

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

Koba Associates, Inc.)	
)	CAB No. D-1013
Under Contract Nos. JA/81805,)	
JA/80986, and JA/89900)	

For the Appellant, Koba Associates, Inc.: Keith R. Malley, Esq. For the Government: Grace Perry-Gaiter, Esq., Assistant Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Matthew S. Watson, concurring.

OPINION

Appellant Koba Associates, Inc., entered into three contracts with the District to develop a long-term group home for emotionally disturbed female youth, another long-term home for emotionally disturbed male youth, and a short-term crisis home/facility for severely emotionally disturbed youth. In addition to providing for payment to Koba at fixed unit prices for operating the group homes and crisis home, the contract provided that Koba would be reimbursed on a cost reimbursement basis for certain start-up activities during the first 90 days after the contracts were executed. The cost reimbursable start-up activities included the start-up costs of leasing the homes, renovations, furnishings and accessories, start-up period salaries for the program staff who would operate the homes, vehicle purchases, transportation, training of the program staff, and start-up costs for an educational program for the youth. The contract also provided for the reimbursement of indirect costs on the various start-up direct costs, in the form of a 12 percent general and administrative cost, and a 5 percent fee on start-up costs. Because of the difficulty in finding suitable homes, Koba was unable to complete the start-up activities within the 90-day period. It requested and was granted a 90-day extension. After approximately 6 months of start-up activities, consisting almost exclusively of efforts to locate suitable homes and a school facility to serve the youth, the District advised Koba that due to a policy change, it would have no youth to place in the group homes. Thereafter, Koba essentially suspended activities. The District allowed the contracts to expire at the end of the base year. Koba submitted invoices totaling \$141,123.47 covering an 8-month period seeking reimbursement for time Koba employees expended in the search for suitable homes and facilities. The District paid Koba a total of \$23,301.36. Koba now seeks the unpaid difference, \$117,822.11, plus Quick Payment Act interest penalties, and statutory interest pursuant to D.C. Code § 1-1188.6. We conclude that Koba has been paid all amounts to which it is entitled. Therefore, we deny its appeal.

BACKGROUND

On August 6, 1992, Koba and the District entered into three contracts, each with a base year

period of August 7, 1992, through August 6, 1993. Under Contract No. JA/81805, Koba was to start up and operate a group home for eight emotionally disturbed girls, under Contract No. JA/80896, Koba was to start up and operate a group home for eight emotionally disturbed boys, and under Contract No. JA/89900, Koba was to start up and operate a short-term group home for up to ten severely emotionally disturbed boys and girls. (Appeal File ("AF") Exs. 1-3). Section B.1 of Article I ("Scope of Services") for each contract required Koba to provide the following services:

1. Start-Up – During the first ninety days after contract execution, the Contractor shall acquire, renovate and outfit the residential and educational facilities necessary to provide the services enumerated in the succeeding paragraphs of this section and hire and train the staff who will perform these services. Start-up activities shall be performed as specified in the Work Plan approved under the terms contained in ARTICLE [VIII].¹

The District agrees to use its good offices to assist the Contractor in obtaining all Advisory Neighborhood Commission (ANC) and other community approvals and consents, and all governmental permits, licenses and other authorizations necessary to open and operate the residential and educational facilities.

All activities necessary to enable to Contractor to be fully capable to provide all services enumerated herein shall be completed to the satisfaction of the Contract Administrator/Designee within the ninety-day start-up period. Because there are many factors involved in the acquisition and renovation of the facilities, and in obtaining approvals and authorizations, the Contractor may extend the start-up time to accomplish these tasks, provided such extension shall be at the sole cost of the Contractor, and shall not increase the start-up budget of this contract.

Section B.2 - B.22 required *inter alia* Koba to furnish a comprehensive therapeutic program for all participants, develop and update individual treatment plans, provide appropriate educational placement at either a D.C. Public School or at a school operated Koba, and arrange for the delivery of dietetic, vocational, recreational, and physical health services.

Article V,² entitled "Licensure and Certification Requirements," required Koba to lease or purchase a facility "conducive to a homelike atmosphere meet[ing] all necessary DCRA [Department of Consumer and Regulatory Affairs] specifications" and to obtain "all necessary zoning and

¹ Although the provision references Article VII, the parties agree that for Contract Nos. JA/81805 and JA/80896, the reference should be to Article VIII, which is entitled "Work Plan." The reference to Article VII is correct for Contract No. JA/89900.

² For Contract No. JA/89900, the same requirements are contained in Article IV.

building occupancy permits prior to the placement of clients in the facility.” Article V imposed responsibility for any delays in obtaining the various licenses and certificates on Koba.

Article VIII required Koba to submit to the District’s contract administrator for review and approval a detailed proposed Work Plan addressing all of the therapeutic, residential and educational services identified in Article I and “a detailed description and timetable for the activities to be performed during the Start-Up period, [and] the staffing composition which will be used” The Work Plan was to be the first contract deliverable and had to be approved by the contract administrator before work began. Article XXIII incorporates by reference into each contract Koba’s initial Work Plan which was submitted with its proposal. The parties have not been able to locate a copy of either the initial Work Plan or any subsequent iterations of the Work Plan for any of the three contracts. (*See Report on Telephone Conference, dated July 21, 1999*).

A. The Contract Cost Reimbursement Items

Article XIV (“Contract Type/Cost”)³ defines the contract as an indefinite quantity contract with fixed unit prices where the units of service are a “client occupied residential day” and a “client attended educational session.” Of particular importance to the dispute here, Paragraph E states that in addition to the payment of fixed unit prices, and in accordance with Attachment E of the contract (*i.e.*, Koba’s “Fixed Price Cost and Price Analysis worksheet and schedules” submitted in its BAFO), Koba would be reimbursed on a cost reimbursement basis for the following start-up costs on each contract:

1. start-up period salaries, consistent with the hiring schedule contained in Attachment D,⁴ not to exceed thirty-seven thousand nine hundred forty-two dollars and no cents (\$37,942.00);⁵
2. costs of renovations to physical plant, not to exceed twenty-five thousand five hundred dollars and no cents (\$25,500.00);
3. start-up costs of lease and operation of physical plant, not to exceed ten thousand eight hundred dollars and no cents (\$10,800.00);
4. supplies necessary to outfit the residence, not to exceed twenty-three thousand one hundred sixty-one dollars and no cents (\$23,161.00);

³ Article XIV of Contract Nos. JA/81805 and JA/80896 are identical. Minor differences in Article XIV of Contract No. JA/89900 are identified in notes 5-8 *infra*.

⁴ Attachment D could not be located for any of the contracts. (*See Report on Telephone Conference, dated July 21, 1999*).

⁵ Contract No. JA/89900 set a not-to-exceed (“NTE”) amount of \$41,698 for start-up period salaries.

5. transportation costs during the start-up period, not to exceed two thousand eight hundred twenty-three dollars and no cents (\$2,823.00);
6. communication costs during the start-up period, not to exceed two thousand six hundred twenty-four dollars and no cents (\$2,624.00);
7. purchase of vehicles, not to exceed twenty-two thousand dollars and no cents (\$22,000.00);⁶
8. furnishings and accessories which are required to outfit the residence, in one of the residential service categories enumerated herein, not to exceed twenty-two thousand dollars and no cents (\$22,000.00);⁷
9. staff training during start-up period, not to exceed three thousand five hundred dollars and no cents (\$3,500.00);
10. insurance costs during start-up, not to exceed one thousand two hundred fifty dollars and no cents (\$1,250.00);
11. various start-up costs for the educational component, not to exceed fifty-four thousand six hundred ninety-nine dollars and twenty-nine cents (\$54,699.29);
12. general and administrative and fees for cost reimbursable items, not to exceed twenty-six thousand six hundred and eighty two dollars and no cents (\$26,682.00);⁸ and
13. emergency medical services specifically approved by the Contract Administrator, not to exceed five thousand dollars and no cents (\$5,000.00), excluding indirect, fee and start-up. These funds are in addition to and not calculated in any budget submitted by the Contractor. Billing for these services will be outlined in the Work Plan.

Cost reimbursable items shall be paid either in full upon receipt of evidence of the expense (Attachment C, Cost Reimbursable Listing) or as approved by the Contract Administrator/Designee, as set out in the Work Plan. In the event the District

⁶ Contract No. JA/89900 set a NTE amount of \$25,000 for purchase of vehicles.

⁷ Contract No. JA/89900 set a NTE amount of \$26,355 for supplies to outfit the residence.

⁸ Contract No. JA/89900 set a NTE amount of \$28,637 for general and administrative and fees for cost reimbursable items.

exercises one or more of its options pursuant to ARTICLE XVII, there shall be no cost reimbursements.⁹

Each of the start-up reimbursable cost items is better understood after considering other contract terms and the contents of the Best and Final Offer ("BAFO") that Koba submitted pursuant to the solicitation for the group home for girls. It is the only BAFO in the record. We focus, however, on the reimbursement item for staff salaries because nearly the entire claim relates to that item.

Staff salaries

Contract cost reimbursement item E.1, for staff salaries, with an NTE of \$37,942, is derived from the Koba BAFO cost detail for its proposed staff positions and salaries during the 90-day start-up period:

STAFF POSITION	% TIME	HOURLY RATE	START-UP HOURS	START-UP WAGES	START-UP HRS/WK	NO. OF WEEKS
Program Manager Trainer	15.00%	\$33.654	120	\$ 4,038	10 Hrs/Wk	12
Admin. Director/Evaluator	3.30%	\$26.442	120	\$ 3,173	10 Hrs/Wk	12
Residential Director	100.00%	\$18.269	560	\$10,231	40 Hrs/Wk	14
Family Therapist/Social Worker	100.00%	\$13.462	120	\$ 1,615	40 Hrs/Wk	3
Senior Counselor	100.00%	\$10.096	120	\$ 1,212	40 Hrs/Wk	3
Staff Counselors	750.00%	\$ 8.654	600	\$ 5,192	40 Hrs/Wk	2
Registered Nurse	50.00%	\$19.471	80	\$ 1,558	40 Hrs/Wk	2
Psychologist	25.00%	\$19.231	80	\$ 1,538	40 Hrs/Wk	2
Recreational Therapist	50.00%	\$12.019	120	\$ 1,442	40 Hrs/Wk	3
Maintenance/Courier/Driver	50.00%	\$ 8.113	240	\$ 1,947	20 Hrs/Wk	12
Secretary	33.00%	\$ 8.654	80	\$ 692	40 Hrs/Wk	3
Total Wages:				\$32,638		
Fringe @ 16.25%				\$ 5,304		
Total Labor:				\$37,942		

(AF Supp. Ex. 2, at B-6). The "% time" column represents the time commitment during regular contract performance of each staff person as a percentage of a full time equivalent position. (*See id.*, at B-35). To determine the proposed commitment of time during the start-up period, one must compare the column depicting total start-up period hours and the last columns depicting hours per week and number of weeks during the start-up period. Thus, Koba proposed having the trainer and evaluator for 12 weeks during the start-up period (essentially the entire start-up period) at 10 hours per week, the residential (program) director for 14 weeks, the family therapist/social worker for 3 weeks, the senior counselor for 3 weeks, the staff counselors for 2 weeks, the registered nurse for 2 weeks, the psychologist for 2 weeks, the recreational therapist for 12 weeks, the

⁹ Attachment C, the "Cost Reimbursable Listing," could not be located for any of the contracts. (*See Report on Telephone Conference*, dated July 21, 1999).

maintenance/courier/driver for 12 weeks, and the secretary for 2 weeks. These durations are consistent with the written assumptions in Koba's BAFO that the group homes would have "at least a 90 day start-up period before [Koba] begins admitting children," that Koba may extend the start-up time "provided such extension shall be at the sole cost of [Koba], and shall not increase the startup budget of this contract," and that "Staff will be phased in during the start up period. All staff will be on board two weeks prior to the end of the start-up. During those two weeks the staff will receive intensive training." (*Id.*, at A-1). Indeed, under Article XIV, Paragraph F, no payment could be made for cost reimbursable salaries of staff to be trained during the start-up period or for reimbursable training activities unless a training syllabus and identities of the trainers had been previously approved by the contract administrator.

The personnel identified in contract Article X, entitled "Staffing and Personnel Requirements," are essentially identical to those specified in the start-up staffing plan of Koba's BAFO. Article X required Koba to have the following full-time equivalent staff to perform the contract tasks:

• Trainer/Evaluator	0.18
• Program Director	1.00
• Senior Counselor	1.00
• Child Care Worker	7.50
• Registered Nurse	0.50
• Social Worker	1.00
• Recreational Therapist	0.50
• Psychologist	0.25
• Psychiatrist	0.05
• Maintenance/Driver	0.50
• Secretary/Admin. Support	0.33
• Educational Staff	3.67

Koba's BAFO staffing chart for start-up does not list the psychiatrist position but costs for such services are contained in Koba's BAFO computation of the contract rate to be charged during regular contract performance. (*Id.*, at B-36). For the crisis/respite home contract, Koba was required to have the following minimum full-time equivalent staff for contract performance:

• Trainer/Evaluator	0.083
• Residential Director	1.00
• Social Worker/Family Therapist	1.00
• Psychologist	0.50
• Nurses (at least 1 FTE must be RN)	1.50
• Recreational Therapist	0.50
• Senior Mental Health Counselor	1.00
• Mental Health Counselors	9.00
• Maintenance/Driver	0.50
• Secretary	0.50

- School Staff 3.67

Because the BAFO for the crisis/respite home procurement cannot be located by the parties, we cannot compare the contract staffing requirement with Koba's BAFO plan.

Reimbursement Items E.2-E.11

The contract cost reimbursement items E.2 through E.11 are directly derived from Koba's BAFO schedules which show an expected start-up period of three months. For example, cost reimbursement item E.3, for start-up costs of lease and operation of physical plant, is derived from the Koba BAFO cost detail for "Occupancy Costs" consisting of "rent (\$2,500/mo. x 3 mos.)," "operating costs (maintenance, repair, renovation)," "insurance (building)," and "utilities (hook-up, electric, gas, water, pest, trash)." (*Id.*, at B-6). Cost reimbursement item E.9, for costs of staff training during the start-up period, is derived from the Koba BAFO cost detail for "Staff Training (Trainer Consultants, Training Materials, etc.)." (*Id.*, at B-7). Cost reimbursement item E.11, for various start-up costs for the educational component, is derived from the Koba BAFO budget summary form for start-up education costs (*id.*, at B-5), and the two-page cost detail supporting the budget summary (*id.*, at B-8, B-9). Koba planned to rent and operate a school facility which would support the educational requirements for the youth from all three residences (the girls and boys group homes and the crisis/respite residence). The total educational costs for the 3 month start-up period – \$164,098 – were allocated evenly among the three programs, *i.e.*, \$54,699 for each. (*Id.*, at B-9).

General and administrative costs and fees for cost reimbursable items

Contract cost reimbursement item E.12, for general and administrative costs and fees based on the other cost reimbursable start-up items, with an NTE of \$26,682, is derived from the Koba BAFO cost detail sheets at pages B-6 and B-7. The cost detail shows total direct costs of \$151,600 for all cost reimbursable items. (*Id.*, at B-7). The general and administrative ("G&A") cost is an indirect cost calculated at 12 percent of the total direct costs, which is \$18,192. In its BAFO, Koba adds the G&A amount to the total direct costs to give a subtotal of \$169,792, to which a 5 percent fee is applied, which is \$8,490, yielding for the girls home contract a total reimbursable start-up costs for 3 months of \$178,282. (*Id.*).

Although Koba's BAFOs submitted for the boys home and the crisis/respite home procurements cannot be located by the parties, the record as a whole supports finding that the type of reimbursable costs on those contracts were of the same types as those for the girls group home contract.

B. The Start-up Period

Contract start-up efforts began shortly after the contracts were executed on August 6, 1992. In a progress report covering the first month of start-up activities during August 1992, Koba reported that it was currently negotiating leases for four identified facilities to house the programs, namely the girls and boys group homes, the crisis/respite home, and a school facility to house "Koba

Academy” which would provide the educational services required by all three contracts. (AF Ex. 8, at 5). The only activities described in an attached activity log for August 1992 were those relating to searching for the homes and school facility. Koba reported that it intended to hire Ron Bates as the program director for the boys group home and Ned Hitchcock as the program director for the crisis/respite home, and that a search was continuing for the program director for the girls group home. (*Id.*). Koba identified in the progress report the following schedule and planned activities:

- A. Directors for each of the projects will join staff by October 1, 1992 and will begin recruitment of individual program staffs. Orientation and training outline completed and training scheduled for October 26-30, 1992.
- B. Facility leases and agreements secured, Certificate of Occupancy.
- C. Order furnishings and equipment, including household items, telephone systems, school equipment and vehicles.
- D. Finalize food menus and submit for approval. Contract for food service.

(*Id.*, at 6). This schedule indicates that Koba expected to complete start-up by early November 1992.

The first invoices, dated September 22, 1992, cover all three contracts, for the period August 7-31, 1992. Each is annotated as a “revised” invoice. (AF Ex. 8, at 2). Koba established four internal project numbers for the three contracts: KA751 (girls home), KA741 (boys home), KA761 (crisis/respite), and KA771 for the educational component for all three contracts. Koba’s August 1992 invoices billed as follows:

for salaries and wages: \$2,389.74 (girls), \$2,141.04 (boys), and \$2,402.81 (crisis/respite);

for fringe benefits at 16.25 percent of salaries and wages: \$388.33 (girls), \$347.92 (boys), and \$390.46 (crisis/respite);

for travel and transportation: \$13.00 (boys);

for indirect cost/overhead (calculated as 12 percent of salaries, wages, and fringe benefits): \$333.37 (girls), \$300.24 (boys), and \$335.19 (crisis/respite); and

for the fee (calculated as 5 percent of the other costs): \$155.57 (girls), \$140.11 (boys), and \$156.42 (crisis/respite).

(AF Ex. 8, at 2; Ex. 9, at 3; Ex. 10, at 72). The educational component was billed in the total amount of \$2,487.81 for salaries and wages, fringe benefits, indirect costs, and fee, and evenly allocated (\$829.27 each) among the three programs. (AF Ex. 8, at 2, 24-25). Thus, for August 1992, Koba billed the District a total of \$11,982.01, comprising \$4,096.28 (girls), \$3,771.58 (boys), and

\$4,114.15 (crisis/respice). Except for the \$13 for travel and transportation charged to the boys home contract for August 1992, essentially all of the remaining amounts billed derive directly or indirectly (through application of indirect rates for fringes, overhead, and fee) from salaries paid to Koba employees. For the remaining period from September 1992 through March 1993,¹⁰ all costs charged as start-up costs to the three contracts constituted directly or indirectly Koba employee salaries, except for \$21.32 charged to supplies and \$33.50 charged to communications for the girls program (AF Ex. 11); \$13.00 charged to travel and transportation, \$51.38 charged to communications, and \$730.65 charged to "other direct costs" for the boys program (AF Ex. 12); and \$249 charged to supplies for the crisis/respice home (AF Ex. 10).¹¹

There is no dispute that for the period August 1992 through March 1993, Koba invoiced the District \$141,123.47 for all three contracts, that the District paid \$23,301.36, and that the District refused to pay the remaining invoice balance of \$117,822.11. (Appellant's Memorandum, filed May 11, 1998, Schedule One). The invoices indicate that for the start-up period Koba claimed to have incurred only about \$1,112 in direct costs other than salary and fringes. In other words, more than 99.0 percent of the claimed start-up direct costs claimed by Koba consists of salary costs.

The salaries are supported by: (1) a one-page "Start Up" time summary for each project which provides Koba's internal billing number (*e.g.*, KA751 for the girls contract), the month, the Koba employee name, the number of hours allocated to the contract, and the wages based on the allocated hours (*e.g.*, AF Ex. 8, at 3, 24; AF Ex. 9, at 4; AF Ex. 10, at 73); (2) time sheets of the Koba employees (AF Exs. 8-12); (3) the monthly narrative report for August 1992 and portions of the narrative reports for October 1992 through March 1993 (AF Ex. 8; AF Supp. Exs. 8, 9, 14); and (4) a "Tasks Accomplished" report compiling Koba internal memoranda, notes, and calendars, for the period August 31, 1992, through March 15, 1993, prepared in approximately September 1993 (AF Supp. Ex. 13).

For August 1992, the "Start Up" time summary shows that six Koba employees allocated the following hours to each of the three contracts and the educational component:

Koba Employee	KA751 (girls)	KA741 (boys)	KA761 (crisis/resp.)	KA771 (education)
Mark Litke	34 hrs	22 hrs	34 hrs	18 hrs

¹⁰ Although the contracts defined the start-up period as the first ninety days after contract execution, *i.e.*, August 7 through November 4, 1992, Koba requested and received approval for a three month start-up extension to the start-up period. (AF Supp. Ex. 3).

¹¹ The latest invoice located in the record for the crisis/respice home was for October 1992. (AF Ex. 10). The parties are unable to locate any of the subsequent invoices for this contract. (*See* Appellant's Memorandum, filed May 11, 1998, Schedule One, note).

-10-

Koba Assocs., CAB No. D-1013

Mohammed Haque	4 hrs	3 hrs	3 hrs	3 hrs
Frances Lorenzi	24 hrs	24 hrs	24 hrs	16 hrs
Brett Wallace	12 hrs	12 hrs	13 hrs	13 hrs
Monica Silver	4 hrs	4 hrs	4 hrs	4 hrs
Kathy Guy	10 hrs	10 hrs	10 hrs	10 hrs

Although time sheets for August 1992 are not in the record, it appears that these six Koba employees were not dedicated exclusively to the three contracts but also provided management, administration, and/or clerical support either on a company-wide basis or on other Koba projects or project groups.

The time summaries for September 1992 show these same six employees, plus an additional employee, Darrell Nearon, charging time to the four Koba project numbers for the three contracts. The time sheets also show these employees allocating time to at least five projects other than the three contracts. (*E.g.*, AF Ex. 8). After September 1992, Monica Silver stopped billing time to the contracts. (*See* AF Ex. 44, at 2). The time summaries for October 1992 show hours being charged by Litke, Haque, Lorenzi, Wallace, Guy, and Nearon. The time summaries from November 1992 through March 1993 show these same Koba employees, with the addition of Helene Jones (who was hired as the program director for the girls group home) charging time to the three contracts. The time summaries indicate that they also charged time to other Koba projects, while other time was not charged to any particular Koba internal project number. To properly analyze whether these salary costs were properly chargeable under Article XIV.E.1 for "start-up period salaries", we must examine the role of these employees and how their activities related to the start-up period.

Frances Lorenzi held a number of management roles within Koba. She was vice president of operations for Koba, executive director of Koba's Family Guidance Center ("FGC"), and led the "FGC Management Team" that was responsible for managing the three contracts at issue here. (AF Supp. Ex. 13, at 3, 29; AF Ex. 44). Brett Wallace, also a member of the management team, was FGC executive administrator and acting director for finance at Koba. (AF Supp. Ex. 13, at 3, 6, 31; AF Exs. 55, 57).

As a result of questions raised by the District's contract administrator concerning whether Koba had complied with requirements of the District's Department of Employment Services ("DOES") for hiring the individuals who were being billed as members of the program staffs, particularly, Litke, Guy, Haque, Silver, and Nearon, Koba responded by stating that all of the employees were prior employees of Koba rather than new hires. (AF Exs. 44, 54). Koba explained that Mark Litke, a Koba employee since 1989, was Koba's program director for its Maryland-based group homes and shelters. He was also assigned to the position of Residential Project Director for all three of the contracts "pending final facility location and zoning and building approvals," was Koba's deputy director for residential programs, and was a member of the FGC management team. (AF Exs. 59; AF Supp. Ex. 13, at 3). His major responsibilities included locating the facilities,

creating vendor accounts, communicating with District zoning officials, developing the policies and procedures manual, and coordinating the recruitment of all related staff. Darrell Nearon, a Koba employee since 1990 who worked with the Koba "Central Management Team" in directing quality assurance and contracts management, was assigned to the three contracts from September 1992 until December 1992 to support Mr. Wallace and Mr. Litke in such tasks as recruitment, the development of the policies and procedures manual, and development of the quality assurance program. Monica Silver, hired by Koba in July 1992, provided secretarial/administrative assistant support on other Koba government contracts and then was assigned to the three contracts for August and September 1992. Mohammed Haque, hired by Koba in 1980, provided secretarial/administrative support on all three contracts from the date of award, but that "[o]nce the facilities are operational and accepting children, Koba will hire [an] on-site secretary in accordance with the contracts" Kathy Guy, previously a part-time consultant with Koba, began working on August 31, 1992, on a full-time basis supporting Ms. Lorenzi, the program manager responsible for the clinical/operations of each project. She was a member of the management team and assisted in recruiting the program staff for the homes.

The "Tasks Accomplished" document identifies activities being performed by Lorenzi, Litke, Wallace, Guy, Jones, Nearon, Haque, and Silver, on a bi-weekly basis between August 31, 1992, and March 15, 1993. The predominant activities related to the search for suitable group homes and a school facility. Other activities for these individuals included working to secure proper zoning and building permits; arranging site visits and inspections; participating in weekly "management team" meetings; preparing of monthly progress reports, work plans, invoices, financial systems, and administrative policies and procedures; interviewing potential program staff for the group homes and hosting job fairs; participating in status meetings with the District's program staff; and developing the school requirements and educational curriculum. (AF Supp. Ex. 13, at 3-24).

Considered together, the documents in the record demonstrate that Lorenzi, Wallace, Litke, Guy, Nearon, Haque, and Silver were not the program staff identified in Article X (and Koba's BAFO start-up staffing plan) which defines the staffing and personnel requirements. Because the reimbursable cost item for start-up period salaries under Article XIV.E.1 was meant to reimburse Koba for salaries of each contract's program staff (defined by Article X) who were to be hired according to hiring schedule contained in contract Attachment D, the salaries of Lorenzi, Wallace, Litke, Guy, Nearon, Haque, and Silver were not properly chargeable under Article XIV.E.1. Rather, these Koba employees were management, financial, administrative, and clerical support personnel who supported the general operations of the corporation. Although these employees were called upon by Koba to perform specific tasks supporting the start-up of the three contracts at issue, as well as other Koba contracts and activities, their employment status with Koba, the nature of the tasks they performed during the start-up period, and the duration of their activities all show that these employees are more properly classified, for purposes of the three contracts at issue here, as general and administrative personnel -- not program staff as defined by Article X of the contracts.

In its monthly narrative reports and in the "Tasks Accomplished" document, Koba admits that it was actively recruiting program staff for each of the contracts "with an anticipated start date as soon as [a] program site is secured" and that "[a]ll staff will receive an intensive orientation and

training in policies and procedures, first aid & counseling skills prior to accepting youth into the program.” (AF Supp. Ex. 14, at 10, 13, 14). The record discloses that Koba hired only one program staff member during the entire start-up period -- Helene Jones, the program director for the girls program, who was hired in November 1992. (AF Supp. Ex. 13, at 13). Although in its August 1992 narrative report Koba implied that it was in the process of hiring a program director for the boys home (Ron Bates) and the crisis/respite home (Ned Hitchcock), those individuals were never hired. Also, Koba never hired any of the other Article X program staff for the three contracts. Koba stated repeatedly that it would hire and train its program staff once it had secured the homes. Koba never secured any homes and thus never hired any of the program staff except the program director for the girls home.

The duration of the start-up salaries charged by Koba also was not consistent with the intent of the contracts. As indicated in its BAFO, Koba planned on hiring most of its program staff either two weeks or four weeks prior to the end of the start-up period. (AF Supp. Ex. 2, at B-6, B-8). Those projected durations formed the basis for the BAFO cost for the staff salary component of start-up costs and the BAFO cost estimate (\$37,942) was the precise amount incorporated into the NTE for the salary reimbursement item under Article XIV.B.1. Thus, the contracting parties intended that nearly all of the program staff would be hired near the end of the start-up period and would be in training during that time. The same expectation is reflected during performance as documented in the status report for August 1992, the narrative sections of the other status reports, and the “Tasks Accomplished” record of activities. (See AF Ex. 8; AF Supp. Exs. 13, 14). Koba billed for Lorenzi, Wallace, Litke, Guy, Nearon, Haque, and Silver, starting at or near the beginning of the contract, and for the most part continued to bill their time during the entire 6 months of start-up. None of these Koba employees received the training called for by the contracts, again, because Koba never intended that these employees would be the program staff who would operate the homes and school facility.

Although Koba never expressly referred to the proper Article XIV.E cost reimbursement categories in its invoices and it appears that the contract administrators for CYSA also did not fully understand the personnel (Article X) and cost reimbursement provisions (Article XIV) of the contracts (see AF Ex. 42), Koba attempted to charge its general and administrative salaries under the category meant for program staff start-up salaries. Then, Koba compounded the invoicing error by applying the 12 percent “indirect cost/overhead” rate to the salaries of Koba’s general and administrative employees. (See AF Ex. 8, at 2). The 12 percent indirect rate was meant to cover general and administrative salaries and expenses. This means that general and administrative costs (including G&A salaries) were recoverable only as a percentage of proper start-up direct costs under Article XIV.E.1-E.10.¹² To determine the amount of recoverable general and administrative costs,

¹² The NTE for start-up costs for the educational component, Article XIV.E.11, was similar. It was to be calculated based on program direct costs, plus an indirect rate of 12 percent (for general and administrative expenses) of direct costs, plus a 5 percent fee. (Cf. AF Ex. 2, at 33 with AF Supp. Ex. 2, at B-8 and B-9). In fact, Koba erroneously charged general and administrative salaries as program staff salaries.

we must first determine total direct costs.

The time summaries and time sheets in the record show Helene Jones charged 424 hours to the three contracts between November 1, 1992, and February 28, 1993. Her wage rate, apparently not including fringe benefits, was \$19.24 per hour. We assume for purposes of decision that her salary of \$8,157.76 allocated to these contracts, plus fringe benefits (at 16.25 percent), for a total of \$9,483.40, was properly chargeable under Article XIV.E.1 as reimbursable salary costs. As discussed earlier, the invoice records disclose other reimbursable direct costs (apparently, categorized under Article XIV.E.4 (supplies), E.5 (transportation costs), and E.6 (communication costs)) of only \$1,112 for all three contracts. The sum of the Article XIV.E.1 reimbursable salary costs of \$9,483.40, and the \$1,112 in other direct costs, yields total reimbursable direct costs of \$10,595.40 for the three contracts. Applying the indirect rate of 12 percent to total direct costs yields a general and administrative cost under Article XIV.E.12 of \$1,271.45, which when added to total direct costs equals \$11,866.85. Applying a 5 percent fee, which equals \$593.34, and adding it to the subtotal results in total reimbursable costs for all three contracts under Article XIV.E of \$12,460.19.

For the \$141,123.47 invoiced by Koba for start-up costs on the three contracts, the District made payments totaling \$23,301.36, consisting of \$11,982.01 (the entire amount invoiced by Koba for August 1992) and \$11,319.35 (partial payments of Koba's September and October 1992 invoices). (Appellant's Memorandum, filed May 11, 1998, Schedule One;¹³ District Memorandum, filed July 16, 1998, at 6). The District only paid one third of the September and October 1992 invoices because the District representatives believed that Koba in billing for the three contracts was simply billing the same effort three times. No further payments were made on invoices after October 1992, the balance of which totaled \$117,822.11.

Although Koba complained repeatedly about the District's scrutiny of its invoices and failures to pay, Koba's invoicing for start-up costs was substantially flawed. Beyond the error in charging general and administrative salaries as direct costs under Article XIV.E.1, Koba's initial invoice submission for September 1992 apparently sought payment of \$90,450 under Article XIV.E.7 for purchase of vehicles even though Koba never purchased the vehicles. (AF Ex. 57). In sum, we find that, on the record presented by the parties, the District overpaid Koba by \$10,841.17.

The record shows that start-up was not completed within 90 days of contract execution because Koba had difficulty locating suitable group homes for the youth. By mid-February 1993, when the three month extension to the start-up period had expired, and District officials had rejected certain group home sites proposed by Koba at the beginning of that month, the District informed Koba representatives that it had no youth to place in any homes and that cancellation of the contracts was being considered. Koba essentially suspended performance under the contracts. The District allowed the contracts to expire at the end of the base year.

¹³ Koba made an error in its chart listing payments under Contract No. JA/89900. The District payment for September 1992 should read \$2,063.92 (not \$2,065.98) and the payment for October 1992 should read \$1,125.57 (not \$1,126.69).

On January 27, 1994, Koba submitted a claim to the contracting officer seeking \$117,824 plus interest for unreimbursed start-up costs under the three contracts. (AF Supp. Ex. 16). On January 13, 1997, Koba resubmitted its claim to the Director of the former Department of Administrative Services. On May 28, 1997, Koba filed a notice of appeal with us from the deemed denial of its claim. Koba moved for summary judgment on May 11, 1998, and the parties agreed on July 21, 1999, to submit the case for a decision on the record.

DISCUSSION

We exercise jurisdiction over the appeal pursuant to D.C. Code § 1-1189.3 (1999).

Article XIV of each contract governs the reimbursement of start-up costs. Article XIV.E specifies the type of costs that were to be reimbursable. Koba's claim rises or falls on whether the salaries for Lorenzi, Wallace, Litke, Guy, Nearon, Haque, and Silver between August 1992 and March 1993 were properly chargeable as start-up period salaries as defined in Article XIV.E.1. Based on our review of Koba's BAFO in connection with the Article XIV.E reimbursement provisions and the Article X program staff definitions, we conclude that salaries of program staff -- not Koba general and administrative personnel -- were meant to be reimbursed under Article XIV.E.1. The level of salary reimbursement for these program staff positions was to be consistent with the contract hiring schedule. We have found that Koba's Lorenzi, Wallace, Litke, Guy, Nearon, Haque, and Silver were not the program staff defined by Article X and thus their salaries were not reimbursable under Article XIV.E.1.

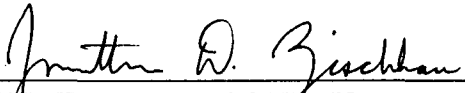
The record amply demonstrates that Koba did not consider Lorenzi, Wallace, Litke, Guy, Nearon, Haque, and Silver to be program staff within the meaning of Article X, but repeatedly advised the District that it was recruiting the program staff and would hire such staff once the homes were secured. No homes were ever secured. And except for the program director for the girls home hired by Koba in November 1992, no other program staff for any of the three contracts was hired. In addition, Article XIV.F.4 provides that the District would not reimburse salaries of staff to be trained during the start-up period unless "the training syllabus and the identities of the trainer(s) have been approved by the Contract Administrator at least two weeks in advance of incurring costs." The record shows that there was no approved training syllabus and trainers. Consistent with this requirement is the information in Koba's BAFO and the monthly narrative progress reports which indicate that Koba intended to hire most of the program staff shortly before the end of the start-up period and then give them intensive training prior the girls and boys being brought to the group homes. Thus, Koba's general and administrative personnel salaries were not reimbursable under Article XIV.E.1 because those Koba employees were not the intended contract program staff, the type of activities they performed were meant to be reimbursed under Article XIV.E.12 as general and administrative costs calculated at 12 percent of direct costs, their durations of work were inconsistent with the hiring schedule, and they did not received the required training by approved trainers as required by Article XIV.F.4.

The record as submitted by the parties shows Koba's total reimbursable direct costs equal to only \$10,595.40 for the three contracts. Based on that, we have found that Koba was entitled to recover only \$1,271.45 (12 percent of total direct costs) as general and administrative costs under Article XIV.E.12. Including the 5 percent fee of \$593.34, Koba has shown entitlement to total reimbursable costs of only \$12,460.19 for all three contracts under Article XIV.E and F. Because the District made payments to Koba totaling \$23,301.36, the District overpaid Koba by \$10,841.17.

CONCLUSION


Koba has not shown that it is entitled to recover. Accordingly, we deny its appeal.

DATED: August 25, 1999

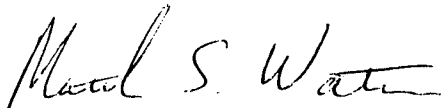


JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:



LORILYN E. SIMKINS
Chief Administrative Judge



MATTHEW S. WATSON
Administrative Judge

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD**

717 14TH STREET, N.W., SUITE 430

WASHINGTON, D.C. 20005

(202) 727-6597 (Ofc #)

(202) 727-3993 (Fax #)



August 26, 1999

TO: Keith R. Malley, Esquire
KOBAS ASSOCIATES, INC.
5612 Second Street South
Arlington, VA 22204

Mark D. Back, Esquire
Assistant Corporation Counsel
441 4th Street, N.W., 6th Floor
Washington, DC 20001

SUBJECT: CAB No. **D-1013** (Appeal Of: **Koba Associates, Inc.**)

Attached is a copy of the Board's Opinion denying appeal.

BARBARA THOMPSON
Secretary to the Board