Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: New Jersey Department Of Human Services
Docket No. A-10-19
Decision No. 2318

DATE: June 3, 2010

DECISION

The New Jersey Department of Human Services (New Jersey) appeals the September 25, 2009 decision by the Centers for Medicare & Medicaid Services (CMS). CMS disallowed $7,978,278 in federal Medicaid funding for professional fees claimed by the State. CMS disallowed the costs on the grounds that New Jersey failed to document and substantiate the necessity and reasonableness of the fees and that New Jersey paid the fees under contingency arrangements.

For the reasons explained below, we uphold the disallowance. We conclude, among other things, that New Jersey did not show that the fees were reasonable in relation to the services rendered, as required by the applicable cost principles.

Legal Background

The Medicaid program, established under title XIX of the Social Security Act (Act), provides medical care to financially needy and disabled persons.[1] The federal government and states share

[1] The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

the funding of program costs. Sections 1901, 1903 of the Act; 42 C.F.R. § 430.0. Each state establishes and administers its own Medicaid program, subject to various federal requirements and the terms of its "plan for medical assistance" (state plan), which must be approved by the Secretary of the Department of Health and Human Services (HHS). Section 1902 of the Act; 42 C.F.R. §§ 430.10-430.16. Once a state plan is approved, the state becomes entitled to receive federal financial participation (FFP) for a percentage of its program-related expenditures. Section 1903(a) of the Act directs payment of FFP at different matching rates for costs "found necessary by the Secretary for the proper and efficient administration of the State plan."

During the period in which New Jersey entered into the contracts and claimed FFP for the professional fees at issue, the administrative requirements at 45 C.F.R. Part 74 (with certain exceptions not relevant here) applied to HHS entitlement grants, including federal Medicaid funding. See 42 C.F.R. § 430.2(b) (1993) (incorporating by reference as applicable to State Medicaid programs the provisions of 45 C.F.R. Part 74). The regulations required the allowability of costs incurred by state governments to be determined in accordance with the cost principles of Office of Management and Budget (OMB) Circular No. A–87, "Cost Principles for State, Local and Indian Tribal Governments" (OMB A-87). 45 C.F.R. § 74.27(a)(1994-current).[2] OMB A-87 was also made applicable to the claims at issue under the regulations at 45 C.F.R. Part 95. Sections 95.503 and 95.517(a)(1993-current) require a state to claim FFP for all state agency costs of public assistance programs (including Medicaid) in accordance with an approved cost allocation plan (CAP). Under section 95.507(a)(2)(1993-current), the state's CAP must conform to the accounting principles and standards in OMB A-87.

Attachment A of OMB A-87 (1995) sets forth general principles for determining allowable costs.[3] Under the basic guidelines, to

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[2] In 2003, the Secretary made the administrative requirements at 45 C.F.R. Part 92 (rather than Part 74) applicable to Medicaid and other HHS entitlement grants. 68 Fed. Reg. 52,843 (Sept. 8, 2003). Part 92 also requires states to use OMB A-87 to determine the allowability of costs. 45 C.F.R. §§ 92.20(b)(5), 92.22.

[3] The 1995 version of the circular was effective for costs covered by a state CAP for a governmental unit's fiscal year

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be allowable, costs must be "necessary and reasonable for [the] proper and efficient performance and administration" of the award. OMB A-87 (1995), Att. A, ¶ C.1.a. A cost is "reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost." Id. at Att. A, ¶ C.2. OMB A-87 specifies multiple factors to be considered in determining whether a given cost is reasonable. Id. at Att. A, ¶¶ C.2.a.-C.2.e.

Attachment B of OMB A-87 sets forth specific guidelines to determine whether selected cost items are allowable. Under the specific guidelines, costs of professional and consultant services are allowable when, among other things, they are "reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Federal Government." Id. at Att. B, ¶ 33.a.

Part 74 of the administrative regulations also requires states to undertake and document cost or price analyses for procurement actions. Specifically, 45 C.F.R. § 74.45 (1994-current), "Cost and price analysis," states:

> Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability.

Section 74.46 (1994-current) provides that procurement records and files for purchases exceeding a statutorily-established threshold amount (currently $100,000) must include, among other things, the basis for the award cost or price. See 41 U.S.C. § 403(11) (defining the "simplified acquisition threshold").

Case Background

The following facts shown by the record are undisputed. The disallowance at issue involves claims for professional service

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beginning on or after September 1, 1995. 60 Fed. Reg. 26,484, at 26,490 (1995). OMB A-87 was revised in 2004 and is now codified at 2 C.F.R. Part 225. 69 Fed. Reg. 25,970 (2004).

fees paid by New Jersey to two different consulting firms, Health Care Resources, Inc. (HCR) and Deloitte Consulting, LLP (Deloitte), under contingency arrangements.

In early 1993, New Jersey awarded a contract to HCR to identify areas for additional or increased Medicaid FFP and "to perform the activities required to claim and receive the revenue." New Jersey (NJ) Br. at 2; CMS Ex. 3. The contract was originally effective from February 7, 1993, until February 6, 1994, and was later extended through February 6, 1995. NJ Br. at 2. Under the terms of the contract, New Jersey paid "HCR 5% of the net additional retroactive FFP received by the State as a result of HCR's efforts, and 4% of net additional prospective FFP received by the State." Id. New Jersey and HCR entered into a second contract for similar services, effective March 21, 1996, until March 20, 1999. Id. Under the terms of that contract, New Jersey paid HCR "4.25% of net additional retroactive FFP, and 3.75% of net additional prospective FFP" that New Jersey received as a result of HCR's work. Id.; CMS Br. at 4.

Based on the net additional FFP New Jersey received, it paid HCR fees totaling $1,336,356. New Jersey submitted claims for these fees as Medicaid administrative costs for the period April 1, 1996, through December 31, 1999, and received $668,178 in FFP based on the claimed costs. Id.; CMS Br. at 4.

In 1996 New Jersey awarded a three-year contract to Deloitte to identify and claim additional Medicaid FFP for New Jersey. CMS Ex. 4. Under the terms of that contract, New Jersey agreed to pay Deloitte "7.5% of net additional retroactive FFP and 6% of net additional prospective" FFP obtained as a result of Deloitte's work. NJ Br. at 3.

Based on the net additional FFP New Jersey recovered as a result of Deloitte's efforts, New Jersey paid Deloitte fees totaling $19,681,538. Id. New Jersey submitted claims for FFP based on $14,620,200 of those fees for the period October 1, 1997, through June 30, 2001, and received $7,310,100 in FFP based on the claimed costs. Id.; CMS Ex. 2, at 1, 4.

In January 2008, the HHS Office of Inspector General (OIG) issued an audit report of its "Review of New Jersey Medicaid Contingency Fee Contract Payments for the Period April 1, 1996, Through June 30, 2001." CMS Ex. 2. The OIG report concluded that New Jersey improperly claimed $15,956,556 ($7,978,278 FFP) in contingency fees paid under the HCR and Deloitte contracts and recommended that New Jersey refund the FFP to the federal government. Id. at i. New Jersey disagreed with the OIG.

By notice dated September 25, 2009, CMS issued a decision disallowing $7,978,278 in FFP for the contingency fees claimed on the ground that New Jersey "failed to document and substantiate the necessity and reasonableness of the fees," as required under the basic guidelines of OMB A-87 and the regulations at 45 C.F.R. §§ 74.45 and 74.46. NJ Ex. A. CMS further stated that the costs were unallowable under the professional services cost standards of OMB A-87 because the fees were paid under contingency fee arrangements. Id.

New Jersey timely appealed the disallowance determination.

Analysis

Below, we first explain why we conclude that the professional service costs claimed by New Jersey were unallowable under the cost principles of OMB A-87 and the procurement cost analysis requirements of 45 C.F.R. Part 74. Next, we discuss why we reject New Jersey's argument that CMS created a grace period for contingency fee claims submitted prior to May 20, 2002, and that the disallowance should therefore be reversed.

> *The fees paid to HCR and Deloitte were not allowable under the cost principles of OMB A-87 and the procurement standards at 45 C.F.R. §§ 74.45 and 74.46.*

The uniform administrative requirements for grants to states place on a state the burden of documenting the allowability and allocability of costs for which reimbursement is claimed. See 45 C.F.R. §§ 74.50-74.53 (reporting and record retention requirements); see also Oklahoma Health Care Authority, Ruling No. 2008-4, at 4 (2008), citing California Dept. of Health Services, DAB No. 1606 (1996)("It is a fundamental principle that a state has the initial burden to document its costs and to show that its claim for reimbursement is proper."). In this case, therefore, New Jersey bore the burden of documenting that the fees paid to HCR and Deloitte were allowable under the cost principles of OMB A-87 and that it met the administrative requirements at 45 C.F.R. Part 74 in connection with the costs.

As summarized above, the basic guidelines of OMB A-87 provide that costs are allowable if, among other things, they are "necessary and reasonable for [the] proper and efficient performance and administration" of a federally-funded program. OMB A-87, Att. A, ¶ C.1.a. A cost is reasonable "if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost." Id. at Att. A, ¶ C.2. Among the factors to consider in determining

whether a cost is reasonable are whether "the individuals concerned acted with prudence in the circumstances considering their responsibilities to the governmental unit, its employees, the public at large, and the Federal Government;" and whether the "cost is of a type generally recognized as ordinary and necessary for the operation of the governmental unit or the performance of the Federal award." Id. at Att. A, ¶ C.2. As further noted above, under OMB A-87's guidelines addressing selected cost items, the costs of professional and consultant services are allowable when, among other things, they are "reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Federal Government." Id. at Att. B, ¶ 33.a.

Applying these standards to the record before us, we conclude that New Jersey failed to establish that the fees paid to HCR and Deloitte were allowable. First, we note that in a factually analogous prior appeal, the Board held that fees paid by a state to a private contractor to generate additional federal funding for various state programs were unallowable where the amount of compensation was contingent upon the amount of federal funds recovered as a result of the contractor's efforts. Nebraska Health and Human Services System, DAB No. 1660 (1998).[4] The Board determined that the professional service fees were not "reasonable" under the basic guidelines of OMB A-87 because the contingency fee arrangement failed to guarantee that the fees bore an appropriate relationship to the amount of time and effort performed by the contractors. Id. at 6. Specifically, the Board held that in "the context of the federal programs at issue, a consultant could expend a very small amount of time and effort and still obtain millions of dollars in fees under a contingency fee contract." Id. Indeed, the Board wrote, the total fees paid to the contractor over a period of less than two years exceeded $2.5 million, and the consultant was not required to provide any substantiation of the time or effort involved. Id. The Board further concluded that Nebraska failed to

[4] The costs claimed in Nebraska were subject to the 1981 version of OMB A-87, which, like the 1995 version of the circular, included the basic guideline that to be allowable, a cost must be "necessary and reasonable for proper and efficient administration of the grant programs." OMB A-87 (1981), Att. A, C.1.a. The specific provision on professional service costs in the 1981 version of the circular did not, however, directly address costs paid on the basis of contingency fee arrangements. Id. at Att. B, C.7.

undertake a cost or price analysis for the services, as required under section 74.45 of the regulations.

New Jersey in this case similarly provided no evidence to show that the fees it paid to HCR and Deloitte were reasonably related to the time and effort expended by the contractors under the agreements. Indeed, while New Jersey paid over $20 million to HCR and Deloitte, it provided no documentation of the actual time and effort spent by HCR and Deloitte employees in carrying out their contractual responsibilities. Furthermore, the contractors were not required to substantiate their efforts under the terms of the contracts. Accordingly, we conclude that New Jersey failed to demonstrate that the fees were reasonable in relation to the services rendered or under the circumstances prevailing when it incurred and claimed the costs, as required under OMB A-87.

Furthermore, we concur in CMS's determination that New Jersey failed to meet the cost analysis requirements at sections 74.45 and 74.46 of the regulations with respect to the fees paid to HCR and Deloitte. As noted, these regulations require a state to undertake "[s]ome form of cost or price analysis" for each procurement action, and to maintain records showing the basis for the costs. Section 74.45 defines "cost analysis" to mean "the review and evaluation of each element of cost," and it states that a price analysis "may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts." Here, however, New Jersey provided no evidence that it had conducted any cost or price analysis in connection with the fees paid to HCR and Deloitte.

New Jersey nevertheless argues that the fees paid to HCR and Deloitte were allowable because "the contracts were competitively bid in order to assure that the fees or costs for the services rendered were reasonable." NJ Br. at 8. Further, New Jersey contends that when it entered into the contracts "it was not possible to identify the specific work tasks to be performed or the effort needed, which is why the fees were contingent upon the successful completion of the work." Id.

We reject these arguments. New Jersey provides no authority to support its contention that fees paid pursuant to a contingency-fee contract may be considered "reasonable" within the meaning of the circular solely on the ground that the contract was open to competitive bidding. Moreover, while section 74.45 states that a price analysis may be accomplished by comparing "price quotations submitted, market prices and similar indicia," New Jersey provided no evidence or argument indicating that it

received competing bids for the projects to analyze whether the fee arrangements with HCR and Deloitte were reasonable or that it otherwise made any cost comparisons or evaluations. Further, even assuming New Jersey may not have known what specific tasks would be performed or the total efforts that would be undertaken by HCR and Deloitte, this would not have precluded New Jersey from contracting to receive the services through a different fee arrangement wherein costs would reflect actual contractor time and effort expended in order to prevent imprudent or unjustifiable program expenditures.

We also reject New Jersey's contention that the fees at issue were allowable under the specific requirements governing professional service costs at OMB A-87, Attachment B, paragraph 33.a. New Jersey argues that the fees paid to HCR and Deloitte were not the type of fees excluded from allowable costs under paragraph 33.a. – those that are "contingent upon recovery of the costs from the Federal Government." Specifically, New Jersey contends that the term "costs" "can only mean the 'cost of professional and consultant services,' since that is the only other reference to 'cost' in section 33(a)." NJ Reply at 6. New Jersey argues that it satisfied the plain language of the contingency provision because New Jersey was contractually obligated to pay the consultant fees to HCR and Deloitte "regardless of whether CMS would reimburse" New Jersey for those fees. NJ Br. at 9. CMS, on the other hand, reads the contingency provision in paragraph 33.a. to mean that "costs are not allowable where the payment to the consultant is contingent upon the amount of additional FFP the consultant recovers for the state." CMS Br. at 8.

New Jersey's construction of the language "contingent upon recovery of the costs from the Federal Government" is unreasonable. First, the provision does not refer to federal "reimbursement for the professional fees" but to "recovery of the costs." Costs may be "recovered" through indirect means as well as through direct reimbursement. Here, both whether any payments would be made and the amounts of the payments to HCR and Deloitte were contingent on New Jersey receiving additional FFP that it would not have received but for the contractor's efforts.

Moreover, New Jersey's interpretation of the contingency provision fails to address the risk of unjustifiable federal spending posed by contingency arrangements such as the contracts at issue here. That is, New Jersey's interpretation would

permit states to obtain federal funding to support the cost of arrangements that provide incentives for contractors to recommend that states claim FFP for questionable expenditures.[5] On the other hand, reading the provision to exclude from allowable costs consultant fees that are contingent on the amount of additional FFP recovered as a result of the consultant's efforts would deter states from entering into such arrangements, which pose a threat to the federal fisc.

New Jersey's interpretation also fails to take into account the reason contingency provisions are generally not considered prudent -- they involve a commitment of funds without certainty of what amount, if any, a state ultimately will be required to pay. See generally OMB A-87, Att. B, ¶ 12.

We also note that New Jersey does not contend that it relied on the interpretation of OMB A-87 that it puts forward here when it entered into the contracts or when it later paid and claimed the amounts at issue.

Finally, even if New Jersey's reading of the contingency provision in paragraph 33.a. was reasonable and New Jersey had relied on that reading, New Jersey's argument would fail. Paragraph 33.a. not only makes costs incurred under certain types of contingency arrangements unallowable, but also requires consultant fees to be "reasonable in relation to the services rendered." Since, for the reasons explained above, the costs claimed failed to meet this requirement, the costs were unallowable under Attachment B, paragraph 33.a., as well as the general principle requiring all costs to be reasonable.

Based on the foregoing discussion, we sustain CMS's determination that the professional service costs paid by New Jersey to HCR and Deloitte were unallowable under the cost principles of OMB A-87 and the regulations at 45 C.F.R. §§ 74.45 and 74.46.

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[5] For a detailed discussion of the risk of waste, abuse and exploitation of federal Medicaid funding posed by contractual arrangements wherein the amount of fees a state pays to a contractor to maximize FFP is contingent upon the amount of FFP recovered from the federal government, see GAO-05-748, United States Government Accountability Office, Report to the Chairman, Committee on Finance, U.S. Senate, "Medicaid Financing: States' Use of Contingency-Fee Consultants to Maximize Federal Reimbursements Highlights Need for Improved Federal Oversight."

We reject New Jersey's argument that CMS created a grace period for claims submitted prior to May 20, 2002 for contingency fees under arrangements such as the ones at issue.

New Jersey argues in the alternative that OMB A-87 and the regulations at 45 C.F.R. Part 74 do not apply to the costs claimed in this case "because of a nationally promulgated grace or hold harmless period." NJ Reply at 2; NJ Br. at 11. Specifically, New Jersey contends that a May 20, 2002 memorandum from the Director of the Center for Medicaid and State Operations to CMS regional administrators established a national grace period for contingency fee claims filed before May 20, 2002. NJ Reply at 2-3; CMS Ex. 1. New Jersey also argues that a May 29, 2002 CMS Region II, Division of Medicaid and State Operations Letter (Number M02-4), which contained language virtually identical to the wording of the May 20, 2002 memorandum, implemented this policy. NJ Reply at 2-3; NJ Br. at 4; NJ Ex. B.

The May 20, 2002 memorandum and May 29, 2002 letter stated that the purpose of each document was "to reiterate [CMS] policy that, in general, [FFP] is not available for the cost of Medicaid contingency fee contracts." CMS Ex. 1; NJ Ex. B. Each document explained that costs incurred under contingency arrangements are inconsistent with the requirements at OMB A-87 and section 74.45 of the regulations. Next, the documents stated that the "only exception to the general prohibition on contingency fee arrangements is for contracts for collecting Medicaid third party liability (TPL) payments, as described in Section 2975 of the State Medicaid Manual (SMM)." Id. The memorandum and letter provided that a state should consult the CMS regional office before entering into a TPL contingency fee arrangement to ensure that the arrangement met all of the criteria of SMM section 2975.

Central to New Jersey's contention that the claims in dispute are allowable is its interpretation of language that appears at the end of the May 29, 2002 letter, in which CMS stated:

> We recognize that a number of states currently have contingency fee contracts in place that do not meet the requirements of Section 2975 of the SMM. For the vast majority of these, the state appropriately is not claiming any FFP in the contingency fees. . . . Finally, there may exist contingency fee contracts in which the state has been claiming FFP without first consulting with the [regional office]. Where we have identified such a contract and have initiated deferral or disallowance action, we will proceed

> with that action. *However, we do not plan to initiate new reviews of FFP already claimed in such contracts.* Therefore, except as indicated above with respect to contingency fee contract claims under section 2975 of the SMM or for approved contracts, FFP is not available for claims received by CMS . . . on or after May 20, 2002.

NJ Ex. B (emphasis added).[6] According to New Jersey, the sentence italicized above meant that "CMS would not disallow the claims for FFP related to contingency fee contract costs submitted by the State before May 20, 2002." NJ Br. at 12, 16. New Jersey contends that the memorandum and letter thus "rendered" the regulations "inoperative" with respect to the claims at issue, and that CMS's determination in this case "arbitrarily and capriciously" reversed the grace period. NJ Reply at 4, 8; P. Br. at 14.

CMS takes the position that New Jersey misinterprets the May 2002 memorandum and letter. CMS points out that the first sentence of the paragraph quoted above made clear that the topic of the paragraph was the treatment of claims under "contingency fee contracts . . . that do not meet the requirements of Section 2975 of the SMM." CMS Ex. 1; NJ Ex. B. Since section 2975 of the SMM involves only TPL contingency fee arrangements, CMS argues, the statement that the agency did not plan to initiate new reviews of claims of "such contracts" applied to "the treatment of claims relating to TPL contracts and does not apply to the claims at issue . . . ." CMS Br. at 12.

The May 2002 memorandum and letter made clear that their purpose was to reiterate existing CMS policy that FFP was unavailable for contingency fees, with one limited exception – contingency fees paid under a TPL contract that met specific criteria, including submission to, and approval by, a regional office. Further, as summarized above, the focus of the latter part of each document, including the topic sentence of the paragraph addressing contracts that "do not meet the requirements of section 2975 of the SMM," involved the treatment of contingency fees under TPL contracts. Accordingly, we find CMS's construction of the statement in the May 29, 2002 letter that it did not "plan to initiate new reviews" of certain FFP claims, as relating only to TPL contingency contracts, to be the more

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[6] The May 20, 2002 memorandum from the Center for Medicaid and State Operations addressed to the regional offices stated that "we do not ask that you initiate new reviews of FFP already claimed in such contracts." CMS Ex. 1.

reasonable interpretation in light of the context in which the statement was made.

In any event, even if one read the statement that CMS did "not plan to initiate new reviews of FFP already claimed in such contracts" to include claims for fees paid under contingency contracts other than TPL contingency contracts, the May 2002 documents could not reasonably be understood as establishing a national hold harmless or grace period. First, the common meaning of the verb "to plan" is to have as a specific aim or purpose, or to intend; and the common meaning of the noun "review" includes "an inspection or examination." The American Heritage Dictionary of the English Language, Fourth Edition, http://dictionary.com (accessed: June 3, 2010). Thus, based on the plain meaning of the language used, CMS's statement indicated that the agency did not intend to initiate new examinations of previously filed claims to determine their allowability. The statement did not, however, either preclude CMS from later disallowing previously filed claims when, as in this case, it was otherwise brought to CMS's attention that the claims were not allowable under the governing cost principles and regulations or preclude CMS from later deciding that a review of previously-filed claims was merited.

Moreover, even if we were to conclude that CMS intended to establish a grace period, New Jersey provides no valid authority to support its contention that CMS had "sole discretion to grant states a grace period" in which to comply with the governing regulations, or its contention that the CMS documents rendered the regulations "inoperative." NJ Br. at 11; NJ Reply at 3. Although New Jersey cites the Board's decision in Maryland Dept. of Human Resources, DAB No. 1886 (2003) to support its argument, that decision does not stand for the proposition asserted. Maryland involved a determination of the Administration for Children and Families (ACF) disallowing FFP claimed for foster care maintenance payments and administrative costs under title IV-E of the Act. The grace period discussed in Maryland was not created under an ACF policy issuance that was inconsistent with departmental regulations, as New Jersey suggests. Rather, it was established in the *Federal Register* preamble to the regulations at issue in the case, stating that the department would "not take adverse action against States who cannot comply with [a regulatory] requirement for a period of 12 months from the effective date of this final rule." DAB No. 1886, n.1,

quoting 65 Fed. Reg. 4020, 4025 (2000).[7] Thus, the grace period discussed in Maryland is not comparable to the alleged grace period New Jersey claims was established under the May 2002 memorandum and letter.

Finally, while New Jersey's interpretation of CMS's May 2002 memorandum and letter is central to its argument that the disallowance should be reversed, New Jersey cannot complain that it relied on this understanding of the documents when it entered into the HCR and Deloitte contracts or when it incurred and claimed the costs at issue. As New Jersey itself acknowledges, it had incurred the expenses and claimed FFP for the cost of the services well before May 2002. NJ Br. at 4.

Conclusion

For the reasons stated above, we sustain CMS's September 25, 2009 determination to disallow $7,978,278 in FFP for contingency fees paid to HCR and Deloitte.

_____/s/_____
Sheila Ann Hegy

_____/s/_____
Constance B. Tobias

_____/s/_____
Judith A. Ballard
Presiding Board Member

[7] We further note that, under 45 C.F.R. § 74.4, only after consulting with OMB may the HHS Office of Grants and Acquisition Management (OGAM) grant CMS an exception from the uniform requirements in Part 74 for classes of awards subject to those requirements. While exceptions on a case-by-case basis may be made by CMS without prior approval from the OGAM, an awarding agency such as CMS will not consider a request for a deviation favorably where "the deviation would impair the integrity of the program." 45 C.F.R. § 74.4(b).