BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of THE TREATMENT AND LEARNING CENTERS, INC.	)	
Under DHMH DDA Contract No. MR-448-NRD	)	Docket No. MSBCA 1746

February 7, 1994

Equipment Adjustment - Allowable Costs - A cost which relates to the performance of the contract may be an allowable cost. However, such cost may not be awarded as part of an equitable adjustment pursuant to a termination of the contract for convenience unless such cost is also a reasonable cost that the contractor has incurred to the date of termination or a reasonable cost associated with the termination.

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APPEARANCE FOR RESPONDENT: Sharon Krevor-Weisbaum
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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim for an equitable adjustment by the Department of Health & Mental Hygiene (DHMH) Procurement Officer arising out of the termination of Appellant's contract for convenience. The accelerated procedure was requested by Appellant and this opinion is issued pursuant to COMAR 21.10.06.12d.

Findings of Fact

1. In April of 1991, Appellant entered into a contract with DHMH to provide services to developmentally disabled individuals. Four awards involving discreet funding for residential, day, supported employment and individual support services were covered by the contract.

2. The three year term of the contract was for the period July 1, 1991 through June 30, 1994.

3. The four awards provided for yearly, not to exceed, incremental amounts with a total, not to exceed, compensation for the three year term of the contract of $1,142,271.

4. Appellant allegedly incurred a sizable operating deficit in FY'1991 and FY'1992 in providing services under the residential award involving four clients whose disability related to head injury.

5. In July of 1992, Appellant requested that the residential award be terminated for convenience pursuant to Section 2100.06 of the Human Services Agreements Manual, which Manual was incorporated by reference into the contract.

6. Section 2100.06 of the Human Services Agreements Manual provides:

> Should the vendor wish to terminate the contract or MOU, it must make a written request for termination to the Director of the appropriate program administration at least sixty (60) days before the proposed termination date. Approval must be secured before services to clients are stopped.

7. DHMH agreed to terminate the residential services award for convenience. By letter dated November 12, 1992, DHMH notified Appellant that termination of the residential services award would occur on November 15, 1992.

8. The Board finds that the time frame for Appellant's request for termination on July 31, 1992 and the actual termination on November 15, 1992 does not involve the passage of an unreasonable amount of time as asserted by Appellant. The Board further finds that the State alone retains the right to terminate a contract in whole or in part. A contractor does not have such right under Maryland's General Procurement Law. Herein the State, although not required to, agreed to Appellant's request to terminate the residential services award; i.e. agreed to partially terminate the contract for convenience. The rights of the parties in a partial termination for convenience of a contract are governed by the language of the termination of convenience clause required to be included in all State procurement contracts.[1] Pursuant to direction in COMAR 21.07.01.12A for inclusion of a mandatory termination for convenience clause and the language thereof, the contract herein contains the permitted short form alternate version, to wit:

> TERMINATION FOR CONVENIENCE
>
> The performance of work under this contract may be

[1]Section 13-218(a)(2), Division II, State Finance and Procurement Article requires a procurement contract to include a clause covering termination for convenience "if the head of the...unit determines that termination is appropriate."

terminated by the Department in accordance with this clause in whole, or from time to time in part, whenever the Procurement Officer shall determine that such termination is in the best interest of the State. The Department will pay all reasonable costs associated with this contract that the Contractor has incurred to the date of termination and all reasonable costs associated with termination of the contract. However, the Contractor shall not be reimbursed for any anticipatory profits which have not been earned up to the date of termination.

9. Appellant timely submitted a claim for $24,496.00 with DHMH which was denied. During the hearing of Appellant's appeal, the amount of the claim was reduced and Appellant now seeks $20,811.64 for expenses allegedly incurred as a result of the termination.

10. The costs claimed involve: (1) $438[2] for carpet cleaning and approximately $1,460 for installing grab bars and other repairs to the two apartments in which Appellant's clients were housed to comply with program licensing requirements for Appellant to maintain its license from the State to provide the services at issue; (2) approximately $14,000 for the cost

[2]The State contends that only one carpet at a cost of $219 was required to be cleaned by Appellant as a condition of licensure. The State otherwise agrees with Appellant that the costs included in the claim are allowable; i.e., represent a cost that would be an allowable cost for the services involved; that is costs that (1) are costs for activity related to the provision of the services called for and (2) are not prohibited by the contract cost principles and procedures as set forth in COMAR 21.09 nor the cost principles set forth in the Human Services Agreements Manual.

of a consultant agency's services in absorbing the workload of Appellant's employees who left the employ of Appellant in anticipation of termination of the program; and (3) approximately $4,162[3] representing overtime payments to staff who remained with the program to absorb the workload of employees who left Appellant's employ.

11. Appellant's claim was denied by the DHMH Procurement Officer on August 18, 1993 and this timely appeal followed on September 16, 1993.

Decision

The State has stipulated that the claimed costs of $20,811.64 (less $219.00 for the cost of cleaning one carpet) are allowable costs. The state asserts, however, that such costs are not reasonable pursuant to the language of the termination for convenience clause providing that the State will pay all reasonable costs that the contractor has incurred to the date of termination and all reasonable costs associated with termination of the contract. We agree.

The costs principles set forth in COMAR 21.09 may be used as guidance in a dispute over the appropriateness of costs in a termination for convenience.

Reasonable costs are defined in COMAR 21.09.01.04 as follows:

> .04 Reasonable Costs.
>
> A. Any cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by an ordinary prudent person in the conduct of competitive business in that industry.
> B. In determining the reasonableness of a given cost, consideration shall be given to:
> (1) Requirements imposed by the contract terms and conditions;

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[3] The $14,000.00 costs for the consultant agency's services and $4,162 for staff overtime only captures costs incurred up until October 15, 1992 (see Exhibit 5 to Appellant's complaint). The record does not permit the Board to determine costs for those items incurred during the period October 15, 1992 to the date of termination, November 15, 1992.

(2) Whether the cost is of a type generally recognized as ordinary and necessary for the conduct of the contractor's business or the performance of the contract;

(3) The restraints inherent in, and the requirements imposed by, these factors as generally accepted sound business practices, arms' length bargaining, and federal and State laws and regulations;

(4) The action that a prudent business manager would take under the circumstances, including general public policy and considering responsibilities to the owners of the business, employees, customers, and the State;

(5) Significant deviations from the contractor's established practices which may unjustifiably increase the contract costs; and

(6) Any other relevant circumstances.

Most of the additional costs sought arise out of Appellant's failure to run the residential program in a cost effective manner thereby leading Appellant to seek to be excused from further performance. Costs stemming from a contractor's failure remain the responsibility of the contractor. However, we have noted that the State has agreed that the claimed costs are allowable. Allowable costs are defined at COMAR 21.09.01.03 as follows:

.03 Allowable Costs.

A. General. Any contract cost proposed for estimating purposes or invoiced for cost-reimbursement purposes shall be allowable to the extent provided in the contract and, if inconsistent with these cost principles, approved as a deviation under Regulation .23. The contract shall provide that the total allowable cost of a contract is the sum of the allowable direct costs actually incurred in the performance of the contract in accordance with its terms, plus the properly allocable portion of the allowable indirect costs, subject to any specific contract limitations, less any applicable credits (such as discounts, rebates, refunds, and property disposal income), plus profit.

B. Accounting Consistency. All costs shall be accounted for in accordance with generally accepted accounting principles. In pricing a proposal, a contractor shall estimate costs in a manner consistent with its cost accounting practices used in accumulating and reporting costs to other similar activities.

C. When Allowable. The contract shall provide that costs shall be allowed to the extent they are:

(1) Reasonable;
(2) Allocable;
(3) Lawful under any applicable statute;
(4) Not unallowable under Regulations .06 through .19; and
(5) In the case of costs invoiced for reimbursement, actually incurred or accrued and accounted for in accordance with generally accepted accounting principles.

According to this definition a cost to be an allowable cost must be reasonable and lawful. The State's agreement with Appellant that the costs were allowable may be viewed as inconsistent with the State's argument that the costs were not reasonable. However, it is clear the State was not conceding that the costs were allowable to the extent it may be said to decide the issue of the reasonableness of the costs claimed. The State argues the costs claimed are not reasonable and we find that the costs claimed are not reasonable. Additionally, we note that the cost principles set forth in the Human Services Agreement Manual at Section 2150.04 link allowability of cost with a finding of reasonableness by the Director of the Developmental Disabilities Administration. Because the State has denied Appellant's claim we infer that the Director did not find the costs Appellant claims to be reasonable.

We also find that certain of the costs claimed are not lawful because such costs relating to a contractors failure to operate in a cost effective manner are not recoverable under any theory when the State exercises its right to terminate a contract for convenience. When the State exercises its right to terminate for convenience the only lawful costs that may be paid are those that are permitted by the General Procurement Law and implementing provisions of COMAR. See §13-218(a)(2), Division II, State Finance and Procurement Article; COMAR 21.07.01.12. COMAR 21.07.01.12A sets forth what may be recovered by a contractor. Costs relating

to failure to operate in a cost effective manner are not included.[4]

The cost for the grab bars, carpet cleaning and apartment repairs would have been required as a condition of continued licensing regardless of the pending termination. The inspection that led to the repair, cleaning and alteration work occurred prior to Appellant's request to be terminated. Even had such inspection occurred after such request was made or indeed even after the request for termination was granted by the State the costs would not be reasonable costs resulting directly or indirectly from the termination. Such costs were incurred as a condition of continued licensing of the Appellant to enable it to provide the type of services called for under the residential award. Such costs may not be said to be a cost of performance of required services under the residential award program under Appellant's contract nor to relate to the termination of the required services.

The costs for hiring temporary employees from a consulting agency and overtime payments to existing staff to perform the required services from the time Appellant requested the State to terminate until termination are costs that related to performance of the required services under the contract. They are not costs arising out of the termination. Counsel were asked if they had found any reported procurement case in any jurisdiction in which such costs had been allowed. None had been found. This Board has issued no opinions in which it awarded such costs as part of an equitable adjustment in a termination for convenience dispute.

The facts in this appeal support a finding that the State exercised it right to terminate for convenience. This is a termination for convenience pursuant to the General Procurement Law and COMAR. The fact that the Human Services Agreements Manual provided that the contractor could request that the contract be terminated does not alter the fact that only the State may exercise

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[4] No Cost and Price Certification was filed at the commencement of or at anytime during performance of the contract. Therefore, it is difficult to ascertain what set of costs would relate to performance of the required services.

the right to terminate for convenience and when it does so the law governing such a termination applies. The additional costs for performing the basic services required by the contract herein were not caused by the termination and thus are not reasonable nor lawful. The appeal on grounds of damages under the termination for convenience clause is thus denied.

Appellant additionally or alternatively argues that it is merely requesting a budget modification or supplemental funding pursuant to provisions of the Human Services Agreements Manual addressing such funding mechanisms. We reject these arguments on the basis of the following from the Procurement Officer's final decision of August 18, 1993 which we adopt and on the basis thereof deny Appellant's claim on such alternate or additional grounds.

"In a number of instances, the claim alludes to TLC's requests for more funding as a "budget modification." As per section 1009 of the Manual, a budget modification "... neither increases or decreases the amount of the award and/or the services to be provided." A budget modification contemplates a contract which is fully performed and in which there is no overall change in the cost or performance of the contract, but merely a change in the approved use of budgeted funds.

The total amount of this award for residential services in FY'93 was $119,332. The combined cost to the State for these services in FY'93 between TLC and the successor vendor was $119,305, leaving just $27 eligible to be paid to TLC as a budget modification. Therefore, TLC's request for a budget modification could only be approved up to this amount.

Aside from a budget modification, TLC has asked that its request be deemed as a request for supplemental funding as provided under section 2070.02(a), (b), or (c) of the Manual. TLC has cited subsections a, b, and c as rationale for its request. None of these sections apply for the following reasons:

1. *Section 2070.02(a) - requires the increase in cost to be supported by an increase in specific appropriation - this did not happen.*

2. *Section 2070.02(b) - states that an error occurred in the budget process - no such error is alleged, or in fact occurred.*

3. *Section 2070.02(c) - states that an unforeseen event causes a need for more funds. TLC has already stated that it lost money on this portion of the contract in the 1991 fiscal year (July 1, 1990 to June 30, 1991). Nevertheless, on April 8, 1991 it entered into a new three year contract to continue those same services for only a modest projected inflationary increase. Therefore, it cannot be concluded that an "unforseen event" caused the need for more funds.*

   In addition, TLC should not have expected to terminate this section of its contract at all, so being held to performance six weeks longer than it requested cannot be considered unexpected.

Finally, section 2070.96 of the Manual specifically states that "Supplemental funding under the procurement process is considered a contract modification." This section also states that a budget modification and a contract modification are different, and

that a contract modification "is subject to the state's procurement laws and regulations." Under COMAR 21.01.02.01, a contract modification requires action in accordance with a contract provision or by "mutual action of the parties to the contract". DDA did not agree to a contract modification.

Appellant's requests as discussed above would increase the total cost of the contract and do not merely seek to change the use of budgeted funds.

Accordingly, Appellant's appeal is denied.

Wherefore, it is ORDERED this 7th day of February, 1994 that Appellant's appeal is denied.

Dated: February 7, 1994

Robert B. Harrison III
Chairman

I concur:

Neal E. Malone
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 1746, appeal of **THE TREATMENT AND LEARNING CENTERS, INC.** under **DHMH DDA** Contract No. MR-447-NRD.

Dated: February 7, 1994

Mary F. Priscilla
Recorder