

an amendment to the contract entitled Amendment No. 1 which terminated the contract for convenience. However, after negotiating the continuance of the contract with Palmetto, MMO deleted Amendment No. 1. MMO then issued Amendment No. 2 which canceled Amendment No. 1 and deleted two items dealing with the Department's liability for lost or abused linen. The purpose of the deletion of these two items was to relieve the Department of any liability to Palmetto for lost or abused linen over the life of the contract. Palmetto did not sign Amendment No. 2 but continued performance of the contract. On August 2, 1996, the Department informed Palmetto that it was discontinuing its use of diapers and requested that Palmetto pick up all diapers from the facility. On August 2, 1996, Palmetto wrote a letter to the Administrator of the Coastal Center informing him that Palmetto had picked up the diapers but that the amount retrieved was thousands less than the inventory that Palmetto was carrying for the facility.

On December 2, 1996, the CPO received a letter of protest from Palmetto seeking compensation in the amount of \$27,762 for the lost linen. On January 21, 1997, the CPO conducted a hearing on the matter in which he found the Department liable for the lost linen and awarded Palmetto damages in the amount of \$13,055.

CONCLUSIONS OF LAW

The Department first argues that it is not liable for the lost linen and, secondly, that if it is found liable, that the depreciation of the diapers should be factored into the computation of damages. The Department contends that it is

not liable for the lost linen because it relieved itself of this liability by issuing Amendment No. 2 which deleted Amendment No. 1 and the liability clauses for lost and abused linen. The original contract contains items 5 and 6 which define the liability for lost or abused linen as follows:

5. The assigned coordinator from each location will keep a count of the out-going soiled linen and check quantities of delivered clean linen at the time of delivery. Any discrepancies should be corrected at that time. Should there be any discrepancies, adjustment should be corrected at that time to maintain an accurate inventory record. Contractor will charge only for the clean linen delivered. **Abused linen or any lost linen will be paid for by the S.C. Department of Disabilities and Special Needs at the below schedule prices.** (Emphasis added)
6. Abused linen is considered to be linen that has been used for purposes other than its intended use. Any linen determined to be abused must be so determined at the time of soiled linen pick up. [Record p. 44].

Amendment No. 2, which deleted these clauses, reads as follows: "Contract No. C300477001 is modified by canceling Mod. 001. Also by deleting items 5 and 6 of the specifications effective immediately." [Record p. 90]. Mod. 001 refers to Amendment No. 1 which canceled the contract for convenience. On the form that the State uses for amendments to contracts, the words "MUST BE SIGNED TO BE VALID" appear in capital letters in the middle of the page. [Record p. 89]. Amendment No. 2 was never signed by Palmetto. The Department argues that, even though Amendment No. 2 remained unsigned, it was in effect along with other Amendments to the contract. The Department contends that the conduct of both parties during the entire contract established an implied agreement to the Amendments. The Panel disagrees and finds that Amendment No. 2 was not in

effect because it was not signed by Palmetto. This conclusion is supported by the language on the State's own document and by the common law governing contracts. A modification of a contract requires the assent of both or all parties to the contract. "One receiving an offer to change a contract to which he is a party is held to be under no obligation to respond to it, and his silence cannot be construed as an acceptance where nothing else is shown." Florence City-County Airport v. Air Terminal Parking Company, 322 S.E. 2d 471 (S.C. App. 1984).

The Department further argues that if Amendment No. 2 was not in effect because it was not signed, then no contract existed because Amendment No. 1 had canceled the contract for convenience and Amendment No. 2 served to delete Amendment No. 1 and reinstate the contract. While the Panel concedes that the State had the option to cancel the contract for convenience without the consent of Palmetto, the State continued to accept the services of Palmetto and engage in performance of the contract. Because it continued the contract for three years after the issuance of Amendment No. 1, the State is now estopped from claiming that no contract existed.

The Department contends that even if it is liable for the loss of the diapers, that the computation of damages should include the depreciation of the diapers over their average life. Depreciation is defined as the deterioration, or the loss or lessening in value arising from age, use, or improvements; a decline in value of property caused by wear or obsolescence." Black's Law Dictionary 397 (5th ed. 1979). The contract states that the Department "will not be held accountable for items damaged as a result of fair wear and tear for vendor

supplied linens." [Record p. 39]. The Panel finds that this contract clause exempting the Department from liability for normal wear and tear serves to account for any depreciation in the linen supply. In its claim for damages, Palmetto acknowledged that one might expect a shrinkage in inventory due to normal wear and tear of 10% and testimony at the hearing established that this is an industry standard. In calculating the amount of damages owed to Palmetto, the CPO subtracted 10% for normal wear and tear. The Panel finds that the 10% allowance for normal wear and tear serves the purpose of factoring in depreciation and that any further deduction would be duplicative and unfair to Palmetto.

At the hearing, Palmetto introduced evidence to support an increase in the damages awarded by the CPO. However, because Palmetto did not appeal the decision of the CPO to the Panel, the Panel is precluded from considering evidence on this issue.

For the foregoing reasons, the Panel dismisses and denies the Department's protest and upholds the decision of the CPO.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
Gus J. Roberts, Chairman

Columbia, South Carolina
May 5, 1997