BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF PHP HEALTHCARE CORPORATION c/o PHP Collateral Trust 2579 John Milton Drive 105-133 HERNDON, VIRGINIA 20171 UNDER DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL CONTRACT NO. 96034	)	DOCKET NO. MSBCA 2159

September 15, 2000

Mistakes in Bid - Mistake in Price is a Negotiated Procurement Discovered After Award - Where a proposal is accepted with a mutual understanding of the price offered and a mistake is discovered after award, the mutual understanding of the parties prior to award will control.

APPEARANCE FOR APPELLANT — John G. Sakellaris, Bernstein & Sakellaris, Baltimore, MD

APPEARANCE FOR RESPONDENT — Alan D. Eason, Assistant Attorney General, Baltimore, MD

OPINION BY BOARD MEMBER HARRISON ON MOTIONS FOR SUMMARY DISPOSITION WITH RESPECT TO UNDERBILLING

Through Motion and Cross Motion each party seeks summary disposition with respect to entitlement (and quantum) on the Appellant's underbilling claim for $341,893,540.82 which is the subject of the appeal in MSBCA 2159.[1] The Board having received argument of counsel on the Motions, hereby grants the Respondent's Cross Motion and denies the Appellant's Motion.

Findings of Fact

1. In June 1996, following issuance of a Request for Proposals pursuant to COMAR21.05.03 (procurement by competitive sealed proposals), the State of Maryland, acting through the

[1]Appellant has also filed a number of appeals regarding various issues and claims which have been consolidated for purposes of discovery and any necessary hearings. As a result of the decision herein, the Board's consolidation order no longer applies to this appeal.

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.

2. The initial term of the Contract was for the 12-month period from July 1, 1996 through June 30, 1997. The State had the right to unilaterally extend the Contract for two one-year periods.
3. The Contract at Section 6.4.1 provided payment to Appellant as follows:

> By the 15th business day of each month, the Contractor shall invoice the Agency for the amount listed in ATTACHMENT VI as the PER CAPITA PRICE multiplied by the Billable Population Count.

4. The Department, by Addendum No. 4, dated May 13, 1996 sent all offerors a proposed contract which included the language of Section 6.4.1 contained in the Contract as set forth in paragraph 3 above. However, at all relevant times it was the belief of both parties that the State was requesting the offerors to submit monthly invoices based on that month's share of an annual price derived by multiplying the annual Per Capita Price by the Billable Population Count.[2] Thus the parties believed that the monthly invoice should reflect 1/12 of the number derived by multiplying the Per Capita Price by the Billable Population Count.
5. Appellant's final price offer as presented in its May 20, 1996 price proposal submitted in response to a request for best and final price offers (BAFO) set forth in Addendum No. 5, contained a Per Capita Price of $2,277.00. The Per Capita Price, as noted above, was intended to reflect a yearly (annual) rather than a monthly amount consistent with the definition of Per Capita Price in the RFP as an annual price. The State determined that Appellant's proposal was the most advantageous to the State, considering price and the evaluation factors set forth in the RFP. The parties believed at the time of award that the Contract price for the first year would not exceed $16,544,682 ($2,277 x 7,266 inmates)[3] derived from Appellant's May 20, 1996 price proposal. Approval for such yearly amount, $16,544,682, was sought from the Board of Public Works. Such approval was obtained and the Contract was awarded to Appellant.
6. The Board of Public Works approved the first one-year extension provided for in the Contract. Consistent with such approval, the Department issued unilateral Change Order No. 96034A, dated June 17, 1997, extending the Contract for a period of one additional year from July 1, 1997 to June 30, 1998. The language in the Contract set forth in Finding of Fact No. 3 above was not changed by that Change Order.
7. During the first year and the first extension year[4] Appellant billed the State only one-twelfth each month of the amount yielded by multiplying the Appellant's Per Capita Price of $2,277 by the actual monthly inmate population count (Billable Population Count). By letter dated June 21, 1999, Appellant submitted new and revised requisitions for payment totaling $341,893,540.82 based on multiplying the Per Capita Price by the monthly Billable

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[2] The Billable Population Count was defined in the Contract as the sum of the average daily populations for the month for each of the facilities in the Baltimore Region less certain persons for which the Department had no commitment.

[3] The 7,266 inmate figure was a figure based on a total budgeted inmate population for the Baltimore Region. Offerors were instructed in Addendum No. 5 to use this number in structuring their BAFO's.

[4] The Contract was terminated for default at the end of the first extension year. Such termination is the subject of other appeals before the Board.

Population Count of inmates for each month for the 24 months of Contract performance. Prior to that letter Appellant never requested payment based on a full year multiplier result for any given month.

8. Thereafter, by letter dated July 6, 1999, Appellant filed its notice of claim, claim, and request for a final decision.
9. By letter dated December 28, 1999, the Procurement Officer denied Appellant's claim for the additional billing and Appellant timely appealed that final decision to this Board.

DECISION

Since its inception, the Maryland State Board of Contract Appeals has considered and granted motions for summary disposition,[5] although not specifically provided for under the Administrative Procedure Act, because of its belief that to do so is consistent with legislative direction that it provide for the "informal, expeditious, and inexpensive resolution of appeals." See Md. Code Ann. State Fin. & Proc. § 15-210, Division II. The party moving for summary disposition needs to show the absence of a genuine issue of material fact, Mercantile Club, Inc. v. Scherr, 102 Md. App. 757 (1995) and the record must be examined as a whole, with conflicting evidence and all reasonable inferences from the facts that may affect the outcome of the matter resolved in favor of the non-moving party. Honaker v. W.C. & A.N. Miller Dev., 285 Md. 216 (1979); Delia v. Berkey, 41 Md. App. 47 (1978) aff'd 287 Md. 302 (1980); Coffey v. Derby Steel Co., 291 Md. 241 (1981); Russo v. Ascher, 76 Md. App 465 (1988); King v. Bankerd, 303 Md. 98 111 (1985). See also Heat & Power Corp. v. Air Products, 320 Md. 584, 591 (1990). Applying such standard to the Motions of the parties herein, the Board will grant the Respondent's Cross Motion.

Appellant does not contend that by submitting its price proposal of May 20, 1996, it intended to received on a monthly basis the product of the Billable Population Count times the Per Capita Price of $2,277.00 submitted in its proposal. Appellant argues that it made a mistake in its proposal by submitting an annual Per Capita Price instead of a monthly price that it argues was called for in the Request for Proposal. However, the Request for Proposal called for an annual price. Thus the mistake was not in Addendum No. 5 or in Appellant's response thereto. The mistake, if any, was the lack of clarity in the language of Section 6.4.1, one arguable interpretation of which is that each month the contractor would received compensation derived by multiplying the Per Capita Price by the Billable Population Count. However, assuming arguendo that either the Appellant did make the mistake in its BAFO that it alleges it made or that the State failed to draft contract language that made clear the price Appellant was entitled to, Appellant is not entitled to an equitable adjustment.

Appellant, in this regard asserts that State regulations and the Maryland Court of Appeals have clearly set forth that mistakes in bids affecting price cannot be corrected after award. COMAR 21.05.02.12D dealing with competitive sealed bids states as follows:

Mistakes Discovered After Award. Mistakes may not be corrected after award of the

[5]The word disposition is used rather than judgment because the Board of Contract Appeals has no equitable power or jurisdiction.

contract except when the procurement officer and the head of a procurement agency make a determination that it would be unconscionable not to allow the mistake to be corrected. Changes in price are not permitted. Corrections shall be submitted to and approved in writing by the Office of the Attorney General. (Emphasis added.)

The Maryland Court of Appeals in Md. Port Adm. V. Brawner, 303 Md. 44 (1985), in interpreting the above regulation made it clear that its judicial enforcement of the rule that changes in price are not permitted after award was in part because: "We see this rule as aimed at prevention of any chicanery in the bid process and as intended to instill public confidence in the bidding process . . . ." 304 Md 44 at p. 59. To allow the contractor herein to receive an increase above its proposed price due to an alleged pre-award mistake or ambiguity in the Contract language regarding compensation not discovered until after award would undermine public confidence in public procurement and shall not be sanctioned by this Board.

COMAR 21.05.02.12D is specifically applicable to invitations for bids. However, COMAR 21.05.03, and particularly 21.05.03.03D and E thereof, applicable to procurement by competitive sealed proposals, contains no provision allowing for correction of mistakes in proposals after award. This Board has interpreted the lack of a clause permitting changes for mistakes discovered after award in the procurement regulations for competitive sealed proposals to preclude any such changes even in the context of a change that may not affect price. See Mullan Contracting Company, MSBCA 1768, 4 MSBCA ¶347 (1993). We conclude that changes in price are not allowed after award of a contract through competitive negotiation conducted pursuant to COMAR 21.05.03. The competitive position of the offerors may be affected in a negotiated procurement where award is not based solely on low bid but is based on a combination of technical merit and price and all offerors whose technical proposals are accepted must be afforded an equal opportunity to propose prices and respond to requests for best and final offers respecting price proposals. Indeed, increases or decreases in price offers may also affect the technical offers and the offeror's competitive position versus the other offerors relative to evaluation of the proposals to determine which constitutes the best offer considering both technical and price proposals.

Because we find that changes in price after award in a negotiated procurement are not permitted, Appellant's claim and appeal to the extent it may be viewed as seeking a post award increase in price must be denied.

We would reach the same result if we were to find as requested by Appellant that (1) it mistakenly submitted a best and final price offer of over one hundred and fifty million dollars for the initial one year term of the Contract, which mistake was not detected until after award or (2) that the State made a mistake by drafting ambiguous language in Section 6.4.1 that could be interpreted as calling for payments twelve fold what the parties had agreed to, which alleged mistake was also not discovered until after award.

Assuming that we were to make such findings, Appellant argues that since changes in price are not allowed it should receive an equitable adjustment from the Board for over several hundred million dollars for the two years of performance under the contract. First we note that the record clearly reflects that prior to award the parties believed that Appellant's final offer was

$16,544,682 for a year and not $16,544, 682 for a month. The Board of Contract Appeals (MSBCA) is empowered by the State Finance and Procurement Article to determine money due a contractor (or to the extent funds remain in the contract money due the State) under a contract claim. Where the record reflects that a proposal is accepted with a mutual understanding of the price offered, the mutual understanding of the parties prior to award will control, and any failure of the contract to incorporate the mutual understanding of the parties concerning price will not result in the MSBCA determining that a party is due more or less money as a result of the mistake.

Secondly, and more fundamentally herein, the Contract was required to be approved by the Board of Public Works. The record reflects that the Board of Public Works only approved a Contract whose annual value was sixteen million, not twelve times that amount. Absent required approvals, sovereign immunity is not waived and this Board lacks jurisdiction to award an equitable adjustment; i.e. to determine whether money is due a contractor. See ARA Health v. Dept. of Public Safety, 344 Md 85 (1996). To sum up, the MSBCA holds that under the General Procurement Law and its implementing regulations that neither a ministerial mistake in the State's preparation of a price term in a contract nor a mistake in a price BAFO will set aside the pre-award understanding or agreement of the parties concerning the price offered.

Accordingly, the Motion filed by Appellant is denied and the Cross Motion for Summary Disposition filed by Respondent is granted and the appeal is denied.

Wherefore, it is Ordered this 15th day of September 2000 that the appeal is dismissed with prejudice.

Dated: September 15, 2000

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 Tine 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 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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2159, appeal of PHP HEALTHCARE CORPORATION, under DPSC Contract No. 96034.

Dated: September 15, 2000

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Mary F. Priscilla
Recorder