DOCUMENT RESUME

02392 - [A1572560]

[Claim for Cost of Rejected Shipment of Pig Feet Is Referred to Contracting Agency]. B-188281. May 26, 1977. 2 pp. + 3 enclosures (4 pp.).

Decision re: Sam Hirman, Inc.; by Robert F. Keller, Deputy Comptroller General.
Enclosures are letters from Robert F. Keller to Lt. Gen. W. W. Vaughn, Sen. Lawton M. Chiles, and Sen. Harry F. Byrd, Jr.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).
Organization Concerned: Defense Supply Agency; Department of the Army.
Congressional Relevance: Sen. Lawton M. Chiles; Sen. Harry F. Byrd, Jr.
Authority: B-183693 (1975). Crystal Soap and Chemical Co. v. United States, 103 Ct. Cl. 166 (1945). United States v. Joseph A. Holpuch Company, 328 U.S. 234 (1946). S and E Contractors, Incorporated v. United States, 406 U.S. 1 (1972).

Contractor's claim for cost of rejected shipment of pigs feet and reshipping expenses was referred to contracting agency, since the matter was for administrative processing under the "Disputes" clause of the contract, even though it was improperly considered by GAO Claims Division. (Author/DJM)

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Louis Kozlakowski
Proc. I

DECISION

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

FILE: B-188281 DATE: May 26, 1977

MATTER OF: Sam Mirman, Inc.

DIGEST:

Claim for cost of rejected goods and expenses in reshipping is referred to contracting agency as matter is for processing under "Disputes" clause of contract, even though previously considered by GAO Claims Division.

By letter dated January 21, 1977, Sam Mirman, Inc. (Mirman), has requested reconsideration of the Settlement Certificate issued by our Claims Division on December 17, 1976, which disallowed its claim for expenses incurred incident to the reshipment of goods under contract No. DSA13H-75-C-PA-67 with the Defense Supply Agency (DSA) (now the Defense Logistics Agency).

The contract called for certain quantities of pigs feet. The goods were rejected by the Department of the Army twice; once for improper labeling or marking and a second time for being improperly packaged in fiberboard boxes which lacked protective linings, because one lot was composed entirely of hind feet in violation of the contractual requirement which provided for front feet only, and because they were contaminated. Mirman seeks damages for the alleged wrongful rejection of the lot of hind pigs feet and the expenses incurred in reshipping the goods.

Section L 19.81(a)(1) of the contract provided that "all material furnished under this contract will be free from defects in material or workmanship and will conform with the specifications and all other requirements of this contract." Additionally, the contract provided that transportation charges for returned supplies and the correction or replacement of the supplies are to be borne by the contractor. Further, failure to agree to any determination made under section L 19.81 is a dispute concerning a question of fact within the meaning of the "Disputes" clause of the contract. See section L 19.81(g).

The propriety of the Government's rejection of the goods tendered by Mirman involves a question of fact since the reason for the rejection was a failure to meet the contract specifications. Crystal Soap & Chemical Co. v. United States, 103 Ct. Cl. 166 (1945). Further, it is well established that when a contract sets out a procedure under which disputes are to be settled administratively, the remedy thereby provided must be exhausted by the contractor. United States v. Joseph A. Holpuch Company, 328 U.S. 234 (1946); Hydro Fitting Manufacturing Corporation, B-183693, May 8, 1975, 75-1 CPD 288. Mirman failed to pursue this matter under the "Disputes" clause with the contracting agency.

In light of the above, we believe the matter is cognizable by the contracting officer under the "Disputes" clause and was improperly considered by our Claims Division. Accordingly, we are referring the matter to DLA for processing. Furthermore, following the Supreme Court decision in S&E Contractors, Incorporated v. United States, 406 U.S. 1 (1972), we no longer review Board of Contract Appeals decisions absent a showing of fraud or bad faith.

R.F. Keller

Deputy Comptroller General
of the United States

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

Louis Kozlakowski
XXXXXXXX Proc. I

B-188281

MAY 26 1977

The Honorable Lawton M. Chiles
United States Senate

Dear Senator Chiles:

Reference is made to your interest in the claim of Sam Mirman, Inc., of Washington, D. C., for reimbursement of expenses incurred incident to performance under contract No. DSA13H-75-C-PA-67.

By our decision of today, a copy of which is enclosed, we have concluded that the claim of Sam Mirman, Inc., was improperly considered by our Office because it involves a dispute of fact under the contract. We have referred the matter to the Defense Logistics Agency for processing.

Sincerely yours,

R. F. Keller
Deputy Comptroller General
of the United States

Enclosure

Louis Kozlakowski
Proc. I

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

B-188281

MAY 26 1977

The Honorable Harry F. Byrd, Jr.
United States Senate

Dear Senator Byrd:

Reference is made to your interest in the claim of Sam Mirman, Inc., of Washington, D. C., for reimbursement of expenses incurred incident to performance under contract No. DSA13H-75-C-PA-67.

By our decision of today, a copy of which is enclosed, we have concluded that the claim of Sam Mirman, Inc., was improperly considered by our Office because it involves a dispute of fact under the contract. We have referred the matter to the Defense Logistics Agency for processing.

Sincerely yours,

R.F. Keller
Deputy Comptroller General
of the United States

Enclosure

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

B-188281

May 26, 1977

Lieutenant General W. W. Vaughan
Director, Defense Logistics Agency
Cameron Station
Alexandria, Virginia 22314

Dear General Vaughan:

Enclosed is a copy of our decision of today concluding that the claim of Sam Mirman, Inc., was improperly considered by our Office because it involves a dispute of fact under contract No. 13H-75-C-PA-67.

Accordingly, we are returning your Departmental file as submitted for processing of the matter in accordance with the Disputes clause of the contract.

However, in reviewing the claim file, we note that the contracting officer changed the unit price "just to accede to Sam Mirman's insistence that he originally believed he was bidding on hind feet." The change order, however, cited "revised requirements of the Government."

It is clear that where a bidder alleges a mistake in its bid after award that was neither induced nor shared by the Government, the bidder must bear the consequences of his mistake, unless the contracting officer was on actual or constructive notice of the error prior to award. Saligman v. United States, 56 F. Supp. 505 (E.D. Pa., 1944); Wender Fresses, Inc. v. United States, 343 F.2d 961 (Ct. Cl. 1965).

From the contracting officer's own statement, he did not believe the bid to be in error. Further, based on the small price difference ($134.80) we cannot conclude that the contracting officer was on constructive notice of error at the time of award. Allowing Mirman to revise the contract price to include the cost of front pigs feet it did not plan to supply when it submitted the bid was tantamount to permitting Mirman to recompute its bid.

In the future DLA should not allow increases in the price of the contract "merely to accede" to a contractor's insistence. We recommend that you take such procedures as necessary to prevent the recurrence of this action. We would appreciate being advised of any actions taken on our recommendation.

Sincerely yours,

R. F. Keller

Deputy Comptroller General
of the United States

Enclosure