

*Support*

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**DECISION**



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

FILE: B-204728

DATE: September 29, 1981

MATTER OF: Abney Construction Company Incorporated

**DIGEST:**

1. Contractor under pre-March 1, 1979, contract has right to have claim, pending as of that date before the contracting officer or initiated thereafter, processed under Contract Disputes Act of 1978 or under disputes clause of contract.
2. Contractor under pre-March 1, 1979, contract has requested GAO review of claim, pending before contracting officer on March 1, 1979, which was finally denied on March 23, 1979. If contractor under facts of record has consciously elected to have claim processed under act rather than under contract's disputes clause, GAO may not consider claim since consideration would afford contractor a forum it would otherwise not have. Alternatively, if contractor has elected to have claim processed under the disputes clause, GAO may still not review claim to the extent a disputed question of fact exists as is involved in the subject claim.

Abney Construction Company (Abney) has requested reconsideration of the settlement certificate issued by our Accounting and Financial Management Division, Claims Group, on August 19, 1981, which disallowed its claim for costs related to damage to a transformer which was struck by lightning on September 2, 1977. The disallowance noted that a dispute concerning a question of fact existed as to when the United States assumed control of the transformer under Abney's contract No. N62467-74-C-0562, dated June 23, 1976, with the Department of the Navy.

The record shows Abney's claim was finally decided by the Navy's contracting officer by letter of March 23,

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1979. This letter also informed Abney that the company might appeal the contracting officer's decision to the Armed Services Board of Contract Appeals (ASBCA) "within ninety days from the date you receive this decision." The contracting officer also informed Abney that:

"[i]n lieu of appealing to the cognizant Board of Contract Appeals you may bring an action directly in the U. S. Court of Claims, within twelve months of the date you receive this decision."

Both the 90-day filing period for appeals made to the ASBCA and the 12-month filing period for a suit in the Court of Claims are periods described in the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (Supp. III, 1979).

Abney then appealed the decision to the ASBCA; this appeal was docketed on June 13, 1979. We are informed that Abney's appeal was thereafter withdrawn from the ASBCA prior to the filing of the claim with our Office.

Under the above facts, the contractor may have elected to have its appeal governed by the act rather than the disputes clause of its contract. The act effectively provides that a pre-March 1, 1979, contract may be governed by the act rather than by the disputes clause if the contractor so elects with respect to any claim pending then before the contracting officer as of that date or initiated thereafter. In this case, Abney's claim was pending before the contracting officer on the effective date of the act and, therefore, Abney had the option of electing to proceed under the act. If the contractor has so elected, the election is final. Cf. Tuttle/White Constructors, Inc. v. United States, Court of Claims No. 205-80C, July 29, 1981, where the court held that a contractor which had made a "conscious election" to proceed under the disputes clause could not later change its election and proceed instead under the act. Moreover, it is clear that we may not consider any claim which is properly for consideration under the act since this consideration would give the contractor a forum it would otherwise not have. See Thurman Contracting Corp., B-196749, June 13, 1980, 80-1 CPD 415.

In the alternative, if Abney has elected to pursue its claim under the disputes clause of its contract, we may not review the claim. Prior to the act, even we would not review a claim arising under the contract if the claim had been finally decided by the contracting officer, as here, to the extent the claim involved disputed facts. See Consolidated Diesel Electric Company, 56 Comp. Gen. 340, 343 (1977), 77-1 CPD 93. Here, the record shows that Abney's claim involves at least one disputed fact as to whether the United States was in possession of the transformer on the date the loss occurred for the purpose of determining, under the contract, which of the contracting parties had assumed the risk of loss involved.

Accordingly, we dismiss Abney's claim.

*Harry R. Van Cleve*

Harry R. Van Cleve  
Acting General Counsel