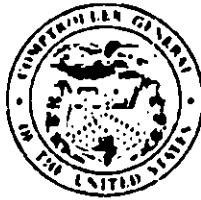


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**DECISION**



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

**FILE: B-191162**

**DATE: July 18, 1978**

**MATTER OF: Metropolitan Contract Services, Inc. -  
Reconsideration**

**DIGEST:**

Prior decision is affirmed upon request for reconsideration where GAO finds Board of Contract Appeals decision cited by protester not to be controlling on facts and 4-percent cost ceiling only applied to Employee Stock Ownership Plan costs and not to all labor costs.

Metropolitan Contract Services, Inc. (Metropolitan), has requested reconsideration of our decision of June 14, 1978 (B-191162), in which we denied Metropolitan's protest of the proposed award of a contract by the National Aeronautics and Space Administration (NASA) under request for proposals (RFP) No. 1-101-5700.0120.

Metropolitan's request for reconsideration is grounded on the belief that our Office has misinterpreted the legal effect of a 4-percent cost ceiling which Metropolitan offered on the costs of its Employee Stock Ownership Plan (ESOP). The Service Contract Act wage determination applicable to this procurement contained as a fringe benefit an 8-percent ESOP. In our decision of June 14, 1978, we found that Metropolitan in its best and final offer had placed a firm, unconditional 4-percent cost ceiling on the ESOP costs NASA would have to reimburse Metropolitan under the contract. However, we held that NASA could properly refuse to evaluate Metropolitan's proposal with the 4-percent ceiling. We agreed with NASA that:

\*\*\* as only Metropolitan of the three offerors had an ESOP, Metropolitan was the only offeror in a position to manipulate the cost level or contribution rate of the ESOP because, according to NASA's counsel, the Metropolitan

Board of Directors could unilaterally change the plan at any time. Also, as the wage determination required an 8-percent ESOP or its equivalent, if Metropolitan unilaterally reduced its ESOP costs to 4 percent, it would be required to provide some additional fringe benefit, which, when coupled with the 4-percent ESOP, would yield the equivalent of 8-percent ESOP costs. Thus, while ESOP costs were reduced to 4 percent, the total fringe benefit package costs would remain unchanged."

In denying this basis of protest, we stated:

"However, as noted by NASA, altering the 8-percent ESOP would most likely require raising another fringe benefit. NASA was given no protection regarding other fringe benefit costs. It is clear from Metropolitan's best and final offer that the 4-percent ceiling only applied to the ESOP. If the ESOP contribution was reduced or the ESOP abolished altogether and an equivalent increase given the employees in another portion of the wage determination, NASA would not receive any of the cost savings Metropolitan attributes to its 4-percent ceiling. In passing, we note that Metropolitan has renegotiated its labor agreement with the union involved and, effective July 1978, the ESOP has been deleted and a 7-percent increase made in the pension fund for employees. Therefore, there will be no ESOP to which to apply a ceiling and NASA would have to reimburse the full 7-percent pension fund cost.

"Accordingly, we find nothing improper in NASA's cost projections for the offerors."

Metropolitan contends that its 4-percent ceiling would have applied to any equivalent increase in another fringe benefit to which the 8-percent ESOP costs, if the ESOP was abolished, were transferred.

Metropolitan cites Reynolds Metals Co., ASBCA No. 7686, 1974 BCA 4312, reconsideration, 1964 BCA 4477, for the proposition that a contractor cannot recover the increased costs of changing the allocation of fringe benefits, after contract award, even though the contractor could not have foreseen the change in circumstances leading to the reallocation.

We do not find Reynolds controlling in this situation. The Armed Services Board of Contract Appeals held that Reynolds' allocation of a Supplemental Unemployment Benefit Plan contribution to 16 plants as overhead charges on the basis of direct labor hours worked at each plant could not be changed to reflect the benefits actually paid to workers at one plant which had been closed on the completion of the contract. The retroactive reclassification of this one item of overhead cost, at one plant, was inconsistent with Reynolds' accounting system and contrary to generally accepted accounting practices. The original decision and the reconsideration make clear that it was the retroactive nature of the change which the Board found objectionable.

Here, if there was a shift of costs from the ESOP to another fringe benefit, there would be no retroactive revision and, therefore, we do not find the reasoning of Reynolds to require altering our prior decision of June 14, 1978.

While Metropolitan also makes the argument that its 4-percent ceiling applied to labor costs and not

just ESOP costs, we believe the following statement in its best and final offer clearly shows the ceiling only applied to the ESOP:

\*\*\* Too, although the ESOP costs remain the same as required by the Wage Determination Act of September 22, 1977, we would like to inform the SEB that management has reviewed the impact of amortizing of the ESOP costs over the longer five-year contract period and if Metropolitan is awarded this contract, our costs will be 4 percent, 4 percent and 4 percent, respectively. We are confident these amounts can be negotiated with IBEW Local 1340; however, in the event they cannot, Metropolitan would agree to a ceiling of 4 percent, 4 percent and 4 percent, respectively, for the ESOP costs under contract. Accordingly, we feel NASA should consider this as a cost savings under Metropolitan's revised proposal. \*\*\*

Accordingly, our decision of June 14, 1978, is affirmed.

  
Deputy Comptroller General  
of the United States