DECISION

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

97034

FILE: B-181687 DATE: September 23, 1975

MATTER OF: SIMMEL, Industrie Meccaniche Societa Per Azioni

97432

DIGEST:

1. Devaluation of United States dollar during original and extended term of contract which was denominated in dollars though performed in Italy will not support price adjustment since United States is not liable as contractor for consequences of its acts as sovereign, including currency devaluation, absent contract provision authorizing modification to compensate equitably for such acts.

2. Price increase to compensate for decreased rate of tax reimbursement by Italian Government is denied where effect would subject United States to tax from which it was exempted by United States-Italy agreement.

3. Absent contract provision protecting against delay caused by labor strike, Italian contractor is required to complete undertaking without recovery for damages sustained by reason of strike, even though strike occurred during period of compensable Government-caused delay.

This decision is rendered pursuant to a request by SIMMEL, Industrie Meccaniche Societa Per Azioni (SIMMEL), for reconsideration of the disallowance of its three-part claim No. Z-2145425(1) by Settlement Certificate of August 20, 1974. The claims are for alleged additional costs up to $534,832 incurred incident to performance of contract No. DAJA 37-70-C-0544, dated December 12, 1969, for the sale of artillery shells to the United States Army under the offshore procurement program.

I.

SIMMEL's first claim in the amount of $327,862 covers losses incurred as a result of the devaluation of the United States dollar during the extended term of the contract to March 1972 provided by modification P00003, effective May 24, 1971. Modification P00003 was issued because of a United States Government-caused delay.

With regard to claims arising out of the devaluation of the dollar, we stated in 53 Comp. Gen. 157 (1973):

> "The devaluation of the dollar is attributable to the Government acting in its sovereign capacity. See B-175674, May 30, 1972. It is well settled that the Government is not liable as a contractor for the consequences of its acts as a sovereign. See Horowitz v. United States, 267 U.S. 458 (1925); The Sunswick Corp. v. United States, 75 F. Supp. 221, 109 Ct. Cl. 772 (1948). Also, where a Government contract contains an express stipulation as to the amount of compensation to be paid, and no provision is made for any increase in the event performance becomes more expensive or difficult, the fact that the cost of performance is increased by factors which do not constitute undue interference by the Government as a contractor does not entitle the contractor to additional compensation. See B-175674, supra, and cases cited therein. As was stated in Penn Bridge Co. v. United States, 59 Ct. Cl. 892, 896 (1924)--
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> > "'* * * Contractual rights once fixed in a proper contract executed by authority are inviolate. They may be forfeited by one party or the other, construction is permissible if the terms are ambiguous, but in the absence of ambiguity or forfeiture of rights by conduct, such a contract cannot but be enforced as written.'" (Emphasis supplied.)

SIMMEL's letter of January 21, 1975, requesting reconsideration, acknowledges that the contract price was stipulated in United States dollars and that the price was fixed. The company also agrees that a devaluation of the dollar during the original term of the contract would not be imputable to the United States acting in its capacity as contractor.

Modification P00003 did not abrogate the original contract payment terms. As stated at the bottom of block 12 of modification P00003:

> "Except as provided herein, all terms and conditions of the document referenced in Block 8 [contract No. DAJA37-70-C-0544, dated December 12, 1969,] as heretofore changed, remain unchanged and in full force and effect."

Thus, the contract, as modified, partook of all the same terms and conditions as before, with only the exceptions expressly noted. The original contract contained no provision for any increase in price for costs incurred by virtue of currency fluctuation and the modification introduced no such provision. Consequently, under the modified contract, as before modification, the United States Government, acting in its contracting capacity, was not liable for acts of the United States Government acting as a sovereign. Horowitz v. United States, supra.

II.

SIMMEL's second claim in the amount of $119,878 covers increased costs incurred by reason of a decrease in the rate at which sellers to the United States are reimbursed by the Italian Government for transaction tax (I.G.E.) payments.

SIMMEL seeks such compensation pursuant to paragraph (b) of clause 22 of the contract which provides in pertinent part:

> "* * * if the contractor or a subcontractor is required to pay in whole or in part any tax, duty or other public charge which was not included in the contract price and which was not applicable at the contract date of execution the contract price shall be correspondingly increased."

Since there is no factual dispute regarding this claim, the only matter for our consideration is whether any basis exists to compensate SIMMEL for these increased "tax" costs. See Ferry Creek Rock and Concrete, Inc., B-172531, October 24, 1974.

The Dunn-Vanoni Agreement, an intergovernmental Executive agreement between the United States and Italy, executed March 5, 1952, articulated the fundamental principle that:

> "expenditures made in Italy by the United States for the common defense should be exempt from Italian taxes and imposts." 3 U.S.T. 4238, T.I.A.S. 2566.

That policy was implemented by Article 1 of the Agreement, which provides:

> "1. Italy will grant relief from Italian taxes and imposts in the manner specified in the Annex to the present note * * *" Id.

The Annex provides that the Ministry of Finance will refund the I.G.E. paid by sellers of goods to the United States. 3 U.S.T. 4240, Part 1 (A) (II). The tax exempt status of the United States was reaffirmed in the Agreement of March 31, 1954, between the United States and Italy which extended exemption status to United States offshore procurements. 5 U.S.T. 2237, T.I.A.S. 3083. General provision 8 of that Agreement states:

> "(a) The contract prices, including the prices in subcontracts hereunder, are understood to be net of the taxes and duties which, in accordance with the agreement entered into between the Government of the United States and the Government of Italy, will not be borne by the United States for its expenditures in Italy, as well as net of all other taxes or duties not applicable to this contract under the laws of Italy." (Emphasis supplied.)

In express recognition of the I.G.E. exemption, special provision 1 (SP-1) of the contract excluded from the contract price an amount computed on the basis of the 7.5 percent I.G.E. Apparently, reimbursement by the Italian Government to SIMMEL was made on the basis of a 7.5 percent I.G.E. until Italian Law Decree No. 195, of May 1, 1970, reduced the rate of reimbursement to 6.5 percent. This rate of reimbursement was later further reduced to 5.5 percent.

SIMMEL contends that these decreased rates of I.G.E. reimbursement are compensable under paragraph (b) of clause 22 of the contract. However, even assuming this decreased rate of reimbursement could be considered a new tax burden under paragraph (b), payment of this claim is effectively precluded by paragraph (a) of clause 22, which states in pertinent part:

> "(a) The contract price * * * does not include any tax, duty or public charge which by law, regulation or governmental agreement is not applicable to expenditures made by the United States, or on its behalf * * *"

Since the United States has effectively been insulated from assuming any burden for contractor I.G.E. payments by virtue of the Dunn-Vanoni Agreement (as specifically recognized by SP-1 of the contract), the decreased rate of I.G.E. reimbursement by the Italian Government affords no basis for payment of this claim.

We do not believe that Impresa C.E.S.I.C.A., ASBCA No. 16523, 73-2 BCA 10215, cited by SIMMEL, is applicable here, inasmuch as the bases for decision in that case were contract clauses not present in the SIMMEL contract.

III.

The third claim in the amount of $87,092 relates to increased inspection costs incurred during the extended period of the contract provided by modifications P00003 and P00004.

Modification P00003 expressly recognized Government-caused delays in approving the first article sample, inspection gages, plywood and wood preservative. The possibility of such delays was anticipated by clause SP-5(f) of the contract which provides:

> "(f). In the event the contracting officer does not approve, conditionally approve, or disapprove the first article within the time specified * * *, the contracting officer shall * * * make a determination of the delay occasioned by the contractor thereby, and shall equitably adjust the delivery or performance dates or the contract price, or both * * *."

Pursuant to this clause, modification P00003 extended the performance date from July 1971 to March 1972, and modification

P00006 provided for a price increase of $41,422 to compensate the contractor for additional inspection costs incurred by virtue of this extension. Having agreed to both modifications, SIMMEL is now foreclosed from questioning either this time extension or the resultant price increase.

SIMMEL claims that it was acting as an agent of the United States in regard to payment of inspection costs and should be reimbursed for expenditures made on its behalf. However, SIMMEL agrees that the original contract price included an allowance of $97,760 for inspections. This provision, as well as the price adjustment provided by modification P00006, would be unnecessary if the parties intended that all inspection costs would be refunded by the United States. Furthermore, clause SP-18(a) provides that the United States intends to utilize the inspection services of the Italian Inspectorate and clause SP-18(g) provides that charges related to the use of the Italian Inspectorate shall become a part of the contractor's cost.

In recognition of labor strikes in Italy, modification P00004 extended the delivery schedule to provide for final delivery in December 1972. The delay was not occasioned by any action of the United States and the contract contains no provision for equitable price adjustment for excusable delay.

In Fritz-Rumer-Cooke Co. v. United States, 279 F. 2d 200 (6th Cir. 1960), a contractor was unable to perform on time because of a labor strike. As in the instant case, the Government granted an extension of time but disputed the contractor's right to damages sustained as a result of the work stoppage. The contract contained no provision regarding delay caused by strike. In the course of its decision denying the contractor's claim, the court stated:

> "It has long been a well-settled rule of law that if a party by his contract charges himself with an obligation possible to be performed, unforeseen difficulties, however great, will not excuse him, unless performance is rendered impossible by Act of God, the law, or the other party. [Cases cited.] Since there was no provision in the contract protecting against a delay caused by a strike, the application of this rule required the contractor to complete his undertaking without right of recovery for any damages that may have been sustained. [Cases cited.]" 279 F.2d at 201, 202.

Finally, SIMMEL claims that the United States must assume all responsibility for any damage incurred by the contractor after the original term of the contract since, had the United States approved the goods as originally agreed, performance would have been completed prior to the labor strikes. However, SP-5(f) does not form a basis for delay damages caused by unforeseeable acts of God or third parties, such as labor strikes, occurring during a period of Government-caused delay. Rather, this clause only allows for equitable price adjustment for late Government approvals of first article samples.

Consequently, the disallowance of SIMMEL's claim is sustained.

Deputy Comptroller General
of the United States