

12816 *Lebanon Project*



DECISION

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

FILE: B-158792

DATE: February 12, 1980

MATTER OF: National Visitors Center

DIGEST:

GAO finds no basis to object to Department of Interior's proposed settlement of National Visitors Center project.

[Propriety of Proposed Settlement With Fee Limitations]

³ The National Park Service of the Department of the Interior (Interior) has asked us for an advance decision on the propriety of a proposed settlement with The George Hyman Construction Company (Hyman) for work performed (Project 2) on the National Visitors Center. The principal question is whether the fee, tentatively agreed upon between Interior and Hyman, complies with the limitation on fees under 41 U.S.C. § 254(b) (1976). *cn600297*

⁷⁸ The National Visitors Center construction project began as a privately financed arrangement between the owners of Union Station in Washington, D. C., and Hyman. It was originally contemplated that Interior would lease the facilities from the owners. See National Visitors Center Facilitation Act of 1968, 40 U.S.C. § 801 (1974). Subsequently, this simple arrangement evolved into a complex, multi-party financial and management arrangement with Interior becoming directly involved in construction of the facilities.

Our audit report, The Status and Problems in Constructing the National Visitors Center, April 4, 1977, PSAD-77-93, concluded that when Interior became a party to the cost-type construction contract between Hyman and the Union Station owners and used Federal funds to finance the construction, the Federal procurement rules were applicable to the extent Federal funds were expended. Interior's request for this decision was prompted in part by our audit report.

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The total proposed settlement is \$21,183,369 in costs and \$1,520,000 in fee. While Interior is not certain that the Federal Procurement Regulations (FPR) should apply to the project, Interior states in reaching the proposed settlement the procurement regulations were applied. Interior also states the proposed settlement is reasonable under a quantum meruit basis. Hyman has already been paid the total settlement, less approximately \$20,000.

Interior reports that its Office of Inspector General has audited the costs and, with exceptions no longer relevant, recommends acceptance of all costs. We have reviewed Interior's audit of the costs and, based on the information furnished, find no basis for objection. 3/39

With regard to fee, the proposed fee of \$1,520,000 is 7.18 percent of the proposed costs and would appear to be within the 10 percent limitation on fees required under 41 U.S.C. § 254(b) and FPR § 1-3.405.5. However, the question has been raised whether a straight mathematical computation of fee would be an appropriate method to calculate fee in this case.

The agreement between Interior and Hyman refers to two fees, a "contractor-agent fee" and a "subcontractor fee". The contractor-agent fee was paid to Hyman in its capacity as a general contractor. The subcontractor fee resulted from Hyman's (with Interior's approval) subcontracting some of the work to itself. Our review indicates that at various times throughout the project--because of the mix of Hyman's subcontracts--Hyman was accruing fees in excess of 10 percent, while the total proposed fee is less than 10 percent. (No fees paid to Hyman are included in the \$21 million of costs.) If Hyman's fees that from time to time were accruing at a rate in excess of 10 percent were to be disallowed, the proposed settlement fee would have to be reduced by \$63,089.

Interior and Hyman believe the proposed fee is proper and that Hyman's total fee should not be reduced. They indicate that while the fee may have exceeded 10 percent at times, it was less than 10 percent at other times and 7.18 percent for the entire project. They believe Hyman's work should be looked at as work on the entire project, rather than as a collection of separate contracts, particularly since this settlement follows a termination of the entire project for the convenience of the Government. Hyman states that it accepted smaller fees for some of the work because of higher fees in other parts of the work. Hyman's position is that it is unfair to disapprove only the high fees without regard to the low ones.

Both Hyman and Interior point out that the contractual arrangements for the National Visitor's Center are unique, having originated as an agreement between private parties, with Interior's involvement coming later as a result of unusual circumstances. They note that had this been a normal Government contract, Hyman would have been entitled a single fixed fee covering all its work whether it performed it itself or subcontracted it.

In any event, Interior and Hyman believe the procurement laws do not bar payment of the fee proposed because the "contractor-agent fee" represents not only profit, but also reimbursement of some costs that would be allowable under a typical Government cost-type contract.

The contract provides:

"The fee [contractor-agent] * * * shall cover, in addition to profit, but not be limited to, the following:

(a) Services of Contractor Agent's Officers and all home office personnel engaged in main office routine * * *.

(b) All costs, in connection with the operation of Contractor Agent's main or branch offices * * *."

Under these arrangements, they state, the contractor-agent fee was intended to reimburse Hyman for officers' salaries and related expenses which are normally allowable costs, but which were not reimbursed under the contract.

In this connection, Hyman has submitted a letter from its accounting firm indicating that Hyman's general and administrative expense for the period in question exceeded 3 percent of costs and thus approximately 10 times the \$63,089 that arguably might be disallowed. Hyman has also submitted affidavits of personnel who worked on the project, but whose salaries, while not charged to the project costs, total almost twice the amount at issue. On this basis, Interior and Hyman also believe the real fee is under 10 percent under any method of computing fee.

Lastly, the contracting agency states the total fee is reasonable because, in summary, (1) the work performed was extremely complex, (2) the amount of planning, scheduling and engineering performed was far more extensive than under the usual construction contract, (3) Hyman's performance was exceptional under extremely difficult circumstances, (4) Hyman's personnel were very responsive to Interior's requests for budget and design information and scheduling changes, and (5) Hyman incurred costs not reimbursed under the contract.

From the information furnished by Interior and Hyman, we find no basis to object to the proposed settlement. While there were improprieties in the arrangements between Interior and Hyman (see The Status and Problems in Constructing the National Visitors Center, supra), it is reasonable and consistent with the parties contemporaneous interpretation of their arrangements to view Hyman's work as participation in the entire project and to view the fee arrangement as involving one 7.18 percent fee, rather than to segment the work and calculate fees for each such segment.


DEPUTY Comptroller General
of the United States