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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-199412

Office of the Controller
U.S. Department of Energy
Cermantown, Maryland 20585

Attention: Raymond Holt, Jr.
Accounting Policy and
Procedures Branch

Dear Mr. Holt:

This responds to your informal request that we review Department of Energy (DOE) contract No. DE-AC01-79-CR10000 and advise you (1) whether task order contracts such as this are considered indefinite delivery contracts and (2) when obligations are incurred under such contracts.

The contractor in this case agreed to provide DOE with an estimated total of 125,000 man-hours of support over one year, with two option years at the same level-of-effort. The specific tasks to be performed were to be assigned by the contracting officer as the need arose.

DOE agreed to pay a base (fixed) fee of \$54,000 plus the contractor's actual, allowable costs for man-hours, travel and materials, and computer time; these costs were estimated at approximately \$2,700,000. An award fee of up to \$10,000, based on quality of performance, also was available. If less than 113,000 or more than 137,000 man-hours were involved, these amounts were to be equitably adjusted.

Pre-contract costs were covered in article 3.5, which stated that the contractor was entitled to up to \$800,000 for reimbursement of expenses incurred between November 1, 1978, and April 27, 1979 (the date of execution) if these would have been allowable under the contract. In our opinion, at the time of award the

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Government became obligated to pay these precontract costs. In any event, under the legal theories of quantum meruit and quantum valebant, the Government owed the contractor the reasonable value of the goods or services if it had accepted them or otherwise received a benefit.

Beyond this, it would not have been consistent with 31 U.S.C. § 200 to record an obligation on April 27, 1979, since on that date neither party was required to perform or pay for work to be set forth in task orders. However, once a task order was issued, an amount sufficient to cover the cost of the minimum number of hours specified in the contract might have been recorded as an obligation on an estimated basis, see generally Obligations and Charges under Small Business Administration Contracts, B-109574, February 2, 1981 (copy enclosed), since placing of the task order would have served as consideration for the contractor's agreeing to perform, and a valid contract existed.

A second or alternate interpretation is that if both the contractor and DOE intended to enter into a contract on April 27, 1979, a promise by the Government to place task orders and to pay for a stated minimum number of man-hours may be implied. See Sylvan Crest Sand and Gravel Co. v. U.S., 150 F.2d 642 (2d Cir., 1945), in which the plaintiff was to deliver trap rock "as required," in accord with delivery instructions to be given by the Government; the court found an implied promise by the Government to take and pay for the trap rock and to give shipping directions or to give notice of cancellation within a reasonable time.

Under this interpretation, the contract would have been valid upon execution, rather than when the first task order was issued. In cases such as this, an amount sufficient to cover any pre-contract costs, plus costs and fixed fees for the minimum number of hours which the Government is obligated to purchase must be obligated at the time of award. The remainder, up to the maximum, may be administratively reserved. Our Office has held that a contract in which the level-of-effort is expressed in man-hours to be applied on the basis of work orders issued after award is definite enough to justify recording the full estimated amount as an obligation at the time of

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award. Bureau of Alcohol, Tobacco, and Firearms--Pay-
ments under International Agreement, 50 Comp. Gen. 471, 474
(1979); Recording Obligations under EPA Cost-Plus Contract,
B-193184, May 30, 1978, and cases cited therein (copy also
enclosed). (In the EPA case, however, the Government was
clearly obligated to order specific tasks.)

We also note the general rule that obligations are chargeable to the annual appropriation for the fiscal year in which they are incurred. The contract which you submitted to us for review covered more than one fiscal year (April 1979 to April 1980), but we cannot tell what type of appropriation was used. If annual appropriations were involved, since the Government may enter into a contract which extends only to the end of the fiscal year, the amount obligated could not have been applied against task orders issued after the end of the first fiscal year. Of course, if multiple or no-year funds were involved, this would not have been a problem so long as the amount appropriated was sufficient to cover the contractor's costs and fees.

In any event, valid task order contracts are similar to the indefinite delivery, indefinite quantity contracts described in the Federal Procurement Regulations (FPR) § 1-3.409(c) (2d Ed., Circ. 1, June 1964). The date and time of performance, i.e., delivery, are indefinite. However, unlike the contracts described in the FPR, which are for firm-fixed prices, although they may provide for price escalation or price redetermination, DCE contracts are of the cost-reimbursement type.

I hope this information will be helpful to you. If you have further questions you may call Marilyn Eaton of my staff at 275-5476.

Sincerely yours,

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Seymour Efros
Associate General Counsel

Enclosures