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DECISION

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

FILE: B-187593 DATE: June 26, 1978

MATTER OF: GKS, Inc.

DIGEST:

1. An Air Force had no authority to make express contract to purchase contractor's suggestion that parts previously obtained on sole-source basis be procured competitively, there could be no implied-in-fact contract to accomplish same purpose, and claim for quantum meruit recovery--on basis that contractor provided benefit to Air Force and Air Force implicitly ratified transaction--is denied.

2. Where Air Force repeatedly advised contractor that its purported Value Engineering Change Proposal (VECP) was rejected--VECP essentially amounting to suggestion that certain parts be procured competitively rather than sole source--Air Force's conduct in initiating competitive procurement for parts did not impliedly modify contractor's contract to include Value Engineering Incentive clause, nor does equitable estoppel apply against Government in circumstances. Claim for share of savings resulting from competitive procurement is denied.

This is our decision on a claim by GKS, Inc., concerning contract No. F42600-76-C-0249 awarded by the Ogden Air Logistics Center, Hill Air Force Base, Utah.

Background

The contract, awarded to GKS in July 1975, was for the supply of a quantity of parts kits. Eight component items of the kits were Government-Furnished Material (GFM) and were being obtained by the Air Force from National Waterlift Company. On October 6, 1975, the Air Force issued request for proposals (RFP)

No. F42600-76-R-5524, which contemplated a new contract for an additional quantity of the same kits.

By letter dated October 30, 1975, GKS submitted what it called a Value Engineering Change Proposal (VECP), contingent upon the Value Engineering Incentive (VEI) clause being added to its contract -0249. Essentially, GKS's VECP suggested that the Air Force procure the eight GFM parts competitively rather than buying them sole source from National Waterlift because additional suppliers were available and the Air Force would save money.

The applicable regulation provides that value engineering (VE) is concerned with the elimination or modification of anything that contributes to the cost of a contract item or task but is not necessary for needed performance, quality, maintainability, reliability, or interchangeability. VE is described as a systematic and creative effort, not required by any other provision of the contract, directed toward analyzing each contract item or task to ensure that its essential function is provided at the lowest overall cost. Armed Services Procurement Regulation (ASPR) § 1-1701 (1975 ed.).

ASPR provides for consideration of VE proposals in two situations--where the VEI clause (ASPR § 7-104.44(a)) is included in the contract, and where a company which has no current contract submits an unsolicited VE proposal. In the former situation, if the Government accepts a VECP under the VEI clause, the contractor shares in any savings resulting from the VECP. ASPR § 1-1702.1. Inclusion of the VEI clause in contracts under $100,000 (as here) is discretionary. In the latter situation, the Government may decide to purchase an unsolicited VE proposal. ASPR § 1-1706.

Since GKS had a current contract which did not contain the VEI clause, its VECP did not fit either of the two ASPR categories.

By letter dated December 22, 1975, the contracting officer rejected GKS's VECP for two reasons: (1) GKS's contract did not contain a VECP clause and there was

therefore no provision in the contract for processing such a proposal, and (2) after an engineering evaluation the Air Force had determined that the VECP was incomplete because it did not specifically state what commercial parts were available. The letter went on to state that "Drawings and specifications of these commercial parts should be submitted with the VECP so that it can be determined if the suggested commercial parts are equal to the parts being procured."

In the meantime, in the procurement being conducted under RFP -5524 the Air Force undertook to qualify additional sources for the eight GFM components, and as part of this effort furnished parts kits to GKS and other companies. The Air Force states it was not in a position to provide drawings of the parts as the basis for a competitive procurement, nor were commercial parts numbers available. In this connection, GKS by letters dated February 10, 1976 (1) resubmitted its VECP, and (2) requested Air Force approval as an alternate source to National Waterlift. GKS's submission included drawings and other data from several companies which, GKS stated, were currently supplying the parts to National Waterlift (and then to the Air Force).

In response to this, the contracting officer by letter dated April 27, 1976, again rejected the VECP. The reasons given were that (1) there was no VECP clause in GKS's contract, and (2) the VECP criteria were not met because there was no change from the existing kit and the one being proposed, i.e., no new design, change in function or means of performing the function; rather, the parts were identical to those being obtained from National Waterlift. However, GKS did receive limited source approval in the competition being conducted under the RFP. On April 30, 1976, GKS was awarded contract No. F42600-76-C-1667 for the supply of a quantity of parts kits including the eight previously GFM components, with the stipulation that seven of the eight had to be obtained by GKS from either National Waterlift or W.S. Shamban Company.

GKS resubmitted its VECP by letter dated June 1, 1976, arguing that the VECP was valid under the ASPR criteria and that it could be accepted if the Air Force would incorporate the applicable VE clause into the contract. The contracting officer's June 28, 1976, letter again rejected the VECP, stating that it related to a change in purchasing practices rather than to the type of VE effort contemplated by ASPR. GKS again took issue with the contracting officer's position (letter dated July 8, 1976) and the contracting officer replied (letter dated July 14, 1976) that his position was unchanged.

Subsequently, GKS filed its claim with our Office. GKS estimates that over a 1-year period the Government has saved a minimum of $106,322.58 as a result of its VECP and contends that in fairness these savings should be shared with it in a 50-50 ratio.

Claimant's Position

GKS states its claim is premised on the theory of quantum meruit. Mainly, GKS relies on RCA Corporation, B-183289, December 3, 1975, 75-2 CPD 369. There, with the full knowledge and acquiescence of Government officials, including the contracting officer, but without having been awarded a contract, RCA conducted a training course for the Marine Corps. It was held that since the Government acknowledged it had received a benefit and the unauthorized action had been implicitly ratified, payment could be made on a quantum meruit basis. GKS points out that in this as in other decisions, e.g., 40 Comp. Gen. 447 (1961), our Office has recognized that in appropriate circumstances payments may properly be made for the reasonable value of work or labor furnished to the Government despite the fact that the Government cannot be bound beyond the actual authority of its agents.

Other theories advanced by the claimant are that there was a constructive acceptance of a valid VECP and an implied modification of GKS's contract to include the VE1 clause, and also that the Air Force

is equitably estopped to deny that it abrogated the requirements of the VEI clause, citing Emeco Industries, Inc. v. United States, 485 F.2d 652 (Ct. Cl. 1973) and North American Rockwell Corp., ASBCA No. 14485, 71-1 BCA § 8773.

## Agency's Position

The main point advanced in the Air Force's report to our Office is that GKS's proposal was not a valid VECP because it did not involve design or production engineering effort or any change in or betterment of the components. The agency believes that the purported VECP is thus contrary to the spirit and intent of ASPR. Also, the Air Force contends that the Armed Services Board of Contract Appeals (ASBCA) would be without authority to consider any claim by GKS concerning the rejection of its proposal and maintains that our Office is similarly without jurisdiction.

## Discussion

As GKS points out, it appears that the situations where the ASBCA has considered whether the Government constructively accepted VECP's involved contracts which included the VEI clause, which is not the case here. Our Office's jurisdiction, however, is not determined by the presence of certain clauses in a contract, but extends to all claims and demands whatever by or against the Government. See 31 U.S.C. §§ 71, 74 (1970). Contrary to the Air Force's view, GKS's claim is therefore within our jurisdiction.

The claimant's quantum meruit theory, however, fails in light of Grismac Corporation v. United States, 556 F.2d 494 (Ct. Cl. 1977). In that case, Grismac had submitted two unsolicited proposals to the Army styled as VECP's though it had no express contract with the Army containing the VEI clause as the basis for its proposals. The VECP's recommended certain changes in the pallets used in storing and handling boxed ammunition. The Army implemented

the ideas in the VECP's but was unable to agree with Grismac on appropriate compensation. Grismac sued to enforce alleged implied-in-fact contracts. The court's decision stated in pertinent part:

> "* * * [T]he decisive issue in this case is whether 10 U.S.C. § 2386 authorizes expenditure of appropriated funds to purchase suggestions of the kind plaintiff submitted. That section reads as follows:
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> "'Funds appropriated for a military department available for making or procuring supplies may be used to acquire any of the following if the acquisition relates to supplies or processes produced or used by or for, or useful to, that department:
>
> "'(1) Copyrights, patents, and applications for patents.
>
> "'(2) Licenses under copyrights, patents, and applications for patents.
>
> "'(3) Designs, processes, and manufacturing data.
>
> "'(4) Releases, before suit is brought, for past infringement of patents or copyrights.'
>
> "We do not think plaintiff's ideas naturally fit any of these statutory categories. The mot juste for them appears to us to be 'suggestions.' Congress did not authorize expenditures under § 2386 for mere suggestions. * * *" Id. at 497.

The court went on to find no other legal basis authorizing purchase of the suggestions and concluded that as the Department of Defense officials had no authority to make express contracts obligating appropriated funds for the purchase of suggestions, it was not legally possible for them to make implied-in-fact contracts enforceable in the Court of Claims.

As in Grismac, the essence of GKS's VECP does not fit any of the categories in 10 U.S.C. § 2386. We believe it is clear that GKS's VECP was basically a suggestion that the Air Force change its procurement practices from sole source to competitive purchase of the eight GFM items. While the VECP included certain manufacturers' drawings and other data, we do not think it could be regarded as an offer to sell designs, processes or manufacturing data to the Air Force. Rather, this information was merely submitted to show the feasibility of the fundamental concept of the VECP, i.e., competitive procurement was practicable because other sources besides National Waterlift could supply the GFM items. We do not believe that purchase of GKS's suggestion could be authorized under 10 U.S.C. § 2386, nor are we aware of any other authority which could support such a purchase.

Accordingly, as the Air Force lacked any authority to make an express contract for the purchase of GKS's suggestion, there could be no implied-in-fact contract to accomplish the same purpose, and quantum meruit recovery, which is premised on an implied contract theory, is precluded. The decisions relied on by GKS where quantum meruit recovery was allowed are distinguishable as involving the type of situation where the Government had authority to make a contract for the purchase of the goods or services involved, but no valid contract was consummated because required procedures for making an award were not followed.

As for GKS's contention that the Air Force by its conduct impliedly modified contract -0249 to incorporate the VEI clause, we note initially that in the absence of a contract modification or some provision in the contract permitting a price adjustment, there is no legal basis for adjusting the price of a fixed-price contract to compensate a contractor for additional work which is outside the express terms of the contract. See United States Steel Corp. v. United States, 536 F.2d 921, 928-929 (Ct. Cl. 1976). To the extent that the claimant's implied contract modification theory is analogous to an

alleged waiver by the Government of its rights under the express terms of the contract, it has been held that the Government's conduct establishing such a waiver must be clear, decisive and unequivocal. United States v. Chichester, 312 F.2d 275 (9th. Cir. 1963). Where, as here, the Air Force took steps to introduce competition for the eight previously sole-source items--an effort which resulted in GKS receiving an award--but at the same time specifically rejected the VECP several times in writing, we do not think such conduct can be established. Without the VEI clause in the contract, the issue whether the Air Force constructively accepted a valid VECP is moot.

Similarly, the estoppel argument fails on a number of grounds, even if the claimant were to overcome the threshold requirement noted in Emeco, supra, and other decisions that the responsible Government officials must have been acting within the scope of their authority. In view of the foregoing discussion, we believe the reasonableness of GKS's reliance in the circumstances is dubious. The actual injury experienced by the claimant is also questionable since, as the Air Force points out, GKS can be viewed as having received the benefit of its suggestfon because it was awarded contract -1667 which included the eight previously GFM parts.

As for the authorities cited by GKS, Emeco involved a situation where the Government failed to inform the apparent low bidder, which was preparing to perform the entire contract, that the award would be split between it and another contractor. In North American Rockwell, supra, the contractor (whose contract included a VEI clause) was encouraged by the Government to submit a VECP dealing with a test procedure, but was not told by the contracting officer that the Government had already decided to adopt an almost identical procedure, which was subsequently incorporated into the contract by a modification. On the contractor's appeal from the disapproval of its VECP, the Board held that the Government was equitably estopped to assert that it had thought of adding the test procedure first, prior to the submission of the VECP. We do not think either case offers any significant support for the claimant's position in the present case.

In view of the foregoing, the claim is denied.

Deputy Comptroller General
of the United States