DECISION

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

14932

FILE: B-211213 DATE: April 21, 1983

MATTER OF: The Department of Labor--Request for Advance Decision

DIGEST:

1. When goods are furnished or services rendered to the Government, but the contract provision under which performance occurred is void, the Government is obliged to pay the reasonable value of the goods or services under an implied contract.

2. Procuring agency should attempt to recover payments that are in excess of the fair and reasonable value of services rendered under illegal contract provision. This can be done by setting off overpayments against any other amounts due the contractor, and may be done any time up to 10 years in appropriate circumstances.

The Department of Labor requests our opinion concerning three task order contracts for architect-engineering management services provided to the Job Corps. The contracts, all of which extend to September 30, 1983, contain provisions that the agency believes constitute a cost-plus-a-percentage-of-cost system of contracting.

We agree that the provisions violate the prohibition contained in 41 U.S.C. § 254(b) (1976) against this system of contracting, and we recommend that the Department of Labor attempt to recover any improper payments made under these contracts.

The contracts, with ceiling amounts, are as follows:

The Leo Daly Company	$9,568,858
FACE Associates, Inc.	$2,350,000
Environmental Management Consultants	$9,155,300

In each, the Government has agreed to pay the contractor certain per-day rates for certain classes of employees who will provide field and office support. These rates, the contracts state, include salaries and wages, overhead, G&A, and profit.

In addition, the Daly and FACE contracts contain a provision permitting the contractor to add a percentage of costs to certain expenses. They state:

> "A maximum of * * * 7.5 percent of basic costs shall be added by the contractor on all materials, subcontracts, travel, and other expense items to cover overhead and profit. A maximum markup of 5 percent will be added for all expenses that are not supervised and/or subcontracted for by the contractor."

The Environmental Management contract is identical except that it provides for a maximum markup of 10 percent of basic costs.

The Department of Labor states that it now is taking action to delete the provision from the three contracts, and is attempting to negotiate a settlement of costs incurred thus far on a quantum meruit basis, with recovery of unearned profits. The agency asks whether additional legal or administrative actions are necessary.

The usual guidelines applied by our Office in determining whether a contract constitutes a cost-plus-a-percentage-of-cost system of contracting are (1) whether payment is at a predetermined rate; (2) whether this rate is applied to actual performance costs; (3) whether the contractor's entitlement is uncertain at the time of contracting; and (4) whether it increases commensurately with increased performance costs. Department of State--Method of Payment Provisions, B-196556, August 5, 1980, 80-2 CPD 87. The provision quoted above appears to fall within these guidelines, and the presence of a ceiling on costs does not save it from violating the statute. See Federal Aviation Administration--Request for Advance Decision, 58 Comp. Gen. 654 (1979), 79-2 CPD 34.

In our opinion, that portion of the contract containing the markup provisions is therefore void. We believe, however, that the portion providing for payment of wages at specific daily rates, including overhead and profit, is still valid. In other words, the contract is divisible into a legal portion, supported by valid consideration, and an illegal portion invalid because the method of payment specified is contrary to statute. See Calmari and Perillo, Contracts, § 384, Divisibility of Illegal Bargains (1970); 6A Corbin on Contracts § 1528 (1962).

If the Job Corps needs architect and engineering management services between now and September 30, 1983, as it informally advises us it does, it must modify the contracts by deleting the illegal payment provisions and in each case negotiating a fixed fee that the contractor will be paid in addition to his direct costs for the expenses covered by the provision. The Department of Labor advises us that it is preparing a new procurement, and that the cost-plus-a-percentage-of-cost payment provisions will not be included in contracts for similar services in fiscal 1984.

As for payments already made, the courts and our Office have recognized that when goods are furnished or services rendered, but the contract under which performance occurred is void, the Government is obliged to pay the reasonable value of the goods or services on an implied contract for quantum meruit or quantum valebat. Federal Aviation Administration, supra; Marketing Consultants International Limited, 55 Comp. Gen. 554, 564 (1975), 75-2 CPD 384.

Therefore, if the contracting officer determines that the amounts already paid were fair and reasonable, and the Government has received a benefit, payments to date may be considered proper. Overpayments, if any, may be considered during negotiation of the fixed fee, as outlined above. If they cannot be recaptured in this manner, the Department of Labor should attempt to recover any payments that it considers in excess of the fair and reasonable value of services rendered by setting them off against any other amount owed to the contractors by the Government.

The statute of limitations, 28 U.S.C. § 2415 (1976), would prevent court action to recover overpayments after 6 years. However, legislation enacted late in the 97th Congress makes it clear that in appropriate circumstances, outstanding claims may be recovered by means of administrative setoff for up to 10 years. See 31 U.S.C. § 3716, as adopted by Pub. L. 97-452, 96 Stat. 2471 (1983). Nonetheless, the Department of Labor should seek recovery as expeditiously as possible.

for Harry R. Van Cleve
Comptroller General
of the United States