DOCUMENT RESUME

02691 - [A1792814]

[Refund of Demurrage Charges Assessed by a Railroad against a Contractor]. B-188383. June 17, 1977. 3 pp.

Decision re: Louisville Scrap Material Co., Inc.; by Milton Socolar (for Elmer B. Staats, Comptroller General].

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Transportation Law.
Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).
Organization Concerned: Illinois Central Gulf Railroad; Defense Logistics Agency.
Authority: 56 Comp. Gen. 340. 53 Comp. Gen. 167. 53 Comp. Gen. 829. Great Northern Ry. v. United States, 312 F.2d 906 (Ct. Cl. 1963). Simpson v. United States, 172 U.S. 372, 379 (1899). Penn Bridge Co. v. United States, 59 Ct. Cl. 892, 896 (1924). Richards Associates v. United States, 177 Ct. Cl. 1037, 1052 (1966).

The claimant requested reimbursement for demurrage charges assessed by the Illinois Central Gulf Railroad against the claimant for detention of railcars beyond the free time published in tariffs. The contractor was not entitled to payment as a matter of law where the contract specifically stated the liability of the Government as to demurrage charges and the relief which can be granted. Contracts are to be enforced as written in the absence of ambiguity or forfeiture of rights by conduct. (Author/SC)

R Heitzman
Trans

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

FILE: B-188383 DATE: June 17, 1977

MATTER OF: Louisville Scrap Material Co., Inc.

DIGEST: Contractor claiming a refund of demurrage charges assessed by the railroad is not entitled to payment as a matter of law where contract specifically states the liability of the Government as to demurrage charges and the relief which can be granted. Contracts are to be enforced as written in the absence of ambiguity or forfeiture of rights by conduct. Consolidated Diesel Electric Company, 56 Comp. Gen. 340 (1977), 77-1 CPD 93; 53 Comp. Gen. 167 (1973); Richards & Associates v. United States, 177 Ct. Cl. 1037, 1052 (1966).

This decision involves a claim filed with our Office by Louisville Scrap Material Co., Inc. (Louisville), in connection with Contract No. 31-6440-014, with the Defense Logistics Agency. The claim is for a refund of demurrage charges assessed by the Illinois Central Gulf Railroad. Demurrage is the rail carrier's charge to the shipper for detention of rail cars beyond the free time published in tariffs for loading, unloading, diversion, reshipment, etc. Great Northern Ry. v. United States, 312 F.2d 906 (Ct. Cl. 1963).

The record shows that Louisville was awarded a contract to purchase iron and steel scrap located at Fort Knox, Kentucky. The contract provides that the Government will load an open top conveyance for the benefit of the purchaser. Louisville claims that a delay in loading was caused because the crane at Fort Knox was out of service, that the delay caused the accrual of demurrage charges and that it does not feel that this should be the purchaser's responsibility.

Louisville requested a refund of the demurrage charges from the Defense Logistics Agency. The sales contracting officer, relying on a provision of the contract, replied that the contract placed no obligation on the Government to pay the demurrage charges.

The General Accounting Office will not consider disputed questions of fact pertaining to matters arising under the disputes clause of a contract. Bradley Mechanical Contracting, Inc.,

53 Comp. Gen. 829 (1974), 74-1 CPD 229. Here, however, there is no dispute as to the facts and the contract has been fully executed. However, there exists the question whether any additional moneys are due the contractor. This is a question of law which we can consider. See 53 Comp. Gen. 167 (1973).

Contract No. 31-6440-014 was awarded to Louisville on July 8, 1976, in response to Invitation For Bid (IFB) No. 31-6440. Incorporated as part of the IFB was Defense Property Disposal Service pamphlet, "SALE BY REFERENCE, DECEMBER 1975." Part 2, paragraph 8 of the pamphlet provides, among other things, that the purchaser must make all arrangements necessary for packing, removal, and transportation of property. Thus, it was the responsibility of Louisville to arrange for the rail transportation.

Part 2, paragraph 31 of the pamphlet provides under the heading "DEMURRAGE AND OTHER STANDBY COSTS," that:

> "Where it is provided in the Invitation for Bids that the Government will load, it is agreed and understood that the Government shall not be liable for any costs, direct or indirect, which may be incurred by a Purchaser as a result of the Government's failure to load property in a timely manner. The sole and exclusive remedy for such a failure shall be an appropriate extension of the free removal period."

The terms of the contract provides the only relief available to Louisville: extension of the free removal period. In this case the removal period was five work days after date of oral notification or seven work days after date of written notification. See Loading Table Note L to IFB 31-6440.

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

> "Considering the facts * * *, it is [illegible]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 sanctioned 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 urging 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. 31-6440-014 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 Penn Bridge Co. v. United States, 59 Ct. Cl. 892, 896 (1924):

> "* * * Contractual rights once fixed in a proper contract executed by authority are inviolate. They may be forfeited 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."

See Consolidated Diesel Electric Company, 56 Comp. Gen. 340 (1977), 77-1 CPD 93; 53 Comp. Gen. 157 (1973); Richards & Associates v. United States, 177 Ct. Cl. 1037, 1052 (1966).

In view of the foregoing, there is no legal authority for our Office to grant the relief requested.

Milton J. Socolar

For The Comptroller General
of the United States