DIGEST - Cont

Released

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UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548 B-152306 12/12/66

"But see" on 46 Comp. Gen. 556 and 46 Comp. Gen. 573 B-152306 12-19-66

OFFICE OF GENERAL COUNSEL

B-205793

January 18, 1982

Maurice C. Inman, Esq.
General Counsel
Immigration and Naturalization Service
United States Department of Justice
Washington, D.C. 20536

Dear Mr. Inman:

This responds to your December 9, 1981 letter about the apparent conflict between 41 U.S.C. § 254(b) (1976) and Federal Procurement Regulations (FPR) § 1-4.1005-1(b) (1964 ed.) regarding the six percent limitation on the fee in contracts for architectural or engineering (A-E) services. The statute limits the "fee inclusive of the contractor's costs" to six percent of the estimated cost of the project, exclusive of fee. The regulation states that the costs included in the fee limitation are only those costs related to the production and delivery of plans, designs, drawings and specifications. The regulation thus would allow the A-E firm to be reimbursed for the costs of travel, technical assistance, preliminary engineering tasks and construction supervision irrespective of the six percent limitation. Based on a review of the statute's legislative history and decisions of this Office, however, you have concluded that the costs included in the fee limitation are all those incurred by the A-E firm in performing the contract. You have forwarded the matter to our Office at the request of one of your contracting officers.

We believe the regulation properly describes the scope of the fee limitation, although we concluded otherwise in our decisions that you discuss in your letter.

As you recognize, we addressed the issue in our decision at 46 Comp. Gen. 573 (1966). We had been advised that the Government's established practice was to apply the fee limitation only to the preparation of designs and plans. We stated that in our opinion, however, the fee limitation in 41 U.S.C. § 254(b) included the total compensation payable

for all the A-E contract services, regardless of whether the cost of those services represents travel expenses, consultant fees, reproduction expenses, supervision of construction, preliminary engineering effort, or the like. One week earlier we had expressed a similar opinion with respect to the six percent fee limitation on contracts for A-E services imposed on the Department of Defense by 10 U.S.C. § 2306(d), which also traditionally had been applied only to design production and delivery. 46 Comp. Gen. 556, 565 (1966).

In both cases, however, we stated that we would take no action to enforce our opinion because we were in the process of conducting a Government-wide review of A-E contracting procedures in general, and expected to express our views on the fee limitation, as well as on related matters, in the resultant report to the Congress.

Our report was transmitted to the Congress in April of 1967, and is entitled "Government-Wide Review of the Administration of Certain Statutory and Regulatory Requirements Relating to Architect-Engineer Fees" (B-152306). We stated our view that the limitations in both 41 U.S.C. § 254(b) and 10 U.S.C. §2306(d) applied to all A-E services, and our concern with the conflicting interpretation by the contracting agencies. We also attached copies of our two 1966 decisions as appendices I and II.

The Government Activities Subcommittee of the House Committee on Government Operations reviewed our report and commented in a letter of November 16, 1967, signed by Subcommittee Chairman Jack Brooks. It was the Subcommittee's opinion that the six percent limitation clearly related only to the production of plans, drawings, and specifications. Regarding 10 U.S.C. § 2306(d), the Subcommittee asserted that by describing the fee limitation as applicable to "contracts for architectural or engineering services" the Congress simply intended to restate for the entire defense establishment, in simplified terms, the existing fee limitation that applies by three separate statutes to the Army, Navy and Air Force. Each of those statutes authorizes the Secretary of the military department to employ A-E firms by contract or otherwise to produce designs, plans, drawings and specifications specifically, and limits the fee "for any service under this section" to six percent of the estimated cost of the project to which the fee applies. See 10 U.S.C. §§ 4540, 7212, and 9540, respectively. The Subcommittee was of the opinion that the statutes define the services to which the fee limitation applies. It was also the

Subcommittee's opinion that the same general concept extended to the civilian agencies by the legislation at 41 U.S.C. § 254(b) which was enacted two years after its military counterpart, since the language used was the same. The Subcommittee therefore concluded that neither statute needed clarification as we had suggested.

Congress' consideration of the need for legislation in response to our 1967 report culminated in the 1972 enactment of the Brooks Act, Pub. L. No. 92-582. The statute, whose major proponent was, of course, Subcommittee Chairman Jack Brooks, does not address the scope of the six percent fee limitation. Nonetheless, with certain exceptions the Brooks Act was intended to codify the traditional method of selecting A-E firms for Government projects. See S. Rep. No. 92-1219, 92d Congress, 2d Sess. 1 (1972). As stated above, we recognized in our 1966 decisions that the six percent fee limitation traditionally had been applied only to the production and delivery of designs and plans. Moreover, as you note in your letter, the statute's legislative history does include a statement in an explanation of the legislation that the fee limitation, "when applied to the preparation of designs, plans, drawings and specifications as Congress intended, is a valuable safeguard to the public." S. Rep. No. 92-1219, supra at 2.

Oct 27, 1972
86 Stat. 1278

You suggest that the statement in the Senate report may be only "an open ended list of the types of services to which the fee limitation would apply." We think, however, that it would be more appropriate to consider the statement in conjunction with the Congress' failure to clarify the six percent limitation in response to our 1967 recommendation, and the Subcommittee's reaction to our 1967 report. Viewed in that light, we believe that the Congress formally affirmed the Subcommittee's belief that the fee limitation relates only to the production of plans, drawings and specifications. Therefore, we have not objected to the statement of the fee limitation's scope as stated in FPR § 1-4.1005-1(b). We also have not objected to the similar statements in Defense Acquisition Regulation § 18-306.2 and .3, which implement 10 U.S.C. § 2306(d).

Sincerely yours,

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel