

DOCUMENT RESUME

02200 - [A1392365]

[Request for Reimbursement of a Prompt Payment Discount of \$1,133]. B-185846. May 11, 1977. 7 pp.

Decision re: Ira Gelber Food Services; by Paul G. Dembling (for Elmer B. Staats, Comptroller General).

Issue Area: Federal Procurement of Goods and Services:
Reasonableness of Prices Under Negotiated Contracts and Subcontracts (1904).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Department of the Navy.

Authority: Assignment of Claims Act of 1940, as amended (31 U.S.C. 203; 41 U.S.C. 15); A.S.P.R. 7-103.8; B-184665 (1975). Carolina Paper Mills, Inc., ASBCA 4488 and 4614, 58-2 BCA 1832 (1958). Old Atlantic Services, Inc., ASBCA 18108, 74-1 BCA 10494 (1974). Thos. Soperville Company v. United States, 99 C. Cls. 329. B-174410 (1972). B-170877 (1971).

Claimant argued that, even though he submitted a correct invoice, the Department of the Navy withheld assignment of payment to his bank due to submission of incorrect invoice, thereby costing the claimant his "prompt payment" discount. The four cases cited by the claimant were distinguishable from his, and his claim was denied. (SS)

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J. Cunningham
Proc I

DECISION



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

FILE: B-185846

DATE: May 11, 1977

MATTER OF: Ira Gelber Food Services, Inc.

DIGEST:

1. Notwithstanding fact that Government could have theoretically paid invoice--subject to instant claim--which contained only notice of assignment and lacked evidence of assignment required by Assignment of Claims Act, GAO agrees with Navy's position that, as practical matter, invoice was "incorrect" and not for payment until assignment evidence had been received.
2. When invoice contains notice of assignment it is rightfully presumed that receipt of required proof of assignment is imminent--thus raising possibility that Government might be exposed to double liability should payment nonetheless be made to contractor-assignor (as claimant suggests).
3. It must be assumed that because of knowledge of past practice claimant realized Navy would consider assigned invoice to be "incorrect"--thus preventing start of prompt payment period--until right of designated payee had been established. Therefore, claimant must be presumed to have agreed to computing of prompt payment discount period from date Navy received evidence of assignment rather than from date assigned invoice was received.
4. Only one incident of four cited supports claimant's argument that Navy's prior practice was to compute prompt payment period from date assigned invoice was received rather than from date Navy received evidence of assignment. This one incident does not establish that taking of discount involved in subject claim was inconsistent with prior practice. Cases relied on by claimant are distinguishable.

Ira Gelber Food Services, Inc., has requested reimbursement of a prompt payment discount totaling \$1,133 taken by the Department of the Navy under contract No. N00600-75-C-0035.

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The contract required Galber to provide mess attendant services to the Naval Air Facility, Andrews Air Force Base, for the month of July 1974 at a price of \$11,330. The Food Service officer--the individual designated by the "Submission of Invoices" clause of the contract to receive invoices--received Galber's invoice for the work on July 31. On the face of the invoice appeared the notation "ASSIGNED" and the following statement: "Payment of above invoice is assigned to: the First National Bank of Atlanta * * *."

By letter dated August 16, 1974, the Navy's Norfolk Finance Center requested the named assignee to furnish the Center with documented evidence of the assignment. On August 19, the Navy's contracting officer (Washington, D.C.) acknowledged receipt of the assignment documents; on August 30 the Navy's Finance Center (Norfolk, Virginia) acknowledged receipt of the documents. Payment (less the discounted amount) to Galber was made on September 3.

The Navy computed the 20-day discount period beginning from the day the Finance Center received the assignment documents. Under this view, or under the Navy's alternative view that the period actually began on August 19, payment on September 3, 1974, would have fallen within the 20-day prompt payment period.

The legal foundation for the Navy's view is predicated on analysis of the "Discounts" clause of the contract. That clause provides:

"In connection with any discount offered time will be computed from * * * the date correct [emphasis supplied] invoice or voucher is received in the office specified by the Government, if the latter date is later than the date of delivery."

The Navy argues that Galber did not submit a "correct" invoice because: (1) the invoice showed that the contract had been assigned, thus indicating payment was to be made directly to the bank; (2) the invoice did not contain the "required assignment papers submitted in accordance with the Assignment of Claims Act," thus preventing the Navy from making direct payment to the bank and suggesting that Galber, rather than the bank, should be paid; and (3) notwithstanding the suggestion of the invoice that, contrary to express direction, Galber rather than the assignee should have been paid, a pertinent Navy regulation prevented payment to Galber by specifying:

"payment [is to] be withheld [in situations where notices of assignments have been given] until [the completed assignment papers have been received]."

(Paragraph 046051-2B of the Navy Comptroller Manual).

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Given the confusion surrounding the correct payer, the Navy argues that Gelber's July 31 invoice can hardly be considered a "correct" invoice sufficient to trigger the running of the prompt payment discount period.

Conversely, the Navy argues that the receipt (either on August 16 or August 29) of the completed assignment papers made "correct" the otherwise "incorrect" July 31 invoice since the papers then evidenced compliance with the requirements of the Assignment of Claims Act of 1940, as amended, 31 U.S.C. § 203, 41 U.S.C. § 15 (1970). (The cited act, as implemented by Armed Services Procurement Regulation (ASPR) § 7-103.8 (1974 ed.), requires that for an assignment to be binding upon the Government the assignee must forward to the administrative contracting officer, the disbursing officer, and the surety, if any, the notice and instrument of assignment. Navy Accounting and Finance Center--Request for Advance Decision, B-184665, September 25, 1975, 75-2 CFI 189, and cases cited in text.)

In rebuttal to the Navy's position counsel for Gelber argues:

- (1) July 31 was the day the Navy received the "correct" invoice in question since "that invoice accurately reflected the contractor's entitlement to payment;"
- (2) "The processing of assignment documents has nothing to do with timely payment of an invoice by the Government. In short until an assignment is perfected, there is no assignment, and payment must be made to the contractor [emphasis supplied] within the discount period or else the Government loses the right to the discount;" and
- (3) It has been the Navy's practice (as shown by four prior vouchers) to refund discounts taken under identical circumstances under price contracts—thus estopping the Navy from denying a refund of the discount for the present contract.

Several prior decisions of our Office and the Board of Contract Appeals are cited by Gelber and the Navy as applying to the subject claim. The Navy argues that the present case is "strongly reminiscent"

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of Carolina Paper Mills, Inc., ASBCA Nos. 4488 and 4614, 58-2 BCA 1352 (1958), which involved a factual situation identical to that presented here.

The Board held that a "correct" invoice, as contemplated by the "Discount" clause, had not been submitted until all documents of the assignment in question had been received. The Board stated that a "contrary interpretation would mean that the contractor could obtain a contract by offering a discount, but prevent the Government from taking the discount by withholding necessary [assignment] documents, and it is unreasonable to believe that this is the intent of the 'Discounts' clause."

Counsel for Gelber does not dispute the similarity of the facts of the Carolina Paper Mills case to the facts of the present claim but simply expresses disagreement with the Board's decision.

The Board's decision in the subject case was predicated, in part, on the presumed impossibility of paying a contractor who had notified the Government of a purported assignment but who had not furnished, under the Assignment of Claims Act, documentary evidence of that assignment. Actually, however, as Gelber points out, there is no legal bar under the Assignment of Claims Act restricting payment of an otherwise correct invoice to a contractor who has given the Government notice of a purported assignment.

Nevertheless, we agree with the Navy's position that the confusion inherent in the contractor's July 31 invoice rendered the invoice "incorrect" as a practical matter notwithstanding the theoretical possibility that payment might have been made to the contractor without violating the Assignment of Claims Act. We regard it as a "practical matter" because when a submitted invoice contains a notice of assignment it is rightfully presumed that receipt of the required proof of assignment is imminent—thus raising the possibility that the Government might be exposed to double liability should payment be made to the contractor-assignor. As was stated by the Board:

"The key words in the 'Discounts' clause are 'correct invoice.' Has a contractor submitted a correct invoice when he has not submitted all the documents he is required to submit to support payment?"

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Ordinarily an invoice is considered 'correct' if it can be paid without being returned to the contractor for correction or without a statement of disallowances involving payment in a reduced amount. See Thos. Somerville Company v. United States, 99 C. Cls.

329. The assignment papers can hardly be considered as a part of the invoice. However, when the contract is construed as a whole so as to carry out the general intent, we are of the opinion that a 'correct invoice,' as contemplated by the 'Discounts' clause, has not been submitted until the contractor submits all documents the contractor is required to submit to support payment, regardless of whether such documents are required to accompany the invoice."

Carolina Paper Mills, Inc., supra, at page 7243.

Further, although the contract does not expressly contain the Navy's internal regulations or practice concerning the procedures to be followed for payments under assignments, it seems inconceivable that Gelber, as an experienced Government contractor, was not aware of internal naval procedure, namely: the withholding of payment from either the contractor or the assignee when an invoice, as here, was stamped "ASSIGNED" but evidence of the assignment had not been furnished with the invoice. We say inconceivable because there is nothing in the contract that requires a contractor-assignor to note an assignment on the submitted invoice--this is by internal practice, we understand. To the extent that Gelber must be presumed to have been aware and contracted with full knowledge of the procedure, it must also be assumed that Gelber realized the Navy would consider an assigned invoice to be "incorrect" (incomplete) for payment purposes until the right of the designated payee--the assignee--to the payment had been established. Under this presumed knowledge, Gelber must be seen to have agreed to the computation of the prompt payment discount period as was done here.

Gelber's argument that the manner of computing the discount period is inconsistent with prior practice has been challenged by the Navy in a lengthy report which observes:

"A review of Mr. Gelber's 11 June 1976 and 6 March 1974 letters indicated that his allegations concerned only invoices submitted to NRFC, San Diego.

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Of the four instances cited by Mr. Gelber, two (involving discounts of \$211.60 and \$846.32) were merely refunds of discounts taken beyond the discount period. These discounts were not deducted during discount periods calculated from the date of the completion of an assignment. Rather, no assignment was involved and the time for calculation of the discount period was clear. The other two situations, however, did involve discounts taken during such a period. Of those two instances, one which involved the July 1974 invoice under Contract NO0123-74-C-2001 (cited in Mr. Gelber's letter dated 9 September 1974), was a situation in which the discount was returned because it was erroneously deducted from a 'no discount' amount. While it was a refund of a discount taken during the 20-day period following the completion of the assignment, it should be noted that the discount was not refunded because of Mr. Gelber's protest that the discount period should not be calculated from the date the assignment is completed, but rather because the discount was taken from an improper amount.

"In the other case, the discount (\$1,057.92 taken on DOV 3431, dated 5 September 1973) was properly deducted during the 20-day period following the completion of an assignment and was returned, contrary to Navy Regulations, after Mr. Gelber protested. This one instance hardly supports the 'past practice' argument * * *."

We agree. Therefore, our decision B-174410, June 30, 1972, relied on by Gelber to support the "past practice" argument is distinguishable since repeated incidents of prompt payment discount taking contrary to established administrative practice were involved in the cited case rather than the one incident present here.

Other cases cited by Gelber are also distinguishable from the circumstances present here, namely: (1) In Old Atlantic Services, Inc., ASBCA No. 18108, 74-1 BCA 10494 (1974), the Board held that a "discrepant" invoice (one which contains a charge subject to a formal "disputes" claim) is "correct" for discount period purposes since the contractor and the agency had contracted with knowledge

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that prompt payment of the undisputed amount of the invoice would be made; (2) In B-170877, January 22, 1971, a prompt payment discount was taken since, even though a "correct" invoice had been submitted, the agency improperly felt that the discount period did not begin to run until the delivered goods had been inspected. Thus, those cases involved "correct" invoices unlike the situation here.

Claim denied.


For The Comptroller General
of the United States