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Appeal of :
:
SER- JOBS FOR PROGRESS, INC., :
Appellant :
:
Under Contract Nos. 48-9-00055 :
and :
48-1-00055 :
.....

Case No. 84-BCA-36

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

March 28, 1985

Eduardo Pena
Pena, Aponte and Ortiz-Dalio
Washington, DC
for Appellant

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Office of Associate Solicitor for
Employment & Training Legal Services
U.S. Department of Labor
Washington, DC
for Respondent

DECISION OF THE BOARD

This is an appeal from the Final Decision of the Contracting Officer of the U.S. Department of Labor (hereinafter referred to as the "Department") which disallowed certain costs claimed by appellant, SER-Jobs for Progress, Inc., as performance costs under the contract.

A hearing was held on December 21, 1984 at which both parties presented testimonial and documentary evidence. After the hearing, both parties submitted briefs.

1. The Contract

Cost-reimbursement-type Contacts Nos. 48-9-00055 and 48-1-00055 were awarded to appellant on 5 July 1979 and 1 October 1980, respectively. Under the contracts, appellant agreed to operate the Laredo Job Corps Center in Laredo, TX, from, as modified, 6 July 1979 through 30 April 1983, against reimbursement of its costs up to a maximum of \$600,000. The

contract contained the General Provisions for Cost-Reimbursement Type Contracts of April 1974 (AF Tab C).

2. Appellant's Performance, Audit and Final Decision

The record does not reflect that the quality of Appellant's training program was questioned. Appellant's contracts were audited on behalf of the Department by a private firm of certified public accountants located in California. The auditors questioned \$49,855 in expenditures based on several alleged violations of the contract and regulations (AF Tab B).

On 11 May 1984 the contracting officer issued his preliminary decision recommending in five findings that the questioned costs be disallowed. In response to the preliminary decision appellant met with members of the contracting officer's staff in an attempt informally to resolve the disallowance. Additional documentation for expenditures was submitted and reviewed.

On 13 July 1984 the contracting officer issued his final decision which disallowed expenditures totalling \$41,856 (AF Tab A 4(b), pp. 8-13).

The disallowed amounts in issue here were as follows:

<u>Alleged Violation</u>	<u>Amount</u>	<u>Finding No.</u>	<u>Contract No.</u>
Failure to obtain prior approval for travel over a radius of 100 miles from the Center (AF Tab C, pp. 155)	\$1,649 \$ 887	1	48-9-00055 48-1-00055
Salary and fringe benefits paid to a staff member who did not meet minimum qualifications for the position in which he was employed (20 CFR 684.120)	\$3,027	2	48-1-00055
Salaries and fringe benefits paid to nine staff members in excess of ten percent (10%) over their previous salaries without contracting officer's	\$8,093	3	48-1-00055

approval (AF, p. 139)

Monthly travel allowance of \$3,210 paid to five staff members without requiring or maintaining documentation to support the expenditures (AF, p. 120; 20 CFR 684.120(a))	4	48-1-00055
Supplies purchased without soliciting competitive bids	5	48-1-00055

FINDINGS OF FACT

Finding No. 1

The contracts required appellant to "obtain prior approval from the GAR (Government Authorized Representative) for travel over a radius of 100 miles from the Center" (AF, p. 155).

The contracting officer disallowed \$2,536 in staff travel expenditures, \$1,649 of which was disallowed under Contract No. 48-9-00055, and \$887 of which was disallowed under Contract No. 48-1-00055 because prior approval for the travel had not been obtained (AF, p. 60). Written GAR approval was not obtained prior to the travel (T7-10). Appellant submitted an affidavit of the GAR listing the travel which he had orally approved (Appt. Ex. 2).

Finding No. 2

The contract required appellant to develop a written staffing plan and recruit and hire only qualified staff. 20 CFR 684.120(B). The regulations further provided that the plan should be flexible to provide for the center's needs. The qualifications for the position of senior residential advisor at appellant's center was a bachelor's degree plus two years experience. Experience could be substituted for formal education on a year-for-year basis (Appt. Ex. 2). Appellant promoted an individual who had been employed at the center for almost two years to the senior residential advisor position (T16) even though he technically did not meet the job requirements (T16-17, 42).

Appellant promoted the technically unqualified employee because only he and one less qualified person had applied for the job (T13), and because the individual who was promoted had performed very well in his current position as residential advisor (T13, 16). Furthermore, the promoted employee met appellant's needs (T13-14) and the job requirements were unrealistically high (T16). Appellant well performed the duties of a senior residential advisor (T14).

Finding No. 3

The contracts under which appellant performed required that:

"Salaries paid for new hires or promotions of more than 10% of the incumbent's most recent salary base, . . . must be fully justified in writing to the Contracting Officer as follows:

10%-15%--Permissible to hire first/seek justification after the fact

Over 15%--Prior justification required/promote only after approval by the Contracting Officer." (AF Tab C, p. 139.)

The contracting officer disallowed under Contract No. 48-1-00055 costs totaling \$8,093 for salary and fringe benefits paid without his approval to nine staff members in excess of ten percent (10%) above their previous salaries (AF, p 10, 64). Seven of the nine employees received wages that exceeded their previous salaries by more than 15%. The calculation of the period of excess payments for the nine employees covered the period from 18 March 1981 to 30 April 1983 (AF, p. 87). Prior approval was not obtained before appellant increased the employees' salaries more than 10% above their current pay (T12). However, approval to promote employee H (AF, p. 87) was granted, effective on 8 March 1982 (Appt. Ex. 5; T 23-25); he had been promoted as of 21 December 1981.

Finding No. 4

Appellant was required under the contract (AF, p. 120), to maintain sufficient, auditable and otherwise adequate records to support expenditures of contract funds (AF, p. 120). Appellant paid five employees a monthly allowance for their daily travel expenses without requiring that they submit documentation supporting the expenditures which they incurred. (T39-40). To determine the monthly allowance appellant relied on estimates derived from a 30-day travel cost study (T52). Two employees testified to their monthly travel expenditures (T30-40, 171), but did not provide estimates of their actual expenses (ibid.).

The contracting officer disallowed \$3,210 in costs under Contract No. 48-1-00055 for lack of documentation supporting the travel allowances.

Finding No. 5

In his Final Decision the contracting officer disallowed \$24,990 in costs under Contract No. 48-1-00055 because appellant failed to obtain competitive bids prior to purchasing equipment, supplies and ordering electrical work (AF, p. 11).

a. Cash Registers and Dining Room Tables

Appellant was authorized to purchase 76 dining room tables, at a total cost of \$5,193 and six cash registers, at a cost of \$1,000 each, from government sources (AF, p 183, 360; Appt. Ex. 7, 21; T 95). Both the dining room tables and the cash registers were in fact purchased from the appropriate government source (Appt. Ex. 10, 20; T107-108). However, seven cash registers rather than the approved six were purchased; six cost \$850.25 each and one cost \$1,825.94 (Appt. Ex. 20, at pp. 1, 3, 8 and 9).

b. Other Purchases

The purchases of duffel bags (\$1,490), beverage mix (\$1,823), dining supplies (\$5,867), food items (\$1,407), stationery (\$746) and electrical services (\$1,425) were from non-government sources.

(1) Duffel Bags

In purchasing the duffel bags, appellant relied for the availability of the item on its previous experience in finding a vendor and determining the number of bids which it would be able to solicit. The duffel bags were not obtainable locally (T126, 167), and past experience of other job corps centers (T128) led appellant to conclude that solicitation of bids on the duffel bags would have been futile. The Department made no effort to demonstrate that the market situation was other than as appellant claimed.

(2) Beverage Mix and Stationery

Appellant produced a bid sheet to show that prior to purchasing the beverage mix for \$1,823, and stationery for \$746, three bids were obtained and that the lowest bid was subsequently accepted (Appt. Ex. 7, 13, T87).

(3) Food

Competitive bids were not solicited prior to purchasing food items in the amount of \$1,407 (T116-121).

The procedure was not feasible as the prices fluctuated daily or weekly (*ibid.*). Instead, sales-people visited appellant's center approximately twice a week and purchases were made based on the salespeoples' quoted prices (T 117).

(4) Dining Supplies

Appellant's agent testified that competitive bids were received over the telephone prior to the expenditure of \$5,867 for dining supplies (T113) and that the lowest bid was accepted (T113-714). No documentary evidence was produced.

(5) Electrical Supplies

The contracting officer aggregated five quotations issued by one vendor on the same day (AF, pp. 90, 92). The total amount of \$1,425 was disallowed based on appellant's failure to obtain competitive bids. Appellant submitted quotations from other electrical contractors obtained subsequent to the audit (Appt. Ex. 17, T135), and produced a letter, written almost three years after the services were provided, which stated that the services were requested on an emergency basis.

CONCLUSIONS OF LAW

I

Finding No. 1

The contract does not specifically require written approval for travel over a radius of 100 miles from appellant's job corps center (AF, p. 155). The affidavit of the GAR provides sufficient evidence to show that such oral approval was given. However, even if his affidavit is credited there exists an internal conflict in the record regarding destinations, travel dates and check numbers which prevents the allowance of the expenditure thus tainted by uncertainty. The checks involved are Nos. 493, 497, 501 and 2953, totaling \$881.00. To this extent the disallowance must, therefore, be upheld. The grant officer's decision is reversed in the amount of \$1,655.00.

Appellant's counsel attempted to use his reply brief to repute the uncertainty which hovers over the four cited items of travel. Not only is it basically inappropriate to seek to expand the record by submitting without permission of the court and advance notice to the opposing party new evidence that late but no authentication of the evidence by way of affidavits is offered. Instead, appellant merely offers arguments on the basis of unauthenticated documents. Such evidence should have been offered at the hearing where it could have been tested. Hence, notwithstanding appellant's argument, our decision stands.

Finding No. 2

The employee whom appellant promoted, although not technically qualified (T16, 17, 42) was sufficiently skilled to meet appellant's needs (T13-14) and appellant was aware of the high quality of the employee's work (*id.*). While the employee did not meet fully the experience requirements in lieu of an academic degree, the employee was in fact so fully qualified that his promotion in this particular case appears proper. Thus, the disallowance of \$3,027 should not in this instance be upheld.

Finding No. 3

Appellant concedes that required approval was not obtained to increasing the salaries of nine employees by more than 10% over their current salaries (T12). The Government's control

over contract expenditures was frustrated by appellant's conduct and there is no evidence for appellant's gratuitous contention that, if approval had been sought, it would have been granted. Appellant's asserted obligation that it had to increase employee "I's" (AF, p. 67) salary to the level to which it did in order to comply with the Equal Pay Act of 1963 also does not relieve it of its contractual obligation of seeking the contracting officer's approval. Appellant failed to show that an inappropriate time frame was applied in the calculation of any employee's excess salary payments except for employee H. Her excess salary was miscalculated from erroneous dates. The correct dates appear in appellant's Exhibit 4 (p. 5) and lead to the allowance of \$1,065. The remaining disallowance of \$7,028 must be affirmed.

Finding No. 4

Appellant's reliance on estimates derived from a study to determine five employee's monthly travel allowance was in error. The regulations clearly require that expenditures be documented, not estimated. 20 CFR 684.120(a). Further, neither the study nor its actual results were produced to determine its accuracy. Only two of the five employees testified to their travel expenditures (T30-40, 171) and their testimony was inconclusive as to their actual travel expenses compared to the allowance. Therefore, the contracting officer properly disallowed \$3,210 in costs on the basis of insufficient documentation of the amount of the travel allowances.

Finding No. 5

Of the \$12,232 spent by appellant for cash registers and dining room tables respondent now allows \$11,193. It leaves disallowed \$1,039 spent for the seventh cash register. However considered, appellant overspent on that cash register and the disallowance must stand.

Appellant's apprising itself of the local availability of duffel bags and researching similar purchases by other job corps centers (T126-129, 167) provided to all practical intents and purposes the desired completion. Appellant's purchase of the duffel bags satisfies any requirements for competitive procurement and the expenditure for the duffel bags (\$1,490) is allowed.

Appellant produced sufficient evidence to show that it satisfied all competitive procurement requirements in its purchase of the beverage mix (\$1,823) and the stationery (\$746). Three bids were obtained and the lowest bid was accepted. Thus, \$1,823, representing the cost of the beverage mix, and \$746, representing the cost of the stationery are allowed.

Appellant did not maintain on file the quotations received for the prices of the food items. Such a formal procedure was clearly not feasible (T116-121). Nonetheless, numerous quotations were received by appellant. It had an established method to study carefully the prices of food items prior to their purchases in order to obtain the best price. Thus, the expenditure of \$1,407 for the purchase of food items is proper. Young Women's Christian Association of Jersey City, 78-BCA-103 (1980).

Appellant produced insufficient evidence to show that \$5,867 expended for the purchase of dining supplies was the lowest bid price available. The bids were required to be maintained

on file. Appellant produced only testimony that an undisclosed number of bids were received (T113) and the lowest bid accepted (T113-114). This testimony is insufficient proof that the most favorable price was obtained. Thus, \$5,867, expended on dining supplies, is disallowed.

Appellant aggregated five invoices of a single vendor, totaling \$1,425 but did not preserve the bids received. A letter stating that bids were solicited, written almost three years after the electrical services were rendered (Appt. Ex. 16), is insufficient documentation to allow the expenditure. Thus, the disallowance of \$1,425 expended for electrical supplies is proper. Accordingly the contracting officer's disallowance under Finding No. 5 in the amount of \$24,990 is upheld in the amount of \$8,331.

II

On the Findings of Fact, the Conclusions of Law and the record as a whole, the appeal is denied in the amount of \$19,450 and is otherwise allowed.

Dated: Washington, DC
28 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