



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Heritage Visual Sales, Ltd.--Reconsideration

File: B-221226

Date: July 6, 1987

DIGEST

In response to Heritage Visual Sales' request for reconsideration of B-221226, February 6, 1986, denying quantum valebant claim for payment for its distributor's erroneous shipment of an extra set of videotapes, Defense Logistics Agency investigated to determine whether the government had physical possession of the tapes or ever received quantifiable benefit. Inability to locate tapes and Heritage's failure to show more than receipt of package that may have contained tapes falls short of requisite showing of benefit to the government necessary for recovery.

DECISION

M.L. Johnson Enterprises (Johnson) requests reconsideration of our decision in Heritage Visual Sales, Ltd., B-221226, February 6, 1986, in which we found that the failure to establish receipt, acceptance and use of a duplicate set of 26 videotapes of the television series World at War, erroneously sent to the Defense General Supply Center (DGSC) of the Defense Logistics Agency, precluded recovery of a claim for \$16,770. For the reasons stated below, we are still unable to allow the claim on the basis of the present record.

Johnson is the distributor for Heritage and has been assigned the right to make a claim for the alleged erroneous duplicate shipment of videotapes. In our previous decision, we concluded that since there was not a contract, either express or implied-in-fact, for the shipment of a second set of World at War videotapes, the only basis on which we could authorize payment would be on a theory of quantum meruit/quantum valebant, which was explained as follows:

"Where a performance by one party has benefited another, even in the absence of an enforceable

contract between them, equity requires that the party receiving the benefit should not gain a windfall at the expense of the performing party. The law thus implies a promise to pay by the receiving party whatever the goods or services are reasonably worth. Assuming the procurement would have been permissible if proper procedures had been followed (or more accurately in this case, if the Government had in fact intended to procure the items), we can allow payment on a quantum meruit/quantum valebant basis only if (1) the Government received and accepted a benefit, and (2) the contractor acted in good faith. The amount allowable is measured by the reasonable value of the benefit received. E.g., 63 Comp. Gen. 579, 584 (1984); B-207557, July 11, 1983." B-221226, Feb. 6, 1986 at 2.

In his request for reconsideration, Merton L. Johnson, President of Johnson Enterprises, submitted United Parcel Service (UPS) tracers for each of three shipments of tapes, including the two shipments for which payment was made. UPS Tracer #T07493538, dated March 14, 1984, for the disputed shipment, shows that three parcels, described as containing tapes and having a declared valuation of \$300 were picked up by UPS on January 20, 1983, and delivered at Dover Air Force Base on January 24, 1983 as evidenced by a receipt signed by a person identified as "Morris." Although return of the parcels was requested, they were never returned or paid for.

Upon receipt of the request for reconsideration of our earlier decision, we sent copies of the materials sent to us by the requester to the DGSC and asked them to attempt to locate the person who signed for the incoming shipment and to determine, if possible, whether the government still had possession of the tapes in question, could determine what had happened to them or had ever used the tapes or in any way received a benefit from them.

In a letter dated January 8, 1987, M. Jo Hendley, counsel to the DGSC, informed us that they were unable to locate the person who had signed for the shipment. She was able to identify the individual as Sherri Morris, an employee at the Dover Air Force Base at the time of the shipment, who was authorized to sign for incoming shipments. However, Ms. Morris subsequently married and left her position at the Air Force Base. Despite efforts by the contracting officer to locate Ms. Morris, which included contacting various offices at the Base, the DGSC was unable to locate her or even determine her married name.

We have also been provided with a letter dated December 12, 1986 from the Office of the Library Director, Headquarters, United States Army, Europe (USAREUR), and Seventh Army, which summarizes the investigations conducted in West Germany. This letter states in pertinent part:

"4. All contracted materials were shipped to REMO [Remote Site Library Support Center], which until August 1984, was located at the U.S. Army Printing and Publication Center Europe (USAPPCE) in Rodelheim, a suburb of Frankfurt. Because HQ V Corps Library Branch had limited space to receive and break-down shipments for distribution, the Office of the Library Director allowed their shipments to be received at REMO with the proviso that they be responsible for the inventory of their orders.

"5. In March 1984, Mr. James Dorrian, HQ V Corps Librarian, was queried by DGSC concerning an alleged duplicate shipment from Heritage. Mr. Dorrian coordinated his search and response with the staff of the Office of the Library Director and REMO. Our search confirmed that only those items requisitioned were received. A duplicate shipment had not been received.

"6. In February 1985, the Office of the Library Director, was also queried about the matter. As requested, we compared contracts, distribution documents and inventory records to physical items on hand. Our investigation yielded the same results as the HQ V Corps search conducted in March 1984

"7. Mr. James Dorrian, HQ V Corps Librarian, and Ms. Bonnie Klein, HQ USAREUR Special Services Librarian, who conducted the search and investigation for the alleged duplicates are prepared to sign affidavits stating that a physical search was completed and only those items requisitioned were received by HQ USAREUR and HQ V Corps."

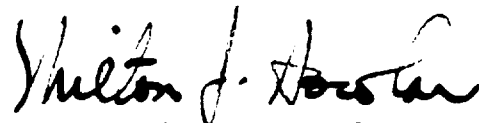
The additional materials submitted by the claimant and searches conducted at our request by DGSC have failed to demonstrate that the government received any benefit from receipt of the duplicate tapes. The only change in the fact situation presented in our earlier decision has been a showing that three packages were sent by the claimant and received by the government at Dover Air Force Base. Even if it were established beyond question that these packages contained the missing tapes, this would not be enough to warrant recovery.

In the request for reconsideration, claimant states:

"The question of whether the Air Force can find the video tapes at this late date is beside the point. The contractor has no control over the tapes once they are delivered to the Air Force, and if they have been lost or stolen after receipt by the Air Force, that is the Air Force's responsibility."

Regardless of the validity of this statement if we were dealing with goods supplied under contract or purchase order, it is not true where, as here, the goods were not ordered by the government but shipped as a result of the vendor's mistake. Since it is clear that there was no contract for the duplicate tapes, the only basis for recovery is, as noted earlier, quantum meruit/quantum valebant. One of the essential elements of recovery under this theory is benefit to the government, which is not the same as loss to the claimant. This element is missing in this case in that there has been no showing that the duplicate tapes were ever used by the government or that the government in any way received a benefit from them.

Accordingly, there can be no recovery under this claim, and our prior decision is affirmed.

for 
Comptroller General
of the United States