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United States General Accounting Office
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Office of the General Counsel

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Mr. David L. Burich
Authorized Certifying Officer
United States Forest Service
14th & Independence, SW, P.O. Box 96090
Washington, DC 20090-6090

Subject: Recovery of payment to Colorado State University

Dear Mr. Burich:

This responds to your request for our advice concerning a $425,952 payment by the Forest Service for administrative personnel expenses treated as direct, rather than indirect, costs under a cost-reimbursable research agreement between the Forest Service and the Center for Ecological Management of Military Lands (Center) at Colorado State University (University). The Forest Service also paid $42,595 to the University as indirect costs, calculated as ten percent of the direct costs, resulting in a total payment of $468,547.

The Inspector General (IG), Department of Agriculture, has questioned the payment of this amount, contending that the University had presented insufficient documentation of these costs. Given the posture of this matter and the factual gaps in the record, we think it is more appropriately resolved by administrative officers charged with claims collection responsibilities.[1] Nevertheless, we are providing the following information that may be of assistance to you in analyzing this matter.

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[1] By law, agencies are required to try to collect all claims owed to the United States that arise from their activities. 31 U.S.C. § 3711(a). Until relatively recently, when agencies had questions concerning the validity of claims they were trying to collect, they could come to this Office to have those claims settled and adjusted pursuant to 31 U.S.C. § 3702. However, that authority has since been transferred to various agencies, including the Office of Management and Budget. 31 U.S.C. §§ 3529, 3702(a)(4), as amended by Pub. L. No. 104-316, § 202(n)(n), 204, 110 Stat. 3826, 3843-44, 3845 (1996).

In 1992, the Forest Service entered into a cost-reimbursable research agreement with Colorado State University (Cost-Reimbursable Agreement 28-CR2-626, 1992) under authority of the National Agricultural Research Extension and Teaching Policy Act of 1997 (the Act), 7 U.S.C. § 3319a. The Act authorizes the Secretary of Agriculture to enter into cost-reimbursable agreements with educational institutions to carry out agricultural research, extension, or teaching activities of mutual interest.[2] 7 U.S.C. § 3319a. The University's Center agreed to conduct ecological research studies of mutual interest to the government and the University for the Department of Defense (DOD).[3]

At issue is application of the Act's cost reimbursement provision. The Act specifies that "[r]eimbursable costs under such agreements shall include the actual direct costs of performance, as mutually agreed on by the parties, and the indirect costs of performance, not exceeding 10 percent of the direct costs." 7 U.S.C. § 3319a. The Act does not define direct or indirect costs. Agriculture Department regulations, however, require that agreements made pursuant to the Act are to conform to the provisions of OMB Circular A-21. 7 C.F.R. § 3016.22(b). In that regard, the Forest Service agreement with the University provided that "[a]ll applicable laws, regulations, Executive Orders and other generally applicable requirements . . . form a part of this agreement," effectively incorporating into the agreement the provisions of Agriculture's regulations and OMB Circular A-21. The OMB Circular defines direct costs as "those costs that can be identified specifically with a particular sponsored project, an instructional activity, or any other institutional activity, or that can be directly assigned to such activities relatively easily and with a high degree of accuracy." OMB Circ. No. A-21, sec. D.1. It defines indirect costs[4] as "costs that are incurred for common or joint objectives and, therefore, cannot be readily and specifically identified with a particular sponsored project, an instructional activity, or any other institutional activity." OMB Circ. No. A-21, sec. B.4.

For the period June 1992 through January 1996, the University charged administrative personnel costs of $425,952 to the Forest Service as direct costs. The Forest Service paid this amount, as well as an additional $42,595 for indirect costs, calculated at ten percent of the amount allowed as direct costs.

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[2]In Departmental regulations, the Secretary of Agriculture has delegated the authority to enter into such agreements to the Chief of the Forest Service. 7 C.F.R. § 2.60(a)(15).

[3]The Forest Service entered into this agreement on behalf of DOD, and DOD reimbursed the Forest Service for its payment to the University.

[4]In a recent amendment to the Circular, OMB adopted the term "Facilities and Administrative" (or "F&A") costs in place of "indirect" costs, and explained that it considers those terms to be synonymous. OMB Circ. No. A-21, sec. D.1.

In March 1997, the IG reported on an audit of the Forest Service's cost-reimbursable research agreements, and questioned the Forest Service's payment of these administrative personnel costs as direct costs. USDA OIG, Audit Report No. 08601-18-SF: Forest Service Research Cooperative and Cost Reimbursable Agreements (Mar. 1997). The IG reported that the agreement with the Center was only one of a number of cost-reimbursable agreements that the Forest Service had with the University. The IG found that the Forest Service had aggregated all of those agreements in order to calculate and pay the ten-percent allowance for indirect costs. Finding No. 6 of the IG's report stated that "[the Center's] staff of over 300 functions basically as a research center [within the University's Department of Range Science]. [The Center's] administrative expenses, therefore, would be departmental overhead, in accordance with OMB Circular A-21." Id. at 22. The IG concluded that the Center's administrative costs really were within the scope of, and part of, the University-wide allowance for indirect costs. Id. at 21.

In response to this finding, a Forest Service accountant interviewed the Center's staff and reviewed the Center's records. The Forest Service concluded that the University had adequately documented the Center's administrative personnel costs. The Forest Service maintains that the authority to allocate expenses between direct and indirect costs lies solely "within [the] agency's prerogative in managing cost-reimbursable agreements." The IG claims, however, that the Center did "not produce actual verifiable hours charged, but had cost certifications which did not have supportable accounting data." The IG asserts that the Center's records of its direct costs under this agreement consist solely of after-the-fact judgmental estimates based on the recollections of the Center's director, rather than contemporaneously prepared records of costs actually incurred.

OMB Circular A-21 permits agencies to treat administrative personnel costs as direct in certain circumstances. The Circular states that "[d]irect charging of these costs may be appropriate where a major project or activity explicitly budgets for administrative or clerical services and individuals involved can be specifically identified with the project or activity." OMB Circ. No. A-21, sec. F.6.b(2). In the context of the Forest Service's agreement with the University, the Circular, and the agreement which incorporated the Circular's definitions, would permit the Forest Service to reimburse the Center's administrative and clerical costs as direct costs so long as the University (1) had included those costs in its budget for the agreement, and (2) can establish that the Center incurred those costs specifically in performance of the agreement.

In an interpretive memorandum entitled "Direct Charging of Administrative and Clerical Salaries," July 13, 1994, OMB explained that in order to take advantage of the authority under Circular A-21 to charge the salaries of administrative and clerical support as direct costs, "the special circumstances requiring direct charging of the services would need to be justified to the

satisfaction of the awarding agency in the grant application or contract proposal." There is no indication in the record submitted to us by the Forest Service that (a) the University included in its budgets a separate item for the Center's administrative costs; (b) the Forest Service requested or the University volunteered any explanation of the "special circumstances" that would justify direct charging of the Center's administrative overhead; or (c) the Forest Service specifically considered or approved that treatment for the Center when it entered into or amended the cost-reimbursable agreement. In fact, it was not until September 17, 1996, after the IG completed his audit, that the University formally asked the Forest Service to approve direct cost status for the Center's administrative expenses. Nevertheless, the Forest Service maintains that it has approved this status for the Center.

Given the Forest Service's position, the question then becomes whether the Center can establish having incurred the costs claimed in performance of the agreement. In your May 1998 letter to us, the Forest Service asserts that a Forest Service accountant "verified documentation provided by the University in support of direct charging [Center] expenses which usually may be considered as indirect expenses." Despite our numerous requests for the documentation, the Forest Service has failed to supply it. According to the IG, the University tried to establish that the Center incurred these costs in performance of this agreement only through after-the-fact judgmental estimates, not by contemporaneously prepared records. We would not object to the Forest Service's use of after-the-fact judgmental estimates as a basis for reimbursement so long as the Forest Service can establish the reasonableness and reliability of those estimates. See, e.g., Cost Accounting Standard No. 501, 48 C.F.R. § 9905.501-20 ("for any significant amount of estimated cost, the contractor must be able to accumulate and report actual cost at a level which permits sufficient and meaningful comparison with its estimates"). In this case, however, the record does not permit us to resolve this factual issue.

We trust this information will be helpful to you. Should you have any questions concerning this matter, please contact Mr. Tom Armstrong or Mr. Neill Martin-Rolsky of my staff at 202-512-5644.

Sincerely,

Gary L. Kepplinger
Associate General Counsel

Digest

A certifying officer is advised that GAO is unable to advise whether the Forest Service should recover, as recommended by the Agriculture Inspector General, a payment to the Colorado State University for "indirect costs" treated as "direct costs" under a cost-reimbursable coperative research agreement (entered into under 7 U.S.C. § 3319a) because the Forest Service has failed to provide copies of the information upon which it relies to justify the payment.