

DECISION



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

50743
97234

FILE: B-182406

DATE: June 3, 1975

MATTER OF: Damascus Hosiery Mills, Inc.

DIGEST:

Contractor's claim based on alleged Government mistake in pricing award of labor surplus area set-aside is denied since claimant freely offered the goods to the Government at the allegedly mistaken price and the Government accepted in good faith, thereby vesting in the Government the right to require performance in strict accordance with the contract terms.

By letter dated April 22, 1974, Damascus Hosiery Mills, Inc. (Damascus), has filed a claim in the amount of \$41,787.81 under Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania, contract No. DSA100-74-C-0009. Claimant alleges that the above-mentioned amount is owed due to an error in the Government's pricing of the labor surplus area set-aside portion of the contract which was awarded to Damascus.

The record shows that on April 30, 1973, DPSC issued solicitation No. DSA100-73-B-1085 for 3,522,575 pairs of wool, stretch type, cushion sole socks in the following lots:

<u>Item number</u>	<u>Destination</u>	<u>Quantity</u>
0001	Mechanicsburg	1,799,630
0002	Memphis	1,294,440
0003	Richmond	<u>428,505</u>
	Total	3,522,575

In addition, the solicitation included a 50 percent combined small business/labor surplus area set-aside amounting to an additional 428,505 pairs, destination Richmond. Five bids were received and on July 6, 1973, the following awards, all on an f.o.b. destination basis, were made.

B-182406

<u>Contractor</u>	<u>Item</u>	<u>Quantity</u>	<u>Unit Price</u>	<u>Terms</u>
Mauney Hosiery Mills	0002	360,000	\$.935	2%/20 days
Ellis Hosiery Mills	0001	750,000	.91	1%/30 days
Damascus Hosiery Mills	0001	300,000	.916	1%/20 days
	0002	200,575	.931	
Singer Hosiery Mills	0001	312,000	.84018	2%/30 days
	0002	171,495	.84748	
	0003	228,505	.81528	
	0003	200,000	.83348	
AM Ellis Hosiery Mills	0001	437,630	.9291	2%/20 days
	0002	562,370	.9291	

On July 10, 1973, Damascus was requested to submit its offer on the labor surplus area set-aside portion, for delivery f.o.b. Richmond at a unit price of \$.83348 less 2%/30 days or \$.81681 net. Claimant submitted an offer dated July 13, 1973, for 428,505 pairs at a unit price of \$.83348 2%/30 days, f.o.b. Richmond. Modification P00001 was formalized adding the set-aside portion of the contract on July 31, 1973.

Damascus subsequently submitted a letter dated August 7, 1973, claiming that the price per unit on the set-aside portion should be \$.931 per pair on the basis that \$.931 was the highest award price paid for the only item in the bid--men's stretch socks. This letter was answered by the Chief, Clothing and Textile Branch, Procurement and Production Division on August 30, 1973, concluding that the set-aside price of \$.83348, 2%/30 days was proper inasmuch as it represented the highest unit price paid on the non labor surplus set-aside portion for Item 0003, that is, socks f.o.b. Richmond.

No further action was taken until April 22, 1974, when counsel for Damascus filed a claim with this Office asserting that Damascus is entitled to an adjustment in contract price. Counsel cites paragraph (c)(3) of Clause C12.42 of the solicitation, which provides that "awards under the /labor surplus area/ set-aside shall be made at the highest unit price for each item awarded on the non * * * set-aside adjusted to reflect transportation, rent free use of Government property and other cost factors considered in evaluating offers on the non * * * set-aside portion." It is

argued that since all of the non set-aside awards were made for the identical item of men's stretch socks to various destinations, the set-aside portion should have been let at the highest non set-aside price irrespective of destination.

Claimant also argues that it was forced to accept the set-aside portion of the contract at a price which caused it to suffer severe economic hardship. Counsel for Damascus indicates that Damascus was under economic pressure to continue to have work in-house and that Damascus was told that the set-aside portion of the contract was to be accepted at the price offered or not at all.

The administrative report agrees that the determination of the set-aside price should be made in accordance with paragraph (c)(3) of clause C12.42 of the solicitation, but contends that the "item" referred to in that paragraph is Item 0003 of the solicitation, that is, the non set-aside quantity for delivery to Richmond. The contracting officer also states that since all offers were submitted on an f.o.b. destination basis, transportation cost factors were not considered in evaluating offers on the non set-aside portion. He apparently believed that since the solicitation established each destination as a separate bid or line item, the highest non set-aside price for socks delivered to Richmond should be used in determining the price for the set-aside quantity for delivery to Richmond.

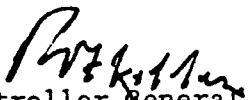
Assuming, without deciding, that claimant's interpretation of the above-quoted solicitation provision is reasonable, we do not find the contracting officer's reliance upon the highest non set-aside award price for Item 0003 in negotiating the set-aside portion to be arbitrary or wholly unreasonable. We believe it is dispositive that Damascus, as requested, offered the set-aside quantity at the highest price accepted by the Government on the non set-aside Richmond portion. That offer, together with the Government's good faith acceptance, in our opinion, created a valid and binding agreement. While Damascus may have agreed to this arrangement to ward off severe economic hardship, it does not appear that the agreement is vitiated because of undue coercion by the Government.

As a general rule it is the right of the Government to require performance in strict accordance with the contract terms and it may not waive its vested rights in the absence of adequate consideration. Moreover, unless specifically authorized by statute no agent of the Government may waive rights vested in the Government because of hardship or equities in favor of the contractor, Day v. United States, 245 U.S. 159 (1917), 22 Comp. Gen. 260 (1942), B-179257, August 3, 1973. Finally, it should be noted that upward adjustment of the

B-182406

set-aside price at this time would operate to the prejudice of the other firm eligible who might have been willing to accept the set-aside portion at the offered price. Any question as to proper award price should have been protested prior to award at the lower price.

Accordingly, the claim is denied.


Deputy Comptroller General.
of the United States