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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

June 2, 1981

B-198811.3

The Honorable Harry F. Byrd, Jr.
United States Senate

Dear Senator Byrd:

This is in response to your letter of December 3, 1980(y), on behalf of Mr. Charles D. T. Lennhoff, counsel for National Systems Management Corporation (NSM). With that letter, you enclosed a copy of a letter of November 21, 1980, from Mr. Lennhoff concerning our decisions in National Systems Management Corporation, B-198811, October 10, 1980, 80-2 CPD 268, and National Systems Management Corporation--Reconsideration, B-198811, November 19, 1980, 80-2 CPD 380.

Those decisions concerned a protest by NSM against the award of contract No. N00123-80-D-0037 to VSE Corporation under request for proposals No. N00123-79-R-1518 issued by the Naval Regional Contracting Office (NRCO), Long Beach, California. In the first decision, we found that NSM's protest was untimely filed. That decision was affirmed in the reconsideration decision.

One of NSM's allegations in the first decision was that the contract was not awarded on the same basis on which proposals were evaluated, since the contract included 48 labor rates while the proposals were evaluated on the basis of only seven rates. According to the protester, some of the improperly included rates were higher than the evaluated rates and would, therefore, result in an overpayment to the contractor. In response to the protest, the Navy stated that the 48 labor categories and rates had in fact been inadvertently included in the contract, but that the error had been corrected by modification P00002. The Navy also stated that the contractor

[Reconsideration of Prior Decision]

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had been overpaid by approximately \$18,300 for the task orders completed before the execution of the modification.

Mr. Lennhoff's letter of November 21, 1980, refers to "a continuing overpayment arrangement in the performance of the subject contract." Specifically, Mr. Lennhoff contends that the same problem occurred again after modification P00002 in task order No. 4M09, which includes the labor category of "Project Engineer" at \$20.34 per hour for 790 hours. According to Mr. Lennhoff, this category and rate were not in the request for proposals or the contract as amended by modification P00002 and, therefore, the contract again differs from the competed requirement and the contractor will again be overpaid.

Usually, we will not examine untimely protests even when asked to do so by Members of Congress. If our Office were to consider an untimely protest on the merits when submitted by a Member of Congress, this would suggest to the procurement community that the timeliness provisions of our Bid Protest Procedures could be circumvented by submitting the protest through a Member of Congress. However, in this case, we were concerned because the Navy, after having admitted that one of the protest allegations was correct, was alleged to have done the same thing again after the protest was dismissed.

In order to obtain the information needed to answer this allegation, we asked the Navy to respond to it. Additionally, we asked the Navy if any action had been taken regarding the earlier admitted overpayment.

In response, the Navy states that the original labor category of "Program Manager" was changed to "Program Manager/Project Engineer" by modification P00004. The reason given by the Navy is that NRCO felt that the task orders issued by the using activity had been requiring more hours in the Program Manager category than NRCO felt was appropriate,

since Program Manager was viewed as an overall supervisory position. The using activity told NRCO that it found, in performing the contract, it needed personnel with the same minimum qualifications as Program Managers, but who would supervise specific tasks rather than provide overall supervision. The Navy states that, since the experience requirements remain the same, the contractor is not being overpaid.

Regarding the overpayment of task orders issued prior to modification P00002, the Navy states that since the inclusion of the wrong labor rates and categories in VSE's contract was an inadvertent error and since VSE had actually furnished the higher paid personnel, there would be no attempt to seek recovery from VSE.

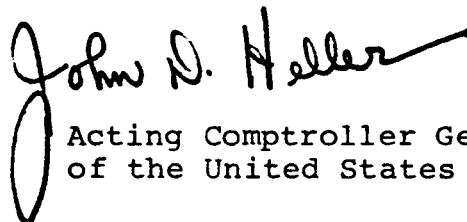
Mr. Lennhoff was given the opportunity to comment on the Navy's response. Mr. Lennhoff claims that the percentage of hours required at the Program Manager level was not unusually high and that the change made by modification P00004 involves either a misuse of higher paid manpower or it permits VSE to substitute lower paid engineers at the higher rate. According to Mr. Lennhoff, this is just another in a series of irregularities in this and previous contracts involving the same parties.

After examining the Navy's explanation for the change made by modification P00004 and Mr. Lennhoff's comments concerning it, it is our opinion that the Navy's action was not a reversion to its earlier admitted error. The Navy's change is no more than an example of the normal and reasonable kinds of occurrences that are involved in administering any contract. Contract administration is the function and responsibility of the contracting agency, not our Office. See Home Oxygen & Medical Equipment, Inc., B-201320, December 29, 1980, 80-2 CPD 445. Also, we do not see how this change affects the validity of the award to VSE or prejudices NSM.

As the Navy points out, the Government's interests are protected by the processing of invoices through the Defense Contract Audit Agency prior to payment and by a projected audit of the contract.

We trust that this information is adequate for your needs.

Sincerely yours,

A handwritten signature in cursive script that reads "John D. Heller". The signature is written in black ink and is positioned above the typed name and title.

Acting Comptroller General
of the United States