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**DECISION**



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

**FILE:** B-221226

**DATE:** February 6, 1986

**MATTER OF:**

Heritage Visual Sales, Ltd.

**DIGEST:**

Heritage Visual Sales' quantum valebant claim for payment for its distributor's erroneous shipment of an extra videotape set may not be allowed. Heritage has failed to make the requisite showing of quantifiable benefit to the Government in that record fails to establish receipt, acceptance, and use of the tapes.

The Defense General Supply Center (DGSC) of the Defense Logistics Agency has submitted a claim for \$16,770 by Heritage Visual Sales, Ltd. to this Office for settlement. For the reasons stated below, we are unable to allow the claim on the basis of the present record.

Heritage's claim arises out of its distributor's, M.L. Johnson Enterprises, Inc., alleged erroneous duplicate shipment of 26 videotapes of the World at War. According to purchase order No. DLA-420-83-0560, December 7, 1982, Heritage contracted with DGSC to supply, in two separate shipments consisting of 13 each, one set of the 26 videotapes that comprise World at War. As originally agreed, each shipment was to be sent via Dover Air Force Base to V Corps, Headquarters A, Gibbs Barracks, Frankfurt, Germany. On January 10, 1983, the contract was modified to change the destination point to Remote Site Library Support Center, USA Printing and Publication Center Europe, 6000 Frankfurt, Roedelheim, Germany. We note that although Johnson allegedly sent the first shipment on December 23, 1982, Johnson's work order for that shipment reflects the new destination point. The second shipment was allegedly sent on January 20, 1983. Thereafter, in late November and early December 1983, Johnson notified the DGSC that instead of having sent two half sets of World at War in the preceding January and December, it mistakenly shipped two full sets and that Heritage refused to pay for the second set. Rather than compensating Johnson for the alleged duplicate shipment, Heritage requested a disbursement for the full purchase price from DGSC. The Defense Logistics Agency conducted a detailed investigation, but was unable to resolve the matter. The claim was then forwarded to GAO.

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At the outset, it is clear that there was no contract, either express or implied-in-fact, for shipment of a second set of World at War videotapes. Thus, the only basis on which we may further consider the matter is the theory of quantum meruit/quantum valebant.

Where a performance by one party has benefited another, even in the absence of an enforceable contract between them, equity requires that the party receiving the benefit should not gain a windfall at the expense of the performing party. The law thus implies a promise to pay by the receiving party whatever the goods or services are reasonably worth. Assuming the procurement would have been permissible if proper procedures had been followed (or more accurately in this case, if the Government had in fact intended to procure the items), we can allow payment on a quantum meruit/quantum valebant basis only if (1) the Government received and accepted a benefit, and (2) the contractor acted in good faith. The amount allowable is measured by the reasonable value of the benefit received. E.g., 63 Comp. Gen. 579, 584 (1984); B-207557, July 11, 1983. In this case, the record does not adequately support a conclusion that the Government received and accepted a benefit.<sup>1/</sup>

In the ordinary quantum valebant claim against the Government, the question of whether goods have been actually retained or accepted by the Government is a relatively straightforward one. See, e.g., 63 Comp. Gen. 579, 585 (1984); B-218957, August 1, 1985, 64 Comp. Gen. \_\_\_\_\_. In the present case, however, the exact benefit to the Government is not readily apparent. At the very least, the record before us does not establish with any degree of certainty that the Government in fact received a second full set of videotapes, let alone used them; nor does it even contain a statement by the contracting officer that the Government has received a benefit. True, the record contains some evidence that a second set was sent to Dover Air Force Base, but the Base has no record of receipt. Furthermore, searches of two facilities in Germany were conducted and neither search turned up an extra set of World at War. With a genuine question of delivery at Dover Air Force Base and no evidence of the videotapes ever having been in or used in Germany,

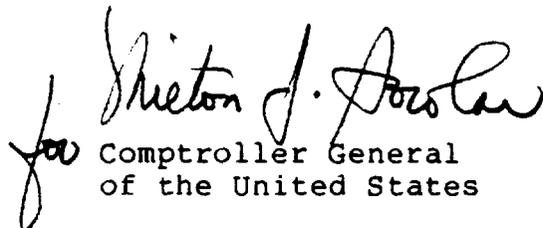
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<sup>1/</sup> There is also a question as to whether Heritage is a proper claimant since it does not appear to have lost anything. In view of our conclusions set forth in the text, however, we have not pursued this issue any further.

any benefit to the Government is at best purely speculative. See B-215145, August 13, 1985. Thus, payment under quantum valebant cannot be authorized at this time.

We note that the record states that one search request was directed to Commander, V Corps Headquarters, in Frankfurt Germany, while two other search requests were directed to Cincusareur, in Heidelberg, Germany. It is therefore not clear to us that both the original (Frankfurt) and the modified (Roedelheim) destination points were searched. It is also not evident whether a physical search was ever conducted at Dover Air Force Base.

We recommend therefore that DLA review its records to determine whether a physical search was conducted at all relevant locations (Dover AFB and the possible receipt/destination points in Germany). If this review discloses that the searches have in fact been conducted, then the claim must be denied because it cannot be established that the Government derived a benefit from the claimant's mistake. Any physical searches that have not been made should be undertaken now. Should an additional search fail to produce the duplicate set of World at War tapes, the claim must be denied for the same reason. If the duplicate tapes are located, they should be returned. If the tapes are located and cannot be returned for some reason which suggests that the Government may have derived a benefit from them, the matter should be resubmitted to us for reconsideration.

  
for Comptroller General  
of the United States