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

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B-176498

October 2, 1973

AVIR Associates, Inc.
5406 Reisterstown Road
Baltimore, Maryland 21215

Attention: Mr. Ivan Stern
President

Gentlemen:

We refer to your letter of August 24, 1973, requesting reconsideration of decision B-176498, June 6, 1973, which denied your quantum meruit/quantum valebant claim in connection with Air Force contract F33615-69-C-1585.

The contract called for a research and development program and the conducting of certain experimental tests. Analysis of all data was to be performed, correlated with other theories, and a technical report was to be submitted. Your company successfully completed the report called for by the contract.

The contract was of the cost-plus-fixed-fee type, which provided for an estimated cost of $92,370 and a fixed fee of $3,434. The contract contained a "Limitation of Cost" clause. This provision required that, for increases in amounts payable under the contract, notice of such increases must be given to the contracting officer and he must authorize such increases. Neither party to the contract would have had any obligation to perform further once the originally agreed upon funds had been expended. Only an agreement for an increase in funding could have obligated the contractor to perform further.

During the course of performance of the contract, your company billed the Air Force for overhead at a provisional rate of 50 percent and G&A at 10 percent. Although questioned by the contracting officer as to the accuracy of these rates, at no time did your

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company indicate that the rates were in error. Only as a result of the final audit was it determined that the correct overhead rate was 90.8 percent and G&A 7.8 percent. Based upon these new figures, your company suddenly found itself in a substantial overrun position. It is the amount of this overrun, $12,529, that you seek to recover under the equitable theory of quantum meruit/quantum valebant.

In the June 6 decision, your claim was denied on the basis that a contractor cannot recover upon quantum meruit where there is an existing contract covering the performance. Hawkins v. United States, 96 U.S. 689 (1877), was cited in support of the proposition. You contend that the Hawkins case is not applicable to the immediate case. Assuming, but not admitting, that your contention is correct, we continue to be of the view that quantum meruit relief is not warranted.

The facts of record indicate that the authorized contracting officials of the Air Force Systems Command were not aware of Avir's overrun position until the contract had been fully performed. At no time did the Air Force request Avir to perform after the funds had expired. And further, when the Air Force was notified of the overrun, it specifically informed Avir that there would be no additional funding under the contract. In view thereof, no basis is presented for finding a contract "implied in fact" which would obligate the Government to provide compensation on a quantum meruit basis for the services furnished by Avir. Byrne Organization, Inc. v. United States, 287 F. 2d 582 (Ct. Cl. 1961).

Therefore, the claim is essentially quasi-contractual in nature, as Avir was acting as a volunteer after the contract funds had run out. The typical cases wherein relief has been granted in these circumstances have presented some element which would remove the payee from the fatal category of pure volunteer. See J.C. Pitman & Sons, Inc. v. United States, 317 F. 2d 366 (Ct. Cl. 1963), and cases cited therein. The record before us, however, is devoid of any such saving elements, and without such, payment may not be authorized. See B-164087, July 1, 1968.

You have contended that, if the overrun is not paid, the Government is not entitled to retain possession of the report. In that regard, we note that subsection (d) of the "Limitation of Cost" clause in the contract provides that in the event the

estimated cost is not increased, the Government and the contractor shall negotiate an equitable distribution of all property produced or purchased under the contract upon the share of costs incurred by each. Therefore, the matter of the retention of the report is for resolution between you and the contracting agency under the contract procedures rather than our Office.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States