

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEALS OF PHP )  
HEALTHCARE CORPORATION )  
Under DPSCS Contract No. 96034 ) Docket Nos. MSBCA 2130 & 2173  
)  
)

September 24, 2004

Award of Interest — Pursuant to a mandate of the Maryland Court of Special Appeals, the Board issued an order consistent with that mandate, including an award of interest to Appellant

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APPEARANCE FOR RESPONDENT: Alan D. Eason  
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OPINION BY BOARD MEMBER BURNS

Findings of Fact

1. In 1996 Appellant entered into a contract (Contract) with the Department of Public Safety and Correctional Services (Department) to provide healthcare services to inmates in the Department's facilities in the Baltimore Region. The Contract covered the period July 1, 1996 through June 30, 1997, and was extended pursuant to an option for an additional one year period ending June 30, 1998. Another option covered the year beginning July 1, 1998 and ending June 30, 1999.
2. When Appellant declined to perform during this second option year unless the Department negotiated changes in the Contract to address various pending claims it had filed, the Department terminated the Contract for default, effective June 30, 1998.
3. The instant appeals involving the issue of the propriety of the termination for default, were the subject of an interlocutory decision by the Board dated January 17, 2001. In that interlocutory decision the Board ruled in the Department's favor on entitlement and, with the agreement of the parties, deferred ruling on the Department's damages. This interlocutory decision also addressed and resolved in the Department's favor MSBCA 2080 challenging the propriety of exercising the second year option and the termination for default.

4. At hearings on May 31, 2001 and September 10, 2001, the parties entered stipulations regarding various items bearing on the Department's damages.
5. By a decision dated September 26, 2001, the Board denied Appellant's (PHP Healthcare Corporation, herein referred to as "PHP") challenge to Respondent Department's termination of the Contract for default and found that Respondent had sustained damages in the amount of \$3,248,308.01 as a result of the Board's finding that Appellant had breached its Contract with Respondent.
6. Appellant filed a Petition for Judicial Review of the Board's decisions in MSBCA Docket Numbers 2080, 2130, and 2173 in the Circuit Court for Baltimore City (Case No. 24-C-01-004884). Appellant also filed a Petition for Judicial Review of the Board's decision in MSBCA Docket Number 2159 in the Circuit Court for Baltimore City (Case No. 24-C-00-004987).
7. In each case, the Circuit Court affirmed the Board.
8. Appeals were taken from the Circuit Court to the Maryland Court of Special Appeals.
9. Court of Special Appeals Case No. 540, 2002 Term, is the appeal from the Circuit Court's affirmance of the decision determining that PHP had committed an anticipatory breach and that the State was damaged by that breach in the amount of \$3,248,308.01.
10. Court of Special Appeals Case No. 1929, 2002 Term, involves the Circuit Court decision rejecting PHP's claim for "underpayments."
11. In an unreported decision filed on December 5, 2003, and issued on January 5, 2004, a panel of the Court of Special Appeals affirmed the judgment of the Circuit Court in Case No. 1929 but reversed the judgment of the Circuit Court in Case No. 540.
12. The Court of Special Appeals remanded the case to the Circuit Court with instructions to reverse the decision of the Board and remand the case to the Board for the passage of an order consistent with their opinion, "including an award to PHP of the sum withheld by the State from PHP's compensation for the first option period, with interest thereon."
13. Certiorari was sought by Respondent from the decision of the Court of Special Appeals to the Maryland Court of Appeals and was denied by the Court of Appeals in an order dated April 12, 2004.
14. In furtherance of the Mandate of the Court of Special Appeals the Circuit Court for Baltimore City issued an Order dated May 20, 2004 which remanded the case to the Board with certain instructions. Those instructions included:
  1. that the Board would pass an Order consistent with the Opinion of the Court of Special Appeals in this case and,
  2. that said Order would include an award to PHP of an amount equivalent to the sum withheld by the State of Maryland from PHP's compensation for the first option period with interest thereon.
15. On June 16, 2004, the State of Maryland paid PHP \$3,148,233.08; that sum comprising the amount withheld from PHP's compensation for the first option period (\$2,725,908.83), as well as settlement amounts previously agreed to between the Department and PHP regarding Liquidated Damages (\$122,325.00) and Claims (\$300,000.00).
16. A hearing concerning the amount of interest to be awarded to PHP was held on August 25, 2004.

## Decision

This matter concerns interest due PHP from the State of Maryland. According to the Stipulations of Fact filed by the parties, the State of Maryland ("State") paid PHP \$3,148,233.08 on June 16, 2004. That sum comprised the amount withheld from PHP for the first option period (\$2,725,908.83<sup>1</sup>), as well as settlement amounts previously agreed to between the Department and PHP regarding Liquidated Damages (\$122,325.00) and Claims (\$300,000.00) pursuant to a Partial Settlement Agreement of the parties dated August 31, 2001, regarding PHP's appeals in MSBCA 2031, 2076, 2077, 2078, and 2079.

The parties agree that the law mandates that the rate of interest to be awarded shall be at the rate of 10 percent per annum simple interest. Courts and Judicial Proceedings Article, §11-107(a), Annotated Code of Maryland; State Finance and Procurement Article, §15-222, Annotated Code of Maryland.

The State's payment of the principle amount on June 16, 2004, makes that date the terminus for any interest calculation.

At issue is what, if any, interest PHP is entitled to concerning the amounts that make up the \$3,148,233.08.

That figure includes: 1) \$1,313,146.73 for services rendered by PHP in May, 1998 ("May Billing"); 2) \$1,324,808.10 for services rendered by PHP in June, 1998 ("June Billing"); 3) \$87,954.00 for other services rendered by PHP ("Prior Withholding"); 4) \$122,325.00 in Liquidated Damages pursuant to the Partial Settlement Agreement previously discussed ("Liquidated Damages Settlement"); and, 5) \$300,00.00 in Claims pursuant to the Partial Settlement Agreement previously discussed ("Claims Settlement").

Appellant claims interest in the amount of \$1,697,437.36. Appellant's Hearing Exhibit 1. Appellant avers that the commencement date for the interest calculation for items 1-3 above should be September 1, 1998. For items 4-5 above Appellant claims a starting date of September 1, 2001. Appellant agrees that the end date for any interest calculation is June 16, 2004.

Appellant, therefore, claims interest in the amount of \$1,697,437.36, including a total of \$1,579,533.48 in interest for the amounts owed for the first option period (items 1-3 above) and \$117,903.88 in interest for the settlement amounts (items 4-5 above).

Appellant argues that the normal discretion of the Board as to the award of interest, State Finance and Procurement Article, §15-222, Annotated Code of Maryland, has been superseded by the opinion and mandate of the Court of Special Appeals, as well as the Circuit Court's remand order. Respondent disagrees.

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<sup>1</sup> There appears to be an error in the Stipulation of Facts concerning this amount. In Stipulation of Fact Numbers 14 and 22 the figure listed as being withheld from PHP for the first option period is \$2,725,954.83. If this figure is added to the settlement amounts also paid by the State on June 16, 2004 - \$122,325.00 and \$300,000.000 — a total of \$3,148,279.83 results. The amount paid by the State to PHP was actually \$3,148,233.83, which is the total of the amounts listed individually in the Stipulations of Fact. It appears clear that an error in addition of the three amounts that went into the amount owed to PHP for the first option period occurred and resulted in the erroneous figure of \$2,725,954.83.

As to items 1–3 above the Board agrees with Appellant; as to items 4–5 the Board disagrees with Appellant.

The language of the Court of Special Appeals panel in the unreported opinion in these appeals seems very clear. The Court noted that:

As discussed above, the change in the CPI from one just for Baltimore to one that includes Baltimore in a larger area consisting of Washington, D.C., Virginia, and West Virginia did not change the formula for computing the contractor's compensation for the second option year. But the legislative COLA change, from a percentage wage increase across the board to one in which specific dollar amount wage increases were awarded, did change the formula to one that PHP had not agreed to. PHP was right in insisting that the Department could not exercise the option without renegotiating the contract. **Simply stated, the Department's attempt to exercise the option was invalid because the changes it insisted that PHP had to accept would have materially altered the terms of the contract with respect to the contractor's compensation ...**

**Since the Department did not — could not — exercise the option because of the COLA change, PHP did not — could not — breach the contract. The Appeals Board erred in affirming the decision of the Director of Procurement Services, and the circuit court erred in affirming the decision of the Appeals Board. Accordingly, we must reverse the judgment of the circuit court in our case No. 540, September Term 2002, and remand the case to the circuit court with instructions to reverse the decision of the Appeals Board and remand the case to that agency for the passage of an order consistent with this opinion, including an award to PHP of the sum withheld by the State from PHP's compensation for the first option period, with interest thereon. (bold emphasis added).**

PHP Healthcare Corporation v. Department of Public Safety & Correctional Services, Nos. 540 and 1929, September Term, 2002, unreported opinion, Maryland Court of Special Appeals, filed December 5, 2003, slip opinion at pp. 25–26.

Respondent petitioned the Maryland Court of Appeals for a Writ of Certiorari to review this decision, and that petition was denied on April 12, 2004.

The Court of Special Appeals decision, therefore, stands and must be viewed as controlling on the Board.

The Board finds that the language quoted above clearly indicates that it is the order of the Court of Special Appeals<sup>2</sup> that PHP is to receive not only the sums withheld by the State for the

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<sup>2</sup> The Order of the Circuit Court filed May 20, 2004, pursuant to the Mandate of the Court of Special Appeals remanded the case to the Board with instructions by the Circuit Court to “pass and Order consistent with the Opinion of the Court of Special Appeals in this case.” Those instructions also noted that the Order “shall include an award to Plaintiff, PHP Healthcare Corporation, of an amount equivalent to the sum withheld by the State of Maryland from PHP Healthcare Corporation's compensation for the first option period with interest thereon” (emphasis added).

first option period but interest on that amount as well. In the Board's view no other result would be "consistent with this opinion."

This would include interest: on the May Billing amount of \$1,313,146.73; on the June Billing amount of \$1,324,808.10; and, on the Prior Withholding amount of \$87,954.00 for a total of \$2,725,908.83.

The only issue for consideration as to these three amounts is, therefore, the starting date for the running of the interest on these three amounts.

On June 11, 1998, the Department received an invoice from PHP for the May Billing amount. On July 16, 1998, the Department received an invoice from PHP for the June Billing Amount. The Prior Withholding, for services rendered in December, 1997 was submitted sometime after that month and before February 5, 1998 (Stipulations of Fact and to Authenticity of Documents, Exhibit 6).

By a letter dated August 28, 1998 (Stipulations of Fact and to Authenticity of Documents, Exhibit 5) and filed by August 31, 1998 (Stipulations of Fact and to Authenticity of Documents, Stipulation of Fact Number 13), PHP filed a notice of claim with the Department for the May Billing, the June Billing, and the Prior Withholding amounts. The total amount PHP claimed as being withheld from the three invoices was \$2,725,908.83. The Department's final decision and action denying PHP's claims was sent to PHP by a letter dated March 10, 2000 (Stipulation of Fact Number 16, Stipulations of Fact and Authenticity of Documents, Exhibit 6).

The Respondent argues that interest on these amounts should begin no earlier than December 5, 2003, the date of the decision of the Court of Special Appeals in this matter. Appellant has suggested a date of September 1, 1998 as being an appropriate date for the start of interest on the amount owed to PHP by the State on these three invoices to begin to accrue. In light of the decision of the Court of Special Appeals, the Board agrees with Appellant.

The decision of the Court of Special Appeals clearly indicates that PHP "did not — could not — breach the contract" between PHP and the State of Maryland. That being the case, the State had no right to withhold the amounts of these three invoices from PHP. By July 16, 1998, PHP had invoiced the State for all three of these amounts. By August 31, 1998, PHP had filed a formal notice of claim with the Department for these three amounts which were being withheld by the State.

The Board has held that there is no liability for interest until a claim is filed with a Procurement Officer and that the Board's focus must be on when the Procurement Officer new or should have known that the claim was valid. Correctional Medical Services, Inc., MSBCA 1822, 1867, 1868, 1869, & 1925, 5 MSBCA ¶411 (1996) p. 10.

The Board finds that the Court of Appeals decision herein does not limit that holding. Here, Appellant filed a notice of claim with the Director of Procurement Services at the Department by a letter dated August 28, 2004 which the parties have stipulated as having been received by August 31, 2004.

Considering this fact in light of the decision of the Court of Special Appeals herein, Appellant's suggestion of September 1, 1998 as an appropriate date for the beginning of interest to run on these three amounts is, in the view of the Board, reasonable and appropriate. Under the facts herein, and under the reasoning of the Court of Special Appeals in this case, the State should have known on September 1, 1998 that PHP's claim was valid and that these three amounts were due and payable to PHP on that date. The Board finds, therefore, that interest on these amounts began to run on September 1, 1998.

In summary, the Board finds that, as a result of the facts of this case and the holding of the Court of Special Appeals in this case, interest on the May Billing, the June Billing, and the Prior Withholding amounts should be calculated so as to begin on September 1, 1998.

That being the case, interest at 10 percent from September 1, 1998 to June 16, 2004 on \$2,725,908.83 is due to PHP. That amount is \$1,579,533.48 and that amount is due to PHP by the State of Maryland.

The Board notes for the record that the Board feels bound by the reasoning of the Court of Special Appeals to come to this conclusion. Under State Finance and Procurement Article §15-222, Annotated Code of Maryland, the Board has the discretion to award pre-decision interest from a day that the Appeals Board determines to be fair and reasonable after hearing all the facts until the day of decision by the Appeals Board, provided that interest may not accrue before the procurement officer receives a contract claim from the contractor. *See also, Correctional Medical Services, Inc., supra.*

The Board finds that this statutory discretion is, in this case, clearly limited by the clear mandate of the Court of Special Appeals. The Board has been ordered to pass an order consistent with the opinion of the Court of Special Appeals. The Board has done so.

As to the Liquidated Damages Settlement and Claims Settlement amounts, Appellant claims that interest on those amounts is also required by the Court of Special Appeals decision. Appellant suggests a starting date of September 1, 2001 for interest on those amounts. Respondent argues that the Board lacks jurisdiction to award pre-decision interest because these amounts were paid in settlement of, and conditioned upon, dismissal of their associated claims.

The Board is not persuaded by Respondent's argument that the Board lacks jurisdiction to award pre-judgment interest on the Liquidated Damages Settlement amount and the Claims Settlement amount.

Respondent's argument that because the amounts involved herein were paid pursuant to a settlement and dismissal of the associated claims while they were pending before the Board and not as a result of a procurement officer's decision in favor of a contractor strikes the Board as a distinction without a difference. The State of Maryland has agreed that certain amounts are due a contractor pursuant to claims filed with the Board. In exchange for certain payments, the contractor has agreed to dismiss certain claims before the Board.

State Finance and Procurement Article §15-211(a), Annotated Code of Maryland, gives the Board jurisdiction to hear and decide all appeals arising from the final action of a unit on a contract claim concerning breach, performance, modification, or termination. The "Partial Settlement Agreement" between the Department and PHP involves MSBCA 2031, 2076, 2077, 2078, and 2079. These appeals, and settlement of these appeals, involve "appeals arising from the final action of a unit on a contract claim." The Board has jurisdiction over these claims and finds that the Board has jurisdiction over the settlement of these claims as well. *See also, Correctional Medical Services, Inc., supra.*

Having found jurisdiction over the Liquidated Damages and Claims settlements the Board now moves on to the issue of interest on those items. The opinion of the Court of Special Appeals deals quite specifically with PHP's compensation for the first option period, *see e.g., PHP Healthcare Corporation v. Department of Public Safety & Correctional Services, supra*, at p. 26, and involves MSBCA 2130 and 2173. The issue of settlement amounts and possible interest on any settlement amounts are not discussed in the Court's opinion.

Appellant PHP itself differentiates between amounts withheld from PHP's compensation for the first option period and amounts involved in settlements between PHP and the State. *See e.g., PHP's Pre-Hearing Memorandum*, at p. 5.

The Board, therefore, believes that the discretion conferred on the Board under State Finance and Procurement Article §15-222, Annotated Code of Maryland, remains with the Board for purposes of consideration of interest on the two settlement amounts herein.

These two settlement amounts were agreed to by the Department and by PHP in a "Partial Settlement Agreement" dated August 31, 2001. In exchange for a payment of \$122,325.00<sup>3</sup> PHP agreed to dismiss its appeals in MSBCA 2031, 2077, 2078, and 2079 with prejudice. Stipulations of Fact and Authenticity of Documents, Exhibit 7, paragraph 3, p. 1. In exchange for a payment of \$300,000.00, PHP agreed to dismiss its appeals in MSBCA 2076, excepting item 1 therein dealing with population shortfall, with prejudice. Stipulations of Fact and Authenticity of Documents, Exhibit 7, paragraph 4, p. 1.

Furthermore, the parties agreed that:

6. The Department agrees to allow PHP a credit against the amounts PHP is found to owe the Department in the amount of the settlements set out herein in paragraphs 3 and 4, and in the event that amounts owed to PHP exceed those owed to the Department, to pay such amounts to PHP.

Until such time as a final determination of PHP's claims had been made, therefore, the settlement amounts were in limbo. In fact, until the filing of the opinion of the Court of Special Appeals on December 5, 2003, these settlement amounts were not owed to PHP but were, under

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<sup>3</sup> The amount listed in the "Partial Settlement Agreement" for the settlement of MSBCA 2031, 2077, 2078 and 2079 was \$145,375.00. In response to Board inquiries at the hearing on this matter, counsel agreed that the \$122,325.00 figure paid represented a reduction based on certain other adjustments that the parties had agreed upon.

the decision of the Board and the affirmance of that decision by the Circuit Court, amounts offsetting the amount found in the Board's decision to be owed by PHP to the State.

It was not until the State's petition for a Writ of Certiorari to review the decision of the Court of Special Appeals was denied on April 12, 2004 that it become legally finalized that the settlement amounts were owed by the State to PHP.

The State paid PHP these two settlement amounts on June 16, 2004, approximately two months after the amounts became due to PHP.

The Board finds, pursuant to the discretion conferred on the Board by State Finance and Procurement Article §15-222, Annotated Code of Maryland, after hearing all of the facts, that two months is a fair and reasonable amount of time for the State to have paid PHP the settlement amounts herein and that, consequently, interest is denied to PHP on the two settlement amounts of \$122,325.00 and \$300,000.00.

For the foregoing reasons, the Board determines that PHP is entitled to \$1,579,533.48 in interest from the State of Maryland in this matter.

On June 16, 2004, the State of Maryland, pursuant to an Order of the Maryland Board of Contract Appeals, paid to Appellant \$2,725,908.83 withheld from its compensation for the first option period. The Board's Order was issued pursuant to the Order of the Circuit Court for Baltimore City, which was issued pursuant to the Mandate of the Court of Special Appeals of Maryland. Appellant is also entitled to \$1,579,533.48 in interest from the State of Maryland on the \$2,725,908.83 paid by the State, such interest beginning on September 1, 1998 and ending on June 16, 2004.

Wherefore, it is Ordered this 24<sup>th</sup> day of September 2004, that Appellant PHP is entitled to \$1,579,533.48 in interest from the State of Maryland.

Dated: September 24, 2004

Michael W. Burns  
Board Member

I Concur:

Robert B. Harrison III  
Chairman

Michael J. Collins  
Board Member

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. — Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2130 and 2173, appeals of PHP Healthcare Corporation under DPSCS Contract No. 96034.

Dated: September 24, 2004

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Michael L. Carnahan  
Deputy Recorder