

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES

WASHINGTON, D. C. 20548

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FILE: B-183184

DATE: MAY 30 1975

MATTER OF: Recording obligations under EPA cost-plus contract

DIGEST: EPA cost-plus contract, which in effect calls for "level of effort" performance by contractor, is sufficiently definitive to permit total estimated contract amount to be recorded as obligation at time of award. However, since contract is funded on single fiscal year basis, ultimate obligation amount is still limited to work actually ordered within fiscal year.

This responds to a request by an Environmental Protection Agency (EPA) certifying officer for our decision on certain questions concerning the recording of obligations under that agency's cost-plus-a-fixed-fee contract with Halifax Corporation for personnel, services, equipment, and facilities to accomplish preventive maintenance, plant operations, and shop services at the EPA facilities in the Research Triangle Park, North Carolina.

The basic contract was entered into on March 3, 1973, with an option to renew, and has since been modified and extended on several occasions. It is now being funded by J-year HIA appropriations for agency and regional management. Article I of the contract, entitled "Scope of Work," calls for performance by the contractor, within "level of effort" limitations, of specific tasks on the basis of work orders to be issued. Article II, entitled "Level of Effort," states:

"It is understood and agreed that the 'Scope of Work' contained in this contract is stated in broad terms in order to achieve maximum required flexibility. The Contractor's contractual obligation is expressed as a level of effort in terms of total number of manhours to perform those tasks set forth in the 'Scope of Work,' as may be modified as provided for in Article hereof entitled "Technical Direction," and which are capable of being performed within the number of manhours herein provided. The Contractor shall provide not more than 10,924 direct manhours in pursuit of the effort described herein for preventive maintenance, certain plant operations and shop services. The Contracting Officer shall furnish to the Contractor direction establishing the maximum level of effort to be expended quarterly."

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The 10,924 manhour figure specified in the original contract has undergone several modifications.

Article VI of the contract sets forth the estimated cost and fixed fee for the contract, which has also been modified several times. Article VII, entitled "Cost and Fee Adjustment," states:

"The Parties hereto agree to negotiate an equitable reduction in the estimated cost and fee of this contract in the event the Contracting Officer pursuant to the Article hereof entitled 'Periodic Manpower Review' authorizes less than 95% of the total of the manhours established by the Article hereof entitled 'Level of Effort,' or in the event the Contractor provides less than 95% of the total of the manhours established by the Article hereof, entitled 'Level of Effort.'

"It is recognized that the Contractor is not obligated to furnish nor is the Government required to accept any manhours in excess of the direct manhours set forth in Article II in pursuit of the effort specified herein, except upon mutual agreement of the parties as to the estimated cost and fee applicable to the additional manhours. Any such agreement will be embodied in a Supplemental Agreement to this contract."

The EPA contracting officer indicates that the Government's obligation under the contract is interpreted to be the full value for the base contract and each modification, when consummated, rather than on a task or work order basis.

The certifying officer's questions, and our responses thereto, are as follows:

1. The full estimated cost and fixed fee of the contract has been recorded as an obligation at the time of award based upon the Contracting Officer's assurance that this is a level of effort contract for "non-severable" type services. The Contracting Officer also contends that the issuance of work orders under the contract merely directs the contractor's technical efforts against the hours bought by the contractual agreement and in no way affects the Government's obligation. Another view of the contract is that obligations should only be recorded as work orders are issued in that the contract, at the date of award, is not sufficiently definitive to constitute an enforceable agreement. Is it proper to record the total estimated contract amount as an obligation at the date of award?

The recording of obligations under the contract is governed by section 1311 of the Supplemental Appropriation Act, 1955, as amended, 31 U.S.C. § 200 (1970), which provides in relevant part:

"(a) * * * no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—

"(1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed * * *.

* * * * *

"(d) No appropriation or fund which is limited for obligation purposes to a definite period of time shall be available for expenditure after the expiration of such period except for liquidation of amounts obligated in accord with subsection (a) of this section; but no such appropriation or fund shall remain available for expenditure for any period beyond that otherwise authorized by law."

As indicated hereinabove, the instant contract is interpreted in effect as a "level of effort" procurement, expressed primarily in terms of manhours, to be applied on the basis of work orders issued during the course of the contract. While the contract expressly recognizes that the scope of work "is stated in broad terms in order to achieve maximum required flexibility," the Government is apparently obligated to order specific tasks as provided in Article XI. Accordingly, we agree that the contract is sufficiently definitive to justify recording the full estimated contract amount as an obligation at the time of award. See 50 Comp. Gen. 589, 591-92 (1971); 34 id. 596 (1955); compare 42 Comp. Gen. 272 (1962); 34 id. 459, 462 (1955).

For the foregoing reasons, question 1 is answered in the affirmative. Of course, while this estimated basis satisfies 31 U.S.C. § 200, it does not fix the Government's ultimate obligation for the fiscal year involved, which may be greater or less than the amount initially recorded as obligated. See 34 Comp. Gen. 418, 420-21 (1955), and discussion hereinafter.

2(a). In view of the nature of the services being procured and the fact that the contract is currently funded with annual appropriations, does the "bona fide need" principle require a deobligation of annual funds where it is determined at the close of the fiscal year that work orders were not issued to the extent that the total contracted level of effort was expended?

2(b). Alternatively, may any surplus level of effort be carried forward at June 30 and used for work orders to be issued during the succeeding fiscal year?

We assume that question 2 is meant to describe a situation in which the level of effort actually ordered against during a fiscal year is less than the maximum contracted for. The actual level of effort furnished apparently represents full performance during a fiscal year and delimits the Government's liability therein. Consequently, any amount initially recorded as obligated in excess of the actual level of effort called for by work orders could not remain as an obligation for that year. Since the contract and its funding operate on a single fiscal year basis, the carryover (upon exercising the option to renew) into a succeeding fiscal year of any "surplus" level of effort as described would be precluded under the bona fide needs principle and related statutory restrictions. See, e.g., 31 U.S.C. § 712a (1970); 50 Comp. Gen. 589, supra; 44 id. 399 (1965); 37 id. 155, 157-160 (1957). Accordingly, question 2(a) is answered in the affirmative, and question 2(b) in the negative.

3. Can an additional obligation of annual funds be properly recorded just prior to the close of the fiscal year where, as a result of mutual agreement, the designated level of effort was increased but was done so without regard as to the sufficiency of the then designated level of effort to cover the work orders in process?

The basic effect of the bona fide needs principle, discussed in the decisions cited above, is that an obligation against a fiscal year appropriation is valid only if it relates to an actual need existing within such fiscal year. In order to properly implement this principle, there must be some basis for administratively determining whether a new or increased obligation meets a bona fide fiscal year need. As to the instant contract, it is difficult to perceive how such a determination could be made without regard to the sufficiency of the existing level of effort to meet work orders in process. In any event, for the reasons stated hereinabove, amounts initially recorded as obligated in excess of work orders actually issued within a fiscal year would have to be deobligated. Accordingly, question 3 is answered in the negative.

E. F. KEMMER

Deputy Comptroller General
of the United States