

U.S. Department of Labor

Board of Contract Appeals
1111 20th Street, N.W.
Washington, D.C. 20036



DATED: November 10, 1987

CASE NO.: 1985-BCA-25

Appeal of:

COALITION FOR UNITED COMMUNITY
ACTION - ORTC, INC.

under Contracts Nos. 99-9-1985-42-5
and 99-0-1985-92-12

Rufus Cook, Esq.
For the Appellant

Darryl A. Stewart, Esq.
For the Respondent

Before: Samuel Groner, Vice Chairman, Glenn Lawrence, and
Stuart A. Levin, Members of the Board.

Stuart A. Levin,
Member of the Board:

DECISION OF THE BOARD

This is a timely appeal from a final decision of a Contracting Officer of the United States Department of Labor, (hereafter the Department) issued January 15, 1985, which disallowed and demanded reimbursements totaling \$61,516 under two government contracts executed in furtherance of the Comprehensive Employment and Training Act (hereafter CETA), 29 U.S.C. 801 et seq.

A hearing was held in Washington, D.C. on December 11, 1986, at which both parties presented documentary evidence and argument, and Appellant presented the testimony of three witnesses: Dorothy Dallas Green, the accountant of Appellant contractor (Tr. 25); Carl W. Latimer, Appellant's President and Executive Director (Tr. 172); and Harold L. Algar, Appellant's financial management consultant (Tr. 219).

Post-hearing briefs from both parties were filed on May 30, 1987.

Findings and Conclusions

Appellant is a nonprofit Illinois corporation which entered into two cost reimbursement type contracts with the Department (AF Tab C).¹

Under the terms of Contract No. 99-9-1985-42-5 (hereafter Contract No. 5) as outlined in the Statement of Work, Appellant proposed phasing disadvantaged minority group members into permanent employment positions within the Chicago construction industry through a five-year "demonstration project" involving screening, training and placement (AF 92). The Department authorized \$449,883 to achieve this purpose. The period of performance for Contract No. 5, as finally modified, was from January 1, 1979, to March 22, 1980 (AF Tab C, 192-94; AX-1A-C).²

Under the Statement of Work in Contract No. 99-0-1985-92-12 (hereafter Contract No. 12), Appellant proposed to use contract funds to pay the administration costs directly associated with the on-going demonstration project set up in Contract No. 5 (AF 200). The Department authorized \$525,000 to achieve this purpose. The period of performance for Contract No. 12, as modified, was from March 23, 1980, through April 17, 1981 (AF Tab C, 301; AX-1D).³

Pursuant to terms of the contracts, the Department authorized the accounting firm of Williams, Young & Herbert (hereafter auditors) to perform a financial and compliance audit of both contracts (AF Tab B). Field work was completed and a preliminary exit conference were held with Appellant's bookkeeper, Ms. Dorothy Green, on February 18, 1983. Appellant's

¹ The following abbreviations will be used in citations to the record:

AF-Administrative File
Tr.-Transcript of the hearing
AX-Appellant's Exhibits
GX-Government's Exhibits

² Contract No. 5 initially ran from January 1, 1979 to December 13, 1979. Three subsequent modifications extended the termination date to March 22, 1980.

³ Contract No. 12 initially ran from April 18, 1980 through April 17, 1981, and was later modified to change the starting date to March 23, 1980.

President, Mr. Carl Latimer, was not available at that time and was unable to attend a formal exit conference to discuss the auditor's recommended disallowances. (AF Tab B, 53). Appellant, through Mr. Latimer and Ms. Green, responded in writing on November 11, 1983. The final auditors' report was transmitted to the Department on March 2, 1984. The auditors questioned and recommended disallowances of \$120,401 in costs incurred by Appellant. The contracting officer's Final Decision, however, disallowed a total of \$61,516 for both contracts, thus allowing \$58,885 in costs to be charged to the Department (AF Tab A, 14).

Contract No. 5

The costs rejected by the contracting officer are the subject of this appeal and are considered below:

A. Copier Equipment Interest Payments

Appellant charged \$1,077 in interest paid for financing copier equipment.⁴ The contracting officer disallowed this cost based on contract provisions and applicable regulations.

Clause 5 in the General Provisions section of Contract No. 5 provides in pertinent part that:

...the Government shall pay to the Contractor (1) the cost hereof (hereinafter referred to as ('allowable cost') determined by the Contracting Officer to be allowable in accordance with: (i) Subpart 1-15.2 of the Federal Procurement Regulations (41 CFR 1-15.2), as in effect on the date of this contract, and (ii) the terms of this contract;..." (AF Tab C at 151).

41 C.F.R. §1.15.205-17 (1978) expressly provides that "[i]nterest on borrowings (however represented), bond discounts, and cost of financing ... are unallowable..."

Appellant entered into an agreement to purchase a Xerox copy machine on September 28, 1978, approximately four months before entering into Contract No. 5 (AF Tab E, 309, 328). Carl W. Latimer, President and Executive Director of the Coalition,

⁴ The auditors questioned and the contracting officer finally disallowed \$321 for the purchase of a sleeper sofa (Tab A, 9). The Department conceded at the hearing that the \$321 expended was part of their office furnishings for which the contractor had prior approval, was an allowable expense, and thus no longer an issue in this appeal (Tr. 174).

testified that they needed and used the equipment for recruiting, training, and placing students in the program (TR 175). Appellant incurred the interest expenses in accordance with a 36-month installment plan, requiring a monthly payment of \$197.63 (AF Tab E, 316).

Appellant argues that the \$197.63 monthly payment for the equipment was an ordinary and necessary expense for the performance of the contract, was less than the amount which would have resulted from a "per-copy-charge", and thus was a reasonable charge for the benefit received. (See 41 CFR §§1.15.201-2, and 3(a) and (d)).

The contracting officer did not dispute the need for copying in the performance of the contract, and, in fact, allowed virtually all copying charges in his Final Decision (AF Tab A, 9). Yet, the \$1,077 in copier equipment interest which the contracting officer questioned was an impermissible expense under the contract and the applicable regulations. Therefore, the disallowance of \$1,077 for copier equipment interest is affirmed.⁵

B. Certificate of Deposit Used as a Surety Bond

To implement the training program funded by Contract No. 5, Appellant was required to join a Carpenter's Union and post a \$5,000 surety bond to guarantee compliance with union regulations regarding fringe benefits. After inquiries revealed that the premium for a surety bond would cost \$500 to \$700 annually, and that such a bond was unavailable in any event, Appellant purchased a \$5,000 certificate of deposit to be used as a surety bond to comply with the union's requirements. (TR. 34-40, 95, 178, Appellant's brief, p. 4). The certificate of deposit earned interest quarterly at an annual rate of 6 percent (AF Tab B). Appellant claimed the \$5,000 surety bond as a fringe benefit cost on their final Detailed Statement of Costs submitted for Contract No. 5 (AF Tab B, 51). Upon termination of the contract, the certificate of deposit was not liquidated and the funds were not returned to the Department. (Tr. 40, 95, 178). The contracting officer disallowed the \$5,000 as an overreported cost and charged the Appellant an additional \$600.00 in interest income earned but not reported to the Department.

⁵ In its post-hearing brief, Respondent urges the Board to reject the entire amount of the copier (an additional \$6,137). This latter cost, however, was allowed by the contracting officer in his Final Decision and is not an issue in this proceeding.

Appellant contends that under the applicable regulations, 41 C.F.R. §1-15, 205-4, bonding costs are allowable where the bond is required either by the terms of the contract or in accordance with sound business practice, provided the rates are reasonable. Since the program funded by Contract No. 5 could not be implemented without posting a bond and subsequent certificate of deposit as a replacement for the bond, they argue the costs should be allowed. Further, Mr. Latimer testified that since the certificate of deposit continued to be used as collateral for the surety bond as required by its union agreement and since the training program initially funded by contract No. 5 was still in effect, the funds could not presently be returned to the Department (Tr. 178). Appellant agreed to refund the certificate of deposit, as well as its related 6 percent interest, once "their membership in the union was self-sustaining" (AF Tab B, 81).

Although bonding costs were allowable, the certificate of deposit was itself the collateral and, unlike an insurance premium, represented an advance of funds under contract. Under 41 C.F.R. §1-15.201-5, any "income, rebate, allowance, and other credit relating to any allowable cost received by or according to the contractor, shall be credited to the government...." Now that both contracts have terminated, the \$5,000 advance must be returned to the Department. Appellant's continued use of the funds it received beyond the expiration date of contract No. 5 demonstrates that the funds are not being used for contract purposes and that the disallowance of \$5,000 must be affirmed.

Clause 46 of the Schedule of Clauses to Contract No. 5 states in pertinent part that "[i]nterest on advance payments will not be allowed as a cost under this contract..." Since the auditors were unable to locate the actual interest statements for the certificate of deposit, they reconstructed the unreported interest income based on 6 percent interest for two years, resulting in a \$600 charge (AF Tab B at 70). Appellant does not challenge the rate of interest imposed. Thus, the regulations at 41 C.F.R. §29-70.205-2 require Appellant to remit any interest earned within 15 days after the end of the quarter in which interest is earned. Accordingly, interest earned at the rate of 6 percent per annum on the \$5,000 advance for the certificate of deposit was properly credited to the government.

In addition, the Appellant argues that the cost of the certificate of deposit was erroneously disallowed twice in both the audit report and the contracting officer's Final Decision. In the Final Decision, it appears once in Finding 4 as "overreported expenditures and earned interest". Appellant incorrectly contends it appears again as part of the "overreported costs" under the fringe benefits disallowed in Finding 5.

The auditors disallowed a total of \$19,646 of overreported fringe benefit costs (AF Tab B at 56). This total was found after a reconstruction of Appellant's financial records due to what the auditor's deemed an "inadequate financial management system" (AF Tab B at 33). Under Schedules B-1, D-9 and E-1 of the audit report, the fringe benefits are disallowed as "overreported costs", while the certificate of deposit and interest are separately reported under "costs recommended for disallowance" and "interest income earned not reported" (AF Tab B at 56). Thus, a careful review of these schedules reveals that the certificate of deposit plus interest totalling \$5,600 was not disallowed twice, but was appropriately disallowed under Finding 4 in the Final Decision.

C. Overreported Costs

Appellant charged \$449,883 under Contract No. 5 for costs related to salaries, fringe benefits, and various other categories of office overhead (AF Tab A, 12). The auditors determined Appellant's general ledgers were out of balance and that the Coalitions accountant/bookkeeper, Ms. Green, was unable to reconcile the variances. As a result, they reconstructed Appellant's contract expenditures by examining their cost disbursement and general journals, and concluded that Appellant had overreported its costs by \$22,442 (AF Tab B, 33-35). The contracting officer agreed, citing 41 C.F.R. §1-15.201-3(d) which states that "significant deviations from the established practices of the contractor which may unjustifiably increase the contract costs" may be considered in determining the reasonableness of a given cost. The contracting officer concluded that Appellant lacked documentation to support its claim that the auditors reconstruction was incorrect. In Appellant's view, the contracting officer failed to provide any documentation at the time of the audit or at the hearing for the calculations of the specific costs they reconstructed and claimed were overreported (AF Tab 337).

Appellant's accountant, Ms. Dorothy Green, was hired to maintain the financial records for both contracts and testified she had sole custody and control over the financial records (Tr. 25). She explained that she is not a certified public accountant, but she used "generally accepted accounting principles" in managing the Coalition's books and presumed the auditors did the same (TR. 105). In testimony, Ms. Green maintained that certain costs were incurred by the Coalition, regardless of how they were recorded in the financial records, and that these costs were chargeable to the Department.

The audit report, however, expressly states that the audit reconstruction was prepared in conformity with Department instructions which differ from generally accepted accounting

principles (AF Tab B, 58-59). It also notes that Appellant administered various other programs "funded by Federal, State and other sources" which were not differentiated in Appellant's books, but were taken into consideration in the reconstruction. Testimony from Ms. Green and Mr. Latimer confirmed the Coalition's involvement with programs other than the CETA programs (Tr. 49, 118, 175-76). Mr. Latimer testified that the Department funds paid for administrative staff salary and fringe benefits, while other local funds paid for the participant's salary (Tr. 175). It was his and Ms. Green's belief that the federal contract money was a supplement to local contract funding and covered the administrative expenses. (Tr. 49, 118, 175, 176).

The applicable regulations require the Contractor's reporting procedures to "provide accurate, current, and complete disclosure of the financial results of each grant or agreement". Each Contractor must:

maintain records which identify adequately the source and application of funds-and to ensure that the records systematically assemble information concerning Federal awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays, and income into balance sheet format for internal control purposes.

(41 C.F.R. §29-70.207-2).

In addition, the regulations require recipients to support their accounting records with source documentation (41 C.F.R. §29-70. 207-2(g)). The burden of producing this source documentation rests with the recipients. Montgomery County Maryland v. DOL, 757 F.2d 1510 (4th Cir. 1985).⁶ In the absence of the specific documentation, testimony or secondary documentation may be used by a contractor to show that a particular cost can be properly allocated to the contract. Harris County Employment and Training Administration, Texas, 80-1 BCA, ¶ 13,141 (1980). In the absence of the required documentation, however, the contractor must submit convincing secondary evidence which clearly establishes the nature and justification for the expenditure. A contractor's mere assertion that the expenditure of the disputed funds was legitimate under the

⁶ Clause 31 of both contracts instructs the Contractor to comply "with all applicable Federal ... laws, rules, and regulations which deal with or relate to the employment of persons who perform work or are trained under this contract." (AF, Tab C, 121). Accordingly, the analogous CETA case law may be considered in this appeal.

contract or that the government benefitted from the expenditures is not sufficient to allow otherwise properly disallowed contract costs. National Association for the Southern Poor, 85-1 BCA, ¶ 1739 (1983).

In the instant case, Appellant submitted documentation in the form of earnings records, invoices, bills, and canceled checks to support their claimed costs for the various categories the auditors suggested as overreported. These sources were apparently available to the auditors at the time of the audit, but it is virtually impossible to determine which sources were used in the auditor's reconstruction and why certain documents were discounted (Tr. 262). The auditors were not present at the hearing to explain their reconstruction of these overreported costs, nor did the contracting officer contest the authenticity of these source documents though given an opportunity to do so post-hearing (Tr. 263).

The auditors and the contracting officer contend Appellant's lack of adequate internal controls over their finances constitute a significant deviation from the Department accounting principles and regulations which justifies the reconstruction and ultimate disaffirmance. However, the contractor at the hearing adduced uncontroverted documents and offered testimony by witnesses under oath, and the Board will not summarily dismiss these sources as unreliable due to Appellant's alleged inadequate accounting practices. Accordingly, each category of claimed "overreported costs" will be reviewed separately along with Appellant's submitted source documentation to determine which particular cost can be properly allocated to Contract No. 5.

1. Salaries

Appellant charged \$293,622 for salary costs under Contract No. 5. The contracting officer found this to be overreported by \$2,796. At the hearing, Appellant's accountant, Ms. Green, submitted schedules of unemployment insurance, employer contribution reports, and payroll records from January 1, 1979, through March 31, 1980, to establish a new total charge of \$300,587.45 in salary costs for Contract No. 5 (AX-3-A, C, D).⁷ Appellant's total reflects \$6,978.11 of costs for wages incurred from March 16 to March 22, 1980, but not paid to its employees until April 5, 1980. Ms. Green testified that she mistakenly omitted these costs initially and believes the auditors recommended that these costs be disallowed because they were paid after Contract No. 5 terminated (Tr. 102).

⁷ The Appellant's accountant testified the original charge was incorrect and due to a typographical error (Tr. 43, 43).

Under the applicable regulation, a cost is properly allocable to a contract when it is incurred, and not when it is finally paid. (20 C.F.R. §31-15, 201-4). Additionally, earnings records provide sufficient proof of employee earnings. American Indian Native Nurses, Inc., 84-1 BCA, ¶ 17,069 (1983)7 Essex County Youth and Rehabilitation Commission, 84-1 BCA, ¶ 16,997 (1983). Bearing this in mind, we find the earnings records submitted by Appellant, along with Ms. Green's testimony, constitute substantial credible evidence that \$300,587.45 in salaries were incurred during the contract's period of performance,' and, thus were properly allocable to Contract No. 5. The documented salary expenses exceed those originally claimed by Appellant by \$6,965.45. Accordingly, we find Appellant underreported its salary costs and, therefore, sum of \$2,796.00 disallowed by the contracting officer is, hereby, allowed.

2. Fringe Benefits

Appellant charged the Department \$55,446 for fringe benefits under Contract No. 5, \$19,646 of which the contracting officer disallowed. Neither the auditors nor the contracting officer explained in their reports what specific items of disallowed costs were included in "fringe benefits" category. The contracting officer did not present testimony regarding the fringe benefits issue, and relied instead on a vague audit report as a basis for the disallowance. Appellant thus attempted to reconstruct, through source documentation, what they believed to be the "fringe benefit" expenses the auditors and contracting officer disallowed.

a. Carpenters and Electrician's Fringe Benefits.

Appellant charged the Department \$26,289.00 for carpenters and electrician's fringe benefits (AX 7). This amount includes the \$5,000 certificate of deposit used as a surety bond for the carpenter's union. As discussed previously, this cost was not included by the auditors in the "fringe benefit" category, and thus should not be a source of Appellant's reconstruction of fringe benefits.

Appellant submitted copies of cancelled checks for fringe benefits payable to carpenters, and to Calvin Hooks and Edward Brooks, both electrical contractors who worked as instructors. Hooks and Brooks received their fringe benefits directly. (AX 2, Tr. 33; AF, Tab D).

Appellant's documentation established \$14,634.35 for the carpenters and electricians benefits, and \$3,611.55 in fringe benefits paid to the instructors (AX-2B, Tr. 36). Accordingly, \$18,245.90 in costs for carpenter's and electrician's fringe benefits will be allowed.

b. Unemployment Insurance.

The contractor charged the Department \$5,464.00 for unemployment insurance (AX-7). The record reveals earnings records and employer reports indicating that premiums were owed, but Appellant did not submit evidence, such as canceled checks, which would establish that they had actually paid the insurance (AX-3A). Accordingly, Appellant has not established, through source documentation, payment for unemployment insurance, and, accordingly, the claimed costs were properly disallowed.

c. Worker's Compensation and General Liability.

Appellant charged the Department \$9,173.00 for workers' compensation payments and \$1,974.00 for carpenters' general liability payments for a total of \$11,147.00. At the hearing, however, Appellant claimed that its actual expenses totaled \$12,068.93 (AX-4; AX-7, Tr. 53, 110-135). In partial support of its contention, Appellant supplied schedules of wages and invoices (stamped "paid" with check numbers presumably written by Appellant).

The Board credits Appellant costs documented by canceled checks, however, we find inadequate mere ledger or invoice notations that an expense has been paid under circumstances in which the canceled checks allegedly issued in payment are not adduced. Appellant has established payment through canceled checks of \$2,865.00 for worker's compensation and accordingly, \$2,865.00 is allowed.

d. Group Insurance Premiums.

Appellant charged \$13,007.00 for group insurance premiums, but claimed at the hearing to have expended \$13,250.00. Appellant admitted, however, that these amounts were based on costs incurred through April 17, 1980, the termination date for contract No. 5 prior to the third modification. (AX-5A, 7; Tr. 60, 136). In taking into account the March 22, 1980 termination date pursuant to the third modification, Appellant now contends they actually incurred group insurance costs of \$11,537.14 (AX-5A).

The documentation submitted by Appellant included insurance invoices stamped "paid" by an unknown source, with check numbers written on them. (AX-5B, AF-E). The documentation does not, however, include copies of the canceled checks, indicated on the invoices, to prove actual payment, and accordingly Appellants' claim for group insurance premiums is disallowed.

e. Schedule Bond

Appellant charged the Department \$160.00 for a "name schedule bond", but indicated at the hearing that the cost was \$156.00 (AX-6, 7; Tr. 140). The notice of premium submitted by Appellant does not show proof of actual payment and, accordingly, this amount is disallowed.

3. Office Rental

Appellant charged, and the contracting officer disallowed, \$824 for a security system and insurance bought after a burglary attempt at the Coalition offices (AF Tab A, p. 12). Ms. Green and Mr. Latimer testified the Coalition was located in a high crime area and that they reported the incident to the police and the contracting officer. Respondent did not submit evidence regarding the disallowance. Appellant submitted source documentation in the form of canceled checks for invoices totaling \$808.83 (AF Tab E, pgs. 390-94). The contractor having submitted evidence of payment for these expenses and the contracting officer failing to contact this documentation, \$808.83 accordingly is allowed.

4. Telephone and Utilities

The contracting officer disallowed \$1,286.00 in telephone and utility costs (AF 12). Appellant submitted electricity bills and canceled checks totaling \$879.11, and telephone bills and canceled checks totaling \$327.31. (AF Tab E, 338). \$1,206.42 is adequately documented and is, therefore, allowed.

5. Supplies, Equipment, Outside Services and Miscellaneous

Appellant submitted no evidence regarding claimed costs for supplies, equipment, outside services, or miscellaneous expenses. Since Appellant has not met its burden of providing source documentation, we affirm the contracting officer's determination of overreported costs for Supplies (\$620.00) and Outside Services (\$47.00), underreported costs for Equipment (\$6,927.00), and Miscellaneous (\$523.00).

6. Postage and Printing

The contracting officer disallowed \$642 for rental of a postage meter and postage and printing costs. (AF 12). Appellant submitted invoices and copies of canceled checks for postage totaling \$436.93 (AF Tab E). No source documentation for the category of "printing" was submitted. Accordingly, postage costs of \$436.93 has been properly documented, and is allowed, and the remaining claim is disallowed as undocumented expenditures.

7. Fidelity Bond

Appellant claimed, and the contracting officer disallowed, \$100 for a fidelity bond (AF 12). Appellant submitted an invoice and a canceled check for a \$100.00 "welfare and wage" bond from March 1, 1979, to March 1, 1980 (AF 341). This uncontroverted documentation constitutes adequate proof that the cost was incurred and the contracting officer asserted no other ground for disallowing it. Accordingly, the claimed cost is allowed.

8. Truck

The contracting officer disallowed \$3,931 for travel costs (AF 12). Appellant documented through invoices and copies of canceled checks a total of \$3,931 for the purchase of a van, and insurance, repairs and maintenance (AF Tab E, 340). Accordingly, truck costs in the amount of \$3,931 are allowed.

II.

Contract 12

A. Expenditures Incurred Outside the Contract and Closeout Periods

The period of performance for Contract No. 12, as modified, was March 23, 1980, to April 17, 1981 (Admitted at hearing, Tr. 203), yet the auditors did not take this modified period into consideration when they filed their final report, and listed the period from April 18, 1980 to April 17, 1981. Accordingly, the auditors failed to account for twenty-six days of the contract (AF Tab B, 31). This error, however, as will be discussed in the subsequent paragraphs, does not alone, invalidate the contracting officer's Final Decision as it applies to Contract No. 12.

1. Overpayment of Fringe Benefits

Based on the auditors report, the contracting officer found Appellant overreported costs of \$5,375 for worker's compensation insurance covering a period which extended eight months beyond the contract and closeout period. (AF Tab A-12). The auditors determined Appellant renewed their worker's compensation insurance policy for the period March 26, 1981, to March 26, 1982. Of the documented \$14,450 (Check No. 1150) advance premium payment, the auditors found that Appellant documented refunds from other programs totaling \$6,387; thus, \$8,063 of contract funds were used to renew this policy (AF Tab E, 359). The auditors allowed four months of premiums to cover the end of the contract, plus a ninety day closeout period. Since Appellant did not cancel the policy or request a refund, the auditors questioned and the contracting officer disallowed, \$5,375

(\$8,063 x 8/12) of the fringe benefits claimed (AF Tab B, 43; Tab E, 362).

In response to this finding, Appellant contends it incurred a total of \$14,781 for worker's compensation and general liability for Contract No. 12, while only charging \$5,864 (AX 8, Tr. 68). Thus, it claimed to have undercharged the Department a total of \$8,917 for worker's compensation benefits (AX-8).

Appellant explained at the hearing that a deposit premium, based on estimated wages of employees was paid at the beginning of the coverage period, subject to adjustment after audit, to reflect actual wages paid during the period of coverage. Appellant introduced evidence, supported by wage schedules and quarterly tax returns, to establish expenses during the contract period totaling \$14,781 (AX-BA, B). They also submitted invoices for the worker's compensation policies within Contract No. 12, but failed to submit the invoice for the March 1981-82 policy in question (AX-4C, BC; Tr. 147-54). In addition, Appellant's written response to the auditor's report and Ms. Green's testimony address the prior period March 26, 1980 March 26, 1981, which is not challenged in this proceeding (Tr. 340). Appellant does not address the disallowed policy.

Although Appellant submitted documentation indicating the payment of \$14,781, Appellant failed to relate the payment specifically to insurance coverage for the period in question. (See AF Tab B, 359). Thus, Appellants have failed to accurately document the claimed undercharge, and, accordingly, the disallowance of \$5,375 is affirmed.

2. Unauthorized Consultants

Appellant charged \$26,496 for consultant fees paid during Contract No. 12's closeout period to Mr. Latimer and Ms. Green from April 3, 1981, to July 28, 1981. The contracting officer disallowed these consulting costs based on the auditor's report which found that: (1) although Mr. Latimer and Ms. Green did not receive a salary during this period, they were still employees of the contractor; (2) Appellant incurred these costs without obtaining prior approval from the contracting officer; and (3) the fees paid were excessive (AF Tab A, 13; Tab B, 44).

The facts presented by Appellant on testimony at the hearing, and in its written responses to the auditor's report are undisputed (Tr. 71-80, 181-185; AF Tab E, 354). Contract No. 12 was administered by Mr. Latimer, who holds a degree in business administration. Ms. Green was the contractor's bookkeeper and she has a degree in accounting. Their position's terminated at the end of the contract.

By a letter dated March 26, 1981, the Department confirmed the termination of the contract as of March 31, 1981 (which was later modified to April 17, 1981), advised Appellant that no further extension would be granted,,and noted that closeout materials would be transmitted approximately two weeks after the expiration of the contract (GX-2).⁸

Ms. Green testified that Mr. Latimer advised her to call Mike Tompkins at the Employment and Training Administration shortly after the termination letter was received to consult with him regarding Contract No. 12's closeout (Tr. 75). Appellant submitted a telephone bill listing a long distance call to Mr. Tompkins to corroborate this fact (AX-9). In the telephone conversation, Ms. Green expressed concern that there was no one available to close out the contract since she and Mr. Latimer were no longer salaried employees once the contract was terminated (Tr. 75, 181). Ms. Green testified that Mr. Tompkins advised her that no salaries could be incurred under the contract after its expiration, but she and Mr. Latimer could be paid as consultants at a per them rate of \$192 (\$24 per hour) to do the necessary closeout work (Tr. 79). In a letter to Mr. Tompkins dated April 15, 1981, Ms. Green confirmed the telephone conversation of April 1 regarding close out consultant fees (AX, EX-9). By letter dated April 20, 1981, the Department again confirmed Contract No. 12 was terminated, giving the termination date as March 31, 1981. It reaffirmed that no costs could be incurred "under the contract subsequent to the expiration date", and requested that closeout be completed within 90 days after termination of the contract.

Ms. Green and Mr. Latimer then proceeded with closeout of the contract as consultants. Ms. Green and Mr. Latimer testified that they later talked by telephone with Mr. Tompkins after receiving the contracting officer's Final Report. They reminded him about the April 1, 1981, conversation, and asked him for written approval for the closeout consultant fees. According to Ms. Green, Mr. Tompkins remembered the conversation, but refused to confirm his approval by letter (Tr. 84, 185). Mr. Tompkins was called by neither party to testify at the hearing.

Mr. Latimer acknowledged at the hearing that he was aware of Contract No. 12's requirement that prior written approval be obtained from the contracting officer before consulting costs could be incurred (Tr. 195). He noted, however, that it "was considered standard procedure" to receive verbal instructions by telephone

⁸ The Department official identified at the top of the letter is "Mike Tompkins"; the signature at the bottom, however, is "William J. Kacvinsky, Contracting Officer".

relating to the implementation of both contracts. He indicated that he had received verbal instructions from the Department in at least 20-25 different instances (Tr 185-86). He testified that a "Mr. Barnes" was assigned by the contract officer to respond to "certain fiscal items" which came up during the contract. Mr. Barnes introduced Mr. Latimer to Mr. Tompkins as representative of the Department, and, based on this introduction and numerous telephone conversations over the course of the contract, it was Appellant's understanding that Mr. Tompkins was a Department official with authority to approve the implementation of Contract No. 12 (Tr. 75, 193, 214).

41 C.F.R. §1.15.205-31(a) provides, in part, that:

"{c}osts of professional and consultant services rendered by persons who are members of a particular profession or possess a special skill, and who are not officers or employees of the contractor are allowable ... when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the government".

In addition, clause 9 of Contract No. 12 states:

(a) Consultant(s) hired to perform under this contract may be compensated at a rate for time actually worked (e.g., amount per day, per week, per month, etc.), or at a normal compensation in accordance with contractor's policies. However, for the use and payment to consultant(s), prior written approval must be obtained from the contracting officer.

(AF Tab C, 113).

In response to the first *finding* by the auditors, that both he and Ms. Green were "employees" for the Coalition, Mr. Latimer testified that once Contract No. 12 had been terminated, he believed they were no longer "employees" since they no longer received a salary. He admitted, however, that they continued to be officers for the Coalition after the *termination* date regardless of what they were paid (Tr. 207). However, since payment for the consultant services were contingent upon recovery of those costs from the government, and contrary to 41 C.F.R. §1.15.205-31(a), the question of whether Mr. Latimer and Ms. Green were employees or officers for the Coalition is irrelevant.

In response to the second finding by the auditors, Mr. Latimer acknowledged that the Coalition did not receive prior written approval from the contracting officer, William J. Kacvinsky, thus failing to meet Clause 9 of the contract which required prior approval. Nevertheless, Appellant urges the Board to consider that the contracting officer delegated his duty of prior written approval, and alternatively, that equitable principles of estoppel and implied contract may be employed to hold the Department accountable for reimbursement.

First, Appellant acknowledges that the government is given greater protection than private individuals with respect to unauthorized acts and is not bound by the act of an agent with only apparent authority. George H. Whike Construction Co. v. United States, 140 F. Supp. 56 (Ct. Cl. 1956). They also cite to Evanbow Construction Co., Inc., 74-1 BCA, ¶ 10,552 (1973) for the principle that when a contracting officer delegates his authority to another government official, approval of contract changes by the delegated official is sufficient. In Evanbow, the Board held that a construction contractor was entitled to recover the costs for numerous changes caused by deficient government drawing's and specifications, despite the contracting officer's lack of knowledge of the changes and his failure to issue change orders. The Board determined that because the work was necessary for satisfactory completion of the contract, and was ordered by a government official with authority delegated by the contracting officer, the contractor was entitled to an equitable adjustment for constructive changes in the contract.

In this case, there is no evidence the contracting officer delegated his authority to affirm the use and payment of consultants. Additionally, even if he did delegate this duty, Mr. Tompkins gave prior verbal approval, not prior written approval as Clause 9 requires. Thus, the evidence does not support the conclusion that Mr. Tompkins was acting pursuant to delegated authority in approving the closeout consultant fees. Appellant has failed to show that the consulting fees should be allowed on the basis of a delegation of authority.

Second, Appellant contends that under equitable principles of estoppel and implied contract, the Department should affirm their consultant costs. Under Quechan Indian Tribe v. U.S. DOL, 723 F.2d 733 (9th Cir., 1984), the Court determined that a CETA grantee failed to meet its burden of showing it complied with CETA regulations, but remanded the case to the Secretary of Labor saying there was "no indication that the ALJ considered the equities in this case in arriving at his decision and order of repayment" of

almost four-fifths of the total grant amount.⁹ 723 F.2d at 736.

Appellant urges consideration of these equitable principles here. Appellant suggests that under the circumstances of this case, the Department is estopped from denying payment for the closeout work performed. It contends the closeout work was necessary, that it was to be completed within 90 days of the contract's termination, and that it could not be performed by salaried employees since the closeout materials were delivered to them two weeks after the expiration of the contract. They contend they took all reasonable steps in determining how to proceed, and acted in reliance on the instructions received from Mr. Tompkins, a Department official held out as the contracting officer's representative.

There is no evidence in the record to indicate that the contracting officer held Mr. Tompkins out as his representative to authorize modification expressly given to him by Clause 9 of the contract. The testimony does suggest, however, that during the course of the contracts' performance, implementation of both contracts were handled over the phone by the contracting officer and other Department agents such as Mr. Tompkins. Thus, there was an implied authorization from the contracting officer to Mr. Tompkins to advise Appellant on routine matters and problems regarding performance of the contract.

Changes originally ordered by an authorized representative under a contract may be treated as a contracting officer-ordered change (thus binding the government) if the contracting officer (1) actually or constructively knew through affirmation or protest by a contractor that a representative had directed the change; and (2) either approved or failed to countermand the change. R.W. Borrowdale Co., 84-2 BCA, ¶ 17,302 (1982); W. Southand Jones, Inc., 67-1 BCA 6128 (1966); Lox Equipment

⁹ The court found the equities to be considered were (1) whether the grantee failed to fulfill statutory and regulatory duties; (2) the fact the grantee was advised ten months after they began participating in the CETA grants that it was in violation of CETA regulations; (3) an extremely high unemployment rate on the Indian reservation; (4) the grant officer's disclaimer of any charges of grantee fraud; and (5) the ALJ's conclusion that the grantee had spent the grant funds on the programs for which they were intended. 723 F.2d at 737. Although not directly applicable, CETA regulations applicable to CETA grants and cases decided pursuant to those regulations may be considered by the Board. See, National Association of Southern Poor, supra (considering Quechan); Portland Public Schools, 85-2 BCA ¶ 17,954 (considering CETA nepotism regulations).

Co., 64-1 ¶ BCA 4463 (1964); Moyer Bros. v. U.S., 157 F. Supp. 632 (Ct. Cl. 1962). In R.W. Borrowdale Co., the Armed Services Board of Contract Appeals found that since the contractor wrote a letter to the contracting officer confirming the agent's contract change and the contracting officer did not protest the agent's representation, the contracting officer, in effect, ratified the contract change. Similarly, Appellant's April 15, 1981, letter to the contracting officer, confirming their conversation with Mr. Tompkins, who indeed was authorized to advise Appellant at least in respect to the day-to-day operation of the contract, communicated the approval of the use of Mr. Latimer and Ms. Green as closeout consultants. Silence by the contracting officer, thereafter, and his failure to disaffirm, Mr. Tompkins' approval in his subsequent letters to Appellant constituted a ratification of the oral agreement for the use of closeout services. See, R.W. Borrowdale Co., supra; See also, National Institute for Advanced Studies, 79-2 BCA ¶ 13,974.

Appellant suggests that the reasonable value of the services rendered by the accountant and the program coordinator during the 90 day closeout should be determined on the equitable basis of implied contract. When services are rendered to the government in good faith and the benefits are accepted, an implied contract arises for payment of the fair value of the services, or restitution. New York Mail and Newspaper Transportation Co. v. U.S., 154 F. Supp. 271 (Ct. Cl. 1957) cert. denied, 355 U.S. 904. In New York Mail, the Court of Claims held that a transportation company's contract with the government was invalid because of a failure to comply with advertisement proposals, but since service had been rendered in good faith on the contract, the Court determined the damages would be awarded.

In the instant case, services were rendered, in good faith with the Contracting Officer's knowledge, to closeout the contract, and the benefit of those services were accepted by the government. The guidelines for the amount of payment for consultant fees, however, are stated in Clause 9(b) of the contract and require: taking into account (among any other relevant factors) the relative importance of the duties to be performed, the stature of the individual in his specialized field, comparable pay for positions under the classification Act or other federal pay systems, rates paid by private employees, and rates previously paid other experts or consultants for similar work.

(AF Tab E, 213).

Based on these guidelines, we find the value of Mr. Latimer and Ms. Green's closeout to be equal to their salaries paid for administrative and accounting services under Contract No. 12.

Payroll records submitted by Appellant indicated that (1) Dorothy Green had earned \$5,214.51 for the quarter ending March 31, 1981, the last full quarter for Contract No. 12, thus giving her a weekly salary of \$401.12 and (2) Carl Latimer had earned \$8,774.65 for the quarter ending March 31, 1981 thus giving him a weekly salary of \$674.99 (AX-BB-4). Both Mr. Latimer and Ms. Green were paid \$960 each week from April 3, 1981 to July 28, 1981 for a total of \$11,904 or 12.4 weeks for Mr. Latimer, and \$14,592 or 15.2 weeks for Ms. Green. Under their contract salaries Mr. Latimer should have been paid \$8,369.67; Ms. Green's total wages should have been \$4,973.88 for a total of \$13,343.56 of allowable consultant costs under the contract.

3. Cost Incurred After Contract Period

The contracting officer disallowed \$205 for vehicle maintenance costs the auditor found to have been incurred outside the performance period of Contract No. 12 (AF Tab A, 13). Appellant contends towing and repair cost of \$205 were necessary for the return of the vehicle pursuant to Department demands and unavoidably incurred after the contract period of performance (AF Tab B, 44).

On March 26, 1981, the Department notified Appellant that no costs could be incurred under Contract No. 12 after March 31, 1981, (GX-2). On June 17, and September 1, 1981, Appellant was instructed by the contracting officer to discontinue its operation of vehicles received under the contract and release them to the State of Wisconsin (AF Tab E, 364). Appellant was notified that it was in violation of the General Provision, Part III, Sec. H, requiring them to return the vehicle upon termination of Contract No. 12.

Mr. Latimer testified that \$205 in costs were necessary to get the vehicle ready for travel on the highway (Tr. 218-19). However, the September 1, 1981 letter from the contracting officer indicates that Appellant refused to allow representatives from the State of Wisconsin Property Division to pick up the property. Appellant did not otherwise address its reasons for incurring costs of \$85 for towing the vehicle on September 8, 1981, and \$120 for maintenance of the vehicle on October 21, 1981, after the expiration of the contract (AF Tab E, 363). Appellant, accordingly, has failed to demonstrate why these costs are allowable under Contract No. 12 and we, therefore, affirm the contracting officer's decision to disallow \$205.

Summary

The Board has carefully considered Appellant's documentation of expenditures in light of the disallowances designated by the contracting officer. Indeed, the contracting officer was

specifically requested at the hearing to identify the extent to which the documentation offered by the Appellant may have duplicated the documentation which the contracting officer had previously considered and rejected. (TR. 252-53; 261-62). The contracting officer, however, failed to identify any item of evidence adduced at the hearing for which the Appellant had previously been given credit. Accordingly, the Board has afforded Appellant credit for documented expenditures totaling \$44,054.64 which will be applied as a reduction against the disallowance totaling \$61,516.00 determined by the contracting officer. Therefore,

ORDER

IT IS ORDERED that expenditures totaling \$44,054.64 be, and they hereby are, ALLOWED; and that disallowances totaling \$17,451.36 are, hereby, AFFIRMED.

STUART A.LEVIN
Administrative Law Judge and
Member of the Board

SAMUEL GRONER
Administrative Law Judge and
Vice Chairman of the Board

GLENN LAWRENCE
Administrative Law Judge and
Member of the Board

SAL:KH:jeh