BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF PHP HEALTHCARE CORPORATION	)	
	)	Docket No. MSBCA 2076
Under DPS&CS Contract No. 96034	)	

January 11, 2001

Equitable Adjustment - Erroneous Representation - A claim for breach of contract based on an alleged erroneous representation may give rise to entitlement to an equitable adjustment.

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OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals the denial of its claim for an equitable adjustment based on alleged population shortfall.

Findings of Fact

1. In June 1996, following a negotiated procurement process, the State of Maryland, acting through the Department of Public Safety and Correctional Services (Department) entered into Contract No. 96034 (Contract) with Appellant to provide medical services to correctional system inmates in the Baltimore Region. The record reflects that the meaning of certain Contract terms generally discussed herein and material to the dispute is as follows:

1. Budgeted Population Count

The term Budgeted Population Count means the budgeted number of inmates that the Department requested the Legislature to fund in the Department's budget request.

2. Average Daily Population

The Average Daily Population was based on the Resident Population column of the Average Daily Population Report generated monthly by the Department. The Department conducted head counts of inmates at least once for each shift (or three times per day). The numbers for a particular shift each day were then averaged to obtain the Average Daily Population for the month.

3. Billable Population Count

The Billable Population Count is defined in Article 3 of the Contract as the sum of the Average Daily Populations for the month for the facilities in the Baltimore Region. The Average Daily Population Report generated monthly by the Department excluded individuals in pretrial status who had not completed bail review, who had been granted recognizance, who had posted bail, or who had not had a pre-determined bail; and probationers and parolees supervised by the Home Detention Unit.

4. Per Capita Price Divisor

The term "Per Capita Price Divisor" (as distinct from "Per Capita Price") was first used in Addendum No. 5. It is the number by which the offerors were required to divide the total costs in their offer in order to obtain the Per Capita Price being offered. As discussed further below, Addendum No. 5 required offerors to use 7,266 as the Per Capita Price Divisor. Prior to the issuance of Addendum No. 5, offerors calculated their own estimates to determine the number of inmates for which they would be paid (i.e., the Billable Population Count) and the number they would use as a divisor to arrive at their price (financial) proposal.

The total annual Contract Price was calculated in the negotiation stage by adding four separate items, namely (a) primary services price, (b) secondary services price, (c) operating costs, and (d) equipment costs. The sum of these four items divided by an estimated number of inmates for the Baltimore Region resulted in a Per Capita Price. Payment under the Contract was based upon the Department receiving a monthly invoice for an amount derived from multiplying the Per Capita Price by the Billable Population Count.

2. The initial term of the Contract was for the 12-month period of July 1, 1996 through June 30, 1997. The Department had the right to unilaterally extend the Contract for two one-year periods. The material circumstances leading up to the award of the Contract follow.

3. In February 1996, the Department issued a request for proposals (RFP) for the Contract. Based upon the information obtained from the RFP and through its own investigation, Appellant submitted its original price proposal using an annual prison population for the Baltimore Region of 6,500 inmates as a divisor[1] on March 26, 1996. The prison population divisor was a factor in determining an offeror's costs (Per Capita Price). The Per Capita Price was an offeror's price per inmate and as described below was an integral part of an offeror's annual price offer. The Billable Population Count (as defined above) is the sum of the average daily prison populations for the month for the facilities in the Baltimore Region. Subsequent offers in the negotiation process followed.

4. In its next financial proposal submitted on April 18, 1996, Appellant adjusted its estimate of the number of inmates used as a divisor, and for which it expected to be paid, to 6,850.

5. In its May 16th financial offer, Appellant also used the figure of 6,850 inmates as the divisor to determine its Per Capita Price. The Appellant believed, based on its own assessments and investigation and business judgement, that 6,850 inmates were the number of inmates that reasonably were to be expected as the annual prison population for the Baltimore Region.

6. However, prices submitted by the two offerors who were then in competition[2] were deemed

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1 As discussed further below an offeror's price was determined by a formula in which the number of inmates was used as a divisor in the formula. The greater the number of inmates used as a divisor, the lesser the price the offeror would be paid.

2 The record does not reflect whether more than two offerors engaged in this competitive negotiation procurement.

by the Department to be too high. In order to reduce prices Mr. Myles Carpeneto, the Department's Procurement Officer, obtained the approval of Mr. Bishop Robinson, the Department's Secretary, for the issuance of Addendum No. 5, which required the offerors to use the specific divisor of 7,266. Prior to Addendum No. 5, the Secretary had instructed the Procurement Officer not to make any representation as to the inmate population.

7. By Addendum No. 5 dated May 20, 1996, the Department made changes and clarifications in four areas "in order to have you (the two contractors) reduce your Total Price and Per Capita Price." One of those changes provided as follows:

> *4. Per Capita Price Divisor*
> *The offeror is to base the Total Price and Per Capita Price on the figure of 7,266 inmates.*

8. In accordance with the above directive in Addendum No. 5, Appellant used 7,266 as the divisor to determine the Per Capita Price in its best and final financial offer submitted later that day, May 20, 1996.

9. Appellant's May 20 proposal was the winning offer and contract performance commenced July 1, 1996.

10. In a pre-BAFO conference conducted shortly prior to the issuance of Addendum No. 5, the Department advised the two offerors that it would require them to use the number of 7,266 inmates as the divisor to calculate the Per Capita Price in their proposals. As explained further below the 7,266 number was obtained from the Budgeted Population Count. According to testimony at the hearing the two offerors were advised at the conference that the 7,266 inmate number was the number of inmates for which the Department had been budgeted and that while the number had a "certain reliability", the Department would not guarantee the number or make it a "floor" for the inmate population under the Contract.

11. According to pre-hearing deposition testimony from Appellant's then Vice President, Mr. Thomas Burden, the following dialogue occurred at the pre-BAFO conference.

> A. We had kicked around at the meeting, well - it looks like, you know, they expected the population to be in the neighborhood of 7000. And I specifically asked the question of the group - and you know, I explained to them, this is a very crucial number. Whatever we use, you know, can make or break our financial performance on this contract.
> If you use a higher number, like 7000, do you expect the inmates to be there? Will these be real numbers? Tony Swetz (Dr. Anthony Swetz, Director of Inmate Healthcare Services) responded to me and said - he laughed and said, "oh you don't have to worry about that, we'll have plenty of inmates. As a matter of fact, that will be the least of your problems."

Mr. Burden provided similar testimony at the hearing concerning this exchange.

12. Appellant asserts its Per Capita Price proposal was calculated by (a) adding together all of its projected fixed costs and costs that varied with the Billable Population and then (b) dividing that number by the Billable Population times the Per Capita Price. Appellant alleges it could only recover its fixed costs (plus profit and overhead associated with those fixed

costs) if the divisor used equaled or exceeded the Billable Population for which it would be paid.

13. As noted above, the Department obtained the 7,266 number from the Budgeted Population Count. The Budgeted Population Count was the budgeted number of inmates that the Department requested the Legislature to fund. The Procurement Officer believed that the Budgeted Population Count of 7,266 was the average population to be expected for the Baltimore Region and, accordingly, this number was the divisor required by Addendum No. 5. Such number (7,266) was also the budgeted number for the first year of the Contract.

14. The 7,266 Budgeted Population Count, however, turned out to be the maximum number of inmates that one could place in the facilities in the Baltimore Region rather than the average population.

15. The Department's Deputy Secretary, Mr. David Bezanson, described the 7,266 number of inmates in a pre-hearing (May 18, 2000) deposition as follows:

Q. I'm just trying to get your understanding sir.

A. But my understanding is the 7,266 was a maximum exposure, maximum capacity, maximum number of inmates that you could put in that region. And it was the potential outside number.

Q. It was the potential top number of inmates? And when you say outside number?

A. Yes. I think you could say that. I think to put more inmates in there than that, we would either be violating a court consent decree or stacking up the surge in other areas in that region.

Q. Which obviously the State, under an emergency situation, might stack them up a little, but it certainly wouldn't allow that kind of condition to exist for a long period of time, would it.

A. Not to exceed that number, no.

16. The Billable Population Count for the two years that Appellant performed under the Contract averages out to 6,799 a month.

17. After nine months of population shortfalls of less than 7,266 inmates, Appellant filed a notice of claim by letter dated April 21, 1996. The notice of claim dealt with both population shortfall or variance and alleged increased operating costs and expenses relating to intake operations and the operation of an infirmary. However, this appeal deals only with the population shortfall. Appellant submitted a partial quantification of its population shortfall claim by letter dated May 27, 1997 and a total quantification of the claim by letter dated June 4, 1998.

18. Appellant's May 20, 1996 proposal, i.e. its BAFO based on Addendum No. 5 upon which the Contract price was based, was calculated by adding the four separate items discussed above, namely, (a) primary services price, (b) secondary services price, (c) operating costs, and (d) equipment costs. The primary service price and the equipment costs price are

relatively fixed. The primary services price includes only costs for labor and overhead involved in staffing certain facilities, which does not change by the addition or subtraction of the number of inmates. The secondary services price varies according to the inmate population. Only a portion of the operating costs is fixed and not dependent on the Billable Population Count.

19. Appellant's total claim based on population shortfall is for $1,292,769.12 including a 3% profit component. Appellant also seeks pre-decision interest.

20. By letter dated July 2, 1998, the Procurement Officer denied Appellant's claim. Thereafter, Appellant filed an appeal with this Board.

21. Assuming Appellant's entitlement to an equitable adjustment, the Department does not contest the calculations submitted by Appellant supporting its claim for $1,292,769.12 excepting the 3% profit component. The Department also disputes that Appellant is entitled to any pre-decision interest.

Decision

While there is a serious issue concerning the timeliness of Appellant's claim, the Board resolves such issue in Appellant's favor based on the record compiled in these proceedings through the hearing on merits. The Board will, however, deny the appeal on the merits.

Although Appellant in certain proceedings on appeal may have referred to this claim as one based on negligent misrepresentation, Appellant agrees that this claim is not a tort claim but is a breach of contract claim based on an alleged erroneous representation. Under Maryland's General Procurement Law we conclude that a claim for breach of contract based on an erroneous representation may give rise to entitlement to an equitable adjustment. While most of this Board's decisions and many of the authorities cited by the parties deal with construction contracts, we believe that the principles enunciated are applicable to Government representations regarding service contracts.

The Federal Circuit Court of Appeals in T. Brown Constructors v. Pena, 132 F.3d 724 (Fed. Cir. 1997) has characterized the elements of a claim based on misrepresentation as follows:

> *In order for a contractor to prevail on a claim of misrepresentation, the contractor must show that the Government made an erroneous representation of a material fact that the contractor honestly and reasonably relied on to the contractors's detriment. See Roseburg Lumber Co. v. Morrison-Knudsen Co. v. United States, 345 F.2d 535, 539 (Ct. Cl. 1965); RESTATEMENT (SECOND) OF CONTRACTS Section(s) 164 cmt. A(1979). "A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so." RESTATEMENT (SECOND) OF CONTRACTS Section(s) 162 (1979). Id.. At 729*

As for what, if any, intent is required by the Government's representatives, the Court of

Claims in Womack v. United States, 182 Ct. Cl. 399 (1968) at pp. 411-412, explained as follows:

> *Whatever the case in tort or other areas, intent to mislead is not an essential element of actionable misrepresentation in the breach of contract context . . . An inadvertent misrepresentation stemming from negligence is fully as damaging as a deliberate one to the party who relied on it to his detriment.*

(Citation omitted)

In Raymond Int'l v. Baltimore County, 45 Md. App. 247 (1980) the County had solicited bids for underwater repairs to the piers of the Wise Avenue Bridge over Bear Creek. Bidders were supplied with plans and specifications prepared for the County in connection with regular and extensive inspections of the piers and the bridge over the years. After the repairs began, Raymond, the successful bidder, discovered that the bid specifications were inaccurate resulting in increased expenses for Raymond. The contract, however, contained exculpatory provisions requiring the bidders to independently determine their own specifications and conduct their own investigations upon which to base a bid. The Court of Special Appeals, nonetheless, held that the contractor was entitled to rely on the conditions, quantities, and representations provided by the County. 45 Md. App. At 259. The Court concluded that the contractor was not reasonably able to discover the true facts for itself.

The Court in Raymond relied in large part upon the decision on this subject by the U.S. Supreme Court in Hollerbach v. United States, as follows:

> *"(T)he specifications assured them of the character of the material, a matter concerning which the Government might be presumed to speak with knowledge and authority. We think this positive statement of the specifications must be taken as true and binding upon the Government, and that upon it rather than upon the claimants must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the Government as a basis of the contract left no doubt. If the Government wished to leave the matter open to the independent investigation of the claimants it might easily have omitted the specification as the character of the filling back of this dam. In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity." (Citation omitted).*

Raymond, 45 Md. App. At 255 (quoting Hollerback, 233 U.S. 165, 167-168 (1914).

The Raymond Court further referred to the decision in Linz v. Schuck, in which the Court of Appeals observed:

> *When two parties make a contract based on supposed facts which they afterwards ascertain to be incorrect; and which would not have been entered into by the one*

party if he had known the actual conditions which the contract required him to meet, not only Courts of justice but all right thinking people must believe that the fair course for the other party to the contract to pursue is either to relieve the contractor of going on with his contract or pay him additional compensation.

106 Md. 220 (1907).

In Raymond the Court of Appeals distinguished its prior decision in Trionfo[3] as follows:

Appellee Baltimore County relies on Trionfo v. Board of Education of Harford County. 41 Md. App. 103, 395 A.2d 1207 (1979), in which Judge Thompson of this Court exhaustively discussed the law of a contractor's right to recover on a theory of misrepresentation. There we held, as we held here, that the plaintiff must establish a right to rely on the misrepresentation. In Trionfo, we found no right to rely because the test boring data furnished to contract bidders were supplied only in exchange for a written release from the bidders designed to absolve the Board from any responsibility for the accuracy or completeness of the information and to protect the Board from assessments for additional work performed pursuant to assumptions made based on the supplied data. No such release provision exists in this contract. We, therefore, find Trionfo inapplicable to the present case. We conclude that the trial court erred in holding that the Appellant was not entitled to rely on the conditions, quantities and representations contained in the contract. We further hold that the trial court erred in its finding that the Appellant was not entitled to compensation for the unforeseen or negligently misrepresented conditions encountered in the performance of the contract.

45 Md. App. At 259.

While dealing with an estimated quantities clause in a construction contract, a clause which to some degree is meant to allocate risk, we believe this Board's observations in Martin G. Imbach, Inc., 1 MSBCA ¶52 (1983) to be instructive, nevertheless, from the standpoint of the good faith that should obtain in Government representations:

In Womack v. United States, supra, the U.S. Court of Claims considered a similar claim for additional costs resulting from a substantial increase in the estimated quantities set forth in the contract. The contract in question expressly provided that "[a]ll estimated quantities in this contract are subject to a twenty-five percent (25%) increase or decrease." Although the government agreed to pay the contractor for the

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3 Joseph F. Trionfo & Sons, Inc. v. Bd. Of Educ. Of Harford County, 41 Md. App. 103, (1979). In Trionfo the Harford County Board of Education invited bids for the construction of a middle school. The contract included exculpatory and disclaimer clauses specifically directed at the subsurface soil conditions. 41 Md. App. At 107. Test boring data related to these conditions was made available to bidders but only upon execution of a specific release making it clear that the Board of Education did not expect the bidding contractors to rely on any of the information contained therein. Id. The Court found that the contractor was not entitled to rely upon that data under the particular circumstances presented. 41 App. at 111.

additional costs incurred in processing items of work which exceeded the estimated quantity by 25%, it contended that the contractor assumed the risk of a 25% overrun under the terms of the contract. The Court of Claims, in rejecting the Government's position, stated as follows:

> *An estimate as to a material matter in a bidding invitation is an expedient. Ordinarily it is only used where there is a recognized need for guidance to bidders on a particular point but specific information is not reasonably available. H.L. Yoh Co. v. United States, 153 Ct.Cl. 104, 105, 288 F.2d 493, 494 (1961). Intrinsically, the estimate that is made in such circumstances must be the product of such relevant underlying information as is available to the author of the invitation. If the bidder were not entitled to so regard it, its inclusion in the invitation would be surplusage at best or deception at worst. Assuming that the bidder acts reasonably, he is entitled to rely on Government estimates as representing honest and informed conclusions. Snyder-Lynch Motors, Inc. v. Unites States, 154 Ct.Cl. 476, 479, 292F.2d 907, 909-10 (1961). In short, in promulgating an estimate for bidding-invitation purposes; the Government is not required to be clairvoyant but it is obliged to base that estimate on all relevant information that is reasonably available to it.*
>
> *By adding a general variance in quantity provision to a bidding invitation for a fixed-price contract the Government does not dilute the standard to which it is held with respect to particular estimates that it includes elsewhere in the invitation. In conjunction with an estimate, the proper office of such a general clause is to afford a flexibility sufficient to accommodate actual deviations from the estimate that are not reasonably predictable at the time that the estimate is made and during the time that it remains subject to reliance by the bidder. It embraces variations that are attributable to facts that are not among those reasonably available to the estimator. The latitude that it affords may not properly be used to excuse the estimator from using and disclosing relevant information that is reasonably available to him. Thus, it may be said that its role is to preserve the stability of a fixed-price contract despite fortuitous departures, up or down, from the estimated amount of work to be done.*
>
> *In summary, the defendant overreaches when it says that the variance in quantity clause, within its percentage limits, put the risk of an index card overrun, whatever its cause and foreseeability, on the plaintiffs. Specifically the clause apportions only a particular type of risk to the parties, the risk of an excess or shortage resulting from factors not reasonably apparent to them at the time that they entered*

into their contract. The clause does not require one party to bear the first 25 percent of the burden of the other party's negligence. (underscoring added) (citations omitted).

Under the foregoing statement of the law which we find to be controlling, Appellant here had a right to rely on the implied representation that SHA's design and estimate of the gabion quantities were carefully prepared and based on all relevant information in its possession. Appellant contractually assumed the risk of any variations from this estimate only to the extent that such variations were attributable to information that reasonably was not available to SHA's estimator.

Martin G. Imbach, Inc., 1 MSBCA ¶52 at pp. 19-20. See also CTA, Inc. v. United States, 44 Fed. Cl. 684, 698-99 (1999).

Section 11-201 of the General Procurement Law stresses fair dealing for those who deal with the State procurement system. This stated statutory purpose and the authorities we have referred to above make it clear that contractors are entitled to be dealt with in good faith in Maryland procurements. Accordingly, the State may not mislead a contractor regarding material information it possesses upon which the contractor may be expected to rely and does reasonably rely in preparing its bid or proposal.

However, as noted, we also believe that reasonable reliance is an element of a claim based on government misrepresentation. An Appellant must thus demonstrate both that it relied on the information conveyed by the State and that such reliance was reasonable.

In Gregory Lumber Co., Inc. v. United States, 11 Cl.Ct. 489, 503 (1986), aff'd, 831 F.2d 305 (Fed. Cir. 1987), cert. denied, 484 U.S. 1061, 108 S.Ct. 1016 (1988) the United States Court of Federal Claims described the reasonableness standard and what it encompasses:

In the context of government contracting, such a standard is measured from the perspective of what the reasonable contractor would have done when charged with knowledge common within the industry .... in general, the test of reasonableness focuses on whether through such knowledge, or through some affirmative signal from the government, the contractor was on notice not to rely on the utterance in issue, or that all such statements should be investigated for the reasons given . . . Failure to heed such warnings leaves any risk created by the alleged misrepresentation with the contractor, and renders a contractor unable to recover under a theory of misrepresentation.

Id. (internal citation omitted).

Finally, we note that a misrepresentation that would give rise to entitlement to an equitable adjustment must be material and that the contractor must show that it relied on the misrepresentation to the contractor's detriment.

As explained by Mr. Thomas Burden, Appellant's Vice President of Operations at the time of the Contract, Billable Population was an important number in the preparation of Appellant's offer. As stipulated by the parties, the average Billable Population for the two years of the Contract was 6,799. The difference of 467 between the actual average population and the higher divisor number of 7,266 meant that Appellant would receive approximately 1.29 million dollars less in billable revenues over the actual two year life of the Contract.

The number of inmates in the Billable Population herein significantly affects the Contract price and is thus a material matter. However based on the legal standards as set forth above we find that the Department's representation in Addendum No. 5 or otherwise of the number of inmates in the Billable Population Count does not constitute an erroneous representation of a material matter that Appellant was entitled to rely upon. Thus, we will deny the appeal.

Appellant does not dispute that until the issuance of Addendum No. 5 the contractors calculated their own Billable Population Count and used that number as the divisor to determine the Per Capita Price. Similarly, there is no dispute that Addendum No. 5 was issued for the purpose of obtaining a lower Per Capita Price from the two contractors then in competition by having them use the higher divisor. Addendum No. 5 specifically states in the first sentence that A[t]he Agency is making changes and clarifications in the following four areas in order to have you reduce your Total Price and Per Capita Price". The Procurement Officer testified that the purpose of requiring the higher divisor was to bring the total bid (offer) within budget. Since price is significantly affected we have found that we deal with a material matter.

The issue is whether the Department, by requiring a specific divisor, directly represented that the contractors should anticipate that the average Billable Population Count would be 7,266 and whether the Department also explicitly made that representation orally during the pre-BAFO conference the day before Addendum No. 5 was issued.

The Procurement Officer apparently believed that the budgeted population of 7,266 would, in fact, be the average population to be expected for the region and for which the successful offeror/ contractor would be paid. However, the Procurement Officer also testified that the offerors were advised that the Department was not setting forth this number as a guarantee or a floor. The Procurement Officer asserted that the divisor of 7,266 was used so that lower prices within the Department's budget would be offered by the two remaining competitors and assist the Department in the evaluation of the proposals since both offerors would be using the same divisor.

In other words, use of the 7,266 figure was to lower the cost to the State. Such lower cost would result in a contract that when presented to the Board of Public works for approval would be within the Department's budget. Prior to Addendum No. 5, the total price obtained from the two offerors was over budget when the Per Capita Price offered was multiplied by the estimate of the inmate population used by the contractors. Thus, to obtain a lower Per Capita Price, the Department required the contractors to use a higher number (7,266) as a divisor.

Prior to Addendum No. 5, Secretary Robinson had instructed the Procurement Officer not to make any representations of the inmate population. However, as noted, the offerors were using

inmate population counts which produced a higher Per Capita Price. When that Per Capita Price was multiplied by the budgeted population, the total bids (price offers) were above budget. Thus, Secretary Robinson gave his approval for the Procurement Officer to issue Addendum No. 5 and to require the contractors to use the 7,266 figure as a divisor to lower the prices.

Appellant was advised that a higher divisor would be required to be used at the pre-BAFO conference the day before the May 20, 1996 issuance of Addendum No. 5. On the same date Addendum No. 5 was issued, May 20, 1996, Appellant was required to submit its Best and Final Offer, which became part of the Contract when Appellant's offer was subsequently accepted.

We shall now focus more specifically on the operative facts that lead us to deny the appeal. In order for Appellant to recover on a claim of misrepresentation, it must show initially, as one element of proof, that the Department made an inaccurate representation upon which Appellant was entitled to rely. We find that Appellant has not made such a showing based on the record herein.

The Contract provided that during the term of the Contract the Department would pay the successful vendor monthly after receiving an invoice for an amount derived from multiplying the Per Capita Price by the Billable Population Count. The Contract defined the Billable Population Count as the sum of the Average Daily Populations for the month for the facilities in the Region. The Contract further provided that the Average Daily Population would be based on the figures from the resident population column of the Average Daily Population Report generated monthly by the Department.

As to the Billable Population Count, the solicitation did not provide any specifics concerning what the population count would actually be during the term of the Contract. Rather, the vendors were left to determine their own number in submitting their proposals and were not provided with a minimum number of inmates that would be housed in the Baltimore region.

Following Appellant's request for a best estimate of the number of inmates that it would be serving, the Department issued Addendum No. 1 to the solicitation. In Addendum No. 1, the Department informed the vendors that the number of "available beds" in the Baltimore Region was 7,246. The Department further expressly stated in Addendum No. 1 that the provided number represented the available beds only and were "not related to the billable population." The record reflects that Appellant's Mr. Burden clearly understood Addendum No. 1 was not providing the estimate Appellant sought.

Appellant subsequently submitted a price proposal utilizing an estimate in the divisor of 6,500 inmates. Later, after it had generally ascertained the number prior vendors used in the region as a population count and the region's likely staffing needs, Appellant submitted a price proposal utilizing an estimate in the divisor of 6,850. However, as noted above, Appellant and its competitor were proposing a price that was too high.

Accordingly, on May 20, 1996, the Department issued Addendum No. 5 to the Contract including "changes and clarifications in the following four areas in order to have [the vendors] reduce [their] Total Price and Per Capita Price." One of the four areas, numbered paragraph 4 of the

Addendum, entitled Per Capita Price Divisor dealt with the divisor to be used by vendors in calculating the price under the Contract. It provided "[t]he offeror is to base the Total Price and Per Capita Price on the figure of 7,266 inmates." Addendum No. 5 did not change the information provided in earlier addenda about the region's number of "available beds".

Beyond Addendum No. 5's language, other evidence demonstrates that the figure of 7,266 was not an estimate of a population upon which Appellant or the other offeror was to rely in determining a rate at which it could perform the Contract profitably. Rather, the Department informed the offerors through the Procurement Officer that it was the number of inmates for which the Department had been budgeted and that while the number had a "certain reliability", the Department would not guarantee the number or make it a "floor" for the inmate population under the Contract.

The Procurement Officer testified that the Department decided to require that vendors use 7,266 as a divisor, and to therefore depart from its earlier practice of requiring vendors to arrive at their own divisors, in part because it realized that in presenting the final Contract for the Baltimore Region to the Board of Public Works it had to reflect a potential Contract cost equal to the number of inmates covered by the budget. The Department wanted to be able to present the selected proposal to the Board of Public Works on a basis equivalent to the upcoming fiscal year's budgeted population for the Baltimore Region to compare "apples to apples".[4] However, this record fails to reflect a positive and affirmative statement by the Department that 7,266 was the actual number of inmates to be housed in the Baltimore Region during the future one-year term of the Contract or that each offeror was to rely on that number in determining profit margins under the Contract. The formal issuance by the Department, i.e., the solicitation, which included the Contract, and Addenda Nos. 1 and 5, provided no such statement. Similarly, the remark by the Department's Director of Inmate Health Services, Dr. Anthony Swetz, at the pre-BAFO conference conducted shortly prior to the issuance of Addendum No. 5 does not provide such a statement. When Appellant's representative asked the Department's negotiation team if they expected 7,000 inmates to be in the Baltimore Region, Dr. Swetz stated in response: "Oh, you don't have to worry about that; we'll have plenty of inmates. As a matter of fact, that will be the least of your problems." This statement does not constitute a positive and affirmative statement by the Department so as to establish a legally sufficient basis for Appellant to rely on an average of 7,266 inmates per month in the coming year to forecast its profit picture under the Contract.

Based on the record herein the Board does not find that by mandating the use of 7,266 as a divisor the State provided vendors with a legally binding representation of the future Billable Population Count entitling Appellant to an equitable adjustment. The number 7,266 in Addendum No. 5 was the number of inmates for which the Department was budgeted. Appellant was informed of this, and was told that the Department was not guaranteeing the number, and not offering it as a "floor."

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[4] While the goal of Addendum No. 5 was to have vendors reduce their prices after receipt of the price offers in response thereto, the Department still was required to make adjustments because Appellant's winning proposal exceeded the Department's budget for medical services, and additional funding had to be obtained.

Assuming arguendo that the Department made a positive and affirmative representation as to the number of inmates to be housed in the Baltimore Region, the Board further finds that Appellant did not reasonably rely on that number, and may not, therefore, prevail on its claim for an equitable adjustment. In order to succeed on its misrepresentation claim, Appellant must demonstrate that its reliance was reasonable. Gregory Lumber Co., Inc. v United States, supra. Appellant's alleged reliance was unreasonable. The procurement documents did not provide offerors with a prediction of the billable inmate population for the region. During the course of pre-award discussions, the Department declined to provide vendors with an estimate, despite requests by Appellant to do so. According to Appellant the Department did not even provide vendors with historical Average Daily Population figures when requested to do so. Appellant itself identified and understood a logical reason for the State's hesitancy to provide vendors with the requested number. As reflected in deposition testimony of Mr. Burden, historical figures were not to be relied upon because the population capacities of correctional regions in the State were changing due to the opening of two new prisons, one in Baltimore and the other in Western Maryland.

Appellant's own pre-award investigation determined that 6,850 was the likely population count for the region. Appellant arrived at 6,850 based on a review of a prior vendor's experience in the region and the region's likely staffing needs. Mr. Burden testified that up until the issuance of Addendum No. 5 and Dr. Swetz's comments on such number at the pre-BAFO conference (see Findings of Fact 10 and 11) he "never believed for a minute that there would be any more [inmates] than . . . 6850.A When the Department issued Addendum No. 5 without any language or documentation supporting the notion that 7,266 was a prediction, over a year in advance, of the likely population for the region, Appellant entertained very strong doubts that 7,266 was a proper estimate, Mr. Burden expressing that his degree of confidence in the number was merely "fifty percent." Furthermore, the Department's statements that it would not guarantee the 7,266 figure or offer it as a "floor", put "the contractor . . . on notice not to rely on the utterance in issue." Gregory Lumber Co., Inc. v. United States, supra at p. 503.

Appellant finally argues that since it was actually required by the Department to use this number it was entitled to rely on its accuracy as a matter of law. We decline to so hold given the facts as set forth above.

In summary we have before us a record that reflects that Appellant seeks to recoup alleged losses sustained as a result of its business decision. It is undisputed that when Appellant submitted its cost proposal in response to Addendum No. 5, it was free to increase its proposal, i.e., the numbers comprising the numerator, to cover its uncertainty concerning the actual regional population that would be realized. However, the record reflects that the Appellant, an experienced contractor whose representatives were intimately familiar with the importance of prison population and how such population affects correctional contracts, exercised its business judgment and chose not to increase the numbers comprising the numerator because it believed if it raised the numbers it would then not obtain the Contract. Thus, in order to obtain the Contract, Appellant assumed the risk that its Per Capita Price, submitted in response to Addendum No. 5, might under-compensate it. Appellant alone made this business decision, the risk of which it could have avoided by adjusting its final cost offer to accommodate its knowledge of the uncertainties in the population and its own estimate of 6,850. Appellant cannot now be heard to complain that it is entitled to an equitable

adjustment because its business judgment was shown to be incorrect. As discussed above in Trionfo & Sons, Inc. v Board of Educ. of Harford County, 41 Md. App. 103, cert. denied, 284 Md. 745 (1979) it was held that a contractor had no right to rely on misrepresentations regarding test boring data provided in exchange for a written release, the Court observing at p. 108 that "[i]nstead of ignoring the contract documents and the terms of release, [the contractor], if it wished to submit a bid without conducting its own test, could have adjusted its bid to cover the risk which any reasonable bidder would have known it was encountering."

Addendum No. 5 requiring the submission of a new best and final cost proposal, was stated to be for the purpose of obtaining reduced prices and required the contractors to justify certain changes in their costs. Given the concerns about the population in the region expressed by Mr. Burden, Appellant could have changed other portions of its cost proposal, based on a figure of 7,266 inmates to account for the risk of a population shortfall, but Appellant declined to do so, because it might then not be the successful offeror/vendor. As Mr. Burden testified:

> Q. But you could have increased your fee in your final proposal, so as to give you a higher per capita rate and, therefore, provide for the contingency of the population falling short of the 7,266 inmates?
>
> A. We could have also not bid.
>
> Q. I understand.
>
> A. I'm not sure that the results would have been any different. The goal was to achieve a winning price, making the best use of all the information provided us to the State, and, you know, through some, you know, mathematical machination, come up with a - - an approach that basically shifted the cost from one place to another wouldn't have gotten you a winning price. So why bother?
>
> Q. So its fair to say in preparing your final proposal, you're balancing your assessment of the risks involved in you winning the bid at the proposed price against having the low price and, therefore, being a successful vendor?
>
> A. Oh, sure. That's the nature of the contract.

Appellant could have adjusted its final cost proposal to protect itself against the risk of a population shortfall, but it made a business decision not to do so because it was concerned about not being the successful vendor.

Accordingly, for the foregoing reasons the appeal is denied.

Dated: January 11, 2001

Robert B. Harrison III
Board Member

I concur:

Randolph B. Rosencrantz
Chairman

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 2076, appeal of PHP Healthcare Corporation under DPS&CS Contract No. 96034.

Dated: January 11, 2001

Mary F. Priscilla
Recorder