DOCUMENT RESUME

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[Claim against Small Business Administration for Excess Costs of Reprocurement]. B-185427. September 21, 1977. 12 pp.

Decision re: Soil Conservation Service; Small Business Administration; by Robert F. Keller, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).
Authority: Small Business Act, sec. 8(a) (15 U.S.C. 637(a)). Miller Act (40 U.S.C. 270a et seq.). Economy Act, sec. 601 (31 U.S.C. 686). F.P.R. 1-1.713-8(g)(1). B-176941 (1972). B-183695 (1975). B-150529 (1963). 47 Comp. Gen. 1. 30 Comp. Gen. 295. 33 Comp. Gen. 565. 52 Comp. Gen. 964. 56 Comp. Gen. 340. S and E Contractors, Inc. v. United States, 406 U.S. 1 (1972).

Reconsideration was requested of a decision in connection with a claim by the Soil Conservation Service against the Small Business Administration (SBA) for excess costs of reprocurement following a contract terminated for default. The decision was affirmed that a contract was in existence between the agencies. In spite of a pending appeal, the merits of the claim were considered since no material facts were disputed and the contractor, SBA, requested a decision. SBA was not found to be liable for excess reprocurement costs since it had met its contract obligations. (HTW)

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DECISION

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

FILE: B-185427 DATE: September 21, 1977

MATTER OF: Soil Conservation Service and Small Business Administration Contract No. AG18scs-00100

DIGEST:

1. On reconsideration, decision is affirmed that "section 8(a)" contract came into existence between Soil Conservation Service and Small Business Administration (contractor). Performance of contract work by SBA subcontractor was not condition precedent to existence of contract, nor is there any indication that formation of contract was conditioned on furnishing of performance and payment of bonds.

2. Though contractor's appeal is pending before Department of Agriculture Board of Contract Appeals, merits of claim involving excess costs of reprocurement are considered by GAO in circumstances where no material facts are disputed and where contractor (Small Business Administration--awarded contract pursuant to section 8(a) of Small Business Act) requests GAO to decide claim.

3. No basis is seen to conclude that Small Business Administration is liable for excess reprocurement costs following termination for default of construction contract awarded to SBA pursuant to section 8(a) of Small Business Act, since SBA met obligation under contract to award subcontract for performance of work to eligible small business concern, contract does not indicate SBA guaranteed satisfactory performance by subcontractor, total responsibility for subcontract administration was in hands of procuring agency, not SBA, and contract did not establish or reasonably imply obligation on SBA's part to provide replacement subcontractor.

This decision concerns a claim by the Soil Conservation Service (SCS), U.S. Department of Agriculture (USDA), for excess costs of reprocurement ($4,651) following the termination for default of a construction contract. The claim is being made against another Federal agency, the Small Business Administration (SBA), since the terminated contract was awarded by SCS to SBA pursuant to the "8(a)" program. Under section 8(a) of the Small Business Act,

15 U.S.C. 637(a) (1970), SBA is authorized to enter into procurement contracts with Federal agencies, and to subcontract the work to small business concerns.

After unsuccessful attempts to collect the claim from SBA, SCS forwarded the matter to our Office in November 1975. In Soil Conservation Service--Request for decision concerning contract with Small Business Administration, B-185427, April 2, 1976, 76-1 CPD 219, we held that it would be premature for our Office to give any consideration to either the jurisdictional or substantive aspects of the claim, because a contract had come into existence between SCS and SBA, the contract contained the standard disputes clause, disputed facts were possibly involved, and the contracting officer had not rendered a final decision under the disputes clause. We suggested that the matter be processed under the disputes clause.

SBA has requested reconsideration of our decision. Also, pursuant to our decision the SCS contracting officer rendered a final decision dated August 13, 1976, which found among other things that SBA was liable for damages sustained by SCS in the amount of $4,651. SBA's appeal of the contracting officer's final decision is now pending before the Department of Agriculture Board of Contract Appeals (No. 76-165).

Our decision of today deals with three aspects of this matter: (1) SBA's request for reconsideration of our April 2, 1976, decision; (2) the propriety of our Office's considering the substantive issues involved, and (3) the merits of the controversy. For the reasons which follow, we (1) affirm our earlier decision, (2) find it appropriate to consider the substantive issues, and (3) do not find any legal basis to support a conclusion that SBA is required to reimburse SCS for the excess costs of reprocurement.

SBA Request for Reconsideration

The background facts are set forth in our earlier decision. Briefly, the prime contract (No. AG18scs-00100) was awarded by SCS to SBA on June 27, 1973, and on June 29, 1973, SBA awarded a subcontract to Mills Enterprises, Inc. (Mills). Performance and payment bonds required by the Miller Act, 40 U.S.C. 270a, et seq. (1970), were not obtained. On September 24, 1973, SCS notified SBA that Mills had terminated its right to proceed with the work by self-default. A replacement subcontractor was not found. SCS denied

SBA's request that the prime contract be terminated at no cost, reprocured the work under a new contract, and billed SBA for the excess cost of reprocurement.

SBA's request for reconsideration essentially challenges our decision's conclusion that a contract came into existence between SCS and SBA. Initially, SBA points out that paragraph 22 of the contract's "SPECIAL PROVISIONS" provided in pertinent part:

> "The Small Business Administration (SBA) agrees as follows:
>
> "(a) SBA will perform the work set forth in this contract * * * by subcontracting with an eligible concern pursuant to the provisions of Section 8(a) of the Small Business Act * * *
>
> "(b) If SBA does not award a contract for the work hereunder this contract may be terminated without cost to either party."

The same language is prescribed in Federal Procurement Regulations (FPR) § 1-1.713-4(g)(i) (1964 ed. amend. 100) for inclusion in 8(a) construction contracts.

SBA believes these provisions constitute an express condition which "relates to the formation of a contract" between SBA and the contracting agency, or which "limits SBA's undertaking to perform under such contracts." Particular reliance is placed upon Williston on Contracts, third edition, chapter 24, section 666 A, where it is stated:

> "A precedent condition in a contract is the typical kind. It must be performed or happen before a duty or immediate performance arises on the promise which the condition qualifies.
>
> "One may also speak of a condition precedent to the existence of a contract. 'A condition precedent may relate either to the formation of contracts or to liability under them.' * * *"

Based upon this, SBA's contentions as we understand them are that (1) the actual performance of the work by subcontracting is a condition precedent to the formation of the prime contract; since the work was never performed by Mills, there was no prime contract, and (2) the actual performance of the work by subcontracting is a condition precedent to SBA's incurring any liabilities as a prime contractor

It must be recalled that for the purpose of reconsidering our earlier decision, the pertinent issue is whether a contract was in existence between SCS and SBA. We do not believe that SBA's latter argument is entirely germane, since it concedes that a contract did come into existence, and essentially goes to the question of the extent of SBA's liabilities under that contract, or the circumstances under which the contract could be terminated at no cost. To whatever extent SBA implies or suggests that it unilaterally effected a no-cost termination of the contract under paragraph 22(b), supra, we think it is sufficient to note that this provision is, on its face, inapplicable to the present situation because it would be operative only if no subcontract was awarded.

Also, SBA's former argument is not persuasive. We believe that a condition precedent to the existence of a contract refers to a situation where the parties to a proposed contract agree that the contract will not be effective or binding until certain conditions are performed or occur, as illustrated by Parkview General Hospital, Inc. v. Eppes, 447 S.W. 2d 487 (Tex. Civ. App. 1969), which is mentioned in a footnote to the above-cited section of Professor Williston's treatise. See, also, Corbin on Contracts, chapter 31, section 649 (1960 ed.).

In the present case, we have found no language in the contract indicating that SCS and SBA intended the existence of their contract to be conditional upon the performance of the work by the subcontractor. Further, paragraph 22(b) of the contract, supra, contradicts any such interpretation of the parties' intent, since it speaks of the termination of an existing contract in the event that no subcontract is awarded.

SBA next addresses our earlier decision's conclusion that the failure to furnish Miller Act bonds does not render a construction contract wholly void, but merely voidable. Our decision cited,

among other cases, B-176941, November 28, 1972. SBA points out that the contract involved in B-176941 was awarded pursuant to formal advertising, and that our Office relied on pertinent language in Standard Forms 21 and 22 in concluding that the mailing of a written acceptance of the bid consummated the contract prior to the time when the contractor would be required to furnish performance and payment bonds. SBA contends that our reasoning is inappliable here, because the present contract was negotiated, and the award document used was Standard Form 23.

In this regard, the pertinent question is not whether the contract is advertised or negotiated, but whether the language used by the parties evidences an intent to consummate the award of a contract prior to the furnishing of a bond. Compare 47 Comp. Gen. 1 (1967) (where the award of a negotiated contract was made by a letter which accepted the offer and called for the subsequent furnishing of a bond) with Square Deal Trucking Co., Inc., B-183695, October 2, 1975, 75-2 CPD 206, and B-183695, November 14, 1975, 75-2 CPD 303 (where the agency's letter made the submission of a bond by the bidder a condition precedent to the effectiveness of an award).

In the present case, an award was made by a Standard Form 23, which on page 1 gives the "Date of Contract" as June 27, 1973. On page 2 of the form, it is stated that the parties "* * * have executed this contract as of the date entered on the first page hereof." The document is signed on behalf of the United States by an SCS official, and on behalf of the contractor (SBA) by an SBA official. Neither the Standard Form 23 nor the attached pages make any reference to a requirement for performance and payment bonds. This point is further discussed infra. It appears, then, that the parties intended to consummate a contract effective as of June 27, 1973.

In view of the foregoing, we do not believe that SBA has demonstrated errors of fact or law in our prior decision's holding that a contract was in existence between SCS and SBA, and that decision is affirmed.

Propriety of Considering the Merits

As our earlier decision pointed out, on several occasions we have rendered decisions on questions or controversies arising in connection with agreements between two Federal agenices. See, for example, 30 Comp. Gen. 295 (1951), 33 id. 565 (1954) and 52 id. 964 (1973), which involved

questions arising under interagency agreements which had been entered into pursuant to section 601 of the Economy Act, 31 U.S.C. 686 (1970). In the present case, SBA requests that our Office consider the question of its liability under the contract. In addition, USDA has stated that it does not object to further review of the matter by our Office to determine whether USDA or SBA appropriations should be charged with the excess reprocurement costs.

Also, as our earlier decision suggested, the procedure prescribed by the contract's disputes clause has been followed. The contracting officer has issued his final decision and SBA has appealed that decision. In this regard, since the decision in S & E Contractors, Inc. v. United States, 406 U.S. 1 (1972), the role of our Office in considering matters which would normally be resolved under the disputes procedure has been limited. However, in a recent decision we considered a contract claim even though the matter was pending before the Armed Services Board of Contract Appeals (ASBCA). See Consolidated Diesel Electric Company, 56 Comp. Gen. 340 (1977), 77-1 CPD 93. Among the factors which influenced our Office in deciding to consider the claim were that the contracting officer had rendered a final decision under the disputes clause, the contractor had elected to submit its claim to our Office for a decision (it had filed an appeal with the ASBCA only as a protective measure), and the claim involved only a question of law—there were no disputed facts.

In the present case, the contracting officer has rendered a final decision and both parties now agree that no facts are disputed. The contractor, SBA, seeks a decision from our Office and USDA apparently does not object to our considering the issues. In view of these factors and the unusual consideration that both the contracting agency and the contractor are Federal agencies, we think it is appropriate to consider the substantive issues involved.

Decision on the Merits

SBA's contentions concerning the formation of the prime contract and subcontract have already been treated. SBA's remaining arguments are based on the language of paragraph 22(a) of the contract, which states that SBA will "perform the work" by subcontracting with an eligible small business concern. In this regard, SBA initially points out that it cannot in fact perform the work. In addition, SBA believes that the performance of the work by subcontracting was a condition precedent to any further contractual obligations on its part. Since

the condition was not fulfilled, SBA maintains there is no liability on its part for excess costs of reprocurement. Also, SBA calls attention to the fact that the contract provided that the work shall be started within 20 calendar days after receipt of the notice to proceed, and that no notice to proceed was ever issued by SCS.

USDA admits that no notice to proceed was ever issued, but affirmatively avers that the contracting officer was never in a position to do so because of the failure to provide proper performance and payment bonds and because of Mills' "stated intent" not to perform. USDA points out that an SBA publication which provides "standard operating procedure" for the 8(a) program (SOP Section 60, No. 41, Revision 1, November 14, 1974) recognizes the requirement for performance and payment bonds in section 8(a) construction contracts. USDA believes that by effecting a no-cost termination of the subcontract, SBA chose to release Mills from its obligations and improperly waived the Government's rights. The agency maintains that SCS should not similarly waive the claim against SBA as the prime contractor, and that if waiver were appropriate the cost should be charged to SBA appropriations.

At this point, review of additional pertinent facts of record is necessary. The record shows that by letter dated June 27, 1973, SBA submitted to SCS on behalf of its proposed subcontractor, Mills, a firm price quotation for the construction work and recommended acceptance by SCS. By letter dated June 28, 1973, SCS forwarded copies of the prime contract and subcontract to SBA, requesting SBA to execute the subcontract between itself and Mills.

Neither the prime contract nor the subcontract prepared by SCS made any reference to a requirement for performance and payment bonds. Both the prime contract and the subcontract provide as follows in paragraph 22(c) of the Special Provisions:

> "The SBA hereby delegates to the Soil Conservation Service the responsibility for administering the subcontract to be awarded hereunder with complete authority to take any action on behalf of the Government under the terms and conditions of the subcontract."

By letter of July 6, 1973, an SCS official provided SBA with copies of the subcontract signed by Mills, and stated "(Mills) expects to have the bonds and construction schedule to me by the end of next week. The Notice to Proceed will then be issued * * *."

An SBA official's letter dated September 4, 1973, advised SCS that Mills "* * * will be in receipt of their Bid and Performance Bonds in the very near future * * * and should be in a position to proceed * * * by next week."

An SCS memorandum dated September 20, 1973, states that representatives of SCS, SBA and Mills met on September 19, 1973. The memorandum states that the Mills representative "(s)aid he had been to see the job and there was no way he could do the job for the price agreed-to in his contract with SBA. He stated he didn't care what we did to him (legally) he could take care of himself. He also said he is not bound by the contract he signed because the person who did the cost estimating is no longer with his organization." The memorandum further states that the Mills representative left before the meeting was concluded.

By letter to SBA dated Septem 24, 1973, SCS stated:

"Mills Enterprises, Inc., * * * has terminated its right to proceed * * * by refusing to prosecute the work. Mr. Mills informed us of this self-default at a meeting held on September 19, 1973. * * *

"It is our understanding that SBA policy is to try to get another 8(a) contractor to perform the contract requirements. We would like to cooperate in your attempt to find a replacement contractor to the maximum extent possible. Therefore, we are prepared to allow you until October 15, 1973 to find a replacement contractor.

"You may consider this as our intent to terminate your right to proceed under our Contract * * * as provided under the General Provisions, Clause 5 if you are unable to find a replacement contractor by October 15, 1973.

"In the event you are unable to find a replacement contractor we will proceed with standard procurement procedures and assess any excess costs to SBA.

"We recommend that you confirm with your contractor his default by failure to prosecute the work. * * *"

In a letter to SCS dated October 12, 1973, SBA requested an extension in time to October 31, 1973, in order to resolve "* * * uncertainties about some of the specification requirements."

SCS's letter to SBA dated October 16, 1973, rejected this request and stated:

> "Pursuant to Clause 5 of the General Provisions, you are hereby notified that your right to proceed with the work under your contract is terminated effective at the close of business on the day on which you receive this notice. You are liable for all increased costs occasioned the Soil Conservation Service in completing the work and any liquidated damages occasioned by non-completion of the work within the contract performance time."

Clause 5 of the contract's General Provisions (Standard Form 23-A, October 1969 Edition) provides in pertinent part:

> "5. TERMINATION FOR DEFAULT-DAMAGES FOR DELAY-TIME EXTENSIONS
>
> "(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the Contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the Government resulting from his refusal or failure to complete the work within the specified time.

> "(b) If fixed and agreed liquidated damages are provided in the contract and if the Government so terminates the Contractor's right to proceed, the resulting damage will consist of such liquidated dameges until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work."

By a modification to the subcontract, effective November 7, 1973, SBA advised Mills that the "Contract for Fishway Construction is hereby cancelled in its entirety without cost to either party."

In our view, the basic issue is whether the contractor, SBA, refused or failed to prosecute, or failed to complete, the work called for in the contract. In interpreting what "work" SBA was obligated to perform, we note that many of the contract's provisions speak in terms of what the "contractor" was required to do in the actual performance of the construction. For example, paragraph 5(c) of the Special Provisions states that "Survey stakes destroyed or removed by the carelessness of the Contractor or his employees shall be replaced by the Government at the Contractor's expense." Also, in its June 27, 1973, letter to SCS, supra, SBA had certified that it was "competent to perform" the contract. However, we believe the contract provisions indicating that SBA would actually carry out the construction must be read together with paragraph 22(a), supra, which recognized that SBA is to "perform the work" by subcontracting with an eligible small business concern. Also, paragraph 23(b)(1) of the prime contract and the subcontract provides that "The subcontractor shall, for and on behalf of the SBA, fulfill and perform all the requirements of Contract No. AG18scs-00100 for the consideration stated therein." (Emphasis supplied.).

We believe the contracting parties' intention is reasonably clear from the language used. The only sense in which SBA was expected to "perform" the contract was by subcontracting the work wholly to an eligible small business concern. It is undisputed that Mills met this description and was awarded a subcontract by SBA. We find nothing in the contract to indicate that SBA guaranteed satisfactory performance by the subcontractor. Further, complete authority and responsibility for administration of the subcontract had been delegated to SCS. In these circumstances, we find it difficult to see how problems experienced with the subcontractor's performance of the work would support a conclusion that SBA had not fulfilled its obligations under the contract.

However, in circumstances where, as here, the subcontractor has failed to perform, the further question is what obligation rests on SBA to provide a replacement subcontractor. In this regard, FPR § 1-1.713-4(g) (1964 ed. amend. 100) indicates that 8(a) construction contracts are not entered into simply on the basis that SBA will subcontract with any eligible concern, but rather that a particular subcontractor will be used. It is apparent from the record that SCS and SBA contracted with the understanding that Mills would be the subcontractor. Further, the contract is silent as to SBA's duty to provide a replacement subcontractor in the event that the subcontractor failed to perform.

SCS's insistence that SBA find a replacement subcontractor was apparently based on its understanding that this procedure was SBA's policy. This policy is reflected in section 56b of SBA's section 8(a) SOP publication, supra, which describes itself as a statement of policy, procedures and guidelines for SBA personnel. However, the SOP publication is not a regulation, the contract does not incorporate its provisions, and in any event it provides for a no-cost termination of the prime contract in the event that it is impossible to locate a new 8(a) subcontractor.

In view of the foregoing, and given the silence of the prime contract on the question of providing a replacement subcontractor, one possible interpretation would be an implied obligation on SBA's part to provide a replacement, since SBA had agreed to perform the work by subcontracting. A second interpretation would be that the failure of the selected subcontractor to perform simply terminated the contractual relationship, unless the parties mutually agreed on a modification of the contract regarding a replacement subcontractor. Considering all the circumstances, we believe the latter interpretation is more reasonable. In addition, this result is supported by the fact that the contracting agency, SCS, was responsible for preparing, and in fact prepared, the contract document. Under the contra proferentem rule of interpretation, ambiguous contract terms are construed against the drafter of the terms. WPC Enterprises, Incorporated v. United States, 323 F.2d 874 (Ct. Cl. 1963).

Finally, USDA's position on the issues raised concerning the notice to proceed and the payment and performance bonds is not persuasive. FPR § 1-1.713-4(g)(1) (1964 ed. amend. 100) provides that no requirement for the SBA to furnish payment and performance bonds shall be included in the prime contract; rather, pursuant to FPR § 1-1.713-4(h) (1964 ed. amend. 100), the requirement is to be included

in the subcontract. Under the regulations, the procuring agency has the responsibility of preparing both the prime contract and the subcontract. Since SCS failed to include the bond requirements in the subcontract, we hardly believe that any difficulties experienced on account of this oversight could be considered within SBA's sphere of responsibility. Further, as SBA points out, it has been held that a contractor which elects to begin work prior to receipt of a notice to proceed does so at its own risk and must bear any loss resulting from such action should the Government fail to give notice to proceed. B-150529, September 19, 1963, and cases cited therein. Moreover, SBA's "release" of Mills from its contractual obligations cannot enlarge SBA's liability under the prime contract.

In view of the foregoing, we see no legal basis to support a conclusion that SBA is liable for the excess costs of reprocurement.

P. J. Keller

Acting Comptroller General
of the United States