ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Humana, Inc.	)	ASBCA No. 49951
	)	
Under Contract No. CS 1773	)	

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OPINION BY ADMINISTRATIVE JUDGE PEACOCK
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This appeal involves a Government claim for interest under a contract to provide health insurance benefits to federal employees and their dependents. The Government seeks interest on overpayments related to alleged defective pricing and defective community rating. The appellant contends that the contract does not permit the recovery of such interest. The appeal is closely related, both legally and factually, to our decision in *PCA Health Plans of Texas, Inc.*, ASBCA No. 48711, 98-2 BCA ¶ 29,900, *aff'd sub nom. PCA Health Plans of Texas, Inc. v. LaChance*, 191 F.3d 1353 (Fed. Cir. 1999) (referred to hereinafter as *PCA*). Appellant moves for summary judgment and the Government cross-moves for partial summary judgment. For the reasons discussed *infra*, we deny the motions.

FINDINGS OF FACT
FOR PURPOSES OF THE MOTIONS

1. In January 1985, Community Group Health Plan d.b.a. Prime Health ("Prime Health") contracted with the Office of Personnel Management ("OPM" or "Government") under Contract No. CS 1773 to provide health benefits for members of the Federal Employees' Health Benefits Program ("FEHBP"). The contract was a "community rated" agreement whereby the prices charged OPM were based upon the

rates that Prime Health charged its other customers for comparable levels of benefits (R4, tab 1 at 85-14 to 85-16). The contract was initially for a one-year term, and "renew[ed] automatically for a term of one year each January first, unless written notice of non-renewal is given" (R4, tab 1 at 85-35). In 1990, Prime Health was wholly acquired by Humana, Inc. Humana became the corporate successor to Prime Health under the contracts. (R4, tabs 1, 4, 5, 8, 10, and 12; complaint and answer ¶ 3)[*]

Terms of the Contract

Contract Years 1988 and 1989

2. Effective 1 January 1988, the parties amended their contract to incorporate by reference various standardized contract clauses listed in the "FEHBP Clause Matrix" ("the clause matrix") (R4, tab 4).

3. Among the clauses incorporated by reference into the agreement for contract years 1988 and 1989 was Federal Employees Health Benefits Acquisition Regulation ("FEHBAR") 1652.215-70 PRICE REDUCTION FOR DEFECTIVE CERTIFICATE OF COMMUNITY RATING. When it was in effect, FEHBAR 1652.215-70 provided in pertinent part that:

> (c) When the Contracting Officer determines that the Carrier submitted a defective community rate and the Government is entitled to a refund . . . , the refund shall bear interest from the date the overcharge was paid by the Government to the Carrier until the date the overcharge is liquidated.

FEHBAR 1652.215-70 was repealed and replaced in 1990.

4. In addition to FEHBAR 1652.215-70, the agreement for contract years 1988 and 1989 also incorporated, by reference to the clause matrix, Federal Acquisition Regulation ("FAR") clause 52.232-17 INTEREST (APR 1984). The clause stated that "all amounts that become payable by the Contractor to the Government under this contract . . . shall bear simple interest from the date due." FAR 52.232-17(a). The "date due" was defined as the earlier of:

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[*] Two separate Rule 4 supplements were filed by appellant. For clarity, we designate the three documents in appellant's supplement dated 9 September 1996 as tabs 1-3 of the Supplemental Rule 4; the six documents in appellant's supplement dated 15 October 1998 constitute tabs 4-9 of the Supplemental Rule 4. Neither party has supported its motion with any affidavits or sworn statements.

> (1) The date fixed under this contract.
>
> (2) The date of the first written demand for payment consistent with this contract, including any demand resulting from a default termination.

FAR 52.232-17(b).

Contract Years 1991 and 1992

5. Effective 1 January 1991, the parties again amended the contract (R4, tab 8). Section 3.3 of the amended contract set forth a revised version of FEHBAR 1652.215-70 entitled RATE REDUCTION FOR DEFECTIVE PRICING OR DEFECTIVE COST OR PRICING DATA (JAN 1991). The clause provides only for a rate reduction without accrual of interest on any OPM overpayment (R4, tab 8 at III-2).

6. Section 5.9 of the amended agreement set forth the full text of FAR 52.215-23 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA – MODIFICATIONS (JAN 1991). FAR 52.215-23 provided in part that:

> (b) If any price . . . negotiated in connection with [this contract] . . . was increased by any significant amount because . . . (1) the Contractor . . . furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, . . . or (3) [the Contractor] furnished data of any description that were not accurate, the price or cost shall be reduced accordingly . . . .
>
> . . . .
>
> (e) If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the United States at the time such overpayment is repaid – (1) Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government is repaid by the Contractor . . . .

The 1991 version of the contract was extended with no significant changes through 1992 (R4, tab 10).

7. For 1991 and 1992 Humana executed and submitted to OPM a "Certificate of Accurate Pricing for Community Rated Plans." The certificate stated in relevant part:

> This is to certify that . . . the cost or pricing data submitted . . . in support of the 1991 [and 1992] FEHBP rates were developed in accordance with the requirements of 48 CFR Chapter 16 and the FEHBP contract and are accurate, complete, and current as of the date this certificate is executed. The FEHBP rates were developed in a manner consistent with the rating methodology used to rate the Carrier's Similarly Sized Subscriber Groups (see FEHBAR 1602.170-11) and approved by OPM . . . .

(R4, tabs 9, 11)

The OPM Audit

8. In 1995, OPM's Office of the Inspector General (IG) audited Prime Health/Humana (hereafter "Humana") operations for contract years 1988 through 1992. The purpose of the audit was to verify whether Humana had charged OPM appropriate prices during each of the five audited years. The IG issued a final audit report detailing its findings in September of 1995. (R4, tab 12)

Audit Report Findings for Contract Years 1988-90

9. In the report, the IG alleged that, during contract years 1988-90, Humana had engaged in "defective community rating," and violated OPM's community rating regulations, by failing to adhere to a consistent methodology for developing prices, and by offering discounts to selected groups other than the FEHBP (R4, tab 12 at 6-10). The report contended that:

> [T]he Plan [(*i.e.*, Humana)] developed the FEHBP's rates with a rating methodology and structure which was inconsistent with that used to develop the rates for commercial and/or similarly sized subscriber groups (SSSG) in 1988 through 1992. [In addition], the Plan granted rate concessions and/or offered discounted rates to selected commercial groups and the SSSGs in 1988, 1989, and 1990. . . .

(R4, tab 12 at i) The report concluded that OPM were entitled to a refund of amounts that OPM had allegedly overpaid to Humana as a result of these defective rating practices.

10. Relying upon FEHBAR 1652.215-70, the IG report concluded that OPM was entitled to recover "lost investment income" (*i.e.*, interest) on the alleged overpayments for contract years 1988 and 1989 (R4, tab 12 at 19-20). The report did not find entitlement to recover interest for contract year 1990 because FEHBAR 1652.215-70 was repealed for contract year 1990 (R4, tab 12 at 19).

Audit Report Findings for Contract Years 1991-92

11. The audit report alleged that Humana had engaged in "defective pricing" for contract years 1991 and 1992. The report's "Executive Summary" stated, "For 1991 and 1992, our evaluation focused on the accurate and consistent application of the Plan's rate development between the FEHBP and the SSSGs. We found that the rate development was inconsistent, and the rate charged the FEHBP were higher than the market price rates charged the SSSGs" (*id*. at ii). With respect to 1991, the report elaborated:

> Our review disclosed that the Plan was in violation of its 1991 Certificate of Accurate Pricing by charging the FEHBP rates which exceeded the market price rates. Application of the DP [defective pricing] remedy results in an amount due the FEHBP of $2,086,502.
>
> Effective with the 1991 contract year, the FEHBP is to be rated in a manner consistent with the Plan's SSSGs.
>
> . . . .
>
> [Humana] selected US Sprint and the City of Kansas City as its SSSGs for 1991. We take no exception to the Plan's selection. However, we found that the FEHBP was charged rates higher than the market price when compared to the rates charged to US Sprint and City of Kansas City.
>
> In 1991, the FEHBP was rated using traditional community rating; US Sprint was rated using CRC; and the City of Kansas City was rated using a "hybrid" CRC rating method.
>
> This "hybrid" method was not similar to any method used by the Plan in prior years, nor was it used in following years. The hybrid method included the use of unsupported actuarial factors which reduced the City of Kansas City's premium

> rates. These factors were not applied to either the FEHBP or the other SSSG (US Sprint).
>
> In accordance with [OPM] regulations, we determined the FEHB's rates using the same methodologies used for the SSSGs. In both cases the recomputed FEHBP rates were lower than the rates [actually] charged . . . .
>
> To correct a condition of defective pricing in 1991, OPM regulations provide that the FEHBP should receive a market price rate. The market price rate is determined by applying the best rates provided to either of the SSSGs. We found that the best rates had been provided to US Sprint and our audited 1991 FEHBP rate represents the FEHBP rates restated using US Sprint's rating methodology. Our calculations show that the FEHBP is due $2,086,502.

(R4, tab 12 at 12-13)

12. For contract year 1992, the report alleged that Humana had offered discounts to its SSSGs but not to OPM, and had "rated the FEHBP using an adjusted community rate (ACR) methodology but rated its SSSGs using CRC" (R4, tab 12 at ii). The report stated:

> The Plan selected US Sprint and the City of Kansas City as its SSSGs for 1992. We take no exception to the Plan's selection. However, our review disclosed that both of the SSSGs received rate reductions as follows:
>
> | Group Name | Rate Reduction |
> |---|---|
> | US Sprint | 6.49 % |
> | City of Kansas City | 8.96 % |
>
> During the 1992 FEHBP rate reconciliation process, the plan reported the 6.49 percent rate reduction given to US Sprint, and reduced the FEHBP's rates by the same amount. However, our audit revealed that the Plan provided a larger rate reduction to the City of Kansas City. . . .
>
> In addition to the rate reductions given to the SSSGs, our review found that the FEHBP's premium rates were increased because of an adjusted community rating (ACR) factor.

> However, the SSSG's premium rates were not adjusted by an ACR factor. In fact, the FEHBP was the only group to receive an ACR rate.
>
> . . . .
>
> To correct a condition of defective pricing OPM regulations provide that the FEHBP should receive a market price rate. The FEHBP did not receive the market price that was offered to the City of Kansas City. We recalculated the FEHBP rates to include the rate reduction given to the City of Kansas City, and to eliminate the ACR factor, and determined that the FEHBP was overcharged $628,974.

(R4, tab 12 at 16-17)

13. The audit report acknowledged that the various methodologies employed by Humana were, themselves, "acceptable" to the Government (R4, tab 12 at ii). The report took issue, though, with Humana's inconsistent use of those methodologies. "[T]here must be consistency in [Humana's] application to ensure that all groups are charged equitable rates . . . . In our opinion, [Humana's] practices resulted in some groups receiving preferential treatment at the expense of others, such as the FEHBP." (R4, tab 12 at ii)

14. For contract years 1991 and 1992, the IG concluded that OPM was entitled to a refund of alleged overpayments, including interest on those amounts. As authority for assessing interest for these years, OPM relied upon FAR 52.215-23. (R4, tab 12 at 19)

15. Humana's "FEHBP Rate Proposal" and "FEHBP Rate Reconciliation" for contract years 1991 and 1992 are in the record (SR4, tabs 4, 5, 6, 7). For 1991, these documents notified OPM that appellant would apply the traditional community rating methodology to develop its rates and that it would apply the CRC methodology to develop the rates for its SSSGs. For 1992, these documents notified OPM that appellant would apply CRC and ACR to develop its rates and those of its SSSGs. (App. supp. br. at 2-3; *see* Gov't reply).

The Settlement, Government Claim and Appeal

16. After the audit report was issued, the parties entered into a settlement with regard to the allegations of defective community rating and defective pricing for the audited contract years. Humana has paid the amount of the settlement but does not admit or concede that there had been defective rating or pricing. No settlement agreement

executed by the parties is in the record. The record contains no contract modification or bilateral agreement memorializing the settlement. The Government has not argued for purposes of the motion that the settlement resolved whether there was defective rating or pricing. (R4, tab 16; *see* Gov't reply to app. supp. br. at 6)

17. The parties specifically did *not* settle OPM's claims for interest on the alleged overpayments for any of the contract years (R4, tabs 16). As a result, the contracting officer issued a final decision dated 29 March 1996 demanding payment of "lost investment income," referred to by the parties and herein as interest, in the amount of $735,170. The decision stated:

> In accordance with Federal Employees Health Benefits Acquisition Regulation (FEHBAR) 1652.215-70(c), effective for contract years 1988 and 1989, and Section 5.9(e) of the contract between the Office of Personnel Management and the Plan effective for contract years 1991 and 1992, we have determined that the FEHB Program is entitled to a recovery of lost investment income totaling $735,170. This amount is based on charges applied through March 15, 1996 on the settlement amounts agreed to regarding the defective community rating/pricing findings for contract years 1988, 1989, 1991 and 1992.

(R4, tab 16)

18. Humana timely appealed to this Board by letter dated 25 June 1996 and subsequently moved for summary judgment. The PCA appeal was already pending at the Board at the time and appellant filed a brief as *amicus curiae* in that appeal. In our decision in *PCA*, we permitted OPM to recover interest from an FEHBP provider that had submitted defective community rating and defective pricing data. Following our decision, the parties supplemented their filings and the Government cross-moved for partial summary judgment. Our decision subsequently was affirmed by the Court of Appeals for the Federal Circuit. The parties agree that the remaining issue to be decided at this time is the extent to which the decisions in *PCA* resolve appellant's motion and the Government's cross-motion.

DECISION

OPM maintains that the appellant was overpaid during contract years 1988-1989 and 1991-1992 as a result of Humana's submission of defective community rates and pricing data. The Government seeks interest on the overpayments. Humana moves for summary judgment for all four contract years in dispute. The Government opposes the

appellant's motion as to years 1988 and 1989 and cross-moves for summary judgment for years 1991 and 1992. For purposes of deciding each motion, we draw all reasonable inferences in favor of the party opposing the motion.

Contract Years 1988 and 1989

With respect to contract years 1988 and 1989, both parties agree that there are genuine issues of material fact concerning whether the "community rate" information submitted to OPM by Humana was "defective" within the meaning of FEHBAR 1652.215-70 and whether there was a contracting officer determination to that effect (finding 3; Gov't reply 7 Dec. 1998 at 6, app. submission 18 Dec. 1998 at 7). Nevertheless, Humana avers that summary judgment is proper because the Government is not entitled to recover interest even assuming that defective rate data was submitted and the Government is entitled to a refund of the overpayment. The appellant contends that the pertinent FAR and FEHBAR preclude the assessment of interest prior to the "date of the first written demand for payment," as specified in FAR 52.232-17 (finding 4). According to the appellant, the Government's assessment is erroneously computed from the dates the overcharges were paid pursuant to the Government's interpretation of allegedly inconsistent and conflicting provisions of FEHBAR 1652.215-70(c) and FAR 52.232-17. Humana maintains that the FAR "trumps" the conflicting FEHBAR clause, thereby rendering any factual dispute irrelevant.

Humana's contentions have been considered, addressed and rejected in the *PCA* litigation. The U.S. Court of Appeals for the Federal Circuit concluded in its decision that the pertinent provisions of the FAR and FEHBAR were ambiguous. *PCA*, 191 F.3d. at 1355. Although the Court considered that more than one reasonable interpretation of the provisions was possible, it found that the ambiguity was patent, imposing on the contractor a duty to seek clarification. Because PCA failed to do so, the Court resolved the ambiguity against the contractor and adopted the Government interpretation that interest was due from the date of overpayment. Similarly, here there is no contention that Humana made any attempt to clarify the ambiguity in the interest-related provisions in dispute. Therefore, the Court's conclusion in *PCA* is controlling precedent and dispositive of the contract interpretation issues raised by Humana in its motion relative to 1988 and 1989. *Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1570 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Newport News Shipbuilding and Dry Dock Co.*, ASBCA Nos. 44731, 44826, 98-1 BCA ¶ 29,692, *aff'd on recon.*, 97-1 BCA ¶ 28,835, *aff'd*, 185 F.3d 844 (Fed. Cir. 1999 (table).

We conclude that interest is properly assessable from the date of overpayment in accordance with the Government's interpretation of the pertinent FAR and FEHBAR sections. Because the parties acknowledge that genuine issues of material fact remain concerning whether defective community rates were submitted, and whether there was a

contracting officer determination to that effect (*see* FEHBAR 1652.215-70(c)), summary judgment is inappropriate for contract years 1988 and 1989. Humana's motion as to those years is denied.

Contract Years 1991 and 1992

Both parties move for summary judgment for contract years 1991 and 1992. In support of its motion, Humana contends that FAR 52.215-23 (finding 6) does not apply to the types of alleged deficiencies identified in OPM's audit report. Appellant argues that no "defective pricing data" was submitted. Rather, in the appellant's view, the audit merely took issue with supposed flaws in Humana's "community rating methodology" and/or errors in judgment. According to the appellant, the Government, at most, was only entitled to a rate reduction under revised FEHBAR 1652.215-70 in contract years 1991 and 1992 (finding 5). That clause provides only for a rate reduction without accrual of interest on any OPM overpayment. Because no "defective data" was submitted, Humana concludes that the Government's claim for interest from the date of overpayment under the defective pricing clause is not maintainable.

The Government bases its cross-motion on our aforementioned *PCA* decision. The Government contends that *PCA* is controlling and dispositive of the issue of whether defective data was submitted in this appeal by Humana.

In *PCA*, we rejected an argument that is analogous to the basic premise of the appellant's motion. In response to PCA's assertions that mistakes described in the OPM audit were fundamentally "methodological" in character and, thus, could not be construed as data, we stated:

> PCA cannot, however, escape application of the interest accrual provision . . . based upon an argument that OPM's claim concerns "methodology," rather than "defective data." . . . The [OPM] audit report found that PCA did not supply OPM with accurate data regarding its [similarly sized subscriber groups (SSSGs)]. The report stated that, in its 1991 proposal establishing FEHBP subscription charges, PCA identified two significantly underrated groups as its SSSGs, when its SSSGs were two other groups, one of which had "a clear rating advantage" which should have been given to FEHBP. OPM's claim, therefore, does not concern rating "methodology," but furnishing to OPM of "inaccurate data," *i.e.*, incorrect identification of PCA SSSGs, affecting OPM's ability to negotiate "most favored customer" treatment.

PCA, 98-2 BCA at 148,021.

On appeal, the Federal Circuit did not disturb our determination that FAR 52.215-23 was properly invoked by the Government and was applicable to the types of defects in dispute in that case. The Court affirmed our decision in that respect. *PCA*, 191 F.3d at 1356. Thus, conclusory labeling of data as "methodological" will not preclude application of the clause where the data is inaccurate, incomplete or not current; interest is properly assessable under FAR 52.215-23 if defective pricing is proven. Similarly, in this appeal, the essential gravamen of the OPM position involves primarily the accuracy and completeness of information submitted by Humana. In particular, the Government focuses on alleged inconsistencies between the calculation of rates for the FEHBP as opposed to the SSSGs. Whether the allegedly inconsistent information properly can be labeled "methodological," and/or is outside the coverage of FAR 52.215-23, involves genuine issues of material fact. These issues include inquiry into the closely-related questions of whether the "inconsistencies" constitute "inaccuracies" or involved the submission of incomplete or non-current data. As a minimum, genuine issues of fact exist concerning the adequacy of Humana's disclosures relative to rate development using a "hybrid" CRC method in 1991 and the discounts offered and ACR method used in 1992. In short, an informed judgment on the existence *vel non* of defective pricing, within the ambit of FAR 52.215-23, requires a more detailed factual record.

On the other hand, the Government motion disregards potential factual differences between *PCA* and this appeal. In *PCA*, the parties waived a hearing and submitted the appeal for decision on the record pursuant to Rule 11. The contractor in *PCA* did not challenge the critical audit report conclusion that "inaccurate" data was furnished. The Board accepted the parties' stipulations and agreements that the information was "inaccurate" in concluding that the defective pricing clause applied. Here the "accuracy" of the data, among other things, is disputed. Whether defective pricing exists typically involves a fact-intensive inquiry and case-by-case analysis of the nature and significance of the data in dispute and the adequacy of its disclosure. *See Litton Systems Inc., Amecom Division*, ASBCA No. 35914, 96-1 BCA ¶ 28,201; *E-Systems, Inc.*, ASBCA No. 17557, 74-2 BCA ¶ 10,782, *aff'd on recon.*, 74-2 BCA ¶ 10,943. *PCA* provides no precedent for resolving the disputes concerning the specific circumstances and details surrounding Humana's submissions here. Without further development of the record, we are unable to resolve genuine factual issues related to the data.

Summary judgment is appropriate when no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Here, material factual disputes exist concerning whether the submitted information in question was defective within the meaning of FAR 52.215-23. Summary judgment is, therefore, inappropriate.

The motions for summary judgment are denied.

Dated: 3 October 2000

ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 49951, Appeal of Humana, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals