BEFORE THE

MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of PRISON HEALTH SERVICES, INC.	)	
	)	Docket No. MSBCA 1776
Under DPS&CS Contract No. 9245B-0201	)	

April 26, 1995

Equitable Adjustment - Oral Agreement - Appellant argued that authorized State officials orally agreed to pay additional compensation for the provision of services already required by Appellant's contract. Assuming arguendo that such a promise was made (and the Board found that one was not), an oral promise to pay a contractor made by an official authorized to approve payment in the amount sought must be reduced to writing in order for the contract or to be entitled to an equitable adjustment. Mere consideration by authorized officials of a request for a contract amendment does not create a basis for entitlement to an equitable adjustment under the General Procurement Law.

APPEARANCE FOR APPELLANT: Carlos M. Lummus, Esq.
New Castle, DE.

APPEARANCE FOR RESPONDENT: Alan D. Eason
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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim for an equitable adjustment for "carry-over" costs resulting from provision of medical services that Appellant asserts should have been provided by a predecessor contractor.

Findings of Fact

1. On November 30, 1992, Appellant executed a competitively procured contract to provide a health care program for certain inmates of the Division of Correction (Division or DOC) of the Department of Public Safety and Correctional Services (DPS&CS). The Division executed the contract on March 2, 1993. The contract provided that Appellant was responsible for all inmate health care commencing January 1, 1993.

2. In either December, 1992 or January, 1993, a Vice President of Appellant contacted the Deputy Commissioner of the Division requesting compensation beyond that provided for in the contract for necessary medical services that allegedly should have been provided to certain inmates under the previous medical services provider contract.

3. As a result of the conversation, Appellant wrote the Deputy Commissioner letters dated January 14, 1993 and January 22, 1993 providing estimates of the alleged carry-over costs.

4. By letters dated March 2, 1993 and April 2, 1993, the Division advised Appellant that Appellant's contract did not provide for reimbursement for services provided as a carry-over from the previous contractor.

5. Appellant filed a claim with the Division by letter dated March 8, 1993 and updated the claim through April 30, 1993 and June 30, 1993 by correspondence dated May 6, 1993 and July 10, 1993.

6. The Division denied the claim by final decision dated October 21, 1993. Appellant timely appealed to this Board on November 19, 1993.

7. The contractor at issues does not address responsibility and payment for carry-over medical services. The contract does provide that Appellant is responsible for all medical services required. The record does not reflect that DOC made any representations to bidders during the competitive bidding phase for this contact concerning the extent of carry-over medical services and the contract does not make any such representations.

8. The Board finds that after the contract was executed by Appellant on November 30, 1992, the DOC did not agree to a contract modification or change concerning payment for carry-over medical services. DOC did, however, agree to consider whether such a contract modification or change would be appropriate. However, by letters dated March 2, 1993 and April 2, 1993 DOC advised Appellant that the contract would not be changed or modified to authorize payment for the carry-over expenses submitted by Appellant.

Decision

The contract at issue does not provide for payment for carry-over medical care; that is payment for medical care that was provided by Appellant after January 1, 1993 that should have been provided by the outgoing predecessor contractor. Accordingly, Appellant seeks compensation for provision of such services based on principles of equitable estoppel, unjust enrichment and quantum

meruit. In making its argument based on equitable estoppel, Appellant asserts that the Deputy Commissioner of Corrections orally agreed to pay Appellant for the cost of providing carry-over medical services and that the Deputy Commissioner had the legal authority to bind the State by such oral agreements. We do not find, based on our review of the record, that the Deputy Commissioner either agreed to pay the carry-over costs or had the authority to agree to such payments. Even if the Deputy Commissioner had the authority to agree to such payments and in fact agreed to them, we would still deny the appeal for the reasons that follow.

When the State enacted the General Procurement Law in 1980[1] it set the parameters relative to the relief available to a contractor following the waiver of its sovereignty in 1976.[2] Accordingly, Appellant may only be awarded an equitable adjustment if such is authorized by the General Procurement Law or COMAR Title 21. Appellant has no remedy under common law legal or equitable principles that are not embodied directly or by necessary implication in the remedial provisions of the General Procurement Law as set presently forth in Division II, State Finance and Procurement Article.[3] In order for any recovery to be considered a procurement contract must exist. 11-202, 15-217, State Finance and Procurement Article. The procurement contract must be in writing. See Boland Trane Associates, Inc., MSBCA 1084, 1 MSBCA §101 (1985). As noted by the Court of Special Appeals in Mass Transit Administra-

[1]Chapter 775, Laws of Maryland, 1980.

[2]Chapter 450, Laws of Maryland, 1976. See generally, McLean Contracting Co. V. MTA, 70 Md. App. 514 (1987).

[3]See generally, Mass Transit Administration v. Granite Construction Company, 57 Md. App. 766 (1984).

tion v. Granite Construction Company, 57 Md. App. 766, 780(1984):

> *Even if we were persuaded that [the State] had been unjustly enriched . . . we would be forced to conclude that sovereign immunity would be a complete bar to recovery.*
>
> *As we have seen, sovereign immunity bars recovery unless waived or abrogated by the State and that the State has waived the defense only with respect to those contract claims which are "based upon a written contract executed on behalf of the State, . . . by an official or employee acting within the scope of his authority." Md. Ann. Code, Art. 21, §7-101. We have also seen that recovery for unjust enrichment is based upon an implied in law contract. The two concepts are incompatible. However meritorious a claim based upon an implied contract may be, if that claim is against the State or any of its agencies, it is barred because it is not based upon a written contract.*

The instant contract was competitively bid. Herein, the State made no representations in the bid documents to bidders concerning what they should expect to find regarding carry-over expenses, nor does the record establish any quantifiable base for what bidders should expect to find regarding carry-over expenses when bidding on Maryland prison inmate health care contracts. The bidder must, therefore, live with the conditions it encounters if awarded the contract, and the contract[4] herein requires Appellant to provide for the consideration set forth in its bid all medical services without limitation based upon what the prior provider may or may not have left undone.[5]

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[4] The Board is addressing here an implicit alternative theory of recovery raised by Appellant that the Board should apply a differing site conditions approach to Appellant's claim. The Board recognizes that the differing site condition clause required by the General Procurement Law for construction contracts and the resultant protection afforded bidders only applies to construction contracts.

[5] The Board notes that certain of the alleged carry-over expenses as set forth in Appellant's Statement of Damages (Appellant's Exhibit 7) appear to involve expenses for medical treatments that became necessary during the term of Appellant's

Accordingly, Appellant argued that after it entered into the contract it became entitled to relief not afforded by the plain language of the contract as a result of alleged promises by the Deputy Commissioner within the alleged scope of her authority that Appellant would receive additional compensation for carry-over expenses. However, such relief grounded on principles of equitable estoppel, unjust enrichment, and detrimental reliance as creating an implied in fact or constructive contract between the parties must be denied since the alleged promise to pay[6] was never reduced to a writing rising to the level of a State procurement contract or contract modification or change order. We have already noted that Appellant's contract as executed on November 30, 1992 requires Appellant to provide, for its bid price, all required medical services necessary after January 1, 1993. Considering the record in the light most favorable to Appellant, communication between the parties as set forth in Findings of Fact Nos. 2, 3 and 4 might be said to evidence that the State was initially considering and them determined to reject an amendment to Appellant's contract. Unless reduced to writing with required indicia of a contract modification or change order, however, mere consideration of a contract amendment will not create a basis for entitlement to an equitable adjustment under the General Procurement Law. See Shirley Novatney, MSBCA 1554, 3 MSBCA ¶279(1991).

For similar reasons, the Appellant's theory of recovery based on quantum meruit must also fail. Essential elements of recovery under quantum meruit are that services were rendered to and accepted by the person sought to be charged under circumstances that reasonably notified the person sought to be charged that the provider expected to be paid for the services. However, such quasi-contractual claim is barred if a written contract between the

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contract rather than during the term of the prior providers contract.

[6] As noted above and in Finding of Fact No. 8 the Board has found that no such promise to pay was made.

parties covers the same subject matter upon which the quasi-contractual claim rests. Even if Appellant's contract did not require it to provide all medically required services, the absence of a written amendment to its contract would preclude recovery. Mass Transit Administration v. Granite Construction Company, supra.

Finally, while Appellant's arguments for entitlement to an equitable adjustment focus on activity that occurred after Appellant executed its contract, certain evidence of record might suggest that Appellant made a mistake in preparing its bid in underestimating the potential for significant carry-over expenses. Assuming arguendo that a failure to properly estimate expenses could be considered a mistake for purposes of COMAR 21.05.02.12 (dealing with mistakes in bids) a change in price due to a mistake in bid discovered after award is not permitted. COMAR 21.05.02.12D; Maryland Port Administration v Brawner Contracting Co., 303 Md 44(1985). Accordingly, no relief may be afforded if Appellant made a mistake in its bid.

For the foregoing reasons, the appeal is denied.

Dated: April 26, 1995

Robert B. Harrison III
Chairman

I concur:

Candida Steel

Candida S. Steel
Board Member

Randolph B. Rosencrantz
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.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1776, appeal of PRISON HEALTH SERVICES, INC. under DPS&CS Contract No. 9245B-0201.

Dated: April 26, 1995

Mary F. Priscilla
Recorder