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Appeal of :  
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SET CORPORATION :  
Appellant :  
 :  
under Contracts Nos: :  
99-16-570-36-10 and -37 :  
99-6-570-92-21 :  
99-7-570-42-11 and -36-12 :  
23-12-76-03 :  
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Case No. 84-BCA-15

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

Joseph F. O'Donnell  
Vice-President  
Washington, DC  
for Appellant

Vincent C. Costantino  
Office of the Associate Solicitor  
for Employment and Training  
Legal Services  
U.S. Department of Labor  
Washington, DC  
for Respondent

DECISION OF THE BOARD

This is a companion appeal to the appeal of SET Corporation, docketed by the Board as Case No. 83-BCA-17 and decided on 25 March 1985. That appeal involved the settlement of three contracts entered into by the United States Department of Labor (hereinafter referred to as the "Department") and the Small Business Administration (hereinafter referred to as the "SBA") under which the SBA entered into subcontracts with appellant pursuant to Section 8(a) of the Small Business Act (15 USC 637(a)) and of a prime contract between appellant and respondent.

The instant appeal involves the settlement of six additional contracts between SBA and the Department and the subcontracts entered into between appellant and the SBA under the aforementioned section 8(a). The course of the appeal regarding the settlement of these six contracts requires some introductory explanation.

On 24 September 1982 respondent issued a final decision and determination respecting the allowability of direct costs incurred by appellant as section 8(a) subcontractor under prime

contracts between the SBA and the Department and as subcontractor of CETA prime sponsors, including the six contracts recited in the caption of the appeal (AF Tab A-6, A-7). This decision disallowed direct costs under the six contracts in the amount of \$44,378.19 (AF, p. 79). It did not adjudicate overhead costs addressed in the audit report on which the decision of 24 September 1982 was based (AF, p. 50). On 15 August 1983 respondent issued a revised final decision addressed to appellant in Miami, FL (AF Tab A-4, -5). The revised final decision also addressed the indirect costs included in the decision of 24 September 1982 (AF, p. 10). This decision reduced the disallowed costs to \$31,485.80 (*id.*, p. 43).

In between the direct cost adjudications of September 1982 and August 1983 appellant on 4 January 1983 had concluded the long-desired overhead rate negotiation agreement on final overhead rates for the years 1975-1978 during which the six contracts before the Board had been performed (Appt Compl., Ex. 24). About 10 weeks later, under date of 15 March 1983, appellant over the signature of its vice-president, filed its claims in writing with the contracting officer of the Department in Washington, DC (Appt Compl., Ex. 25). The transmittal letter showed appellant's address in Arlington, VA (*ibid.*; for contractual instruments changing appellant's address see 83-BCA-17, Resp.Ex. 1A (Contr. No. 99-2-570-92-20, Mod. No. 1, dtd 28 Sep. 1982, Mod. No. 2, dtd 29 Nov. 1982)).

However, in August 1983 new confusions arose. On 16 August 1983 appellant received an initial decision of the contracting officer, proposing to adjudicate the indirect cost claims under the six contracts (Appt Compl., Ex. 27). This decision was confusing because it failed to acknowledge appellant's claim submission of 15 March 1983. On the other hand, one month later a letter of the Department's Inspector General to appellant (*id.*, Ex. 29) first brought the revised decision of 15 August 1983 to its attention. Apparently, appellant had failed to receive it because due to an oversight it was sent to appellant's old Miami address. Appellant asked for clarification as to both the 12 and 15 August 1983 letters but failed to receive any explanation or clarification from the Department nor a copy of the revised final decision of 15 August 1983 (Appt Compl., 16-18).

Having waited for either payments of its claims or an explanation from the Department "as to the process in effect" appellant assumed that its claims were denied and on 7 February 1984 filed its notice of appeal from the denial of its claim. This appeal was docketed as Case No. 84-BCA-17.

The pre-history of the appeal has been set forth in more detailed fashion than is necessary in nearly all other cases coming before us. This was intended to clarify the rather complex sequence of this parties' dealing and to show clearly that appellant's notice of appeal of 7 February 1984 lays a proper basis for this proceeding. Respondent has not objected to the docketing of the appeal and on the contrary has issued a final closeout decision under date of 9 October 1984 which pulled all threads together and clearly restated the issues to be decided herein.

Appellant exercised its option under section 16 of the Contract Disputes Act of 1978 (P.L. 95-563) to elect to bring this appeal under the Act (Appt Ltr to Bd, dtd 1 Oct. 1984, par. 8)

and the parties are in agreement, as is the Board, that all requirements for the Act's application have been met (pre-Hg Conf. of 27 Sep. 1984, T7-8).

A hearing was held on 24 October 1984 at which testimonial and documentary evidence was given by and on behalf of the parties. Post-hearing documentary evidence was received by appellant and is admitted in evidence. Both parties filed post-hearing briefs, the last having been filed on 8 February 1985. The appeal now stands ready for decision.

## FINDINGS OF FACT

### 1. The Contracts

The six contracts on which the appeal is based were executed between October 1975 and July 1978 between the SBA as contractor and the Department representing the United States, respondent. Respecting each contract the SBA entered into a subcontract with appellant as authorized by section 8(a) of the Small Business Act (15 USC 637(a)). The relationship thus created is more fully discussed in the companion case of SET Corporation, 83-BCA-17. It suffices here to state that appellant essentially has assumed the position of the prime contractor, has become responsible for contract performance, was paid directly by the Department rather than SBA, and has become entitled to use the contract appeals process to resolve disputes with the Department.

All of the prime contracts were cost-plus-fixed fee contracts as were the consequent subcontracts between appellant and the prime contractor, the SBA. As relevant here they embodied the standard General Provisions for Cost Reimbursement Type Contracts, applicable to government contracts with other than educational institutions and included standard payment, negotiated overhead rates, limitation of cost and disputes clause.

The clauses in Contract No. 23-12-76-03<sup>1</sup> can be taken as a representative example (Appt Ex. 1). Under the payment clause (GP5)<sup>2</sup> appellant became entitled to recover allocable and allowable contract performance costs. If such costs threatened to exceed the total estimated contract cost appellant was required to give notice to respondent that it had reason to believe (i) that the total expenditures would exceed 75% of the total estimated cost within the next 60 days, or (ii) that performance costs would be greater than total estimated cost at any time (Limitation of Cost (LOC) clause, GP3).

Costs were payable in bi-weekly or less frequent periodic payments and payment invoices or vouchers subject to audit for over- or underpayments prior to final payment (GP5 (b) - (d)).

Since at the outset of contract performance appellant's indirect cost rate is not known appellant as contractor was allowed a provisional overhead or billing rate so as to recover

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<sup>1</sup> All contracts are generally referred to hereafter by their last two digits, e.g. "Contract No. -03".

<sup>2</sup> Or GP4 where the General Provisions lack a Limitation of Funds clause.

overhead during performance, pending postdetermination of an audited overhead rate and adjustment for over- or underpayment under the terms of the contract (GP34, renumbered GP34A; sometimes renumbered as GP30). In Contract No. -03 the provisional rate was set at 30% of direct cost (SP8(1)).

The individual contracts before the Board were awarded as follows:

a. Contract No. 99-6-570-36-10

Contract No. -10 was awarded on 20 October 1975 for a three-month period, extended briefly from 20 January 1976 to 10 February 1976. Total estimated cost started at \$29,045 and was raised by Modification No. 1 to \$34,414 (AF, Tab D, pp. 580 et seq.). The purpose of the contract was delivery of a standard model for technical manuals (id., pp. 583 et seq.).

b. Contract No. 99-6-570-36-37

Contract No. -37 was awarded in March 1976 for a period from 11 February to 7 July 1976 for the performance by appellant as the SBA subcontractor of a series of related design and technical writing tasks at an estimated total cost of \$48,629 (AF, Tab D, pp. 703 et seq.). Contract Modifications Nos. 1 to 3 extended the performance period to 21 October 1976 and increased the estimated cost to \$90,561 (id., pp. 743 et seq.).

Contract No. -37 contained a budget which was at least once superseded by a new budget. At the time of the last time extension the contract was amended to permit flexibility in budget line items so as to permit allocation of remaining funds to cover the cost of the final time extension.

c. Contract No. 23-12-76-03

Contract No. -03, already discussed as to its General Provisions was awarded in June 1976 for the period from 1 July 1976 to 30 June 1977. Appellant as the SBA subcontractor was to furnish to respondent "Analyses to Establish Criteria for Measuring Success of CETA Programs in Meeting EEO Responsibilities" at an estimated cost of \$65,834 (Appt Ex. 1). By Modifications Nos. 1 and 2 the performance period was extended to 31 October 1977.

d. Contract No. 99-6-570-92-21

Contract No. -21 was awarded in late July 1976 for the period from 1 August 1976 to 30 July 1977 and required the prime contractor and appellant as its subcontractor to furnish to respondent a complete program model for implementation of a veterans' training program using a voucher mechanism (AF Tab D, pp. 751 et seq.; p. 754). The estimated total cost of the contract was fixed at \$268,197 (id., p. 751) and provided for a three-member staff at \$40,000 and total direct costs of \$67,632, overhead costs of \$20,290 at 30% of direct costs and a fee of \$5,275. The balance of the estimated cost was to be applied to compensation for 125 disabled veterans each of whom was to receive \$1,400 on average (id., p. 767). Special Provision (SP) 10 allowed for 20% budget line item flexibility, provided that "no change shall be made in any of the wages,

salaries or fringe benefits or that the total estimated cost of the contract is not exceeded". Under SP2 all employees under the contract were required to devote full time to the operation of the contract and prohibited from working for any other contractor or employer. The contract was modified once in September 1976 correcting the effective date of the contract and reinstating GP45 which authorizes advance payments. No other formal modification of the contract is part of the record.

e. Contract No. 99-7-570-42-11

Contract No. -11 was awarded in November 1976 and required the SBA and appellant, its subcontractor, to develop a nationwide multimedia campaign, finding new-concepts and integrating existing materials, to encourage the employment of veterans (AF Tab D, pp. 792 *et seq.*). The contract performance was to run from 20 October 1976 to 20 January 1978 (*id.*, p. 803) and its total cost was estimated to amount to \$695,083 (*id.*, p. 789). By successive modifications the performance time was extended from 20 January to 31 July 1978 (*id.*, pp. 856, 859) and Modification No. 1 increased the total estimated contract cost by \$36,000 to \$731,083 (*id.*, p. 861). The increase served to finance television and radio spots using the slogan "BET ON A VET" (AF Tab D, pp. 861-865).

f. Contract No. 99-7-570-36-12

Contract No. -12 was awarded in April 1977 and required the SBA and appellant, its subcontractor, to provide research, technical writing skills and art work to develop a technical assistance guide and other guidance materials and brochures for veteran counsellors (AF Tab D, pp. 866, 869-871). The contract ran from 11 March to 30 June 1977, *i.e.* work had commenced prior to execution of the formal contract (AF Tab D, p. 872). Total estimated cost was fixed at \$39,993, including fee (*id.*, pp. 866, 873). Overhead was to be paid at a provisional rate of 35% of direct cost (*id.*, p. 877). Other documents in the record show that the estimated total contract cost was \$39,993 (see final closeout invoice, AF Tab F, pp. 1302-3; C.O. Final Dec. (Closeout), dtd 9 Oct 1984 (Summ. Table), and Resp.Br., Ex. 1). Whatever document was omitted or error not corrected the Board will accept the figure given in the cited final decision. The discrepancy, whatever its cause, has no effect on the outcome of the appeal.

2. Performance, Audit and Final Decision

The Board's decision in Case No. 83-BCA-17 adequately covers appellant's contract history and it need not be repeated here; it suffices to refer to the Board's decision in that appeal. Notwithstanding the difficulties which arose in appellant's relations with the Department its substantive performance of the six contracts appears to have been completed to the Department's satisfaction.

After completion of performance of the last of the six contracts respondent caused extensive audits of the direct and indirect costs, incurred by appellant under the six contracts, to be made. Partly, these audits served as a basis for indirect overhead rate negotiations and agreements which were completed in January 1983, partly as a basis for direct cost determinations.

The result of the latter was the contracting officer's decision of 15 August 1983 which disallowed costs subject to debt collection of \$36,989.26 (AF Tab A-5, p. 43) of which \$1,638.04 related to subcontracts of appellant with CETA prime sponsors in Los Angeles, CA, and Philadelphia, PA, and \$624.00 to a prime contract not included in this appeal. At the hearing, however, agreement was reached that the 15 August 1983 decision no longer affected the outcome of the appeal. For at the hearing it became clear that the subcontract disallowances involved disputes between appellant as a subcontractor of CETA grantees which plainly are not justiciable before this Board (T13-19).<sup>3</sup> The \$624.00 disallowance likewise arose under a contract which was part of the scope of the companion proceeding (see Case No. 83-BCA-17).

The cost disallowance in the revised final decision of 15 August 1983 decision which related to the six contracts here in issue have been cleared up by appellant and the 15 August 1983 decision, therefore, no longer affects the instant appeal (T24-27). Its outcome is dependent on the validity of the final decision on closeout of 9 October 1984 which sets forth the final position of respondent. Annexed to the contracting officer's decision is a summary table, also reproduced by respondent as exhibit 1 to its brief, which shows the following disallowances:

Contract No.	Amount
-10	\$ 1,239
-37	668
-21	1,696
-12	0
-11	45,270
-03	170

Respondent concedes in its tabulation that it owes to appellant under the six contracts a total of \$25,963.54. The table calls for the following comments:

a. The disallowances under Contracts Nos. -10 and -37 are undisputed as to amount (T5). They are indirect cost overruns and were disallowed because of appellant's failure to give the cost overrun or "75%" notices required by the LOC clause of the two contracts.

b. The disallowance under Contract No. -21 represents an allegedly prohibited overrun of labor costs but not an overrun of total estimated contract cost. Appellant has explained that the amount in issue under Contract No. -21 represents compensation paid to an additional short-term employee, an employment counselor hired toward the end of the contract term to enable appellant to complete the contract on time (T6-7). Appellant's witness further testified that she had cleared the employment of this person with respondent's representatives and that a modification of the contract was agreed upon (T6, 8). Together with appellant's reply appellant produced the unsworn statements of its witness and of the former project director that a contract modification, allowing the cost, was executed. However, nobody has produced a copy of the instrument and the testimonial assertion do not suffice to establish its existence. Hence, we find that no such modification was executed.

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<sup>3</sup> They may be justiciable in the proper state court or possibly before the administrative law judges of the Department under the CETA regulations.

Nor is that likely. All contracts which have such a clause, have the same flexibility clause as the instant contract. Only under Contract No. -37 was that clause modified and in that instance for the reason that remaining funds needed to be more freely spent to finance a two-week contract extension. The situation under Contract No. -21 does not involve this kind of problem. For consideration of the legal aspects of the matter see the Conclusions of Law, infra.

d. Under Contract No. -12 appellant was overpaid to the extent of \$1,151. Appellant concedes that this amount should be deducted from any amount due appellant as the contracting officer's table shows (T8).

e. Under Contract No. -11 the contracting officer has disallowed the amount of \$45,270 by which the indirect costs, otherwise allowable under the contract, exceed the total estimated cost thereof. The amount of the costs is undisputed as is the fact that appellant did not give either of the cost overrun notices required by the contract's LOC clause. Respondent asserts that lack of the notice allows the contracting officer to disallow the claim while appellant alleges that its failure to give the LOC clause notice is excused because it could not predict the final indirect cost rates, having no experience in overhead rate determinations of, or such negotiations with, the Department.

This is the same argument which appellant asserted against the indirect cost overrun disallowed under Contract No. 99-2-570-20 and which we found lacking in Case No. 83-BCA-17. Here too, as in the companion case, appellant rests its argument on ignorance of, or legitimate lack of reason to believe in, a total cost overrun on lack of a final overhead rate.

Here, appellant's final closeout invoice shows that as of 31 July 1978 it had incurred cumulatively overhead costs of \$160,542 or \$67,941 more than its overhead budget allowed (AF, Tab F, pp. 1310-11). While this figure appears in the column marked "Cost for Report Month" the preceding column shows the costs as cumulative. Therefore, we cannot consider that indirect cost overrun is the product of the last month of contract performance.

We found in Case No. 83-BCA-17 that appellant kept records of such quality that it knew the state of its expenditures even if not its overhead rate and, hence was able to give either of the LOC clause notices. In the instant case the final overhead rates tended to be lower than the provisional rates but this fact does not affect appellant's ability to give a LOC clause notice, when required.

f. Under Contract No. -03 appellant incurred an indirect cost overrun of \$170.00 which the contracting officer disallowed for lack of the required LOC clause notice. Appellant denies that it was able to give such notice.

The copy of Contract No. -03 which is part of the record (Appt Ex. 1) shows total estimated cost of \$65,834 while the contracting officer's tabulation lists it as \$65,822. Hence, \$12 were not paid to appellant (see Resp.Br., Ex. 1, last line) reducing the disallowed amount to \$158 and increasing the amount due appellant (ibid., penultimate col.) to \$25,975.54.

## CONCLUSIONS OF LAW

### I

Appellant, citing WRB Corp. v. United States 183 Ct.Cl. 409 (1968) and Luria Brothers, Inc. v. same, 177 Ct.Cl. 676, 369 F2d 701 (1966), argues that the rule treating interference by one contracting party with contract performance by the other extends to the "relationship of the government and the natural course of the contractor's business" (Appt Br., p. 10). The cited cases and others of the same kind clearly support the application of the rule to government contracts. The rule applies to the interference of the other contracting party with the performance of a particular contract, giving the injured contracting party a right both against its contract partner and third parties which induced the latter to breach the contract. See 45 AM JUR 2d 314.

But this rule cannot be extended as appellant proposes. General interference with appellant's right to conduct its business or to obtain new business alleges acts of a tortious character.

The cancellation of a subcontract between the County of Los Angeles and appellant under a CETA grant of the Department at most involves a charge of the Department's interference in obtaining the termination of a specific contract. Such a charge neither supports appellant's extended theory of contract interference nor does it fall within the Board's jurisdiction.

If the facts give appellant any cause of action based on interference with its non-federal government contracts or its business it must be pursued in another forum.

### II

The parties have agreed that the Los Angeles and Philadelphia subcontracts and any rights of appellant in respect thereof are not before the Board. Accordingly, they need not be dealt with in this decision.

### III

Appellant's indirect cost overrun claims are governed by our decision in appeal No. 83-BCA-17. We have there fully considered appellant's factual and legal arguments and are not persuaded by our reiteration in this appeal to change our views. Hence, based on our Findings of Fact and our cited decision in appellant's companion appeal and the grounds therefor set forth therein, we deny the appeal in respect of the contracting officer's disallowance of appellant's indirect cost overrun claim under Contract No. -11.

We reach a different result as to the indirect cost overruns incurred by appellant under Contracts Nos. -10, -37 and -03. Their amounts are in each instance so small that appellant cannot be said to have had reason to believe that it would incur a total cost overrun or would reach 75% of total estimated cost within the next 60 days. Hence, since disallowance was solely on the basis of failure to give LOC clause notice we are of the view that the contracting officer should have funded the cost overruns under Contracts No. -10 in the agreed amount of \$1,239,

No. -37 in the amount of \$668 and No. -03 in the amount of \$158. The total allowed amounts to \$2,065.

#### IV

As indicated in the Findings of Fact appellant under Contract No. -21 spent \$1,696 in compensation of an employment counsellor hired near the end of contract performance to help in completing it. Appellant asserts, and respondent denies, that this cost is allowable under the budget flexibility clause.

The contract budget lists three staff employees with salaries of \$10,000, \$14,000 and \$16,000 together with a fringe benefit allowance of 22.5% of total direct labor of \$40,000 (AF, p. 768).

The budget flexibility clause in SP10 (AF, p. 761) allows a budget line item flexibility of 20% provided total estimated contract cost is not exceeded as is the case here (see Resp.Br., Ex. 1). Hence, the \$8,000 by which the line item "Staff" and the \$1,800 by which the line item "Fringe Benefits" could be increased were sufficient to provide funds for the disputed expenditure for salary and other compensation.

What remains in issue is the interpretation of the proviso "that no increase shall be made in any of the wages, salaries and fringe benefits." On its face appellant's hiring of the additional short-term employee did not increase any of the items of compensation listed in the contract budget. Appellant did not spend money on raises for the three staff members identified by title in the budget nor increase the fringe benefit costs expended for them. Hence, the terms of the proviso which formed part of SP10 were not violated. The hiring of one or more additional employees for what would likely be short-term employment was permissible under SP10 within the bounds of the 20% limitation. Accordingly, the budget limitations were not transgressed by appellant and the amount of \$1,696 is payable to appellant under Contract No. -21.

Respondent's counsel refers us (Resp.Br., p. 18) in support of his position to the contracting officer's decision of 6 November 1984, regarding Contract No. 99-2-570-92-20 which was part of the record in the companion appeal No. 83-BCA-17. There the contracting officer disallowed excess fringe benefit costs under SP5<sup>4</sup> under a budget which allowed \$137,520 for staff salaries without specification of positions and \$26,262 for fringe benefits for staff (Appeal No. 83-BCA-17, Resp.Ex. 1A, p. 53). To such a budget the interpretation given here to SP10 (or potentially to its counterpart in Contract No. 99-2-570-92-20) would not be applicable. A quicker answer would, of course, be that appellant's Appeal No. 83-BCA-17 did not raise the issue here raised and the contracting officer's decision, although correct, creates no precedent. Respondent's argument is, therefore, not applicable here.

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<sup>4</sup> Not "three" as the decision states.

V

In summary, on the basis of the Findings of Fact and Conclusions of Law and the record as a whole the appeal is allowed in the amount of \$29,736, together with interest at the statutory rate (41 USC 611) from 15 March 1983 to date of payment. In all other respects the appeal is denied.

Dated: Washington, D.C  
26 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