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DECISION



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

10,003

FILE: B-194253

DATE: May 2, 1979

MATTER OF: N. Frank & Son, Inc. DLG01469

~~Reconsideration~~

DIGEST:

[Claim for Reimbursement of Payment for Demurrage Charges]

Contract with Government which provides for desks to be "delivered f.o.b. Warehouse, Number 10 P Street" requires contractor to bear expenses of delivering desks to designated point and contractor is responsible for demurrage charges incurred prior to actual delivery.

N. Frank & Son, Inc. (Frank) requests reconsideration of a settlement certificate dated November 21, 1978, claim number Z-2740217, in which our Claims Division disallowed Frank's claim for \$470 in demurrage charges resulting from Frank's sale of desks to the Architect of the Capitol under a contract with the Government.

Frank contracted with the Government to supply desks to the Architect of the Capitol. Item No. 11 of the contract covers deliveries. It states that the desks shall be ". . . delivered f.o.b. Warehouse, Number 10 P Street, South Capitol and P Streets, S.W., Washington, D.C. . . ." The Architect of the Capitol had been assigned space in the warehouse which is under the jurisdiction of the General Services Administration (GSA). The desks arrived on January 12, 1977, by railroad. Attempts to reach the warehouse by use of the railway siding next to the warehouse failed because the tracks were blocked with snow, ice and debris. As a result, delivery by rail was delayed as Frank tried unsuccessfully for almost a month to have GSA clear the tracks. On February 4, 1977, Frank completed delivery to the warehouse by truck.

Frank has conceded its liability for the costs of the truck delivery. This claim is for reimbursement of Frank's payment of the railroad's bill for demurrage. The demurrage bill is the railroad's charge to Frank for detaining the rail car beyond the free time published in the tariff for unloading. Despite the f.o.b. warehouse language in the contract, Frank argues that GSA was responsible for the delivery delay since its failure to clear the tracks made delivery impossible, and therefore resulted in the demurrage charges.

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While rail delivery might have been impossible, it is clear from the record that delivery was made by alternate means. After unsuccessfully attempting to have the tracks cleared, Frank delivered by truck. The contract did not require that delivery be made by railroad. It did not bind Frank to any particular mode of transportation. The record does not show that Frank's decision to use the railroad was the prudent one under the circumstances. Once Frank made his choice and delivery problems arose, it was his own managerial decision to wait 30 days before seeking an alternate means of delivery.

We note too that the demurrage rules and tariff applicable to the Frank shipment provide forty-eight hours (two days) free time during which no demurrage charge will be made for unloading; it also provides a procedure for seeking an extension of this free time where weather interference can be shown as causing a delay in unloading. Freight Tariff 4-J, I.C.C. H-59. Such an extension must be in writing stating fully the conditions which prevented the unloading. There is no evidence in the record that Frank made a claim for additional free time because of the snow and ice conditions. Frank's failure to seek an extension of free time and its decision to try for almost a month to have the tracks cleared rather than hire a truck after the free time expired, arguably contributed to the accumulation of demurrage charges.

Frank has not proven its contention that GSA was solely responsible for the delivery delay and that the Government should reimburse it for the demurrage charges. The burden is on claimants to establish the liability of the United States and the claimant's right to payment. 4 C.F.R. 31.7 (1978); 44 Comp. Gen. 799, 801 (1965).

The contract language that the desks were to be "delivered f.o.b. warehouse . . ." has a definite and precise meaning in the law. The ordinary business significance of the term "f.o.b." is that the seller will deliver the goods at the designated point "without a charge for prior transportation service." 18 Comp. Gen. 938 (1939); see Brooks-Scanlon Co. v. Illinois Central R.R., 257 F. 235, 237 (5th Cir. 1919).

The procurement regulations which govern Government contracts, including this one between Frank and the Architect of the Capitol, specifically define "f.o.b. destination." It means, "on board the conveyance of carrier, free of expense to the Government, at a specified delivery point where the consignee's facility is located. The term 'facility' . . . means: . . . warehouse . . ." 41 C.F.R. § 1-19.306(a) (1978).

Section 1-19.306 of Title 41 of the Code of Federal Regulations assigns the contractor certain responsibilities, including the duty


to "pay and bear all charges to the point of delivery specified in the contract." 41 C.F.R. § 1-19.306(b)(6) (1978).

The claimant refers to the Uniform Commercial Code (UCC), applicable to the District of Columbia, which defines "f.o.b. the place of destination" in the same manner as the authorities cited above. D.C. Code Ann. § 28:2-319(1)(b) (1973).

The claimant specifically refers to the buyer's "obligations of cooperation" contained in comment 3 to Section 2-319 of the Uniform Commercial Code, published in section 2319 of the UCC Reporting Service (1977). However, the comment does not appear applicable to agreements which call for delivery f.o.b. place of destination or to the particular facts presented by this claim. Therefore, comment 3 provides no legal basis for the Government to allow this claim.

The contract provision, "delivered f.o.b. Warehouse, Number 10 . . ." places the responsibility on the contractor to pay and bear all charges to the delivery point. The demurrage charges occurred prior to reaching the delivery point and therefore Frank is responsible for that cost as provided by the contract.

The settlement by our Claims Division is sustained.


Deputy Comptroller General
of the United States