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B-197344, Aug 21, 1980

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DIGEST: BECAUSE THE GOVERNMENT RECEIVED THE BENEFIT AND HAS RATIFIED THE TRANSACTION, PAYMENT MAY BE MADE TO A CONTRACTOR FOR SUPPLEMENTAL RESEARCH SERVICES PROVIDED IN CONNECTION WITH GOVERNMENT PROJECT EVEN THOUGH WRITTEN CONTRACT AMENDMENTS WERE NEVER ISSUED. APPROPRIATION AVAILABLE AT THE TIME BASIC CONTRACT WAS EXECUTED, NOT CURRENT APPROPRIATION, IS CHARGEABLE.

CDM-WATER RESOURCES ENGINEERS:

A DEPARTMENT OF THE INTERIOR CERTIFYING OFFICER HAS REQUESTED OUR DECISION ON THE PROPRIETY OF CERTIFYING A VOUCHER FOR PAYMENT OF $15,000 TO CDM-WATER RESOURCES ENGINEERS (CONTRACTOR) FOR RESEARCH SERVICES PURSUANT TO AN AGREEMENT WITH INTERIOR'S OFFICE OF WATER RESEARCH AND TECHNOLOGY (INTERIOR).

THE CONTRACTOR'S INVOICE CITES A PURCHASE ORDER ISSUED BY INTERIOR ON NOVEMBER 23, 1979, CONTRACT NO. 14-34-001-1400, AS THE BASIS FOR THE $15,000 CHARGE. THE PURCHASE ORDER PROVIDED FOR DEVELOPMENT OF ECOLOGIC MODELS OF PUGET SOUND AND ITS ADJACENT WATERS AND WAS ISSUED BY INTERIOR PURSUANT TO AN OCTOBER 9, 1979, INTERAGENCY AGREEMENT WITH THE ENVIRONMENTAL PROTECTION AGENCY (EPA). UNDER THAT AGREEMENT EPA AGREED TO REIMBURSE INTERIOR FOR CONTRACT COSTS UP TO $15,000. ALTHOUGH INTERIOR MAY PAY THE CONTRACTOR FOR ITS SERVICES, WE DO NOT THINK THAT UNDER THESE CIRCUMSTANCES A TRANSFER OF FUNDS FROM EPA, AS PROVIDED FOR IN THE INTERAGENCY AGREEMENT, WILL SERVE ANY USEFUL PURPOSE.

THE NOVEMBER 23, 1979, PURCHASE ORDER SETS OUT, IN GENERAL TERMS, THE SCOPE OF WORK AND THE BUDGET FOR THE PROJECT AND STATES THAT THE WORK PROVIDED FOR WAS TO BE ACCOMPLISHED PRIOR TO DECEMBER 31, 1979. PURSUANT TO THE INTERAGENCY REIMBURSEMENT AGREEMENT BETWEEN INTERIOR AND EPA, EPA AGREED TO FUND $15,000 (100 PERCENT) OF THE PROJECT ON A REIMBURSABLE BASIS. INTERIOR WAS TO ADMINISTER THE CONTRACT AS A FOLLOW-ON TO ECOLOGICAL LAKE MODELING WORK DONE BY THE SAME CONTRACTOR UNDER A PRIOR INTERIOR CONTRACT. ALTHOUGH THE INTERAGENCY AGREEMENT WAS SIGNED BY EPA ON OCTOBER 9, 1979, (FISCAL YEAR 1980), THE APPROPRIATION CITATION REFERS TO A FISCAL YEAR 1978-1979 APPROPRIATION.

THE CERTIFYING OFFICER STATES THAT HIS UNCERTAINTY AS TO THE PROPRIETY OF PAYING THE CONTRACTOR'S INVOICE ARISES FROM THE FACT THAT INTERIOR AND EPA HAD CONCLUDED A SIMILAR INTERAGENCY AGREEMENT IN FEBRUARY OF 1979 FOR THE SAME AMOUNTS AND PURPOSES. THAT AGREEMENT HAD BEEN SUBMITTED TO HIM BY THE OFFICE OF WATER RESEARCH AND TECHNOLOGY WITH A REQUEST THAT HE PAY THE CONTRACTOR AND OBTAIN REIMBURSEMENT FROM EPA. THE INTERAGENCY AGREEMENT IN QUESTION, ACCORDING TO THE OFFICE OF WATER RESEARCH AND TECHNOLOGY, INVOLVED "AN ADD-ON TO OUR CONTRACT WITH WATER RESOURCES ENGINEERS (14-31- 0001-9056)." THE SO-CALLED

ADD-ON WAS IN FACT A NEW CONTRACT BETWEEN INTERIOR AND THE CONTRACTOR, EFFECTIVE SEPTEMBER 1, 1972. LIKE THE OCTOBER 1979 INTERAGENCY AGREEMENT, THE FEBRUARY 1979 AGREEMENT PROVIDED FOR THE TRANSFER OF $15,000 OF EPA FUNDS TO INTERIOR TO ENABLE INTERIOR TO PAY THE CONTRACTOR FOR SERVICES RENDERED EPA.

ALTHOUGH THE CERTIFYING OFFICER ESTABLISHED THE REIMBURSEMENT ACCOUNT AS REQUESTED, HE NOTIFIED INTERIOR'S ADMINISTRATIVE MANAGER THAT THE 1972 CONTRACT HAD BEEN FULLY PAID AND CLOSED OUT SEVERAL YEARS EARLIER AND THAT ONLY COSTS INCURRED ON OR AFTER OCTOBER 1, 1978, COULD BE CHARGED TO THE FISCAL YEAR APPROPRIATION CITED IN THE AGREEMENT. THIS CHAIN OF EVENTS, COMBINED WITH STATEMENTS IN INTERNAL INTERIOR CORRESPONDENCE, LED THE CERTIFYING OFFICER TO CONCLUDE THAT THE CURRENT CONTRACTOR'S INVOICE, DATED DECEMBER 19, 1979, WAS FOR WORK PERFORMED MANY YEARS AGO. ACCORDINGLY, HE SUBMITTED THE INVOICE TO THIS OFFICE FOR ADVANCE DECISION.

IN RESPONSE TO OUR INFORMAL INQUIRIES, THE CONTRACTOR AND INTERIOR CONTRACTING OFFICIALS CONFIRMED THAT THE SERVICES IN QUESTION WERE INDEED RENDERED SEVERAL YEARS AGO AND THAT THE PURCHASE ORDER AND INVOICE NOW PRESENTED FOR PAYMENT DO NOT COVER ANY NEW SERVICES. THE EPA TECHNICAL PROJECT OFFICER, HOWEVER, HAS INFORMALLY CONFIRMED THAT THE CONTRACTOR PERFORMED THE WORK CONTEMPLATED IN CONNECTION WITH THE MODIFICATION WITH THE FULL KNOWLEDGE AND ACQUIESCENCE OF EPA, THAT THE WORK WAS SATISFACTORY AND THAT EPA BENEFITED FROM IT.

WE NOTE ALSO FROM THE DOCUMENTS PROVIDED US THAT THE CONTRACTOR SUBMITTED AN INVOICE SHOWING THE $15,000 "EXTENSION AMOUNT" TO EPA'S CONTRACTING OFFICER ON DECEMBER 13, 1974. THE INVOICE WAS FOR "PROFESSIONAL ENGINEERING SERVICES IN CONNECTION WITH CONTRACT NO. 14 31-0001-9056, 'ECOLIGIC MODELING OF PUGET SOUND AND ADJACENT WATERS' DURING THE PERIOD SEPTEMBER 30, 1974 THROUGH OCTOBER 25, 1974," AND LISTED A TOTAL AMOUNT OF $10,546.82 FOR THE DESCRIBED WORK. THE INVOICE ALSO SHOWED A BALANCE DUE UNDER THE REFERENCED CONTRACT, AFTER ADDITION OF $15,000 AS THE "EXTENSION AMOUNT," OF $13,899.66. FINALLY, THE INVOICE IS MARKED "APPROVED FOR PAYMENT $9,446.48." THE APPROVAL IS DATED JANUARY 22, 1976 AND CONTAINS AN UNSIGNED SIGNATURE LINE UNDER WHICH IS TYPED "JAMES E. ROSS, ASS'T CONTRACTS AND GRANTS OFFICER." PRIOR TO THIS APPROVAL, EPA, BY LETTER DATED APRIL 23, 1975, HAD TRANSMITTED THE INVOICE TO INTERIOR. INTERIOR NOTIFIED THE CONTRACTOR BY LETTER DATED FEBRUARY 11, 1976, THAT THE FINAL TECHNICAL COMPLETION REPORT FOR THE CONTRACT HAD BEEN RECEIVED AND ACCEPTED. PAYMENT FOR THE ADDITIONAL WORK WAS NEVER MADE, HOWEVER, PRESUMABLY BECAUSE NO FORMAL AMENDMENT DOCUMENTING THE VALIDITY OF THE CONTRACTOR'S INVOICE WAS EVER PREPARED.

THE CONTRACTOR'S RIGHT TO PAYMENT IN SITUATIONS WHERE HE PROVIDES SERVICES WITHOUT PROPER WRITTEN CONTRACT AUTHORIZATION DEPENDS ON WHETHER THE GOVERNMENT HAS RECEIVED A BENEFIT, AND WHETHER THE ACTION HAS BEEN EXPRESSLY OR IMPLIEDLY RATIFIED BY AN AUTHORIZED CONTRACTING OFFICIAL OF THE GOVERNMENT. B-183289, DECEMBER 3, 1975; B-181038, MAY 16, 1974. WHERE THE GOVERNMENT HAS BOTH BENEFITED FROM AND RATIFIED THE CONTRACT, PAYMENT FOR PRIOR SERVICES MAY BE RENDERED EITHER UNDER THE UNAUTHORIZED CONTRACT ON A QUANTUM MERUIT BASIS, THAT IS FOR THE REASONABLE VALUE OF THE WORK PERFORMED (40 COMP.GEN. 447, 451 (1969)), OR PURSUANT TO THE LATER RATIFIED CONTRACT FOR THE CONTRACT PRICE (58 COMP.GEN. 789 (1979)).

HERE, WHERE THE CONTRACTOR RENDERED UNAUTHORIZED SERVICES WITH THE FULL KNOWLEDGE AN ACQUIESCENCE OF GOVERNMENT OFFICIALS WITH ACTUAL AUTHORITY TO DO SO WHO ACKNOWLEDGED THE BENEFIT AND ATTEMPTED TO OBTAIN PAYMENT FOR THE CONTRACTOR

BY ISSUING SUBSEQUENT PROCUREMENT DOCUMENTS, THERE HAS, IN OUR OPINION, BEEN IMPLICIT, IF NOT EXPRESS, RATIFICATION OF THE CONTRACT. ACCORDINGLY, THE CONTRACTOR IS ENTITLED TO PAYMENT FOR THE AMOUNT OF ADDITIONAL SERVICES ACTUALLY PERFORMED DURING THE PERIOD COVERED BY THE INFORMAL CONTRACT EXTENSION. (COMPARE 42 COMP.GEN. 179 (1962) WHERE WE AUTHORIZED PAYMENT OF PREVIOUSLY WITHHELD AMOUNTS TO CERTAIN GAS COMPANIES SINCE THE COMPANIES WERE NOT PARTIES TO THE FEDERAL GOVERNMENT'S CLAIM AGAINST A STATE FOR REIMBURSEMENT OF ERRONEOUS TAX PAYMENTS.) INDICATED ABOVE, THE COST OF ADDITIONAL WORK DOCUMENTED IN THE DECEMBER 13, 1974 INVOICE WAS $10,546.82, OF WHICH $9,446.48 WAS APPROVED FOR PAYMENT BY INTERIOR. IN THE ABSENCE OF ADDITIONAL DOCUMENTATION THAT MORE WORK WAS PERFORMED, PAYMENT SHOULD BE LIMITED TO THE PREVIOUSLY APPROVED AMOUNT.

THERE REMAINS THE QUESTION OF THE PROPER APPROPRIATION ACCOUNT TO BE CHARGED WITH THE PAYMENT. UNDER 31 U.S.C. SECS. 665(A) AND 712A (1976), THE ONLY PROPER APPROPRIATION TO CHARGE WOULD BE THE FISCAL YEAR APPROPRIATION CURRENT WHEN LIABILITY FOR THE PAYMENT AROSE. THUS, WHEN A CONTRACT PRICE IS ADJUSTED PURSUANT TO THE "CHANGES" CLAUSE IN THE CONTRACT AND THE CHANGES OR CONTRACT MODIFICATIONS DO NOT FALL OUTSIDE ITS GENERAL SCOPE, THE PRICE ADJUSTMENT MUST BE CHARGED AGAINST THE APPROPRIATION CURRENT AT THE TIME THE BASIC CONTRACT WAS EXECUTED. COMP.GEN. 414 (1977); 55 COMP.GEN. 768, 773-74 (1976).

HERE, IT APPEARS THAT THE CONTRACTOR PERFORMED THE SUPPLEMENTAL WORK IN ACCORDANCE WITH AN AGREEMENT ENTERED INTO IN ACCORDANCE WITH THE "CHANGES" CLAUSE OF THE 1972 CONTRACT WITH INTERIOR. THAT CLAUSE PROVIDES:

"4. CHANGES

THE CONTRACTING OFFICER MAY AT ANY TIME BY A WRITTEN ORDER AND WITHOUT NOTICE TO THE SURETIES, IF ANY, MAKE CHANGES WITHIN THE GENERAL SCOPE OF THIS CONTRACT, IN THE STATEMENT OF WORK AND SERVICES. IF ANY SUCH CHANGE CAUSES AN INCREASE OR DECREASE IN THE ESTIMATED COST OF, OR THE TIME REQUIRED FOR PERFORMANCE OF, THIS CONTRACT, OR OTHERWISE AFFECTS ANY OTHER PROVISION OF THIS CONTRACT, WHETHER CHANGED OR NOT CHANGED BY ANY SUCH ORDER, AN EQUITABLE ADJUSTMENT SHALL BE MADE (A) IN THE ESTIMATED COST OR THE TIME FOR COMPLETION OF THE CONTRACT, OR BOTH, (B) IN THE AMOUNT OF ANY FEE TO BE PAID THE CONTRACTOR, AND (C) IN SUCH OTHER PROVISIONS OF THE CONTRACT AS MAY BE AFFECTED, AND THE CONTRACT SHALL BE MODIFIED IN WRITING ACCORDINGLY."

ALTHOUGH THE CONTRACT WAS NEVER MODIFIED IN WRITING IT IS CLEAR THAT THE ADDITIONAL CHARGE AROSE FROM CHANGES TO THE 1972 CONTRACT. IN EPA'S NOVEMBER 20, 1974, LETTER TO INTERIOR APPROVING THE CHANGES, THE PROJECT OFFICER STATED:

"IN THE LETTER OF DONALD EVENSON TO YOU, DATED OCTOBER 4, 1974, WRE INCORPORATED REQUESTED A NUMBER OF CHANGES IN THE FINAL COMPLETION STATUS OF THE PUGET SOUND ECOLOGIC MODEL PROJECT (CONTRACT NO. 1431 0001-9056 (C- 2044-X)). I APPROVE OF THE CHANGES REQUESTED BY WRE."

FURTHER, THE DECEMBER 13, 1974, CONTRACTOR'S INVOICE APPROVED BY EPA INCLUDES THE $15,000 "EXTENSION AMOUNT" IN THE TOTAL COST-PLUS-FIXED FEE FOR THE REFERENCED CONTRACT.

IT ALSO APPEARS THAT THERE IS NO QUESTION AS TO WHETHER THE SUPPLEMENTAL WORK GIVING RISE TO THE INCREASED COST FELL WITHIN THE GENERAL SCOPE OF THE ORIGINAL CONTRACT. IN A LETTER DATED SEPTEMBER 17, 1974, THE CONTRACTOR NOTIFIED EPA THAT THE FUNDS PROVIDED FOR THE PROJECT BY THE ORIGINAL CONTRACT WERE INSUFFICIENT TO

ACHIEVE THE GOAL CONTEMPLATED. THE CONTRACTOR THEN SET OUT A REVISED PROPOSAL WHICH WOULD SUBSTANTIALLY MEET THE CONTRACT REQUIREMENTS IF EPA WOULD COMMIT AN ADDITIONAL $15,000 TO THE CONTRACT:

"THE PROPOSED PLAN OF FUNDING WILL AFFORD US THE OPPORTUNITY TO SIGNIFICANTLY INCREASE THE QUALITY OF OUR PRODUCT OVER THAT ATTAINABLE OTHERWISE (THAT IS, IF THE CONTRACT WERE TERMINATED WITHOUT COMMITTING ADDITIONAL FUNDS). ALTHOUGH THE CALIBRATIONS WILL STILL BE NECESSARILY REDUCED IN EFFORT COMPARED TO THE ORIGINAL CONTRACT, OTHER PRODUCTS WOULD BE NEARLY EQUAL IN SCOPE TO THAT ORIGINALLY INTENDED."

WE CONCLUDE, THEREFORE, THAT THE PAYMENT IN QUESTION IS FOR WORK WHICH FELL WITHIN THE GENERAL SCOPE OF THE CONTRACT AND DID NOT REPRESENT A NEW UNDERTAKING. ACCORDINGLY, SINCE THE GOVERNMENT'S LIABILITY TO MAKE AN EQUITABLE ADJUSTMENT IN THE CONTRACT PRICE MAY BE SAID TO BE FOUNDED IN THE "CHANGES" CLAUSE OF THE 1972 CONTRACT, AND SINCE INTERIOR, NOT EPA, IS CONTRACTUALLY BOUND TO PAY THE CONTRACTOR, PAYMENT SHOULD BE CHARGED AGAINST INTERIOR FUNDS AVAILABLE FOR PAYMENT OF VALID OBLIGATIONS OF THE TIME THE ORIGINAL CONTRACT WAS EXECUTED.

WHILE EPA APPARENTLY STILL IS WILLING TO REIMBURSE INTERIOR FOR THE ADDITIONAL AMOUNT, WE THINK THE LEGALITY OF TRANSFERRING EPA FUNDS TO INTERIOR IN THE CIRCUMSTANCES IS UNCERTAIN. SECTION 601 OF THE ECONOMY ACT OF 1932, AS AMENDED, 31 U.S.C. 686 (1976), IN EFFECT PROHIBITS AGENCIES OTHER THAN THOSE SPECIFICALLY SO AUTHORIZED FROM OBTAINING INTERAGENCY SERVICES TO BE PROCURED BY CONTRACT. EPA IS NOT ONE OF THE AUTHORIZED AGENCIES SO THE INTERAGENCY AGREEMENT HERE, IF IT IS AN ECONOMY ACT TRANSACTION, IS UNAUTHORIZED. THE ECONOMY ACT DOES NOT PROHIBIT EPA, IF IT HAS STATUTORY AUTHORITY TO DO SO, FROM ENTERING INTO JOINTLY BENEFICIAL PROJECTS WITH OTHER AGENCIES REQUIRING SERVICES TO BE PROCURED BY CONTRACT, BUT WE HAVE HELD THAT THE ACT WILL CONTINUE TO APPLY WITH RESPECT TO THE REQUISITION OR PROVISION OF INTERAGENCY SERVICES TO BE PROCURED BY CONTRACT WHERE SUCH SERVICES ARE OF BENEFIT ONLY TO EPA, THE REQUISITIONING AGENCY. 52 COMP.GEN. 128 (1972).

THE INTERAGENCY AGREEMENT WAS ENTERED INTO UNDER AUTHORITY OF THE FEDERAL WATER POLLUTION CONTROL ACT, AS AMENDED (33 U.S.C. SEC. 1151 ET SEQ. (1976)), ONE OF EPA'S BASIC AUTHORITIES, AND THE WATER RESOURCES RESEARCH ACT OF 1964, AS AMENDED (42 U.S.C. SEC. 196LB (1976)), ADMINISTERED BY INTERIOR. THE AGREEMENT STATES THAT THE PURPOSES OF BOTH ACTS WOULD BE SERVED BY THE PARTICIPATION OF INTERIOR AND EPA IN THE PROJECT. NOTWITHSTANDING THIS ASSERTION, IT APPEARS FROM THE RECORD THAT INTERIOR'S INTEREST IN THE PROJECT WAS LARGELY SATISFIED BY THE TIME ARRANGEMENTS WERE MADE FOR THE EPA FOLLOW-ON PORTION OF THE CONTRACT. INDEED, WE CAN FIND NO INDICATION THAT INTERIOR HAD A NEED FOR OR BENEFITED FROM THE ADDITIONAL WORK IT SUBSEQUENTLY CONTRACTED FOR IN EPA'S BEHALF. ACCORDINGLY, THE LEGALITY OF THE AGREEMENT TO TRANSFER FUNDS TO INTERIOR TO COVER THE COST OF THE CONTRACT IS SUBJECT TO QUESTION ON THIS RECORD.

IN ANY EVENT, HOWEVER, EVEN IF THE AGREEMENT WERE PROPER AND A TRANSFER OF EPA FUNDS TO INTERIOR WERE AUTHORIZED, ONLY PRIOR YEAR FUNDS OF EPA WOULD BE AVAILABLE FOR THE TRANSFER, FOR THE REASONS DISCUSSED ABOVE. SINCE SUCH AN ADJUSTMENT WOULD NOT AFFECT THE AVAILABILITY OF EITHER EPA OR INTERIOR FUNDS FOR PRESENT OBLIGATION, WE SEE NO PURPOSE TO BE SERVED BY SUCH A TRANSFER.