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B-206272.5, Mar 26, 1985

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B-206272.5, MAR 26, 1985

CLAIMS - BASIS FOR ALLOWANCE - LACKING DIGEST: CIVIC ACTION INSTITUTE INCURRED COSTS IN EXCESS OF AGREED FEDERAL SHARE OF COOPERATIVE AGREEMENTS WHICH STATED THAT COSTS OVER AGREED AMOUNT WOULD BE BORNE BY THE INSTITUTE. THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT HAS DECIDED NOT TO AMEND THE AGREEMENTS TO INCREASE THE FEDERAL SHARE OF THE COSTS. CLAIM IS DENIED SINCE GOVERNMENT HAS NO LEGAL LIABILITY FOR PAYMENT OF ADDITIONAL COSTS.

CIVIC ACTION INSTITUTE CLAIM FOR COST OVERRUNS RESULTING FROM COOPERATIVE AGREEMENTS WITH HUD:

THE PRESIDENT OF THE CIVIC ACTION INSTITUTE (CAI) BY LETTER DATED OCTOBER 10, 1984, SUBMITTED A CLAIM TO THIS OFFICE FOR $13,250 IN CONNECTION WITH COOPERATIVE AGREEMENTS BETWEEN CAI AND THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD). HE OUTLINES THE CLAIM AS FOLLOWS: "COOPERATIVE AMOUNT AGREEMENT REASON FOR CLAIM DUE CA-0010 EXCESS DRAWDOWN BECAUSE INDIRECT ($9,292)

COSTS WERE LESS THAN PROJECTED HA-6348 COST OVERRUN DUE TO HUD-FORCED 5,524

EXTENSION OF AGREEMENT HA-6515 COST OVERRUN SOLELY ATTRIBUTABLE 17,674

TO HIGHER INDIRECT COSTS THAN

BUDGETED

INTEREST EARNED ON EXCESS MONTHLY (656)

DRAWDOWN ON HA-6348 AND HA-6515 ----------

NET CLAIM $13,250"

FOR THE REASONS DISCUSSED BELOW, WE CONCLUDE THAT CAI IS NOT ENTITLED TO RECEIVE $13,250 BECAUSE OF ADDITIONAL COSTS UNDER COOPERATIVE AGREEMENTS HA-6348 AND HA-6515, WITH HUD.

UNDER COOPERATIVE AGREEMENT HA-6348, MAY 30, 1980, CAI WAS TO CONDUCT SIX WORKSHOPS ON NEIGHBORHOOD-BASED TECHNOLOGY, WITH FEDERAL COST REIMBURSEMENT OF $100,000. WORK ON THE COOPERATIVE AGREEMENT WAS COMPLETED ON MARCH 31, 1981. THE FINAL AUDITED COSTS WERE $105,524. CAI REQUESTED AN ADDITIONAL PAYMENT OF $5,524 BECAUSE THE OVERRUN WAS CAUSED BY AN "ARBITRARY CHANGE OF THE GROUND RULES" BY HUD PERSONNEL. ACCORDING TO CAI, HUD INSISTENCE ON RELOCATING THE FINAL WORKSHOP, NECESSITATING A NO-COST EXTENSION OF THE COOPERATIVE AGREEMENT,

RESULTED IN THE ADDITIONAL COSTS.

HUD ACCEPTED ALL COSTS UP TO THE AGREEMENT VALUE OF $100,000 BUT REFUSED TO PAY THE ADDITIONAL $5,524 BECAUSE IT IS NOT REQUIRED TO DO SO UNDER HA- 6348. IT HAS DECLINED TO EXERCISE AGENCY DISCRETION TO PROVIDE THE ADDITIONAL FUNDS.

AN ADDITIONAL $17,674 IS CLAIMED BY CAI UNDER COOPERATIVE AGREEMENT HA- 6515, OCTOBER 24, 1979. THE FINAL AWARD AMOUNT WAS FOR $520,578, BUT TOTAL COSTS WERE $538,252, $17,674 OVER THE AMOUNT STIPULATED IN THE AGREEMENT FOR WHICH WORK WAS COMPLETED ON OCTOBER 31, 1981. ACCORDING TO CAI, THE ADDITIONAL COSTS WERE CAUSED BY EXTRA OVERHEAD COSTS INCURRED BECAUSE THE INSTITUTE'S OPERATIONS WERE DECLINING AND THE OVERHEAD HAD TO BE SPREAD OVER A SHRINKING BASE.

BASED ON THE PROVISIONS OF THE COOPERATIVE AGREEMENT, HUD HAS DENIED PAYMENT FOR THE AMOUNT CLAIMED WHICH IS IN EXCESS OF THE AWARD AMOUNT. IN THE CASE OF HA-6348, ITS POSITION IS THAT THERE IS NO CONTRACTUAL LIABILITY FOR ADDITIONAL PAYMENT AND IT WILL NOT VOLUNTARILY MAKE THIS PAYMENT. ACCORDING TO CAI'S PRESIDENT, BASIC FAIRNESS SHOULD REQUIRE THE ACCEPTANCE OF BOTH CLAIMS.

THE TOTAL OF THE CLAIMS UNDER BOTH COOPERATIVE AGREEMENTS IS $23,198. HOWEVER, CAI CONCEDES IT OWES HUD $9,292 UNDER COOPERATIVE AGREEMENT CA 0010 FOR EXCESS DRAWDOWN OF FUNDS BECAUSE INDIRECT COSTS WERE LESS THAN PROJECTED, AND $656 OF INTEREST EARNED ON EXCESS MONTHLY DRAWDOWNS ON HA- 6348 AND HA-6515. ACCORDINGLY, CAI HAS REDUCED ITS TOTAL CLAIM TO $13,250.

COOPERATIVE AGREEMENT HA-6348 STATES THAT-- "THE CP (COOPERATING PARTY) SHALL BE REIMBURSED FOR COSTS INCURRED IN THE PERFORMANCE OF WORK HEREUNDER IN AN AMOUNT NOT-TO-EXCEED $100,000. IN THE EVENT THE CP INCURS COSTS IN EXCESS OF THIS AMOUNT, SUCH EXCESS SHALL BE BORNE BY THE CP." ARTICLE III. COOPERATIVE AGREEMENT HA-6515 CONTAINS A SIMILAR ARTICLE EXCEPT THAT THE COSTS ARE LIMITED TO $520,578.

GENERAL PROVISIONS APPLICABLE TO GRANTS AND COOPERATIVE AGREEMENTS ISSUED BY HUD WERE MADE PART OF THE CAI COOPERATIVE AGREEMENTS. PARAGRAPH 10B PROVIDES THAT--

"HUD SHALL NOT BE OBLIGATED TO REIMBURSE THE RECIPIENT FOR OUTLAYS (COSTS) IN EXCESS OF THE FEDERALLY FUNDED AMOUNT OF THE INSTRUMENT UNLESS AND UNTIL THE G/CAO (GRANT/COOPERATIVE AGREEMENT OFFICER) EXECUTES AN AMENDMENT TO THE INSTRUMENT WHICH INCREASES THE FEDERALLY FUNDED AMOUNT.

PARAGRAPH 11 (CLOSEOUT PROCEDURES) STATES THAT THE "G/CAO SHALL MAKE A SETTLEMENT FOR ANY UPWARD OR DOWNWARD ADJUSTMENTS TO THE FEDERAL SHARE OF COSTS AFTER THESE REPORTS (FINANCIAL AND OTHER DATA) ARE RECEIVED." PARAGRAPH 11B(4).

IN ACCORD WITH OUR USUAL PROCEDURE WE REQUESTED A REPORT ON THE COOPERATIVE AGREEMENTS FROM THE SECRETARY OF HUD. IN THE LETTER OF RESPONSE, THE ASSISTANT SECRETARY OF HUD INDICATES THAT AFTER CONSIDERING CAI'S CLAIMS, COSTS IN EXCESS OF THE AGREEMENT VALUES WERE DISALLOWED. EXPLANATION SHE STATES THE FOLLOWING:

"AS CAI STATES, PARAGRAPH 10B OF THE GENERAL PROVISIONS (GP) STIPULATES THAT "THE COOPERATIVE AGREEMENT DOES NOT OBLIGATE HUD TO REIMBURSE THE RECIPIENT FOR COSTS IN EXCESS OF THE APPROVED AMOUNT.' HOWEVER, HUD CONSIDERS RETROACTIVE REQUESTS ON THE MERITS OF THE INDIVIDUAL CASES. PARAGRAPH 11.4 OF THE GPS PERMITS DISCRETION BY THE COOPERATIVE AGREEMENT OFFICER (CAO), AND BASED UPON REVIEW AND ANALYSIS OF AVAILABLE INFORMATION, IT WAS THE DECISION OF THE CAO NOT

TO PROVIDE ADDITIONAL FUNDS."

ENCLOSED WITH THE REPORT WAS A LETTER DATED JULY 26, 1984, FROM THE DIRECTOR, OFFICE OF PROCUREMENT AND CONTRACTS OF HUD TO THE PRESIDENT OF CAI. IN IT THE DIRECTOR SUSTAINED THE JUNE 14, 1984, FINAL DECISION OF THE COOPERATIVE AGREEMENT OFFICER NOT TO FUND $5,524 UNDER HA-6348 AND $17,674 UNDER HA-6515 BECAUSE THE AMOUNTS WERE IN EXCESS OF THE APPROVED FEDERALLY-FUNDED AMOUNTS FOR THESE AGREEMENTS. ACCORDING TO THE DENIAL, SINCE THERE WERE NO AMENDMENTS INCREASING THE FEDERALLY FUNDED AMOUNTS, HUD WAS NOT OBLIGATED TO PAY THE ADDITIONAL COSTS.

HUD DECLINED TO AMEND THE TWO COOPERATIVE AGREEMENTS TO INCREASE CAI'S PAYMENTS. THE PRESIDENT OF CAI INDICATES THAT THE COST OVERRUN IN COOPERATIVE AGREEMENT HA-6348 WAS CAUSED BY A HUD OFFICIAL'S INSISTENCE THAT A WORKSHOP BE RELOCATED FROM MUNCIE, INDIANA, TO BOSTON, MASSACHUSETTS. ACCORDING TO THE PRESIDENT, THIS CAUSED CAI TO AGREE TO A NO-COST EXTENSION OF THE AGREEMENT. THE WORKSHOP WAS LATER HELD IN BUFFALO, NEW YORK, BUT THERE WERE ADDITIONAL COSTS OF $5,534. A COST OVERRUN OF $17,674 UNDER COOPERATIVE AGREEMENT HA-6515 RESULTED FROM INCREASED OVERHEAD EXPENSES ATTRIBUTED TO THIS AGREEMENT BECAUSE CAI'S OTHER OPERATIONS HAD DECREASED.

SUBSEQUENT TO THE RECEIPT OF HUD'S REPORT, CAI'S CLAIM WAS DISCUSSED WITH DEPARTMENT OFFICIALS. REGARDING HA-6348, WE WERE INFORMED THAT IF DOCUMENTATION COULD BE SUPPLIED TO SHOW THAT THE WORKSHOP RELOCATION WAS REQUIRED BY HUD AND RESULTED IN EXTRA COSTS, THAT CLAIM WOULD BE RECONSIDERED. AS TO HA-6515, WE WERE TOLD THAT AN AUDIT FOR THE COMPLETE FISCAL YEAR ENDING JUNE 30, 1982, WAS NOT DONE. HOWEVER, HUD DECLINED TO PERFORM A COMPLETE AUDIT SINCE IT WOULD BE COSTLY TO DO SO AND THE AGREEMENT MAXIMUM HAD BEEN PAID.

IT IS CLEAR THAT UNDER COOPERATIVE AGREEMENTS HA-6348, AND HA-6515, THAT CAI EXPENDED FUNDS IN EXCESS OF THE AGREED AMOUNTS IN EACH CASE AND DID NOT OBTAIN HUD APPROVAL OF THE EXPENDITURES PRIOR TO INCURRING THE ADDITIONAL COSTS. THE TERMS OF THE AGREEMENTS SPECIFIED THAT COSTS IN EXCESS OF THE AGREED AMOUNT WOULD BE BORNE BY CAI. IN THE ABSENCE OF AMENDMENT OF THE COOPERATIVE AGREEMENTS TO INCREASE THE FEDERAL ASSISTANCE AMOUNT, CAI HAS NO CONTRACTUAL RIGHT TO THE ADDITIONAL AMOUNTS WHICH IT HAS CLAIMED.

UPON REVIEW OF THIS CLAIM, WE DO NOT FIND THAT CAI HAS DEMONSTRATED A LEGAL OBLIGATION ON THE PART OF THE GOVERNMENT, SINCE THE AGREEMENTS CLEARLY ESTABLISH THE INSTITUTE'S RESPONSIBILITY FOR COSTS BEYOND THE GOVERNMENT'S AGREED SHARE, AND HUD, THE AGENCY CHARGED WITH ADMINISTERING THE AGREEMENTS, HAS DETERMINED NOT TO AMEND THE AGREEMENTS TO INCREASE THE FEDERAL SHARE OF THE COSTS. IN THIS CIRCUMSTANCE, SINCE OUR OFFICE IS AUTHORIZED TO SETTLE CLAIMS ONLY ON THE BASIS OF THE GOVERNMENT'S LEGAL LIABILITY, WE MUST DISALLOW CAI'S CLAIM. SEE 42 COMP.GEN. 124, 142 (1962) AND B-176615, SEPTEMBER 6, 1972.