

DECISION

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

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FILE: B-183434

DATE: January 15, 1976

MATTER OF: Dumont Oscilloscope Laboratories, Inc.

DIGEST:

Where record establishes that prospective subcontractor ordered inventory on its own initiative, or possibly at suggestion of prime contractor, but not in reliance on demonstrated or authorized representation by Government upon which claimant had right to rely, and where record indicates that claimant knew Government did not anticipate contract except with prime contractor, and that Government employees were not authorized to enter into contract with subcontractor, contention that Government is estopped to deny existence of contract is without merit, and claim based on breach of purported contract is denied.

This case arises upon the request of counsel for Dumont Oscilloscope Laboratories, Inc. (Dumont) that materials submitted previously in support of a bid protest be treated as a claim for damages for breach of contract. We rejected Dumont's protest as untimely in our earlier decision in the same matter, B-183434, August 26, 1975, 75-2 CPD 125, affirmed on reconsideration, B-183434, September 30, 1975, 75-2 CPD 200.

The record indicates that on May 3, 1974, the Army Missile Command (Army) placed an order with the Western Electric Company (Western Electric) for 102 Modification Kits (Army Part #5959855) and 9 Dumont Oscilloscopes (Army Part #10668250), for use in connection with the Hercules Missile System. It appears that as then drafted the specifications for Part #5959855 required that each Modification Kit include 1 Dumont 765 scope. Consequently, the order placed with Western Electric required that Western Electric supply a total of 111 oscilloscopes of Dumont manufacture (all Dumont 765 scopes).

In October 1974, Western Electric issued three requests for quotation (RFQ), formally initiating acquisition of the required scopes. Nevertheless, by telegram and letter dated November 8, 1974, the Army contracting officer directed Western Electric not to take any further action or incur further obligations, until

notified. Thereafter, the Army amended its specifications and the Western Electric order by: (1) raising to 150 the number of Modification Kits ordered; (2) deleting from the order the 9 separate Dumont scopes and (3) substituting the Tektronix 465 Oscilloscope as the standard Kit component.

It further appears that these changes were effected because the Tektronix oscilloscope was believed to be technically superior and substantially less expensive, and because substitution permitted the acquisition of a larger number of units with available appropriated funds.

It appears that Dumont does not contend that it actually had a contractual relationship with Western Electric, since Dumont concedes that the RFQ was cancelled "even before * * * [Western Electric] received our quotation." (Emphasis added.) The essence of this matter appears to be that because it believed that the Army's requirements would be filled with Dumont scopes, that the scopes would be purchased from Dumont by Western Electric, and that Dumont would have difficulty manufacturing the number required without advance preparation, Dumont, in its words, "felt it should buy long lead items representing a cost of approximately \$100,000." Dumont alleges that these circumstances, together with statements allegedly made by Army personnel, discussed infra, estop the Government from denying the existence of a contract, which was subsequently breached.

While counsel for Dumont believes that the Army directed Western Electric to furnish Dumont scopes, we must note that the original order did not specify that the scopes were to be obtained from Dumont. Western Electric was free to satisfy the order with existing inventory, or to purchase Dumont scopes from other sources.

Nevertheless, counsel contends that the Government should be estopped to deny that a contract existed. In Emeco Industries, Inc. v. United States, 202 Ct. Cl. 1006 (1973), the Court of Claims reasserted the four elements of estoppel propounded in United States v. Georgia-Pacific Company, 421 F.2d 92 (9th Circ. 1970), requiring that:

- 1) the party to be estopped must know the facts;
- 2) the party must intend that its conduct shall be acted upon, or must act so that the party asserting the estoppel has a right to believe that the conduct is so intended;

- 3) the claimant must be ignorant of the true facts;
and
- 4) the claimant must rely on the other's conduct,
to his injury.

Moreover, where estoppel is claimed against the Government, the official claimed to have acted on behalf of the Government must have been empowered to bind the Government. Flippo Construction Co., March 7, 1975, 75-1 CPD 139, affirmed on reconsideration, May 20, 1975, 75-1 CPD 303. Cf. Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380 (1947). See also, Fink Sanitary Service, Inc., 53 Comp. Gen. 502 (1974) 74-1 CPD 36.

We find it difficult to conceive that a contract can be established by estoppel, where the party asserting estoppel apparently understood that no direct contractual relationship was intended. We believe Dumont clearly knew that it was at best in the position of a subcontractor, and that the Government entertained no intention of entering into any contract with it. These circumstances alone tend to negate any contention that the claimant could reasonably rely on the representations allegedly made by the Army.

Moreover, while Dumont claims that

"On December 17, 1973, Mr. Pat Zagaria of Dumont and Mr. Jan Fuller, a Dumont representative in Huntsville, met with Mr. James R. Sandlin, * * * [the Army's] Technical Manager for the project * * * who has had principal authority for directing Western Electric on source selection * * *."

We must note that (1) Mr. Sandlin was not the contracting officer in this matter; (2) Dumont does not claim that he had contracting authority; and (3) Dumont admits that, "* * * Mr. Sandlin advised * * * Dumont * * * that a purchase order was to be placed with Western Electric * * *. He noted * * * that it was his intention to use the Dumont scope." (Emphasis added.)

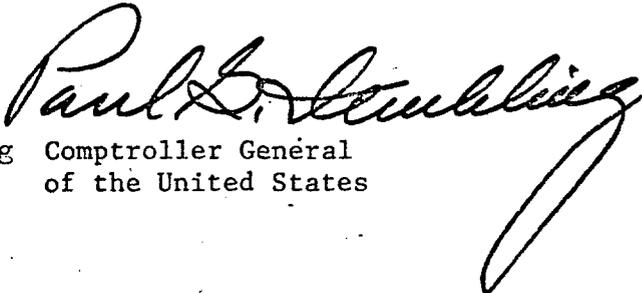
Dumont has also stated that it "was originally promised the award of a contract of 148 oscilloscopes and directed to undertake the procurement of necessary components * * *." The promise of an award is purely anticipatory, and Dumont does not indicate what person with authority directed it to purchase components.

Dumont contends that "*** With a buy imminent [in late 1974] *** we had assurances from [Army] personnel and Western Electric *** that there could be no change from the 765 to any type scope, 'Dumont or not.'" However, specifics of the assurances are not given, nor is this statement indicative of anything more than the view that Dumont scopes would be used, as was then expected. Concerning the representations allegedly made by Army personnel, it is also significant to note that the Deputy Commander of the Army Missile Command caused a review of Dumont's allegations to be undertaken in November 1974, and stated at that time that he found "*** no indication that any discussions have been held by the Government to the effect that [Dumont's] oscilloscope would be procured for this application."

Finally, the authorities cited by Dumont are not in point. Lockheed Shipbuilding and Construction Co., 75-1 BCA 11,245, ASBCA No. 18460, May 13, 1975, involved a contract settlement. The estoppel arose in that case in circumstances where it was found, inter alia, that certain actions had been taken in connection with the settlement by Government officials, acting within the scope of their authority, upon which the contractor relied to its detriment. United States v. Buffalo Pitts Company, 234 U.S. 228 (1914) involved a situation where the Government, after a contract default, took possession of certain property of the contractor, and it was found that the contractor relied on Government representations that payment for the property would be "recommended." Thus, neither decision involved circumstances similar to those here.

Under the circumstances, the record establishes in our view that Dumont made the expenditures for inventory materials on its own initiative, or possibly at the suggestion of Western Electric, but not in reliance upon any demonstrated or authorized representation by the Government, upon which Dumont would have had any right to rely.

For the reason stated, upon due consideration Dumont's claim is denied.


Acting Comptroller General
of the United States