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

FILE: B-195732 DATE: September 23, 1982

MATTER OF: Environmental Protection Agency--Request for Clarification of B-195732, June 11, 1980, 59 Comp. Gen. 518

DIGEST:

Discretionary cost increases in cost reimbursement contracts which exceed contractually stipulated ceilings set forth in Limitation of Cost clauses and which are not enforceable by contractor are properly chargeable to funds available when the discretionary increase is granted by the contracting officer. 59 Comp. Gen. 518 (1980) and other prior inconsistent decisions are modified accordingly.

The Environmental Protection Agency (EPA) requests clarification of our decision in the matter of Recording Obligations Under EPA Cost-Plus-Fixed-Fee-Contract, 59 Comp. Gen. 518 (1980). That decision concerned the proper appropriation to charge for a cost overrun of a cost-plus-fixed-fee-contract with the Institute of Gas Technology for technical consulting services.

Briefly, that decision involved a cost overrun (i.e., an increase in the total cost of the contract beyond the contract's ceiling) resulting from a revision in the negotiated overhead rates used to compute indirect costs. The basic contract was executed on January 17, 1975. The modification which resulted in the cost overrun was executed on March 23, 1979. This modification was negotiated pursuant to the procedures set forth in the "Negotiated Overhead Rates" clause of the basic contract which entitled the contractor to price adjustments under certain conditions. Assuming all other conditions were met, this clause, operating in conjunction with the contract's "Limitation of Cost" provision, required price adjustments for allowable indirect costs but only if the final rate would not cause the contract to exceed "any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in the contract." Clause 29, section (d). The contract, like most cost reimbursement contracts, contained a "Limitation of Cost" clause which established an estimated cost ceiling and provided that once that ceiling is reached, the contractor is under no obligation to continue performance unless additional funds are allocated to the contract. Similarly, the agency is under no obligation to raise the ceiling to fund additional costs.

In our 1980 decision, we concluded that the cost of the 1979 modification to reflect an increase in allowable overhead rates was to be paid from the original appropriation obligated for the contract, even though the modification resulted in an increase in the contract's cost ceiling. The basis for our conclusion was that the increased overhead rates were based on an antecedent contractual liability within the scope of the original contract.

EPA states it agrees with this conclusion insofar as it applies to increases in overhead rates. EPA's agreement is based on its reading of General Electric Company v. U.S., 194 Ct. Cl. 678, 440 F 2d 420 (1971), and similar cases, which hold generally that increased overhead rates must be paid in excess of a contractually required ceiling where failure to give timely notice to the contracting officer pursuant to a "Limitation of Cost" clause was not within the contractor's control. However, EPA is concerned that our decision may be read as requiring that "almost all modifications which are not a breach of contract must be funded out of appropriations current when a contract is signed." This concern arises from statements in the decision to the effect that any contract modification within the scope of the original contract should be charged to funds current when the contract was entered. As discussed below, we agree with EPA that it is not necessary to charge all cost increases within the scope of a cost reimbursement contract to funds available when the contract was entered.

EPA points out that cost overruns on cost reimbursement contracts come about in three ways: (1) through cost increases not related to a change in the contract's Statement of Work, (2) through cost increases pursuant to change orders which require additional work, and (3) through cost increases by bilateral modification, "a new agreement upon different terms than those in the original contract." In all three situations, EPA would use currently available funds to pay increases beyond the original cost ceiling set out in the contract on the theory that there is no antecedent liability, enforceable by the contractor, to grant such increases, and hence no "obligation" of originally available funds.

However, as EPA points out, cost increases allowed for overruns not related to Statement of Work changes, or for changes in the Statement of Work within the scope of the original contract which result in overruns, arise through operation of a contractual clause, the "Limitation of Cost" clause (or the "Limitation of Funds" clause in incrementally funded contracts). Thus, they are clearly within the scope of the original contract. The key, in EPA's view, is whether the contracting officer has discretion to grant or deny a change in the terms of a contract which will increase costs beyond a contractually set ceiling. EPA argues that a contracting officer's discretionary action in these circumstances results in a new obligation chargeable against current funds. EPA also appears to argue that discretionary changes which do not exceed the contract's ceiling similarly may be charged to funds current when the change is ordered.

The general rule relating to the permissible use of annual appropriations after expiration of their period of availability is that they may be applied only "to payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year," 31 U.S.C. § 712a (1976). In applying this provision, we have established the principle that a fiscal year's appropriations may only be charged for contracts executed to meet the bona fide needs of that year. 37 Comp. Gen. 155 (1957); 33 id. 57 (1953); 32 id. 565 (1953).

Thus, even where the fulfillment of a contract made in an earlier fiscal year has required increases in cost in later years, we have allowed the increased costs to be charged to the original appropriation on the theory that the Government's obligation under the subsequent price adjustment is to fulfill a bona fide need of the original fiscal year and therefore may be considered as within the obligation which was created by the original contract award. See 44 Comp. Gen. 399 (1965).

On the question of changes which increase the cost of the contract but do not exceed the contractually set ceiling, we continue to adhere to the view that such increases should be charged to the appropriation available when the contract was entered. This position is based on the fact that an agency must reserve funds in the amount of the contract's ceiling at its inception in order to comply with the Antideficiency Act (31 U.S.C. § 665 (1976)) prohibition against incurring obligations in excess of available appropriations since the agency is contractually bound at the outset to fund any cost increases not related to increased work to the contract's ceiling. Since the ceiling amount must be committed at the contract's inception, any under-ceiling cost increases in later years which are within the contract's scope--whether because of changed work or not--therefore should be considered as covered by the original contractual obligation.

However, application of a rule designed to permit the use in appropriate circumstances of prior year funds after their period of availability has expired to preclude use of currently available funds for otherwise appropriate ends would serve no useful purpose. While an agency is required to reserve funds sufficient to cover any contingent liability which would be enforceable by the contractor in order to comply with the Antideficiency Act (including amounts for final overhead in excess of the ceiling where an enforceable right to such amount exists), it would not be reasonable to require that amounts for cost increases beyond the contract's ceiling similarly be reserved. There is no way to estimate the anticipated amount of such increases or the need for them in any future years and it would therefore be difficult to consider them as bona fide needs of an earlier year.

Upon reconsideration, we therefore conclude that cost increases in cost reimbursement contracts which exceed contractually stipulated ceilings and

which are not based on an antecedent liability, enforceable by the contractor, may properly be charged to funds available when the discretionary increase is granted by the contracting officer. Accordingly, our 1980 decision, 59 Comp. Gen. 518 is modified to conform to this decision, as are other prior decisions inconsistent with this one.

for Harry R. Van Cleve
Comptroller General
of the United States