference:

> You don't have the option of picking and choosing who comes to

> you. If you're selected as a vendor, you must serve those who are sent.

Ms. Carey, an employee of Appellant testified that Appellant did not assess customers, except to the extent that barriers to employment were apparent.

36. Despite this testimony, the record makes clear that while Appellant was performing under the Contract, Appellant sought to maximize and channel referrals so that it would serve only those easiest to serve. In a memorandum dated January 20, 1998, from Ms. Cooper, to Ms. Brenda Redding, Assistant Director for the Family Investment Bureau of BCDSS, Ms. Cooper states:

> We must receive more than (11) referrals so we can thoroughly assess the group and select the (11) that are most likely to succeed in our program. If we do not have (11) or more clients show up then we are pressured into a situation in which we must select whomever shows up.
>
> For example, if only (5) people show up it is highly unlikely that our staff will turn any of the (5) clients away, even if they are not good matches for the program. The staff would be reluctant to turn away clients that are not the best match for the program for fear that they will not have any clients to serve at all, if they turn away the few that show up. Not having a good pool of clients to assess, and select from forces JOBWORKS into selecting just on the basis that they have shown up, rather than on the basis that they are a good match to succeed in the JOBWORKS program.

37. Appellant was not required to serve customers who had barriers to employment. Prior to a referral, BCDSS screened customers for such barriers, which include such circumstances as advanced alcoholism, drug addition, mental or physical disability. As was recognized in the pre-bid conference and in the draft performance model, screening is imperfect. A customer with barriers who has been referred to a vendor may be returned to BCDSS.

38. Customers with barriers did not have a significant impact on Appellant's ability to achieve its goals for two reasons. First, their numbers were relatively small. The draft performance model estimated that 36 customers would need to be returned to BCDSS for services in the course of 160 customers completing Appellant's program. Although Appellant's program in fact grew to 182 customers, Respondent's review of the record identified only 14 customers who were returned. Twelve of those are named in a handwritten memorandum and list dated March 16, 1999 which was included with Appellant's claim. A second source in the record of names of customers with barriers to employment are the status change notices attached to the claim. Of the more than 90 status change notices, three identify customers with barriers, one of which is also found on the March, 1999 list. Appellant alleges that there were over 23 customers with barriers identified in Appellant's attendance logs. Accepting Appellant's number yields a result less than the 36 customers estimated in the draft performance model that would need to be returned to BCDSS for services.

The second reason that customers with barriers did not have a significant impact on Appellant's program goals is that Appellant invoiced Respondent for certain of these customers for reaching a number of payout points. Of the customers that Appellant claimed on the March 16, 1999 list to have a "drug barrier/alcohol barrier," Appellant invoiced for the first payout point for two and all four payout points for another two. Of the two who Appellant claimed could not read, one, K. S. (Initials are used to protect the privacy of the individuals), appears on Invoice 6 (payout point 1), Invoice 20 (payout point 3), and Invoice 23 (payout point 3, again). Finally, of the two customers who Appellant claimed had mental problems, one, M. K., appears on Invoice 2 (payout points 1 and 2).

The same is true for the two additional customers who appear in the status change notices. The two were each invoiced at payout point 1. Thus, for the 14 customers which the record reflects were identified by Appellant as having barriers to employment, Appellant invoiced BCDSS $18,949 ($972 of which was duplicate invoicing).

39. Appellant has repeatedly asserted that it is owed damages due to a late start in the referral of customers under the Contract. However, the record reflects that Appellant was not standing idle while ready, willing and able to perform at the start of the Contract period. The record reflects that Appellant was not prepared to perform until September 1997, that customers were not referred until September 22, 1997, and that training did begin on September 22, 1997.

The Contract had an effective date of June 19, 1997. However, the Contract was not approved by the Board of Public Works and signed by Respondent until July 16, 1997. Where Board of Public Works approval of a contract is required, the contract may not commence until it is approved by the Board of Public Works. The State's sovereign immunity is not waived until all required approvals are obtained. See ARA Health v. Dept. of Public Safety, 344 Md. 85 (1996). Any work performed without required Board of Public Works' approval is work that may not give rise to a compensable claim. Herein, Board of Public Works' approval was not obtained until several weeks after the commencement date set forth in the Contract.

However, lack of Board of Public Works approval did not hamper Appellant in achieving its goals. The record reflects that Appellant was not ready to perform before September, 1997 without regard to BPW approval for several reasons. First, as with all direct job placement vendors, BCDSS and Appellant needed to jointly develop and BCDSS needed to distribute a standard operating procedure (SOP) governing the working relationship between the vendor and the BCDSS district offices which actually refer the customers. BCDSS and Appellant wrote the SOP together, as was the case with all vendors. That SOP is dated August 1, 1997, bears an effective date of September 16, 1977, and states that Appellant's classes are to begin on September 22, 1997. Appellant participated in the development of the SOP in general and determined the start date of classes in particular.

In addition to the lack of an effective SOP prior to September of 1997, Appellant was not ready to perform under the Contract sooner for a variety of other reasons. First, Appellant did not lease space in Baltimore until September of 1997 when it entered into a lease for office space at the Brokerage with a commencement date of September 10, 1997. Appellant's location outside Baltimore was insufficient.[10] The RFP required a location convenient to Baltimore customers and Appellant's proposal named a location in downtown Baltimore.

[10] Prior to moving into the Brokerage, Appellant operated out of offices in Largo and Annapolis.

Appellant also did not have the necessary equipment in place. The SOP, bearing an issue date of August 1, 1997, called for faxing between Appellant and the BCDSS. Appellant also described the use of fax machines for other aspects of its program in its proposal. However, there was no local fax number at Appellant's workplace initially. Correspondence from Appellant states that this was corrected in September of 1997.

In addition, Appellant initially lacked necessary computer equipment to assess WOMIS. This meant that rather than Appellant entering information directly into WOMIS, the information needed to be faxed to BCDSS where BCDSS employees then entered the information.

40. The record reflects that Appellant had customers on September 22, 1997. Correspondence from Appellant's President, Ms. Cooper, to Brenda Redding dated February 12, 1998, states that customers were "referred" by BCDSS and "received" by Appellant on September 22, 1997, as required by the SOP. In addition, Appellant invoiced for six customers who Appellant claimed had completed a class begun on September 22, 1997. Ms. Cooper asserts that the initial customers in Appellant's program were customers that Ms. Cooper and Appellant personally recruited and thus were not referred by BCDSS. Assuming arguendo that this was the case our decision herein would remain the same.

Removed or Vanished Customers

41. Appellant has alleged that Respondent was responsible for 91 "removed" or "vanished" customers. Of the 91 allegedly removed or vanished customers, 58 customers were employed, as indicated either by Appellant's invoices or Appellant's status change notices, as reported in the BCDSS tracking report. Eleven (11) customers do not appear to have become employed, but were included in the tracking report. Twenty-two (22) customers were neither employed nor was BCDSS asked to research their status when the tracking report was prepared.

Of the 58 employed customers, 37 were fully invoiced by Appellant. Regardless of whether these customers vanished or were otherwise removed, Appellant determined that they reached all four payout points and invoiced for them. The other 21 employed customers were employed, as demonstrated by either (1) Appellant's invoices, (2) status change notices submitted by Appellant and reflected in BCDSS's tracking report, or (3) Appellant's May 4, 1998 status report.

The eleven customers who were not employed but were the subject of the tracking report prepared by Respondent at Appellant's request were fully accounted for:

- 1 was exempt from work requirements.
- 4 were still assigned to Appellant on WOMIS.
- 4 had their TCA benefits closed for various reasons unrelated to employment.
- 2 were available for Appellant to track, that is no other vendor was providing services to the customer. One of these had, in fact, been sanctioned.

The remaining 22 customers were neither included in the BCDSS tracking report nor apparently employed. Seven of the 22 customers allegedly were sent to another vendor.

None is identified as having been sent to the BCDSS internal program. Appellant's allegation with respect to the other 15 customers is that BCDSS failed to complete the bottom of the status change notice and return it. These customers were not removed from Appellant's program by Respondent's actions. There is no evidence in the record showing that Respondent acted improperly with respect to these 15 customers.

The status of the 7 customers who are alleged to have been enrolled with other vendors must be considered in light of three policy memoranda issued by BCDSS. The first is from BCDSS to all job placement vendors dated May 28, 1998. It advises vendors that, in accordance with federal policy concerning allowable work activities, customers may remain in the job search activities for no more than four months. In Appellant's program, job search begins no later than the latter two weeks of the four-week classroom training period. Thus, under the terms of the Contract, a customer may not remain in Appellant's program for more than five months unless the customer obtains full-time unsubsidized employment.

The other two memoranda relate to transfer of customers from vendors' programs. The first, dated March 31, 1998, clarified BCDSS policy regarding transfer of customers from one vendor to the other. The second, dated September 25, 1998, stated that in the case of a customer who was inappropriately referred to a second vendor, the customer was to be returned to the first vendor only if the second enrollment took place after March 31, 1998.

Additionally, the record reflects that there are a number of legitimate reasons why a customer originally assigned to Appellant might later be assigned to another vendor. These include excess time spent with the first vendor, customers finding another countable activity on their own (such as education) or obtaining employment on their own. This would not, however, preclude Appellant from invoicing for such employment.

Focusing again on the remaining seven customers alleged to have been enrolled with other vendors, the record contains WOMIS printouts of six of the seven customers at issue.[11] The information from the WOMIS printouts relating to each of these customers reflects the following:

- Ms. T. B.: Referred to Baltimore City Head Start after 10 months in Appellant's program.
- Ms. T. C.: Referred to Southwest Pre-Train Workshops one year after referral to Appellant's program and over 9 months after the actual end date of her activity in Appellant's program.
- Ms. J. J: Referred to Baltimore Urban League 10 months after being referred to Appellant's program, and no activities shown for either vendor.
- Ms. T. K.: Appears to have been simultaneously sent to Baltimore City Head Start and Appellant; no activity shown in Appellant's program.

[11] Counsel for Respondent advises they could locate no such printout relating to Ms. B. H.

- Ms. T. L.: Referred to Appellant 8/25/97; receiving services from BCDSS over a year later 12/16/98; referred to Payne Memorial over 1½ years later 3/30/99.
- Mr. R. L.: Referred to Baltimore Reads 5 months after becoming active in Appellant's program.

42. In short the record fails to reflect that any mishandling of the above referenced 91 customers by Respondent had any significant impact on Appellant's program or that Appellant was required to stand idle due to the actions of Respondent with respect to these customers.

Decision

Appellant's theory of entitlement to an equitable adjustment is based on principles of detrimental reliance and equitable estoppel. In essence, Appellant argues that it relied, to its detriment, on contractual commitments made by Respondent which were breached. Respondent should therefore be estopped from refusing to compensate Appellant for costs incurred in performing and/or maintaining a posture of readiness to perform under the Contract.

Equitable estoppel requires that the party claiming the benefit of the estoppel must have been misled to that party's injury and changed his position for the worse, having believed and relied on the representation of the party sought to be estopped. Dahl v. Brunswick Corp., 277 Md. 471, 487 (1976); Savonis v. Burke, 241 Md. 316, 319 (1966). Although wrongful or unconscionable conduct is generally an element of estoppel, an estoppel may arise even where there is no intent to mislead if the actions of one party cause a prejudicial change in the conduct of the other. Bean v. Steuart Petroleum, 244 Md. 459 (1966); Travelers v. Nationwide, 244 Md. 401 (1966); Alvey v. Alvey, 220 Md. 571 (1959). See, generally the discussion of erroneous government representation in PHP Healthcare Corporation, MSBCA 2076, 5 MSBCA ¶489 (2001).

The elements of equitable estoppel are also spelled out by the Court of Appeals in Grimberg v. Marth, 338 Md. 546 (1995):

> "It is now well established that 'an estoppel may arise even when there is no intent to mislead, if the actions of one party cause a prejudicial change in the conduct of the other.' Indeed, all that is needed to create an equitable estoppel is (1) voluntary conduct or representation, (2) reliance, and (3) detriment."

Id. at 555-56 citing Lampton v. LaHood, 94 Md. App. 461, 475-76, 617 A.2d 1142, 1149 (1993) (quoting Knill v. Knill,) 306 Md. 527, 534-35, 510A.2d 546, 549-50 (1986)).

Citing Cunninghame v. Cunninghame, Court of Appeals of Maryland, No. 109, September Term 2000, Appellant argues that Respondent's conduct misled Appellant into believing it would receive compensation adequate to cover its costs of operation if it continued to perform under the Contract through June of 2000.

Concerning the question of detrimental reliance in Pavel Enterprises, Inc. v. A.S. Johnson Company, 342 Md. 143 (1996), the Court of Appeals had this to say with regard to the claim of a construction subcontractor seeking to force a general contractor to honor the terms of his subcontract bid: "Detrimental reliance doctrine has had a slow evolution from its origins in disputes over charitable pledges, and there remains some uncertainty about its exact dimensions... To resolve these confusions, we now clarify that Maryland Courts are to apply the test of the Restatement (Second) of Contracts, Section 90(1) (1997), which we have recast as a four-part test:

1. *a clear and definite promise;*
2. *where the promisor has a reasonable expectation that the offer will induce action or forebearance on the part of the promisee;*
3. *which does induce actual and reasonable action or forebearance by the promisee; and*
4. *cause a detriment which can only be avoided by the enforcement of the promise."*

Id. at pp. 165-166, footnotes omitted.

In the instant case, Appellant's Contract with Respondent contained the promise that if Appellant provided job readiness, placement, tracking and retention services for duly referred "welfare to work" customers, Respondent would take reasonable measures to assist Appellant in keeping those customers on track (e.g. sanctioning) and would pay Appellant certain pre-determined fees at specified payout points. Appellant alleges it performed, or stood ready to perform as expected and as a result Appellant incurred ongoing operating expenses to its detriment. Appellant's argument continues that in this case, however, through no fault of Appellant, it is impossible for Appellant to know definitively how many payout points were reached by many of its referred customers because they were improperly, and without due notice to Appellant, either terminated from active monitoring, re-enrolled with competitive vendors or absorbed into Respondent's internal work force. Appellant argues that equity therefore demands that Respondent compensate Appellant for the cost incurred in performing, or standing ready to perform, under the Contract.

While this Board is an executive branch agency lacking statutory or judicial equitable powers, it recognizes equitable principles in performing its dispute resolution function. Appellant argues that Respondent's alleged conduct of making certain contractual promises, of delaying the actual start of operations under the Contract, of extending the Contract verbally and in written memoranda, of failing to pre-screen, sanction and re-refer customers, and of failing to notify Appellant of changes in the status of customers induced a reasonable reliance by Appellant to Appellant's monetary detriment.

During the hearing of the appeal the Board had indicated that Appellant may be entitled to an equitable adjustment if it can establish (1) that the Contract period was extended, (2) that Appellant stood ready, willing and able to perform but was idle due to breach of the Contract by Respondent, and (3) that those circumstances (i.e., 1 and 2) caused Appellant to incur expenses in excess of those that would otherwise have been incurred. Appellant has failed to prove that any of these conditions has been met. The Contract was not extended as alleged by Appellant.

(See Finding of Fact No. 30). Furthermore, as set forth below, the record establishes that Appellant had no such idle periods. Appellant is thus not entitled to an equitable adjustment. What time period, if any, was Appellant standing idle while ready willing and able to perform? Respondent submits that there was no such time period and the Board agrees. As discussed in Finding of Fact No. 39 there was no idle time at the start of the Contract. Appellant was not ready to serve customers until those customers actually appeared on September 22, 1997. Contract performance ended on June 30, 1999, and Respondent instructed Appellant not to perform after that time. Training and job placement services were to cease and Appellant was only to invoice for customers reaching payout points on their own.

In fact, Appellant did submit Invoice 24 after June 30, 1999. That invoice included two customers at payout point 1 (training) and three at payout point 2 (new employment). The only indication as to when these activities took place, however, is a single notation that one of the customers (S.W.) had an employment start date of May 3, 1999. There is no evidence of record that any of the work invoiced was performed after June 30, 1999.

Appellant has proven no expenses attributed to standing idle while ready, willing and able to perform under the Contract Thus, there is no basis for the Board to conclude that an equitable adjustment is required. While we thus deny the appeal on entitlement grounds, we believe some brief comment on the damages sought is appropriate.

We note that Appellant's theory of recovery is based on the formula of the total actual expenses less amounts already paid under the Contract. Appellant, thus, seeks an equitable adjustment under a total cost method of recovery. Under a total cost approach, where allowed by the Board, costs to be recoverable as part of an equitable adjustment must be reasonable, allowable and otherwise permitted under the Contract cost principles and procedures set forth in COMAR 21.09.01.

Appellant has claimed operating expenses totaling approximately $619,142. However, and assuming <u>arguendo</u> that Appellant had been able to demonstrate entitlement, the record reflects that certain of these expenses even if incurred while standing idle might not be awarded pursuant to cost principles governing the award of an equitable adjustment.

The damages sought by Appellant are in part independent of any objective measure of the reasonableness of those expenses. Appellant has consistently asserted that it is owed damages based on actual expenses. These include expenses that Appellant's President, Ms. Cooper, determined should be paid to herself, to her mother, to her sister, and, in the case of certain rent and equipment charges, to the Appellant corporation. While Appellant was certainly free to incur these and other expenses in the course of operating its business, it may not be reimbursed without establishing causation, reasonableness, and that the expenses are allocable and allowable under the Contract and COMAR. The record reflects that Appellant seeks reimbursement for every operating expense it alleges it incurred from June 1997 through May 2000 totaling $619,142. Subtracting amounts paid and accepted[12] of $396,927.00, Appellant claims entitlement in this

[12] Appellant has not cashed two checks due to disputes. As noted above one is in the amount of $4,367.00 and the other is in the amount of $4,858.00.

appeal to an equitable adjustment of $222,215.00 ($619,142 - $396,927 = 222,215).[13]

Mr. Kenneth Anderson, a certified public accountant, testified on behalf of Appellant. Mr. Anderson testified that in his opinion Appellant's expenses were reasonable because they were within the projected expenses contained in the budget accompanying Appellant's proposal, which was approved by Respondent when the Contract was awarded. Mr. Anderson also expressed the opinion that because breakdowns of expenses and more detailed accounting procedures were not required when the proposal was submitted, they should not be required to support this appeal. According to Mr. Anderson, Appellant incurred total operating expenses and unrealized profit in performing under or remaining ready to perform under the Contract which exceeded revenues by $222,215.00. This amount is broken down by Appellant as follows:

Salaries for-	
Work Readiness Instructor Tamika Carry	$ 15,793.00
Project Director Toby Cooper	30,000.00
Employment Recruiter Reni Cooper	78,000.00
Business Administrator Barbara Delle Cooper	17,000.00
Total Unpaid Staff Salaries	$140,793.00
Unpaid Office Operating Expenses	11,070.00
Unrealized (Contractually Allocated Profit)	60,000.00
Uncollected Late Fees	10,352.00
GRAND TOTAL	$222,215.00

Respondent submits that the expenses claimed by Appellant were not established as reasonable for the reasons set forth in the report of Rubino and McGeehin, certified public accountants, and the testimony of Mr. William Kime of the Rubino and McGeehin firm. The majority of expenses claimed, over 75%, were labor costs in the form of consultant services. The total amount of labor costs claimed was $435,212, and of that amount, $380,669, all of the related party compensation, was found in the Rubino and McGeehin report to be unsupported by the documentation made available to the auditors by Appellant.

The documentation provided included time records for the related parties. These records set forth monthly hours worked and a reference to BCDSS. Mr. Kime expressed his professional opinion that these records did not provide adequate documentation because they were not the basis for compensation for these individuals, were not used in the Appellant's accounting system, and did not describe the work performed. While making no actual finding on Mr. Kime's opinion, we note the amount of compensation reflected in these records raises the issue of whether any portion of the amounts paid or claimed to be due to the related parties was or would be a distribution of profit as opposed to reasonable compensation as set forth in COMAR

[13] Accepting for argument's sake Appellant's total cost theory of damages, the Board believes that it is the invoiced amount, not the amount paid, that should be subtracted from any expenses proven to have been incurred in this appeal, recognizing that contract disputes over the amount due under certain of the invoices are the subject of other appeals (MSBCA Docket Nos. 2162, 2163, 2188 and 2189) before the Board presently in suspense because Appellant corporation is not represented by counsel in these appeals. As noted above in Finding of Fact No. 32, eliminating duplicate billing, Appellant's has submitted invoices which total approximately $618,934.00, an amount close to Appellant's total alleged operating expenses of $619,142.

21.09.01.16C. The magnitude of the compensation to related parties herein gives rise to a concern that distribution of profit could be involved. Of the $435,212, in compensation expense, $380,669, or 87% was for related parties. The expenses for two of these individuals, Ms. Toby Cooper, Appellant's President and the project director, and Ms. Barbara Delle Cooper, the business administrator, who appear to have had primarily management functions together account for 69% of the total labor expenses. Expenses for Ms. Toby Cooper alone accounts for 53% of all labor expenses. We advise that the Board will require an Appellant to provide substantial justification that payments to related parties does not constitute, at least in part, distributions of profit as discussed in COMAR 21.09.01. 16C.[14]

We will also require depreciation and use allowances to be supported as required by the provisions of COMAR 21.09.01.09B.

Finally, we note that anticipatory profit (i.e. unrealized profit) for work not done will not be allowed. Appellant's theory of recovery is based upon an adjustment representing the difference between the alleged total costs or expense incurred totaling $619,142.00 less the amount actually paid by the State. However, should Appellant be also arguing that it should be paid for customers it allegedly would have served through various pay out points but for the State's alleged contract breaches up to the not-to-exceed Contract amount of $777,285.00, we would deny such a claim because of our belief that a contractor may not be compensated (beyond recovery of expenses where it is required to stand ready to perform) for work that it does not perform to include any anticipated profit on such unperformed work in a Maryland public procurement involving public funds.

For the foregoing reasons Appellant's appeal is denied.

Wherefore, it is ordered this 4th day of September 2001 that the appeal is denied.

Dated: September 4, 2001

____
Robert B. Harrison III
Board Member

I concur:

____
Randolph B. Rosencrantz
Chairman

[14] Appellant argues that because "Appellant's budget included a line item for total salaries of $504,991.00" and because the amount sought for total salaries was only $435,212.00 or almost $70,000.00 under budget, the amount sought is reasonable. This argument does not address the related party compensation verses distribution of profit issue.

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 2146, appeal of Delle Data Systems, Inc. under DHR, BCDSS Contract No. BCDSS/IMA 97/031.

Dated: September 5, 2001

Mary F. Priscilla
Recorder