DIGEST

UNITED STATES GENERAL ACCOUNTING OFFICE

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CIVIL ACCOUNTING AND AUDITING DIVISION

The Comptroller General

During our review of the activities of the Public Buildings Service (PBS), General Services Administration (GSA), questions have arisen as to the intended scope of the architect-engineer fee limitation contained in section 304(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254(b)), which precludes a fee in excess of 6 per centum of the estimated costs of any public works or utility project.

PBS is responsible for the design and construction, extension, remodeling, repair and improvement of many public buildings. In discharging some of its responsibilities PBS negotiates contracts with architects to design, prepare working drawings and specifications, and perform certain post-construction contract services on most of the buildings. In cases where the services required are primarily engineering, PBS negotiates contracts with professional engineers in private practice. In some instances, the professional services contract with the architect or engineer include supervision of construction, or a supervision option. In other instances, supervision of projects is accomplished by PBS.

The American Institute of Architects (A.I.A.), in A.I.A. Document No. 308 (Rev. September 15, 1953), states, among other things, that "The Architect supervises the entire construction to assure that all provisions of working drawings and specifications are faithfully and properly carried out." The 1958 A.I.A. handbook entitled "Handbook of Architectural Practice" states that the normal practice of an architect consists of: (1) consultations with his client; (2) the preparation of designs and construction documents; and (3) the administration of the construction of a building project. With respect to normal architectural service, the A.I.A. handbook indicates that the normal services of a principal architect may be divided into four phases: (1) schematic design, (2) design development, (3) construction documents, and (4) construction.

The Washington-Metropolitan Chapter of the A.I.A. prepared and issued in June 1947 a circular on architectural services and fees. A recent visit to the A.I.A. Washington-Metropolitan Chapter revealed that the June 1947 circular had not been replaced by a new issuance and that the Chapter is currently working on a new fee schedule which may take more than a year to prepare. In the 1947 circular it is stated that the architect's services are divided into preliminary, contract document and supervisory services.

The circular included a schedule of recommended minimum fees[1] for various types of projects. The fees are based upon a percentage of cost and the percentages decline as costs increase and for larger projects the fees are under 6 percent. For example, with respect to office buildings and hotels (Type C) the recommended minimum fee for the architect's complete services which includes supervisory services ranges from 7.25 percent on a $50,000 structure to a minimum fee of 5 percent for a structure involving a cost of $5,000,000 or more.

We note that some States have a fixed maximum fee percentage and others do not, and that a distinction is made percentagewise for architect's services including or excluding supervision of construction. In the April 1949 brochure entitled "Architects of Public Projects--Selection and Compensation" published by The Council of State Governments it was indicated that some States use a sliding scale of fees to compensate architects for services rendered. For example, in Alabama, for architectural services not including supervision, the architect's fee runs from a maximum of 4.20 percent on jobs estimated to cost $50,000 or less to a minimum of 2.559 percent on work estimated to cost $3 million or more. However, if architectural services include supervision, the architect's fee runs from 6 percent on jobs estimated to cost $50,000 or less to a minimum of 5.7 percent on work estimated to cost $3 million or more.

Also, the April 1949 brochure indicated that Connecticut, Massachusetts, and Rhode Island utilized the sliding scale of fees recommended by the Joint Committee of Architects of New England. Explanatory information accompanying the schedule of recommended minimum basic rates states, in part, that "In addition to the Architectural Basic Service, the customary Engineering Services included in the Basic Rates are normal Structural, Plumbing, Heating, and Ventilating, Electrical and General Supervision." For example, with respect to court houses, city halls, banks, high class offices and insurance buildings, theatres, etc. (Category C-rate) the recommended minimum basic rate for architect's services commenced with an initial rate of 8 percent for structures less than $50,000 and declined to a minimum rate of 4.67 percent for structures involving a construction or estimated cost of $5,000,000.

GSA's position is somewhat comparable since it also uses sliding scale fee tables as a guide for the negotiation of contracts for architect-engineer services. One confidential fee table covers professional services necessary for planning and designing the project and includes diagrammatic and tentative sketches and documents; intermediate and final work drawings; and post-construction contract services; but excludes the cost of supervision of construction. A separate table relates only to the cost of supervision of construction contracts. We are not in a position to state whether

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[1]Fee for architect's complete services including ordinary structural, mechanical and electrical engineering performed by consulting engineers or by qualified engineers in the architect's employ.

GSA is aware of the combined effect the use of the two tables would have on the statutory fee limitation for a project.

In view of the aforesaid information on fees it would appear that with respect to a multi-million dollar Federal office building project that the architect's fee which includes supervisory services may be somewhat less than the fee ceiling and statutory limitation contained in section 304(b), supra.

We understand that contracts of the Corps of Engineers for architect-engineer services are generally confined to plans and specifications and under the Corps' present practice the 6 percent limitation contained in section 4(b) of the Armed Services Procurement Act of 1947 is applied to all such contracts. In addition, the Corps believes that the statutory limitation would not apply to contracts for supervision of construction services.

Our review disclosed that, except for the substitution of "property" for "supplies" and "plans" for "plants," the provisions of section 304(b), supra, are substantially similar to the language used in section 4(b) of the Armed Services Procurement Act of 1947, (10 U.S.C. 2301; see also 40 Comp. Gen. 188, 21 Comp. Gen. 580, and 22 Comp. Gen. 464),

We have noted that the construction of the statute with respect to the limitation on architect-engineer fees set forth in the aforementioned acts of 1947 and 1949 differs from the fee limitation contained in the act of April 25, 1939 (53 Stat. 590) and section 2 of the act of August 7, 1939 (5 U.S.C. 221). Accordingly, there remains for interpretation the intent of Congress with respect to the scope of services that are to be considered in determining whether the limitation included in section 304(b) of the Federal Property and Administrative Services Act of 1949 had not been contravened.

Since pronouncements of The American Institute of Architects indicates that normal architectural services includes supervisory services which is reflected in the architect's fee, your opinion is requested on the following questions:

1. Did the Congress intend that the 6 percent limitation should include the cost of supervision of construction and other services usually included in the architect's fee for normal architectural services?

2. In any public works or utility project when the supervision of construction is performed by the PBS staff rather than by the contract architect-engineer for the project, must the supervisory costs incurred by PBS be included with the fee for the architect-engineer services in determining whether the statutory limitation for such services had not been contravened?

3. In projects where the negotiated contract for architectural services excludes supervision and a separate contract is negotiated for supervisory services, must consideration be given to the aggregate fee involved under the negotiated contracts in determining whether the statutory limitation had not been exceeded?

4. In projects where the negotiated contract for architect-engineer services includes supervisory services, must the element of supervisory services be excluded or included in determining whether the statutory limitation had not been exceeded?

5. Was it the intent of Congress that the statutory limitation permits a fee not in excess of 6 percent for architectural services and another fee not in excess of 6 percent for negotiated engineering services with respect to the same public works or utility project?

6. Since the architect-engineer may be required to do additional work as a result of revision, changes and/or amendments which are beyond the scope of work or services originally set forth under the contract, was it the intent of Congress that the aggregate costs incurred for architectural or engineering services for a project are to be considered in determining whether the statutory limitation had not been contravened?

7. Since GSA may include costs such as cost of construction, equipment, elevators, air conditioning, earthwork (excavation, backfill, grading), furniture and equipment, standby generators, fallout shelters, murals, sculpture work, demolition, approach work, roads, walks, trees, planting, shrubs, seeding, sodding and landscaping in the estimated cost of a project, did the Congress express any specific views as to the components includable in the estimated cost of a project or indicate the bases for determining the estimated cost of a project on which to premise the limitation for architectural or engineering services?

8. Since varying estimated costs are cited for a project and since estimated costs generally run higher than actual construction costs, should the limitation on the architect's fee be determined on the basis of estimated cost of construction at the planning stage, or at the construction award stage, or any other stage?

9. Since the estimated cost of a project on which the negotiated contract for architect-engineer services is originally premised may be subsequently reduced because of omissions of scheduled project work or changes in scope and plans for a

project, must the determination of whether the statutory limitation had not been contravened be based on the revised estimated costs of a project?

10. Whenever the estimated cost of a project on which the negotiated contract for architect-engineer services is originally based is later reduced as a result of changes in the size, cost, and scope of the project and if the architect has performed no services prior to the reduction in the scope of the project, must there be a negotiated adjustment in the amount to be paid to the architect-engineer in view of the reduction in the estimated cost of the project?

11. Would the 6 percent statutory limitation be applicable to negotiated contracts for architect-engineer services which relate to projects constituting alterations, conversions, remodeling or additions to existing structures?

Your instructions may be helpful and beneficial to the Defense Accounting and Auditing Division staff since the statutory limitation on fees for architectural or engineering services contained in section 4(b) of the Armed Services Procurement Act of 1947 is substantially similar to the language contained in section 304(b) of the Federal Property and Administrative Service Act of 1949.

JOHN P. ABBADESSA

John P. Abbadessa
Deputy Director

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Director, Civil Accounting and Auditing Division

Returned, with answers to your specific questions as indicated below.

(1) Did the Congress intend that the 6 percent limitation should include the cost of supervision of construction and other services usually included in the architect's fee for normal architectural services?

The legislative history of section 304(b) of the Federal Property and Administrative Services Act of 1949, as amended, 41 U. S. C. 254(b), throws no light on the extent or the scopes of the services intended by the Congress in the 6 percent fee limitation "for architectural or

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engineering services relating to any public works or utility project." However, the Chairman of the Executive and Legislative Reorganization Subcommittee of the Committee on Expenditures in the Executive Departments, House of Representatives, in explaining the provisions of Title III of H. R. 4754, 81st Congress, which became the Federal Property and Administrative Services Act of 1949, stated on the floor of the House to the effect that Title III extends to the General Services Administration the same procurement procedure that the Congress granted to the National Military Establishment in the Armed Services Procurement Act of 1947. See Congressional Record Vol. 95 Part 6, page 7443. Thus, the language of this fee limitation is identical with the fee limitation for architectural and engineering services contained in section 4(d) of the Armed Services Procurement Act of 1947, 10 U. S. C. 2306(d).

In B-18126 of March 19, 1942, reconsidering 21 Comp. Gen. 580, there was considered the legal effect of the provisions of section 2 of the act of August 7, 1939, 10 U. S. C. 4540, establishing a 6 percent limitation on the fee paid for architectural or engineering services for the "production and delivery of the designs, plans, drawings, and specifications required for the accomplishment of any public works or utilities project of the War Department." Similar statutes were enacted for the Navy and the Air Force, 10 U. S. C. 7212 and 9540, respectively. It was held to the effect that since the fee limitation related to the amounts to be paid for the production and delivery of designs, plans and specifications there was no limitation on the amounts which might be paid to architects or engineers for supervisory services, and, consequently, that amounts paid for job site supervision need not be considered in determining whether the statutory limitation imposed by the act of August 7, 1939, had been exceeded in a particular case.

In B-115013-O.M., of April 28, 1953, there was considered the fee limitation on architects and engineers as contained in the act of August 7, 1939, and section 4(b) of the Armed Services Procurement Act of 1947. It was held to the effect that although the 1939 statute imposed a similar 6 percent fee limitation in somewhat different language than the Armed Services Procurement Act, there is nothing contained in the legislative history of the latter act to warrant a belief that the Congress intended to accomplish any different result than that accomplished by the 1939 statute. In view thereof and having regard for the fact that the fee limitation for architectural and engineering services contained in the Federal Property and Administrative Services Act of 1949 and in the Armed Services Procurement Act of 1947 are identical, there is reasonable basis for the view that they may be accorded the same effect. Accordingly, the 6 percent limitation for architectural and engineering services contained in section 304(b) of the Federal Property and Administrative Services Act of 1949, as amended, may be said to relate to the customary services incident to the preparation of

plans, designs and specifications, including structural and mechanical engineering applicable thereto, and that supervision of construction is an item of expense that goes beyond such customary architectural and engineering services, and, therefore, payment for such services need not be considered in determining compliance with the limitations on payment for architectural and engineering services.

2. In any public works or utility project when the supervision of construction is performed by the PBS staff rather than by the contract architect-engineer for the project, must the supervisory costs incurred by PBS be included with the fee for the architect-engineer services in determining whether the statutory limitation for such services had not been contravened?

The fee limitation in section 304(b) is a limitation upon the total compensation payable to architect or engineer contractors exclusive of supervision of construction costs. Hence, the cost of supervision of construction performed by the PBS staff, rather than by the contract architect-engineer, is not a factor to be considered in determining compliance with the fee limitation imposed on architect-engineer service contractors.

3. In projects where the negotiated contract for architectural services excludes supervision and a separate contract is negotiated for supervisory services, must consideration be given to the aggregate fee involved under the negotiated contracts in determining whether the statutory limitation had not been exceeded?

4. In projects where the negotiated contract for architect-engineer services includes supervisory services, must the element of supervisory services be excluded or included in determining whether the statutory limitation had not been exceeded?

No statutory limitation exists on amounts authorized to be paid for architectural or engineering services in connection with supervising construction of any public works or utility project. Therefore, amounts paid for such services need not be considered in determining whether the fee limitation for architectural or engineering services imposed by section 304(b) has been exceeded in a particular case, and regardless of whether the supervisory services are included in the contract for architectural or engineering services covering plans and specifications or made the subject of a separate contract. Questions 3 and 4 are answered accordingly. See 22 Comp. Gen. 464.

5. Was it the intent of Congress that the statutory limitation permits a fee not in excess of 6 percent for architectural services and another fee not in excess of 6 percent for negotiated engineering services with respect to the same public works or utility project?

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The intent of the statute appears to be that the amount payable for both architectural and engineering services relating to any public works or utility project--exclusive of supervision of construction costs--shall not be in excess of 6 percent of the estimated cost thereof.

6. Since the architect-engineer may be required to do additional work as a result of revision, changes and/or amendments which are beyond the scope of work or services originally set forth under the contract, was it the intent of Congress that the aggregate costs incurred for architectural or engineering services for a project are to be considered in determining whether the statutory limitation had not been contravened?

While this question is answered generally in the affirmative, there may be cases where the changes and/or amendments extending the scope of work constitute supplementary agreements. In such cases, the additional fee would be confined to 6 percent of the estimated cost of the additional features. See the answer to question No. 2 in B-115013-O.M., April 28, 1953.

7. Since GSA may include costs such as cost of construction, equipment, elevators, air conditioning, earthwork (excavation, backfill, grading), furniture and equipment, standby generators, fallout shelters, murals, sculpture work, demolition, approach work, roads, walks, trees, planting, shrubs, seeding, sodding and landscaping in the estimated cost of a project, did the Congress express any specific views as to the components includible in the estimated cost of a project or indicate the bases for determining the estimated cost of a project on which to premise the limitation for architectural or engineering services?

The legislative history of section 304(b) furnishes no aid in determining the various cost factors that may be included within the terms "estimated cost" of a project, and it may be stated that the term has been judicially recognized as difficult of exact catalog and application. In Lambert v. Sanford, 12 A. 519, 520, it was held that the estimated cost as used in a contract to pay a certain percent of the estimated cost of a building for the preparation of architectural plans therefor, means the reasonable cost of the building, estimated in accordance with the plans and specifications referred to.

Thus, in the absence of definite legislative expression otherwise, the term "estimated cost" of a project may be said to comprehend the reasonable cost of a project erected in accordance with the plans and specifications, and that the inclusion of cost elements generally not covered by the plans and specifications such as furniture and equipment installed for the occupancy and use of a project would appear to be questionable.

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8. Since varying estimated costs are cited for a project and since estimated costs generally run higher than actual construction costs, should the limitation on the architect's fee be determined on the basis of estimated cost of construction at the planning stage, or at the construction award stage, or any other stage?

The provisions of section 304(b) limit the fee to be paid architects and engineers for their services to not in excess of 6 percent of the estimated cost of the project involved "as determined by the agency head at the time of entering into the contract." This clearly has reference to the time of entering into the contract for the architectural or engineering services since the construction contract will not be let until some subsequent date.

9. Since the estimated cost of a project on which the negotiated contract for architect-engineer services is originally premised may be subsequently reduced because of omissions of scheduled project work or changes in scope and plans for a project, must the determination of whether the statutory limitation had not been contravened be based on the revised estimated costs of a project?

10. Whenever the estimated cost of a project on which the negotiated contract for architect-engineer services is originally based is later reduced as a result of changes in the size, cost, and scope of the project and if the architect has performed no services prior to the reduction in the scope of the project, must there be a negotiated adjustment in the amount to be paid to the architect-engineer in view of the reduction in the estimated cost of the project?

When a fee has been negotiated for architectural-engineering services on the basis of the estimated cost of a project and the services called for thereunder have been performed, the subsequent reduction of such cost estimate by reason of major changes in the character of the project directed by the contracting officer is no proper basis for invoking the revised cost estimate as a basis for determining the amount payable for such services. See Kent v. Darmana, 137 A. 467, 468. If the original cost estimate of a project is reduced on account of changes in the scope thereof directed unilaterally by the contracting officer but prior to the performance of architectural-engineering services, the architect-engineer may have a valid claim for costs incurred, if any, and prospective profits under the original agreement, depending upon the terms of the agreement. In such a situation the fee payable for architectural-engineering services is generally for adjustment on the basis of the revised cost estimate, the unliquidated damages, if any, being for determination by the courts. Any doubtful cases should be submitted here for consideration of the particular facts and circumstances involved. Questions 9 and 10 are answered accordingly.

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11. Would the 6 percent statutory limitation be applicable to negotiated contracts for architect-engineer services which relate to projects constituting alterations, conversions, remodeling or additions to existing structures?

Neither in the provisions of section 304(b) of the Federal Property and Administrative Services Act of 1949, as amended, nor in the military acts cited herein is the term "public works or utility project" expressly defined. "Public Works" are defined in Webster's New International Dictionary, Second Edition, as "All fixed works constructed or built for public use or enjoyment, as railroads, docks, canals, etc., or constructed with public funds and owned by the public." See 19 Comp. Gen. 467, 469; 35 id. 454, and cases cited therein. The word "utility" when used in connection with building construction has reference to such items as sewer and water facilities, heating devices, etc. See 21 Comp. Gen. 167. Accordingly, it appears that contracts for architectural and engineering services covering projects for alterations, conversions, remodeling or additions to existing structures come within the term "public works or utility project" as used in section 304(b), and, consequently, payments for such services are subject to the fee limitation prescribed thereon.

FRANK H. WEITZEL
Assistant Comptroller General
of the United States

Attachment