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DECISION



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

*R. Heitzman
Trans*

FILE:

DATE: FEB 9 1977

MATTER OF: **D-107911**

National Hardware Supply

DIGEST:

Contractor claiming payment for transportation, storage, and interest charges on misdescribed surplus military items purchased under an "as is and where is" contract, is not entitled to payment where contract specifically states relief which can be granted in case of misdescription and where contractor was granted that relief. Contracts are to be enforced as written in the absence of ambiguity or forfeiture of rights by conduct. 33 Comp. Gen. 137 (1973); *Richardson & Associates v. United States*, 177 Ct. Cl. 1037, 1002 (1968); *Amoral of International Company*, ASACA No. 20714, decided February 25, 1976.

The law firm of McCrumb, Bryson, Sheppard, Coyle & Woyte, Fresno, California, representing National Hardware Supply (National), has requested that this Office review certain matters related to National's contract No. 31-6318-256 with the Defense Supply Agency (DSA). The contract is for the purchase of surplus military trucks.

National has alleged that the trucks were misdescribed by the Government in its invitation for bid (IFB) and that it has been damaged thereby.

The record shows that National was awarded the contract to purchase 12 surplus trucks on January 29, 1976. After receiving four of the trucks, National alleged that although the trucks were described as one ton trucks, they were in fact 3/4 ton trucks and requested relief. It was agreed that all of the trucks except one were misdescribed as alleged. National received a refund in accordance with the contract on June 23, 1976, for the eight trucks not sold for the purchaser but not picked up by it. National was advised that upon return of the four trucks at the purchaser's expense, the Government either would make a money adjustment or refund the purchase price.

National returned the four misdescribed trucks on August 9, 1976, and a refund of the purchase price was made on August 31, 1976. However, National also requested payment of transportation charges of \$4,000, storage charges at \$3 per day per truck and interest on the sum of \$4,933.24. The sales contracting officer, relying on the provisions

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of the contract's guaranteed descriptions clause, replied that the contract placed no obligation on the Government to pay these charges.

Contract No. 31-6218-236 was amended to National in response to WAA's Invitation for Bids (IFB) No. 31-6218. Incorporated as part of the IFB was Defense Property Disposal Service pamphlet, "SALE BY DISPENSER, AUGUST 1973". Part 2, paragraph 2, of that pamphlet, among other things, indicated that "Unless otherwise specifically provided in the Invitation, all property listed therein is offered for sale 'as is' and 'where is.'" Article 2A, entitled "Guaranteed Descriptions," also was incorporated as part of the IFB. Found on page 37 of the IFB Article 2A reads:

"Notwithstanding any other provisions of this Invitation for Bids to the contrary, and subject to the limitations and conditions set out in subparagraphs a and b below, all of which are of the essence, the Government guarantees to the original Purchaser of the property that the property delivered or offered for delivery under any contract resulting from this Invitation for Bids will be as described in the Invitation for Bids.

a. That if a misdescription is determined to exist prior to removal of the property from Government control, that the sole and exclusive remedy available to the Purchaser will be refund of the purchase price of the property or to which such misdescription exists, or such portion thereof as the Government may have received.

b. That if a misdescription is determined to exist after removal of the property from Government control, then the Government will make an adjustment in the purchase price paid for the property commensurate with the market value of the property actually received provided, however, that:

(1) No adjustment will be made for shortages of property offered for sale by the lot, and

(2) No adjustment will be made unless the Purchaser mails or otherwise furnishes to the Contracting Officer a written notice, within 30 calendar days from date of removal of the property, that the property is misdescribed and holds the property sufficiently intact to permit identification by the Government, PROVIDED FURTHER THAT THE GOVERNMENT DOES NOT WARRANT OR GUARANTEE ANY OF THE FOLLOWING:

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(a) That the item description contains all specific characteristics or performance data pertaining to the item described.

(b) The stated condition of the property, the total cost of the property, the estimated total weight, the estimated shipping dimensions, suggested uses of the property, and the property's fitness for any use or purpose.

(c) Estimates as to the weight of the property offered for sale by the unit or by the lot.

(d) Estimates as to the number of units of property offered for sale by weight.

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c. Notwithstanding any of the exceptions stated in subparagraph b * * * above, however, the Government will accept return of any property determined to have been misdescribed, to a location specified by the Contracting Officer at the Purchaser's expense, and refund to the Purchaser the purchase price or such portion thereof as the Government may have received, provided timely notice of the misdescription has been furnished to the Contracting Officer in accordance with the requirements of subparagraph b(2) above.

d. The foregoing guarantee is in lieu of all other guarantees, express or implied, and all other obligations on the part of the Government to deliver or offer for delivery property as described in the Invitation for Bids and shall not entitle the Purchaser to any payment for loss of profits or any other money damages, special, direct, indirect, or consequential; nor shall any recovery of any kind against the Government under this provision be greater in amount than refund of the purchase price of the specific material found to have been misdescribed."

The General Accounting Office will not consider disputed questions of fact pertaining to matters arising under the disputes clause of a contract. 33 Comp. Gen. 829 (1974). Here, however, there is no dispute as to the facts and the contract has been fully executed. But there exists the question whether any additional moneys are due the contractor. This is a question of law which we can consider. See 33 Comp. Gen. 167 (1973).

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It is true that the property, to a certain degree, was mis-described (3/4 ton trucks as opposed to one ton trucks). The only question relates to the relief to be granted for such a misdescription and the contract specifically outlines that relief.

Articles BA b and c of contract No. 31-6118-236 state that where an item is misdescribed and the misdescription is not discovered until after the property has been received from the sales yard, the purchaser may simply keep the property in its misdescribed condition and receive an adjustment in the purchase price, or he may return it to the Government, at his expense, and receive a refund of the purchase price. The contractor chose the latter course of action and in accordance with the contract a refund of the purchase price was made by the Government on August 31, 1976. And any further relief, such as that claimed by National, is precluded by Article BA d of the contract.

The courts long have held that valid contracts are to be enforced and performed as written. In Johnson v. United States, 172 U.S. 372, 379 (1899), the Supreme Court holds:

"Considering the facts * * *, it is at once apparent that the claim against the United States can only be allowed upon the theory that it is sustained by the written contract, since if it be not thereby sustained it is devoid of legal foundation. The rule by which parties to a written contract are bound by its terms, and which holds that they cannot be heard to vary by parol its express and unambiguous stipulations, or impair the obligations which the contract engenders by reference to the negotiations which preceded the making of the contract, or by saying that the pecuniary result which the contract has produced has not come up to the expectations of one or both of the parties, is too elementary to require anything but statement."

Contract No. 31-6118-236 contains in its specific provisions all the rights and remedies of the parties and does not on its face entitle the contractor to additional compensation. As was stated in Johnson v. United States, 39 Ct. Cl. 592, 596 (1924):

"* * * Contractual rights once fixed in a paper contract executed by authority are inviolate. They may be frustrated by one party or the other, construction is permissible if the terms are ambiguous, but in the absence of ambiguity or forfeiture of rights by conduct, such a contract cannot but be enforced as written."

