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**DECISION**



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

*M. Eaton  
Proc II*

**FILE: B-187808**

**DATE: January 26, 1977**

**MATTER OF: TOTAL Leonard, Inc.**

**DIGEST:**

1. When contract includes inconsistent provisions for computing discount period, specifically negotiated terms prevail over general Armed Services Procurement Regulation (ASPR) provision incorporated by reference.
2. Government cannot properly claim discounts based upon ASPR provision which contractor neither offered nor accepted.

The Office of Planning and Financial Management, Defense Supply Agency Administrative Support Center (DSASC), requests our decision as to whether four discounts totaling \$1,682.29, taken on payments for jet fuel, must be refunded to the supplier, TOTAL Leonard, Inc. (TOTAL).

During negotiations for Contract No. DSA600-75-D-0562, covering 34,500,000 gallons of jet fuel to be furnished during 1975 to the Defense Fuel Supply Center (DFSC), the contracting officer requested prompt payment discounts. By wire dated February 21, 1975, reconfirming an earlier offer, TOTAL computed the per-gallon cost to DFSC as \$.30236 and specified the terms of sale as "1 percent discount if payment is received within 10 days from date of invoice."

The contract was awarded to TOTAL on February 24, 1975. DSASC's award wire read "Your offer \* \* \* as amended by message dated February 21, 1975 \* \* \* is hereby accepted. \* \* \* Discount terms 1.00 percent, 10 days." The award wire also stated that Domestic Fuels Division's list of clauses dated October 21, 1974, would be included or incorporated by reference in the formal contract. Among these clauses is the following, which Armed Services Procurement Regulation (ASPR) § 7-103.14 (1975 ed.) requires to be included in all fixed-price supply contracts:

"In connection with any discount offered, time will be computed from date of delivery of the supplies to carrier when acceptance is at point of origin, or from date of delivery at destination or port of embarkation when delivery and acceptance are at either of these points, or

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from the date the correct invoice or voucher is received in the office specified by the Government, if the latter is later than date of delivery. Payment is deemed to be made for the purpose of earning the discount on the date of mailing of the Government check.  
(Emphasis added.)

Unaware of the negotiations between TOTAL and the contracting officer, DSASC's finance officer interpreted the contract in accordance with this provision until notified by TOTAL on March 13, 1975, that the discounts taken up to that date would not be allowed, since payments had not been received within 10 days as computed by TOTAL.

In an effort to resolve the conflict, the contracting officer sought an extension of the 10 days for receipt of payment. The record includes a March 27, 1975, wire from TOTAL, stating "We offer 1 percent discount if payment is received at our Alma, Michigan, office within 14 days of invoice date." The March 28, 1975, message returned by DSASC reads: "A prompt payment discount of 1.00 percent - 14 days is incorporated into this contract. The discount period begins on the date of the contractor's invoice and ends on the date of actual receipt of payment by the contractor."

Three of the discounts in question were taken prior to this March 28 amendment to the contract; one was taken after it. The pertinent dates and amounts are as follows:

	<u>Invoice Number</u>	<u>Invoice Date</u>	<u>Date of Receipt</u>	<u>Date Paid and Dispatched</u>	<u>Amount of Discount</u>
1.	342014	2/26/75	3/11/75	3/11/75	\$495.94
2.	342015	2/26/75	3/4/75	3/11/75	\$497.41
3.	343767	3/18/75	3/24/75	3/28/75	\$246.99
4.	354870	7/10/75	7/14/75	7/22/75	\$441.95
					<u>\$1682.29</u>

Since there is no dispute as to the facts, the issue here is whether the discounts, all of which meet the time limits as computed by ASPR in that the Government checks were mailed within 10 days of receipt of the invoices, were properly taken. DSASC argues that the contracting officer exceeded his authority both in negotiating the contract on terms different from those prescribed by ASPR and in modifying the contract to the same effect. Therefore, DSASC argues, the discount period granted by TOTAL is illegal

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and unenforceable. The contractor, however, states that since more than 10 days, or in the one case more than 14 days, elapsed between date of invoice and receipt of payment, under terms of its contract the discounts are unearned. An identical discount period applies to all its customers, TOTAL states, permitting it to improve its cash flow sufficiently to justify the discounts.

We have here a contract which contains two different provisions as to how the discount period should be computed. Although DSASC's February 24, 1975, award wire is ambiguous in stating that discount terms are "1.00 percent, 10 days," it specifically refers to TOTAL's amended offer of February 21, 1975. We therefore assume that the contracting officer intended to accept TOTAL's terms of sale, which conflict with the discount provisions required by ASPR and incorporated by reference in the formal contract.

It is a general rule that when a contract contains conflicting provisions which cannot be reconciled, an attempt should be made to determine which of the provisions should be made effective, rejecting the other, in order to carry out the purpose and intention of the parties. According to Professor Corbin, if the apparent inconsistency is between a clause that is general and broadly inclusive in character and one which is more limited and specific, the latter "should generally be held to operate as a modification and pro tanto nullification of the former." 3 Corbin on Contracts § 547 (1960). Moreover, when provisions which have been incorporated in a contract conflict with or are inconsistent with one inserted by the parties especially for the contract they are then making, the latter should prevail. "The result thus attained sustains the validity of the agreement; and it is believed to accord with the intention of the parties." *Id.* § 548; see generally, Restatement of the Law of Contracts 2d, Tentative Draft, § 229 (1973).


Applying this rule to the case of TOTAL Leonard, Inc., results in a valid contract which includes the specifically negotiated clause allowing a 1 percent discount on payments received within 10 days from date of invoice. The inconsistent ASPR provision is considered nullified.

Moreover, even if DSASC is correct, and the contracting officer exceeded his authority by intentionally accepting a shorter discount period than that permitted by ASPR, we do not believe the effect of such action can be to impose the ASPR terms upon the contractor

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after performance. While the Government is not liable for unauthorized acts of its officers, agents, or employees, Flippo Construction Co., Inc., B-182730, May 20, 1975, 75-1 CPD 303; Harry L. Lowe & Associates, B-178307, February 25, 1974, 74-1 CPD 96, it cannot properly claim a discount based on ASPR provisions which the contractor neither offered nor accepted, particularly when there was no requirement that any discount be offered.

Accordingly, the discounts taken by the Government were not earned, and must be refunded as requested by TOTAL.

  
Deputy Comptroller General  
of the United States