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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-197170

DATE: July 28, 1980

MATTER OF: Booker T. Washington Foundation

[Request for Contract Reformation]

DIGEST:

Question concerning amount contractor can be reimbursed for its indirect costs will not be considered since matter has already been decided by Board of Contract Appeals.

The Booker T. Washington Foundation (BTWF) requests reformation of Department of Commerce contract No. 6-36465 on the grounds of mutual mistake since, according to BTWF, the contract as executed does not reflect the intentions of the parties.

BTWF entered into this cost-reimbursement contract for an amount not to exceed \$725,000 covering the period December 1, 1975, through November 30, 1976. The period of performance was subsequently extended to November 30, 1977, and the amount increased to \$1,325,000. The purpose of the contract was to further the Department of Commerce's (Commerce) minority business enterprise program. BTWF was to operate a Cablecommunications Resource Center and conduct a comprehensive national business venture development program for minority entrepreneurs in the field of cabletelevision and telecommunications.

According to Article XVI of the contract, "Overhead Rates," BTWF could only be reimbursed for its indirect costs at a maximum rate of 33 percent of its total direct costs. BTWF claims that the figure of 33 percent was intended to be only a temporary ceiling subject to later adjustment when the actual indirect costs became known. Thus, when it became apparent that the 33-percent rate would be inadequate to reimburse BTWF for its actual indirect costs incurred during the first year of contract performance, the contracting

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officer agreed to revise the allowable indirect cost rate upward to 42.8 percent of total direct costs for the period December 1, 1975, through November 30, 1976.

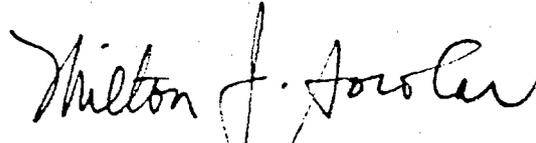
However, despite the contracting officer's decision to revise the rate upward, BTWF still disputed the disallowance of certain salary adjustments and, therefore, appealed the contracting officer's final decision to the Department of Commerce Appeals Board (Board). The Government's answer to this appeal not only opposed the requested relief but also challenged the authority of the contracting officer to alter the indirect cost rate of 33 percent without a compensating benefit to the Government. In its decision, the Board agreed with the Government's position based upon the provisions of the contract and its conclusion that there was no "misunderstanding with respect [to] the terms or understanding of the original contract provisions" and, therefore, denied BTWF's appeal and reinstated the 33-percent rate, holding that the contracting officer was without authority to increase the allowable indirect cost rate without additional consideration flowing to the Government.

BTWF, however, disagrees with the reinstatement of the 33-percent rate and argues that as a result its contract has been transformed from a cost-reimbursement contract to a cost-sharing contract. Since BTWF believes that neither it nor the contracting officer ever intended such a result, it contends that there has been a mutual mistake which requires reformation of the contract to make it clear that the 33-percent rate was merely a provisional rate subject to adjustment based on actual experience.

We have held that the authority of our Office does not include intervention between a contractor and a contracting agency for the purpose of resolving a dispute arising under a contract. This is a matter for settlement pursuant to the procedures set out in the "Disputes" clause which is contained in standard Government contracts. Harry C. Partridge, Jr. & Sons, Inc., B-191808, May 11, 1978, 78-1 CPD 366.

BTWF was following the "Disputes" clause procedures when it filed an appeal from the contracting officer's final decision. When the Board denied the requested relief and also reinstated the 33-percent maximum rate for indirect costs, based upon interpretation of the contract provisions, it was also acting in accordance with the "Disputes" clause procedures. Further, it should be noted that as a result of the Supreme Court's decision in S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972), we no longer review Board of Contract Appeals decisions absent a showing of fraud or bad faith. See, e.g., Sophisticated Images Associates Plastics, Inc., B-190063, October 4, 1977, 77-2 CPD 266; Gilbert R. Green & Company, Inc., B-174231, January 28, 1975, 75-1 CPD 56.

Since there is no indication here that the Board acted fraudulently or in bad faith, we will not review its decision.



Milton J. Socolar
General Counsel