U.S. Department of Labor

Board of Contract Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

Appeal of	:	
	:	
SER- JOBS FOR PROGRESS, INC.,	:	Case No. 83-BCA-8
Appellant	:	
	:	
under Contracts Nos:	:	
99-9-1-66-42-6	:	
99-8-166-33-13	:	
99-0-166-42-4	:	
99-9-166-33-33	:	
	:	

FILED AS PART
OF THE RECORD
18 MAR. 1985
(Date)
R. SOBERNHEIM (JB)
Chairman

Eduardo Pena Jr.
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Washington, DC
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for Respondent

DECISION OF THE BOARD

This is an appeal from the final decision of the contracting officer of the United States Department of Labor (hereinafter referred to as the "Department") which disallowed expenses of $68,442 made by appellant during the performance of the four captioned contracts.

A hearing was set for 25 September 1984 at which time counsel were not prepared to present the case. Accordingly, ways to bring the case to readiness for decision were discussed with counsel by the presiding Board Member. As a result the parties agreed to waive hearing, supplement the record and file briefs thereafter. The parties completed the foregoing and the case now stands ready for decision. In his brief (p. 4) the contracting officer withdrew the disallowance of a computer expense of $50 under Contract No. 99-9-166-33-33. This was the sole disallowance under that contract and it need not be further considered.

FINDINGS OF FACT

1. The Contracts

a. Contract No. 99-9-166-42-6

Contract No. 99-9-166-42-6 (hereinafter referred to by its last digits as Contract No. 42-6) was awarded to appellant by the United States, represented by a contracting officer of the Department, on 19 December 1978 (AF Tab C, pp. 399-497). The contract required appellant to provide training and assistance to its staff and local affiliates in the performance of its programs (AF Tab C, p. 403).

The contract provided for a budget which allowed for line-item flexibility of 20% (AF Tab C, p. 421).

The contract included the General Provisions for Cost-Reimbursement Type Supply Contracts of April 1974, which contain the standard payment and disputes clauses (GP4 and GP(12). The payment clause provided for reimbursement to appellant of the allocable and allowable costs of contract performance (GP4(a)) and permitted respondent prior to final payment to adjust the provisional invoices for over- or under-payment to the contractor (GP4(d)).

b. Contract No. 99-8-166-33-13

Contract No. 99-8-166-33-13 (hereinafter referred to by its last digits as Contract No. 33-13) was entered into on 25 April 1979. It required appellant to provide vocational and career exploration programs to in-school youth to enhance their transition from school to work (AF, p. 623).

Furthermore the contract also included the General Provisions for cost-reimbursement type supply contracts of April 1974, which contain the standard payment and dispute clauses. (GP4(a) and (d); GP(12). Adequate record keeping was also required (GP8).

c. Contract No. 99-0-166-42-4

Contract No. 99-0-166-42-4 (hereinafter referred to by its last digits as Contract No. 42-2) was entered into on 14 November 1979. It required appellant to provide training and technical assistance to various local affiliate programs in order to correct deficiencies found there (AF Tab C, p. 282).

The contract included the General Provisions for Cost-Reimbursement Type Supply Contracts of April 1974, previously discussed, which, also required that adequate records be kept for audit (GP8).

2. Performance, Audit and Final Decision

There is no complaint as to the services which appellant rendered under the contracts. After the end of appellant's performance the contracting officer caused a private firm of certified public accounts in San Diego, CA, to audit appellant's performance of its contracts for the period from 17 April 1978 through 30 September 1980. (AF Tab B, p. 26-277).

After a review of the audit report and appellant's comments and additional documentation, the contracting officer issued his Final Decision on 1 February 1983 (AF, p. 2). In it he disallowed $68,442 of the $146,452 in costs originally questioned by the auditors (AF Tab A, p. 15, Summary Table). After the hearing, $66,846.00 still remains in dispute (see appellant's Post-Hearing Br., p. 2).

3. The Disputes Disallowances

At this point we reach consideration of the merits of the disallowances on their facts. Broad legal arguments presented by appellant's counsel against the validity of the disallowances will be considered in the Conclusions of Law.

a. Line Item Overruns under Contract No. 42-6 (Finding No. 1)

During the period of contract performance, appellant incurred $59,420.00 in expenses which the contracting officer disallowed in the final decision. Specifically, the contracting officer disallowed $40,266 in travel expenses, $5,930 for Board travel, $12,455 for communications, and $769 for equipment and maintenance expenses (AF Tab A, pp. 11-12).

The basis for the disallowances was that the appellant exceeded the budgeted line item flexibility allowance of 20% in each category. The table below illustrates the overruns:

Budget Category	Budget Amount	20 Percent Flexibility	Total Allowable	Actual Expenses	Amount Overspent
Travel	$260,438	52,088	$312,526	$352,792	$40,266
Board Travel	54,512	10,902	65,414	71,344	5,930
Communi-cations[1]	133,036	26,607	159,643	172,098	12,455
Equipment	11,000	2,200	13,200	13,969	769
Total					$59,420

[1]"Communications' expenses consisted of $119,377 in telephone and telegraph expense and of $13,659 in postage (AF Tab C, p. 500).

(AF Tab A, pp. 101-102).

The budget table reflects a budget modification of this contract, which also extended the date of the contract performance through 14 November 1979 (see Modification No. 1, AF Tab C, pp. 499-500). This modification was executed approximately six weeks before the end of the extended contract period. It increased the contract budget from $2,366,000 to $2,602,600 (see AF Tab C, p. 412). Subsequently, appellant requested a modification which it submitted on 24 January 1980 (AF Tab B, pp. 225-226). This request was submitted by appellant after completion of the contract but did not request an amount sufficient to pay the cost overruns in this case. None of these requests were granted.

The facts also show that the line item overexpenditures were offset by underexpenditures in other line item categories. The exception is an amount of $63,00 in relocation costs which appellant has reimbursed to the Department (AF Tab B, p. 78). Thus, the appellant has not exceeded the total estimated cost of the contract.

b. Lack of Adequate Source Documentation under Contract No. 33-13 (Finding No. 2).

The contracting officer disallowed $6,282 for inadequate documentation of travel and communications expenses (AF Tab A, pp. 12-13). Specifically the contracting officer disallowed travel expenses of $2,380 from appellant's Houston office and $1,846.00 from appellant's Fort Worth office to Dallas and other cities. The contracting officer also disallowed $2,056 for communications expenses incurred by the appellant's Miami subcontractor.

As to the travel expenses appellant has conceded that the Fort Worth costs of $1,846 (Appt. P-Hrg Br. p. 19) and $650 of the Houston travel costs were properly disallowed (Appt Br., pp. 17-18). Of the remaining Houston travel expenses $225.00 (check No. 1235) are not detailed by the grant officer, so that appellant cannot respond thereto. An amount of $712 (check Nos. 1155 and 1184) was spent for travel to N.C.L.R. seminars without explanation as to the connection or position of the organization running the seminar. On the other hand, attendance at two seminars in March and April 1979 appears to be sufficiently documented as to purpose to be accepted as a valid contract performance cost.

In sum, of the disputed travel cost of $4,226 on the facts now shown $813 are allowable costs and should be allowed as such. As to the balance of $3,413 the disallowance must stand.

The "communications" expenses, consisting of teaching, testing, and business equipment costs were incurred by appellant's Miami subcontractor, as follows:

Interim teacher's compensation	$ 533.00
Stipend for members of test control group	$1,450.00
Dictating and Transcribing equipment	$ 68.00

	$2,056.00

(AF Tab B, p. 88; see answers to (Caves Interrogatories, Nos. 11, 14, 18).

The $1,450.00 disallowance was paid to non-enrollee students to be tested as a control group, as required by the Department to validate the demonstration project (id., No. 8).

The explanations given by the Director of appellant's Miami organization regarding the challenged subcontract expenditures establish their propriety under the Miami subcontract. In particular, he has justified the part-time salary of $533.00 to a teaching coordinator, subsequently hired as a full-time teacher, and the seemingly high and unusual expenditure for a "control group", a well-known testing device and here required by respondent as a means of validating the Department's project.

Accordingly, the costs are allowable and on the facts allowed.

c. Lack of Adequate Source Documentation under Contract No. 42-4 (Finding No. 3).

The contracting officer disallowed $1,093.75 because he did not receive what he considered adequate source documentation for the April 1980 travel expenses to appellant's national office.

As can be seen from the table below, he disallowed each of five items in whole or in part:

Dated	Check No.	Amount	Amount Disallowed
4/14/80	Various	$122.50	$122.50
4/16/80	1139	$538.73	$201.25
4/16/80	Various	$218.75	$218.75
4/29/80	1318	$457.05	$262.50
4/30/80	1351	$477.07	$288.75
		$1,814.10	$1,093.75

(AF Tab B, p. 107).

Check No. 1139 for $201.25 was issued to pay travel expenses to a meeting with the National staff in California for program orientation (Travel doc., Att'mt to Appt ltr, dtd 16 Jan. 1985, p. 5). This attendance appears to be a proper performance cost and to be sufficiently documented to be accepted as valid.

The expenses shown in check Nos. 1318 and 1351 involving $262.80 (id., p. 20) and $288.75 (id., p. 27), respectively, also appear to be adequately documented. However, the purpose of the travel appears to have served appellant's move from Los Angeles, CA, to Dallas, TX, by familiarizing a Dallas staff member with National Office activities, and did not serve contract performance. The travel paid for by check No. 1351 advanced contract performance by enabling staff members to attain an appropriate training meeting. Hence, the first cost item would on the facts not be allocable to the contract; the second would be both allocable and allowable.

Two cost items listed as "various" do not indicate what expenses were disallowed and the respondent was unable to provide sufficient information to identify substantively the challenged costs and to enable appellant to respond to the contention that they should be disallowed.

Accordingly, on the facts, costs totaling $831.25 would be allowable and costs of $262.50 would remain disallowed.

CONCLUSIONS OF LAW

I

Appellant argues that the final decision of the contracting officer is invalid since he did not issue it within 120 days of the audit report. However, the so-called 120-day rule (Comprehensive Employment and Training Act of 1973, as amended, sec. 106(b), 29 USC 816(b)) is not applicable to Government contracts. It applies only to Government grants under that Act (29 CFR 98.1(a)).

Thus neither the statute (29 USC 816(b)) nor the regulations (20 CFR 676.85(a), 676.88(e)) affect the outcome of this appeal.

II

Appellant argues that the failure of the contracting officer to respond to its budget modification requests relieves it of liability for the cost overruns. This argument is not tenable, since it is an established principle of contract law that silence or inaction does not constitute assent unless a response is required in particular circumstances (see 17 AM.JUR.2d, p. 385). In consequence, appellant's budget was not modified and appellant is bound by its existing budget and the limitations on expenditures which it imposes. This budget was proposed and requested by appellant. Hence, if insufficient in flexibility or amount, appellant must bear the consequences.

Appellant also maintains that in the past similar requests for modifications had been routinely approved. This argument does not justify an inference of, or constitute a substitute for, approval of the budget modifications sought by appellant. It has not produced a scintilla of evidence to support this contention factually.

Appellant further has argued that according to the CETA regulations at 29 CFR 97.371, it could unilaterally revise its budget line amounts. This argument fails since as we have seen, the CETA regulations are not applicable to the Government contracts in issue here.

Nor is it relevant that appellants total cost did not exceed the maximum estimated cost of the contract. Appellant was not only bound by the established total cost of the contract but also by the terms of its contract budget and the limits on line item expenditures. To hold otherwise would result in taking away funds allotted to the achievement of the contract purposes and using them on unauthorized purposes under the contracts to the detriment of those who should

benefitted from the contract performance. Accordingly, the disallowance of $59,420.00 under Contract No 42-6 should be upheld.

III

We find no objection to uphold or reverse the findings and determinations based on our Findings of Fact. No legal reason is apparent which limit the Board in taking such action. We point out, however, that, when the contracting officer is unable to identify the nature of disallowed costs he fails to satisfy respondent's evidentiary burden and we cannot uphold respondent's claim of recovery of costs under the Payment clause (GP4(d)). See OIC of America, Inc., Case No. 82-BCA-40 (1985). It follows that the contracting officer's final decision is upheld as to Finding No. 1 in the amount of $59,420; as to Finding No. 2 in the amount of $3,413; and as to Finding No. 3 in the amount of $262.50 for a total of $63,095.50. To that extent the appeal is denied. In all other respects it is upheld.

IV

Appellant has sought to recover attorneys' fees under the Equal Access for Justice Act (EAJA). The statute expired, however, on 30 September 1984 and its extension was vetoed on 8 November 1984. Hence, no such claim to attorneys' fees can no longer be sustained, for the remedy has ceased to exist. Moreover, even before EAJA expired it was established that Broads Contract Appeals were empowered under the Act to award attorneys' fees and expenses against the United States. Fidelity Construction Co. v. United States, 700 F2d 1379 (Ct.App.Fed.Cir., 1983). Accordingly, the request for attorneys' fees and expenses is denied.

V

The appeal is allowed and denied, as heretofore indicated.

Dated: Washington, DC
18 March 1985

RUDOLF SOBERNHEIM
Administrative Law Judge
Chairman, U.S. Department of Labor
Board of Contract Appeals

I concur:

SAMUEL B. GRONER
Administrative Law Judge
Member, U.S. Department of Labor
Board of Contract Appeals

I concur:

GLENN ROBERT LAWRENCE

Administrative Law Judge
Member, U.S. Department of Labor
Board of Contract Appeals