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Mr. Caylor

DECISION



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

Proper Appropriation to be Charged Cost Overrun

FILE: B-195732

DATE: June 11, 1980

MATTER OF: Recording Obligations Under/EPA
cost-plus fixed-fee Contract

DIGEST:

1. Where Environmental Protection Agency initially elected to charge no-year "R & D" appropriation with expenditures for cost-plus-fixed-fee contract, continued use of the same appropriation to the exclusion of any other is required for payment of cost overrun arising from adjustment of overhead rates to cover actual indirect costs which exceeded the estimated provisional rates provided for in the contract.
2. As general rule, cost overruns and contract modifications within scope of original contract should be funded from appropriation available in year contract was made. Current appropriations may only be used if additional costs amount to new liability, not provided for in original contract. In instant case, original funds were "no-year" appropriations and are therefore available for both old and new obligations.

An Environmental Protection Agency (EPA) certifying officer has requested our decision on several questions concerning the proper appropriation against which to charge a \$474.03 cost overrun on that agency's cost-plus-fixed-fee contract with the Institute of Gas Technology for technical consulting services. For the reasons that follow, the cost overrun must be charged against the same appropriation from which the original contract was funded.

The basic contract, with an estimated cost and fixed fee totalling \$28,600, was executed on January 17, 1975, and was later modified through a series of supplemental agreements to extend the period of performance, adjust the number of man hours or level of effort required from the contractor, and to revise the negotiated overhead rates used to compute the indirect cost. Of

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these modifications, only Modification No. 4, March 23, 1979, revising the final overhead rate, required an adjustment in the estimated cost of the contract. That amendment provided as follows:

- "1. ARTICLE VI - ESTIMATED COST AND FIXED FEE - is hereby amended. The estimated cost of this contract is \$27,097.03, exclusive of the fixed fee of \$1,977. The total estimated cost and fixed fee is \$29,074.03.
- "2. ARTICLE VIII - INDIRECT COSTS - is amended to incorporate the following negotiated rates for the period shown below:

Type	Effective Period		Rate	Base
	From	To		
Final-O/H, Non-Hygas Center	9-1-75	5-17-76	122.88%	(a)

(a) Direct labor dollars plus related fringe benefits.

"3. Recapitulation:

	<u>Est. Cost</u>	<u>Fixed Fee</u>	<u>CPFF</u>	<u>Funded</u>
Original Contract				
Plus Mods 1 thru 3	\$26,623.00	\$1,977.00	\$28,600.00	\$28,600.00
Modification No. 4	474.03	-----	474.03	474.03
Total	<u>\$27,097.03</u>	<u>\$1,977.00</u>	<u>\$29,074.03</u>	<u>\$29,074.03</u>

The final overhead rates set out above were negotiated pursuant to Clause 29 of the contract's general provisions which provides in pertinent part:

"29. NEGOTIATED OVERHEAD RATES

"(a) Notwithstanding the provisions of the clause of this contract entitled 'Allowable Cost, Fixed Fee, and Payment' the allowable indirect costs under this contract shall be obtained by applying negotiated

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overhead rates to bases agreed upon by the parties, as specified below.

"(b) The Contractor, as soon as possible but not later than ninety (90) days after the expiration of his fiscal year, or such other period as may be specified in the contract, shall submit to the Cost Review and Policy Branch of the Contracts Management Division with a copy to the cognizant audit activity, a proposed final overhead rate or rates for that period based on the Contractor's actual cost experience during that period, together with supporting cost data. Negotiation of final overhead rates by the Contractor and the Cost Review and Policy Branch shall be undertaken as promptly as practicable after receipt of the Contractor's proposal. In the event the contractor has more than one contract with the Environmental Protection Agency, only one submittal shall be required with respect to each applicable rate.

"(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with paragraph (a)(i)(A) and (B) of the clause of this contract entitled 'Allowable Cost and Fixed Fee and Payment.'

"(d) The results of each negotiation shall be set forth in a modification to this contract, which shall specify (1) the agreed final rates, (2) the bases to which the rates apply, and (3) the periods for which the rates apply. The incorporation of the negotiated final overhead rates by contract modification shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in the contract."

* * * * *

The contract also contains a "Limitation of Cost" clause which provides that once funds equal to the estimated cost or ceiling are expended, the contractor is under no obligation to continue performance and EPA is under no obligation to fund the overrun until the amount allotted to the contract is increased. This clause operates

to give EPA an effective tool to prevent the overexpenditure of appropriated funds by establishing the estimated cost as the limit of the Government's obligation to make payment, while at the same time providing a method whereby the Government could increase the estimated cost and authorize the contractor to continue performance. Cf., Weinschel Engineering Co., Inc., 1962 BCA para. 3348 (1962).

The certifying officer states that in fiscal year 1975, the Mobile Air Pollution Control program, of which we assume this contract was a part, was funded with both Research and Development (R & D) and Abatement and Control (A & C) funds. He states that the original contract was funded in fiscal year 1975 from R & D appropriations. However, EPA proposes to charge the increase in the contract's price resulting from Modification No. 4 to the A & C appropriations available for obligation in fiscal years 1979 and 1980. The contracting officer notes that the program is currently funded with only "A & C" funds.

The certifying officer asks the following questions:

"1. Should an overrun be funded from the original appropriation, the current year appropriation, or can either appropriation be used?

"2. Is there a general rule that a certifying officer can use to determine the proper appropriation to be charged with cost overruns from prior year contracts?

"3. Does a contract modification which extends the period of performance and increases the cost without a change in the scope of work affect the source of funding?"

For fiscal year 1975, EPA received separate lump-sum appropriations under the headings "Research and Development" and "Abatement and Control". Each appropriation was:

"[T] o remain available until expended: Provided, That this appropriation shall be available only within the limits of amounts authorized by law for fiscal year 1975." Agriculture-Environmental and Consumer Protection Appropriation Act, 1975, Pub. L. No. 93-563, 88 Stat. 1835 (1974).

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For fiscal year 1979 EPA received separate lump-sum appropriations for "R & D" and "A & C", but the funds remain available for expenditure for only two years. Department of Housing and Urban Development-Independent Agencies Appropriation Act, 1979, Pub. L. No. 95-392, 92 Stat. 791, 796 (1978).

The increased cost of this contract must be paid from the original appropriation charged with the contract: the 1975 "R & D" appropriation. With respect to the continued use of "R & D" funds, rather than "A & C" funds, 31 U.S.C. § 628 (1976) restricts the use of appropriations to the particular purposes which they were intended by the Congress to serve. Neither the "R & D" nor the "A & C" appropriation expressly provides for the Mobile Air Pollution Control program. Neither is it apparent on the face of the contract whether the "A & C" appropriations can properly be charged with expenses of the contract. We will assume, however, that either of the two appropriations can be reasonably construed as available for Mobile Air Pollution Control program expenditures. We have held that in such cases, an administrative determination as to which appropriation will be charged may be accepted. However, continued use of the same appropriation to the exclusion of any other for the same purpose is required. 23 Comp. Gen. 827 (1944); 10 *id.* 440 (1931). Thus, even if we assume that either appropriation could have been reasonably construed as available for the original contract, EPA is bound by its election. Therefore, we do not believe the modification in overhead rates may properly be funded from an "A & C" appropriation.

The determination of whether an overrun should be charged against the original appropriation or the current appropriation is governed by the terms of the original contract. When the Government's liability to pay the increased cost arises from the terms of the original contract and is within that contract's scope, the appropriation initially used to fund the contract must be charged.

Increased costs may result from changes in specifications, delay, increases in overhead rates, and so forth. The Government's liability to pay for such increased costs is governed by standard clauses such as the "Changes" clause or, as in the present case, by the "Negotiated Overhead Rates" clause. Thus, where a contract's estimated cost increases because of the operation of such a provision contained in the original contract, the Government's liability to pay that increased cost arises at the time the contract is executed and payment must be made from the appropriation current when that original agreement is made. See, 55 *id.* 768 (1976); 50 *id.* 589 (1971); 23 *id.* 943 (1944). A current

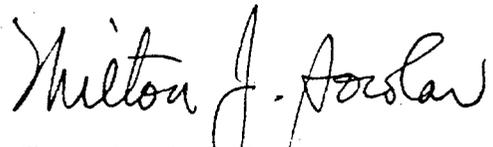
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or subsequent appropriation may be used only if the contract modification gives rise to a new liability involving an obligation incurred in the year that appropriation is available. In such cases, the original appropriation is not available. 57 id. 459 (1978); 56 id. 414 (1977); 37 id. 861 (1968).

Modification No. 4, which increased the estimated cost of the present EPA contract, was issued pursuant to Clause 29 "Negotiated Overhead Rates" of the original contract. That clause entitles the contractor to a price adjustment under certain specified conditions. Accordingly, no new liability is created when a modification is issued in accordance with its terms.

Neither, in our view, does a limitation of cost clause operate to create a new liability. The limitation of cost provision warns the contractor not to incur costs above a particular ceiling unless the ceiling is raised by allotting additional funds to the contract. Accordingly, under the EPA contract, the contractor was not entitled to payment for an overrun unless the increase was within the cost limitation or the ceiling was raised. Clause 29, on the other hand, bound the Government to suspend contract performance or to raise the ceiling to cover increased overhead rates so long as chargeable appropriations had not been exhausted and they remained available for obligation. It follows that where a change or modification does not fall outside the general scope of the contract, it will affect the source of funding only if it is not authorized by the contract terms and the amendment is not based on any antecedent liability.

In the present case, EPA's 1975 R & D funds, from which the original contract was funded, are "no year" appropriations and are available until expended. Accordingly, they may be charged with both old and new "R & D" obligations. That appropriation is properly chargeable with the increased contract price which arose from Modification No. 4.



For The Comptroller General
of the United States