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DECISION



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

FILE: B-201987

DATE: June 24, 1981

MATTER OF: Markwell & Hartz Company

DIGEST:

Where doubt remains as to extent of benefit received by Government in situation where no formal contract existed between agency and firm for construction services rendered Government, payment may be made on quantum meruit basis only to extent reasonable value of services performed can be established and appropriate contracting official ratifies actions which led firm to provide services.

The Department of the Army's Corps of Engineers has requested our advance decision regarding the Government's liability for payment for work performed by the Markwell & Hartz Company (Markwell) without a formally executed contract.

The Corps reports that Markwell was the low bidder under a 1979 solicitation for construction of a reinforced concrete masonry five-bay pumping station in Louisiana. For various reasons, the anticipated award to Markwell under the 1979 solicitation was delayed for several months. During this period of delay, favorable river conditions existed for clearing and grubbing the pumping station construction site and Markwell and its subcontractor began to clear the area. The Corps notes that although no contract existed at the time, the work was done with the knowledge and consent of Corps personnel whose primary work responsibility would have been to supervise such work if it had been under contract. Subsequently, the Corps determined that no contract lawfully could be awarded under the 1979 solicitation because a Department of Labor wage determination included in the solicitation had expired. Consequently, Markwell was informed that it would not be awarded a contract; the 1979 solicitation

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was canceled, and the procurement was readvertised in 1980. A firm other than Markwell was the low bidder and received award under the 1980 solicitation. Thereupon, Markwell submitted a request to the Corps for payment totaling \$117,443 for the construction site clearing and grubbing work it had performed. Additionally, Markwell requested that interest be paid on the sum due.

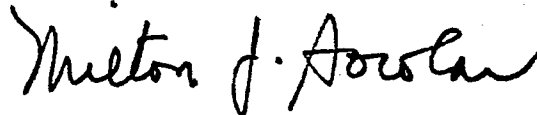
Although no written contract existed between the Corps and Markwell, in appropriate circumstances payment may be made for services rendered on a quantum meruit basis (the reasonable value of work or labor). 40 Comp. Gen. 447, 451 (1961). Recognition of a right to payment on that basis, however, requires (1) a showing that the Government received a benefit and (2) ratification by an authorized contracting official of the Government. DeLoss Construction Company, B-196004, November 2, 1979, 80-1 CPD 201.

While some construction site clearing and grubbing work still remained for the firm that was awarded the contract to construct the pumping station, the Corps states that Markwell's construction site clearing work provided a direct benefit to the Government. However, the Corps reports that when it issued the second solicitation it erred in failing to delete the construction site clearing and grubbing work completed by Markwell. This factor raises the possibility of double payment should Markwell's claim be honored, since clearing and grubbing (the removal of tree roots and stumps) once performed will not be required to be repeated a few months later.

Nonetheless, Markwell should not be held responsible for the Corps error in the award of the second contract since some benefit may have accrued to the Government at the time its work was performed. However, the Corps has not established a basis upon which this Office could approve a quantum meruit payment, since there is nothing which indicates what amount is considered to be reasonable for the work which Markwell completed. Clearly, the amount claimed, even if supported by actual cost data, may not be the reasonable value of the work performed.

Thus, if the Corps can establish the reasonable value of Markwell's work, Markwell may be paid on a quantum meruit basis, provided the necessary ratification is made.

Markwell also requests that interest be paid on the sum due. Such interest is not allowable in the absence of an express contract provision for its payment. Forest Service Ratification of Unauthorized Purchases, B-197754, May 1, 1980, 80-1 CPD 312.



Acting Comptroller General
of the United States

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June 24, 1981

The Honorable John O. Marsh
The Secretary of the Army

Dear Mr. Secretary:

We refer to the Corps of Engineers request for our advance decision regarding the Government's liability for payment for work performed by Markwell & Hartz Company without an executed contract under solicitation No. DACW 29-79-B-0245 issued by the Corps' New Orleans District. Noncontracting personnel authorized the firm to commence performance prior to the award of a contract. Ultimately, Markwell & Hartz did not receive an award.

Our enclosed decision sanctions payment to Markwell & Hartz to the extent the reasonable value of work performed by that firm can be established. Nonetheless, we are concerned that there may be a double payment in this contract since the Corps did not delete the work performed by Markwell & Hartz when it readvertised and awarded a contract to another firm. Since the contract was awarded as a result of formal advertising, the Corps cannot unilaterally reduce the contract price for the particular line item in question.

Nonetheless, if it appears to the Corps that a double payment would occur, we would hope the Corps would explore the feasibility of negotiating a contract price reduction. In any event, we believe this situation points out the need to have noncontracting officials clearly advised that they may not authorize performance prior to award of a contract by the appropriate contracting officials. It further points out the need to have contracting officials take greater care in preparing and issuing solicitations to insure that the solicitations accurately reflect the Government's actual minimum needs.

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Please advise us of the result of the Corps' finding on the Markwell & Hartz claim, and of the steps taken by your Department to avoid a recurrence of this situation in the future.

Sincerely yours,

Milton J. Fowler

Acting Comptroller General
of the United States

Enclosure