Andrew Gallagher
Proc. II

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DECISION

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

FILE: B-185655 DATE: February 7, 1977

MATTER OF: Consolidated Diesel Electric Company

DIGEST:

1. No basis is seen to reform contract to reimburse contractor for general and administrative expenses and profit applicable to amount of Federal Excise Tax (FET) contractor was required to pay during performance of contract. Contract's taxes clause provided that if written ruling took effect after contract date resulting in contractor being required to pay FET, contract price would be increased by amount of FET--and this is what in fact occurred. Therefore, issue presented does not involve reformation, but whether contractor has valid claim under terms of contract as written.

2. Contractor's claim which normally would be resolved through appeal to Armed Services Board of Contract Appeals (ASBCA) under contract disputes clause is properly for consideration if contractor elects to submit claim to GAO in lieu of pursuing appeal to ASBCA, and no material facts are disputed.

3. Claim involving question of law as to contractor's entitlement to general and administrative expenses and profit on amount of Federal Excise Tax (FET) paid during contract performance is denied. Invitation for bids' statement that FET was inapplicable is not viewed as negating effectiveness of contract's taxes clause (ASPR § 7-103.10(a)), and where contract is specific as to price adjustment for changes in tax circumstances, adjustment is to be made as parties specifically provided for. Contract's changes clause appears inapplicable and no reason is seen why taxes clause provides basis for recovery of costs and profit claimed.

This decision involves a claim filed with our Office by Consolidated Diesel Electric Company (CDEC), a Division of Condec Corporation, in connection with its contract No. DAAE07-74-C-0134 with the United States Army Tank-Automotive Command. The claim is for general and administrative (G&A) expenses and profit on an amount which CDEC states it would have included in its bid to cover Federal Excise Tax (FET), but for the Army's misrepresentation in the invitation for bids (IFB) that FET was inapplicable.

CDEC contends that the Army has made an erroneous reformation of the contract (price increased to cover only the amount of FET) and that our Office should now correct this situation by properly reforming the contract (to include G&A and profit applicable to the FET). The Army believes that the controversy in no way involves reformation, but rather is a dispute under the contract, and should be resolved by the Armed Services Board of Contract Appeals, where CDEC's appeal is now pending (ASBCA No. 20819). CDEC responds that the contracting officer has improperly attempted to dictate the choice of a forum by issuing a final decision under the contract disputes clause, that it appealed to the ASBCA only as a protective measure, and that our Office can and should decide its claim.

The Army's April 30, 1976, report to our Office contains the following factual summary:

"* * * The subject multi-year contract (Tab 1, R4) was awarded to claimant on 18 March 1974 for 510 60 ton, lowbed, heavy equipment transporter semitrailers. The semitrailers had been previously purchased by the Army Tank-Automotive Command exclusive of Federal Excise Tax (except for tires), and such tax was not paid. Another contract was awarded to another contractor in June 1973 for the M746 Truck Tractor (which is used to pull the subject semitrailer) exclusive of FET. The subject contract also provided that FET did not apply to the semitrailer, but that it did apply to the tires and the bid would include any applicable FET on the tires. The contract included the Federal, State and Local Taxes Clause, which provides in part that 'with respect to any Federal Excise Tax or duty on the transactions or property covered by this contract, if a statute, court decision, written ruling or regulation takes effect after the date, and--(1) results in the contractor being required to pay or bear the burden of any such Federal Excise Tax or duty or increase in the rate thereof which would not otherwise have been payable on such transactions or property, the contract price shall be increased by the amount of such tax or duty or rate increase.'

"After contract award, the Contracting Officer requested that claimant obtain a ruling from the Internal Revenue Service so as to confirm the Army's position that FET

> was not applicable to the semitrailer. Claimant requested a ruling, and IRS issued a written ruling which stated that sales of the semitrailer were considered to be subject to the Federal Excise Tax. Subsequently, the Contracting Officer increased the contract price by contract modification (under the provisions of the Federal, State and Local Taxes Clause) by the amount of the additional FET imposed after contract award, and issued a final decision that claimant was not entitled to any further recovery."

CDEC cites B-159066, May 6, 1966, where an invitation for bids stated that contractors' purchases for the Federal Government were exempt from a State tax. After the IFB was issued and before award was made, a statutory amendment made the tax applicable, but the IFB was not amended to reflect this. In this and in other similar cases (B-153472, December 2, 1965; B-159063, May 11, 1966; B-169959, August 3, 1970; Rust Engineering Company, B-180071, February 25, 1974, 74-1 CPD 101) our Office allowed reformation of the contracts to reimburse the taxes payable for the reason that the Government's misrepresentation of tax inapplicability was reasonably relied on by the contractor to its detriment. As stated in Rust Engineering Company, supra:

> "Reformation is properly available in cases where an innocent misrepresentation of the law by one party is reasonably relied upon by the other party to its detriment, and restitution may be obtained on the premise that it would be unjust to allow one who made the misrepresentation, although innocently, to retain the fruits of a bargain which was induced, in whole or in part, by such misrepresentation. See 3 CORBIN ON CONTRACTS § 618 (1960 ed.); 12 WILLISTON ON CONTRACTS §§ 1500, 1509 (3d ed. 1970)."

Further, in B-159066, February 12, 1969, we considered the contractor's claim for a markup or handling charges incident to the payment of the State tax involved in B-159066, May 6, 1966, supra. The contractor asserted that had it been aware of the applicability, it would have treated the tax as any other projected contract cost and would have added standard percentages for overhead and profit to the amount of the actual estimated tax liability in computing its bid price. Our decision agreed with the contractor. "* * * [T]he end sought by reformation is to regard the contract as

expressing the agreement which would have been reached by the parties absent the misrepresentation. * * * In this regard, there seems to be no question but that a bidder aware of the applicability of a state tax would have included profit and overhead in addition to the anticipated amount of the tax in calculating his bid price." Our decision noted that the contract's "Federal, State, and Local Taxes" clause was not controlling because it dealt with changes in applicable Federal taxes taking effect after the contract date--rather than with the amount of a contract price adjustment allowable as a result of reformation.

In the present case, we find no basis for reformation of the contract. The contracting parties specifically agreed in the clause entitled FEDERAL, STATE, AND LOCAL TAXES (1971 Nov.) (see ASPR 7-103.10(a) (1973 ed.)) that if a "written ruling" took effect after the contract date which resulted in the contractor being required to pay FET, the contract price would be increased by the amount of such tax. This is exactly what occurred. Most of the above-cited decisions of our Office involved the applicability of State taxes which were not reimbursable under the contract clauses involved. The only one dealing with FET is B-159064, and that decision did not involve a situation where, as here, a written ruling took effect after the contract date which changed the applicability of the tax.

Aside from the question of reformation, CDEC suggests that even if its claim involves a dispute under the contract (as the Army maintains), the claim is appropriately for consideration by our Office because only a question of law is involved. Considering the matter on this basis presumably would require a decision on whether, as CDEC contends, it is entitled to an equitable adjustment under the contract's changes clause, or whether, as the Army believes, the Federal, State and Local Taxes clause is the only operative provision and that reimbursement thereunder is limited to the amount of FET.

Since the decision of the United States Supreme Court in S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972), the role of our Office in considering matters which are normally for resolution under the disputes clause has been limited. As the Army points out, we have declined on a number of occasions to consider contractors' requests for decisions regarding matters of this type. These include cases where the contracting officer has not rendered a final decision

pursuant to the disputes procedure (for example, E. F. Reid, Inc., B-183172, March 7, 1975, 75-1 CPD 141), and also cases where the subject matter of the request is involved in a court action or is before a board of contract appeals (Delta Electric Construction Company, B-182820, March 28, 1975, 75-1 CPD 188). Also, decisions on disputes rendered by the boards of contract appeals either in favor of or adverse to contractors are final and conclusive and not subject to review by our Office absent fraud or bad faith. 52 Comp. Gen. 63 (1972); Cf. 52 id. 196 (1972). Compare 53 Comp. Gen. 167 (1973), where we did consider a question of law as to whether a contract had come into existence although the contractor's appeal involving the same matter was then before the ASBCA, and also Robert P. Maier, Inc., 55 Comp. Gen. 833, 836 (1976), 76-1 CPD 137.

We do not believe that S&E Contractors precludes our Office from considering a contractor's claim where the contractor elects to submit the matter here in lieu of pursuing an appeal to the board of contract appeals, and none of the material facts are disputed. Further, in the present case CDEC has offered to withdraw its appeal to the ASBCA, with prejudice, if our Office agrees to consider its claim. Also, we note that the ASBCA has stated that it will refuse to decide the merits of a claim which has been decided by our Office at the request of or with the acquiescence of the contractor. See Urban Systems Development, ASBCA No. 18399, 74-2 BCA § 10,867; So-Sew Styles Inc., ASBCA No. 15476, 71-1 BCA § 8844. Accordingly, we believe it is appropriate to consider CDEC's claim, if no material facts are disputed. Disputed facts would, of course, have to be resolved pursuant to the disputes clause.

While CDEC asserts that only a question of law is involved here, the Army has raised a question as to whether some material facts might be disputed. In connection with CDEC's appeal to the ASBCA, the Army disagreed with several points in a stipulation of facts proposed by CDEC, and submitted its own proposed stipulation of facts. We have examined these materials, and believe there is no genuine dispute as to any of the material facts in this case. Also, we note that CDEC has stated that it is willing to have its claim decided based upon the factual summary, quoted supra, in the Army's April 30, 1976, report.

The only theory advanced by CDEC in support of its claim is that it is entitled to an equitable adjustment under the contract's changes clause. The Army, on the other hand, maintains that the

taxes clause is the only pertinent contractual provision. The Army believes that the taxes clause is clear and unambiguous, and that it sets out the complete relief a contractor is entitled to where, as here, the amount of FET payable is increased by a written ruling that takes effect after the contract date. The Army cites 49 Comp. Gen. 782 (1970) as supporting the principle that contract price adjustments for changes in tax circumstances should be made as specifically provided for in the contract, and notes that in the decision, our Office stated that the nonapplicability of a State tax did not involve a change within the meaning of the contract's changes clause.

CDEC attempts to distinguish 49 Comp. Gen. 782 on a number of grounds, the essential one being that the decision did not involve the threshold question of whether the taxes clause was applicable at all. In the present case, CDEC contends that the taxes clause was not applicable at the time of bidding because the Government said it was not--i.e., because the Army had stated in the IFB that FET was not applicable to the semitrailers. In this connection, CDEC contends that it was not the IRS written ruling which required payment of the tax, but rather the pre-existing law.

We are unable to see how the IFB's statement that FET is inapplicable operated to negate the effectiveness of the contract's taxes clause. The two provisions are not necessarily inconsistent. Initially, the statement that FET is inapplicable could be taken simply as an indication of the Army's belief at the time the IFB was issued. Also, the taxes clause itself may be taken to impute to a bidder knowledge of the possible applicability of FET. See B-171668, February 17, 1971. Further, the pertinent question is not necessarily the point in time when a contractor becomes obligated in an abstract legal sense to pay a tax, but whether some event has occurred within the meaning of the terms of the contract which affects the parties' rights and responsibilities. See the discussion in 27 Comp. Gen. 767 (1948) as to when a tax was "imposed" within the meaning of the contract clause there involved. In the present case, the relevant event was the issuance of the IRS written ruling.

Further, we agree with the Army that, as a general proposition, where the parties' agreement specifically provides for a contract price adjustment for certain changes in tax circumstances, adjustments

are to be made in the manner and to the extent the parties specifically provided for. See 49 Comp. Gen., supra; Lutz Superdyne, Inc., B-181867, September 4, 1974, 74-2 CPD 144; Teledyne Continental Motors, B-182062, April 23, 1975, 75-1 CPD 259. In any event, we do not perceive in what sense any "change" occurred in this case, since the pertinent contract clause (CHANGES (1958 JAN.), ASPR 7-103.2 (1973 ed.)) makes reference to a written order issued by the contracting officer which changes (within the general scope of the contract) drawings, designs, or specifications, method of shipment or packing, or place of delivery. Compare Fontaine Truck Equipment Company, Inc., ASBCA No. 1690 (1954), 6 CCF ¶ 61,517, where the contractor's bid had excluded FET on materials which were to be exported, a change order was issued calling for domestic delivery, and the Board held that the contractor was entitled to an equitable adjustment for the cost of FET because of the change in the place of delivery.

As far as the taxes clause itself is concerned, we note in Morrison-Knudsen Company v. United States, 427 F. 2d 1181 (Ct. Cl. 1970), that a very similar taxes clause was to be given a liberal interpretation once it was clear that FET was involved. However, we find nothing in that decision, nor are we aware of other authority, which would support the result that a contractor in CDEC's circumstances could be entitled to an adjustment under the taxes clause not only for the amount of the tax but also for the applicable G&A and profit had the amount of the tax been included in its bid.

In view of the foregoing, we do not believe the contractor has presented any legal basis which would establish the liability of the United States. Accordingly, the claim is denied.

Deputy Comptroller General
of the United States