

DECISION

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

60517

FILE: B-185005

DATE: February 13, 1976

MATTER OF: C. M. Cooke & Company

98608

DIGEST:

1. Request for equitable remission of liquidated damages under 10 U. S. C. 2312 must be denied because agency has recommended against remission and Comptroller General may not remit liquidated damages in absence of favorable recommendation from agency.
2. If liquidated damage provision in contract is otherwise valid, fact that Government did not suffer actual damages as result of default does not preclude assessment of liquidated damages against defaulting purchaser.
3. Claim that liquidated damages may not be retained because Government erred in placing claimant on cleared bidders list, thereby invalidating any contracts subsequently awarded to claimant, is without merit, since record does not support claim that clearance was granted in error. Furthermore, since clearance requirement is solely for protection of the Government, validity of contracts would not be affected by Government error in granting clearance.

This decision involves a claim by C. M. Cooke & Company (Purchaser) for the remission of liquidated damages assessed under four contracts (Nos. 92-112-1116-11, 92-112-1118-12, 92-112-1122-3, and 92-112-2002-26) with the Army Property Disposal Agency in Vietnam (APDA) for the sale of Government surplus property.

On January 11, 1971, Mr. C. M. Cooke was cleared to engage in all surplus property transactions for a period of 12 months by the U.S. Embassy in Saigon (Embassy). Mr. Cooke at that time was doing business in the Far East in conjunction with a number of companies and was cleared under the name "C. M. Cooke United Supply Agencies, P.O. Box 1188, Saigon" at the same mailing address as "C. M. Cooke & Company", with both the APDA and the Embassy treating the clearance as applicable to C. M. Cooke & Company as well. The sales contracts in question were awarded to C. M. Cooke & Co. on June 15, 20, 25, and July 6, 1971, and contained a default clause which provided that if the purchaser failed to make payment or remove

the property within the time specified, the Government, upon purchaser's failure to cure, would be entitled to retain as liquidated damages a sum equal to 20 percent of the purchase price of the items on which the default occurred.

In July and August of 1971 a "Notice of Default" on each contract was sent by the Government to the purchaser for failure to remove the subject property from the disposal yard. On August 19, 1971, all 4 contracts were terminated at the specific request of the purchaser. Liquidated damages were assessed by withholding purchaser's bid deposits amounting to 20 percent of the contract prices. C. M. Cooke & Company was then removed from the cleared bidders list by the Embassy on August 24, 1971.

Purchaser requests equitable remission of the liquidated damages pursuant to 10 U.S.C. 2312 (1970). Purchaser further contends that it is entitled to remission as a matter of law, because the Government suffered no actual damages and because the contracts were invalid. Purchaser's claim has been denied by the contracting officer and the APDA, and the Defense Supply Agency recommends against the remission of liquidated damages.

Our authority to equitably remit liquidated damages rests solely upon 10 U.S.C. 2312 (1970), which provides that upon the recommendation of the head of an agency, the Comptroller General may remit all or part, as he considers just and equitable, of any liquidated damages assessed for delay in performing a contract made by the agency. It is apparent from the statute, and it has consistently been our view, that an agency's favorable recommendation for equitable remission is a prerequisite to remission by this Office. Lasko Metal Products, Inc., B-180174, July 24, 1974, 74-2 CPD 54; First National Bank of The Black Hills, B-180566, August 19, 1974, 74-2 CPD 106. Accordingly, we are unable to grant Purchaser equitable remission of all or any part of the liquidated damages assessed.

We are also unable to agree that Purchaser is entitled to remission as a matter of law. The fact that the Government might not have suffered any actual damage as a result of the defaults would not render the assessment of liquidated damages illegal or improper, since it has been generally held that where

a liquidated damage provision is otherwise valid, the absence of actual damages resulting from a breach does not preclude recovery of the stipulated sum. United States v. Bethlehem Steel Co., 205 U. S. 105 (1906); Southwest Engineering Co. v. United States, 341 F. 2d 998 (8th Cir.), cert. denied, 382 U.S. 819 (1965); Department of State, B-180714, August 5, 1974, 74-2 CPD 79; 36 Comp. Gen. 143, 145 (1956).

Purchaser's assertion that the contracts were void ab initio is based on the Embassy's removal of C. M. Cooke from the cleared bidders list. Purchaser regards the rescinding of its clearance as indicating that it had never been properly cleared to submit bids and that therefore no contract could legally have been awarded to it. However, the record shows only that the clearance was removed after Purchaser had defaulted on four contracts; it contains no indication that the granting of the clearance was in error. Furthermore, even if that clearance was the result of Government error, the legality of the contracts would not be affected. The clearance requirement is solely for the benefit of the Government, and the Government's decision to grant a clearance neither confers any enforceable rights upon persons dealing with the Government nor renders invalid any contract awarded as a result of the granting of the clearance. See George Epcar Co. v. United States, 377 F. 2d 225, 227 (10th Cir. 1967); B-168496, January 16, 1970.

In view of the foregoing, the claim for rescission is denied.

R. G. Kibben

Deputy Comptroller General
of the United States