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DECISION

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

FILE: B-195588

DATE: July 30, 1980

MATTER OF: J & P Industrial Products DLG03391

DIGEST:

1. Payment for goods furnished by claimant under improper purchases may be made on quantum valebat basis since Government received benefit and unauthorized purchases have been implicitly ratified.
2. Price stipulated in invalid contract may not be accepted as measure of quantum valebat recovery when price is excessive compared with price of similar goods available to Government.

[Request for

reconsideration of a settlement issued on December 4, 1979, which denied, in part, a claim by J & P for payment for goods and services provided to the Government under improper purchase orders.

The December 4, 1979, settlement authorized the Government to reimburse J & P on a quantum valebat basis (the reasonable value of goods sold and delivered) for part of its claim. The contracting officer concluded that the reasonable value of the goods provided by J & P was 58 percent of the prices listed for these items on J & P's invoices. Accordingly, the settlement authorized payment of the sum of \$25,338.19 of J & P's claim of \$43,686.55, but disallowed the balance of the claim. J & P objects to the contracting officer's determination, asserting that J & P should have received the entire amount of its claim because the claim represents the reasonable value of the goods J & P provided to the Government.

During August-September 1978, J & P supplied a variety of items to the Department of the Army at Fort Bliss, Texas, under a Blanket Purchase Agreement (BPA).

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The Army, however, withheld payment for the items because numerous irregularities were found in the purchases. Specifically, the Army found the following irregularities:

"BPA appointment authorizes the procurement of emergency repair parts only and not items for stock [which were purchased].

"Procurement actions were split to remain within the [\$500] limitation [of the BPA appointment] * * *.

"Not combining awards. When several awards are contemplated to the same vendor, they should be combined and the aggregate amount should not exceed \$10,000 under the Small Purchase Procedures. If it exceeds the \$10,000, action should be taken to formally advertise the requirement and award made on a contract.

"Sole source procurement was effected without competition, although items could be obtained from local sources.

"BPA calls under \$500.00 were not distributed equitably [as required by the BPA appointment].

"Items on mandatory General Services Administration Federal Supply Schedule were procured.

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"Orders were placed by various individuals other than the appointed BPA buyer. * * *

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"Reasonableness of price not established."

Because of these irregularities, the Army has continued to insist that payment of the stated purchase price for the goods, as claimed by J & P, would be improper.

Our Office has recognized that [in appropriate circumstances payment may be made on a quantum valebat basis under a purported contract "which [as here] is invalid because entered into without following the required procedures."] 40 Comp. Gen. 447, 450-451 (1961). Recognition of a right to payment on this basis, however, requires a showing (1) that the Government received a benefit and (2) that the unauthorized action had been expressly or impliedly ratified by authorized contracting officials of the Government.] Defense Mapping Agency, B-183915, June 25, 1975, 75-2 CPD 15; The Singer Company, B-183878, June 20, 1975, 75-1 CPD 406.

[The record indicates that the Government received a benefit by retaining the items J & P supplied to Fort Bliss under the improper BPA purchases. In addition, we may infer ratification from the retention of the materials and the contracting officer's recommendation that J & P be paid for the value of the goods it supplied. See, e.g., Molitor & Grayson, B-188454, January 15, 1979, 79-1 CPD 18; Planned Communication Services, Inc., B-191476, May 31, 1978, 78-1 CPD 408. The Army and J & P therefore agree that J & P ought to be paid for the goods it supplied to Fort Bliss.] The only disagreement stems from the issue of what constitutes the reasonable value of these goods to the Government.

[The price stipulated in an invalid contract may not be accepted as the measure of quantum valebat recovery when the price is excessive compared with the price of similar goods available to the Government. See 38 Comp. Gen. 368 (1958). In the present record, there is a price comparison of many of the items on

J & P's invoices and many similar items available to the Army from other sources. The items included in the comparison are:

- | | |
|------------------------------|--------------------------|
| "(1) Grease GC 8682 | (12) 16 oz. Moly Kote |
| (2) Grease GC 210-12 | Penalube |
| (3) Spray Kleen GC 8669 | (13) 16 oz. Moly Kote |
| (4) Spray Cleaner | 4x Spray |
| (5) Kulka Terminal Block | (14) 11 oz. D.C. 732 |
| #600-18 | RTV Black |
| (6) B&B C717-N Steam Cleaner | (15) 50cc Pro Lock Nut |
| (per gallon) | Type |
| (7) Wheel Brg. Grease 5# Can | (16) 250cc Pro Lock |
| (8) WD40 15 oz. Can | Hydraulic Sealant |
| (9) Penetrating Oil, 16 oz. | (17) Vector Board 169P44 |
| (10) 16 oz. Moly Kote | (18) 16 oz. Relay Keen |
| M8800 | GC8682 |
| (11) 17/6 oz. Moly Kote | (19) 16 oz. Relay Keen |
| Paste G-N | 8271" |

J & P charged a lump-sum price of \$161.90 for these items, compared with a price of \$94.85 obtained from other vendors for similar items. Accordingly, there is an average markup of close to 42 percent in the prices charged by J & P compared with the prices of similar goods available from other vendors. Also, in the record is an Army price analysis which included many different items other than those included in the above sample. The Army found an average markup of 42 percent, based on its analysis. Thus, it seems clear that approximately 42 percent of the amount claimed does not represent the value of the goods received by the Government. By authorizing payment of 58 percent of J & P's claim, we believe that our settlement fairly and accurately reflected the value of the goods supplied by J & P to the Army. Consequently, payment may be authorized only for this amount regardless of the costs incurred by J & P.

We therefore affirm our prior settlement.



For The Comptroller General
of the United States