

117176

DECISION



20406

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

FILE: B-201384

DATE: December 29, 1981

MATTER OF: Effective date of payment in determining liability of U.S. Government for late payment charges

- DIGEST:**
1. The date of issuance of a Government check does not constitute the date of payment for late payment and prompt payment discount purposes. We confirm that B-107826, July 29, 1954, overruled 31 Comp. Gen. 260 (1952) and 18 Comp. Gen. 155 (1938). Government has an obligation to at least issue and mail its checks sufficiently in advance to assure their receipt by the vendor, in the regular course of the mails, on or before the delinquency date or the final discount date, respectively, to avoid liability for properly authorized late payment charges or to obtain the benefit of the vendor's discount, unless a Federal statute or the parties by contract provide otherwise. The parties should establish in the contract what constitutes the effective date of payment.
 2. For purposes of determining the effective date of payment, late payment cases should be treated the same as prompt payment discount cases since the former is assessed and the latter offered because of the time value of the money to vendors.
 3. Veterans Administration (VA) is obliged to pay the Gas Service Company late payment charges on the invoices submitted, since (1) the contract between VA and Gas Service incorporates by reference Gas Service's rules and regulations on file with the Kansas Corporation Commission; (2) these regulations provide for the assessment of late payment charges when payment is not received by the company by the delinquency date; and (3) although the Government's checks were issued and mailed before the delinquency dates, they were not received by Gas Service until after such dates.

The Veterans Administration (VA) asks whether the Gas Service Company, Topeka, Kansas, is entitled to aggregate late payment charges of \$598.12 on bills paid by Government checks, which were issued and mailed before, but not received by Gas Service until after, the delinquency date for payment. Several other vouchers have been submitted by the VA illustrating similar payment problems with other vendors.

For the reasons given below, we conclude that the contract between the VA and Gas Service obligates the VA to pay late payment charges to Gas Service when payment of VA gas bills is not received by the delinquency date provided in the contract. In this instance payment is allowable for late payment charges assessed in such amounts as are administratively determined to be due, in accordance with this decision.* We also conclude as a general rule that absent a Federal statute or contractual expression about the effective date of payment, to avoid liability for properly authorized late payment charges, the Government has an obligation to issue and mail its payment checks sufficiently in advance to assure their receipt by the vendor, in the regular course of the mails, on or before the delinquency date.

The record shows that on several occasions in 1979 Gas Service assessed late payment charges against the VA in situations where the Government check was issued before but not received by Gas Service until after the delinquency date. In reliance on our decision at 31 Comp. Gen. 260 (1952), the VA has not paid these assessments on the theory that effective payment occurs when a Government check is issued rather than when received by the vendor. On the other hand, Gas Service contends that terms of payment are governed by company rules and regulations and orders of the Kansas Corporation Commission, which provide for late payment charges on payments not received before the delinquency date.

The issue of when payment is effected as the United States Government disburses its funds in paying its debts is a matter governed by Federal law, and absent an applicable Act of Congress it is for the Federal Courts to determine the applicable rule. See Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943); United States v. Philadelphia National Bank, 304 F. Supp. 955, 956 (E.D. Pa. 1969).

*There is some ambiguity in the record as to the appropriate amount of the late payment charges. It appears the \$598.12 aggregate figure may include late payment charges on unpaid previous late payment charges. We have no specific information in the record authorizing such charges. We note that absent statutory authorization, the Government can be bound to pay service charges for late payment only if provision for the specific charge is included in the contract or notice of the specific charge is included in the terms of a delivery receipt accepted by the Government. B-199915, September 8, 1980. See also, B-186494, July 22, 1976. Otherwise the charges would be construed as unauthorized interest charges against the Government. See 28 U.S.C. § 2516(a); Ramsey v. United States, 121 Ct. Cl. 426, 431-32 (1951), cert. denied 343 U.S. 977 (1952). However, in light of the ambiguity in the record and the apparently small amount involved, we have not addressed this issue in the opinion.

Early Federal cases uniformly held that the date of issuance of a Government check was the date of payment. See Lloyd-Smith v. United States, 71 Ct. Cl. 74, 80 (1930); American Potash Co. v. United States, 80 Ct. Cl. 150, 165 (1934); Morgenthau v. Fidelity & Deposit Co. of Maryland, 94 F.2d 632, 635 (D.C. Cir. 1937). That was the position of this Office as well. 31 Comp. Gen. 260, 261 (1952); 18 Comp. Gen. 155, 157 (1938).

However, in 1954 the Court of Claims changed this rule, at least in the context of prompt payment discounts. The Foster Co. v. United States, 128 Ct. Cl. 291 (1954). In Foster, the Government checks were issued, that is, written and mailed, at Washington, D.C., within the 10-day discount period but were not received by the vendor in New Orleans within that period. The court found:

"In these circumstances, a party to a private agreement containing a discount provision would not be entitled to the discount. We are not willing to make a special rule for the Government, as contractor and as litigant, which would set it apart from its citizens in this regard. If it is not practicable for it to send its payments so that, in the regular course of the mail, they will reach its creditors within ten days, it must stipulate in its contracts for a longer discount period." Id. at 293.

The court also said, however:

"* * * We do not decide whether putting the checks in the mails at such times as would, in the ordinary course of the mails, have brought them to the plaintiff within the ten day period would have entitled the Government to the discounts.* * *" Id.

Soon thereafter in B-107326, July 29, 1954, this Office followed Foster stating:

"Since the Court's [Court of Claims'] decision represents a judicial precedent precisely in point on the question, the position of this Office to the effect that the date of issuance and mailing of the Government's check constitutes the date of payment for discount purposes is no longer tenable. Thus, it will be necessary to make refunds of discounts in cases wherein the claimants are able to prove that the checks issued in payment of their invoices were not mailed sufficiently in advance to assure their receipt by the payees, in the regular course of the mails, on or before the final discount date."

We confirm that decision overruled 31 Comp. Gen. 260 (1952), relied on by the VA, as well as 18 Comp. Gen. 155 (1938).

Although we find that the Foster standard is now applicable, it governs only in the absence of a contract provision setting forth the effective date of payment. In this regard, we think it preferable that the Government establish that date in contracts with its vendors. Thus, consistent with Foster, in B-107826, July 29, 1954, we recommended that the standard discount clause appearing on bid forms prescribed by the General Services Administration be amended by adding a sentence in substance reading: "The date of mailing of the Treasury check will be considered the date of payment."

We are not aware of a basis for distinguishing prompt payment discount from late payment cases for purposes of determining when payment occurs. A vendor's interest in the time value of money is substantially the same in both. Vendors offer prompt payment discounts to induce customers to pay cash balances due so that vendors will have earlier use of the monies. B-200023, February 13, 1981. Similarly, vendors impose late payment charges because they are deprived of the use of monies they normally would receive by the delinquency date. Therefore, we extend the holdings in Foster and B-107826, July 29, 1954, which relate to prompt payment discounts, to late payment cases as well. In addition, we again emphasize that in late payment cases as well as prompt payment discount cases the question of when payment occurs is best remedied by express contractual provisions.

In the specific situation submitted for decision, we find that the contract between the VA and Gas Service, executed August 13, 1973, and still in effect by renewals, specifically provides for terms of payment in "accordance with the Company's Rules and Regulations on file with the Kansas Corporation Commission." The pertinent company rules and regulations read as follows:

"All bills for gas service are due and payable upon receipt in the net amount thereof. A bill shall be deemed delinquent if payment thereof is not received by the Company, or its authorized agent, on or before the date stated on the bill which date shall be * * * the fifteenth (15th)* day after date of billing. When a bill becomes delinquent, a late payment charge in an amount equal to two percent (2%) of the delinquent amount owed for current gas service will be added to the customer's bill and collection efforts by the Company shall be initiated." (Emphasis added.)

In view of the specific reference in the contract, we find the VA is bound by the Company rules and regulations. They provide that

*The vouchers reveal that the 17th day after date of billing was the delinquency date in at least a portion of 1979.

payment occurs upon receipt by Gas Service of monies due rather than on issuance and mailing of the Government's check. Since provision is also made for a late charge of 2 percent to be assessed on payments not received by the delinquency date and the Government checks in the instances referred to us for decision were not received by Gas Service on or before the delinquency dates, the VA is obliged to pay the late payment charges. Accordingly, payment is allowed for late payment charges assessed in such amounts as are administratively determined to be due in accordance with this decision.

For the *Harry R. Van Cleave*
Comptroller General
of the United States