

DECISION

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

660280

FILE: B-184827

DATE: December 9, 1975

MATTER OF: Ohio Pipe, Valves & Fittings, Inc.

97616

DIGEST:

1. Where Government is required to obtain all pipe needed from contractor under requirements contract, second contract awarded at higher price to same contractor for pipe covered under requirements contract is void, since award of second contract would amount to modification of requirements contract without consideration passing to Government.
2. Where Government accepts goods delivered under void contract, contractor is entitled to payment for value to Government of benefit conferred; however, payment is limited to amount by which Government would be unjustly enriched.

On September 5, 1973, the Defense Supply Agency (DSA) awarded contract No. DSA700-74-D-0009 to Ohio Pipe, Valves & Fittings, Inc. (Ohio). This contract was a one-year requirements contract calling for the delivery of various sizes of steel pipe, including FSN 4710-00-162-1022, upon the issuance of delivery orders. The pipe was to be delivered to Oakland, California, and other specified destinations. The price varied from \$0.5343 to \$0.5709 per foot depending upon the place of delivery and the amount ordered. The contract contained a provision for price escalation not to exceed 10 percent. Apparently due to a steel shortage, Ohio was having difficulty in complying with the delivery dates. Subsequently, the delivery time (within 75 days of the date of the delivery order) was extended to 120 days from the date of the delivery order by modification No. P0001, dated November 14, 1973.

Despite the extension, Ohio was unable to fulfill its obligations under the contract and was delinquent on a number of deliveries. The contracting officer decided not to issue further delivery orders under the contract. Instead, the contracting officer issued invitation for bids No. DSA700-74-B-2600 calling for delivery of 60,000 feet of -1022 pipe to Tracy, California. Ohio was the sole bidder

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with a unit price of \$0.70 per foot and was awarded contract No. DSA700-74-C-5206 on April 3, 1974. The contract called for delivery of the pipe within 300 days of the date of award and provision was made for price escalation not to exceed 100 percent.

On April 24, 1974, contract -0009 was terminated for default.

On May 6, 1974, Ohio alleged a mistake in its bid on contract -5206 in that the bid had been based on black carbon pipe rather than the galvanized pipe specified in the invitation for bids. DSA denied Ohio's request for cancellation of the contract and informed Ohio that performance in accordance with the terms of contract -5206 would be expected.

It was discovered subsequently that contract -5206 called for delivery of pipe which was covered by requirements contract -0009 and that contract -5206 had been awarded at a price in excess of the price under the requirements contract. DSA stated that invitation for bids No. DSA700-74-B-2600 should have been canceled when Ohio's bid was opened and a delivery order under contract -0009 should have been issued. DSA determined that inasmuch as it had the right to issue a delivery order under contract -0009 at the time it awarded contract -5206, it would limit payment for any delivered pipe to the contract -0009 price. Ohio delivered 60,480 feet of pipe in October 1974 for which payment was limited to \$0.5654 per foot.

It must be concluded that contract -5206 amounted to a purchase of one of the items included in requirements contract -0009. The fact that the pipe was to be delivered to a different place than that specified in contract -0009 does not mean that contract -5206 was a procurement for different supplies, since the Government had the right under contract -0009 to change the place of delivery.

The rule is that where a contractor offers to perform at a price higher than that for which he is bound, the offer should be rejected since acceptance would be tantamount to a modification of the original contract to provide for an increase in the contract price without any consideration to the Government. 27 Comp. Gen. 343 (1947); Aerospace America, Inc., 54 Comp. Gen. 161 (1974), 74-2 CPD 130. The reason for the rule is that no officer or agent

of the Government has authority to give away money or property of the United States either directly or by the release of vested contractual rights without adequate legal consideration. American Sales Corporation v. United States, 32 F.2d 141, cert. denied, 280 U.S. 524 (1929); 40 Comp. Gen. 309, 311 (1960). The Government was contractually obligated to obtain all of its requirements of -1022 pipe from Ohio as long as contract -0009 remained in effect. The award of a procurement contract for -1022 pipe to a source other than Ohio would have constituted a breach of the Government's obligation. First Suburban Water Utility District v. United States, 129 Ct. Cl. 8 (1954).

The Government had the vested contractual right to receive its requirements of -1022 pipe at the contract -0009 price. The award of contract -5206 to Ohio amounted to a modification of the contract -0009 price without corresponding consideration. The contracting officer was without authority to release this contractual right without any corresponding consideration passing to the Government. Therefore, the conclusion is reached that contract -5206 is void.

Ohio contends that it is entitled to a quantum meruit recovery for its performance of the void contract and that the measure of such a recovery is the cost of performance in delivering the 60,480 feet of -1022 pipe. This Office has indicated in the past that payment on a quantum meruit basis would be appropriate even in a case where an award is invalid due to a failure to comply with a Federal statute. Cf. 46 Comp. Gen. 348 (1966); 40 id. 447 (1961). Also, we have permitted payment on a quantum meruit basis in cases where a Government agent contracts in the name of the Government although lacking authority to do so. 38 Comp. Gen. 38 (1958); B-173765, November 18, 1971. Recovery in such cases is predicated on the theory that it would be unfair for the Government to have the benefit of the contractor's goods without recompense and recovery is limited to the fair market value of the benefit conferred. B-177416, February 8, 1973.

It would be incorrect to conclude that, by accepting delivery of the pipe, the Government entered into an implied in fact contract

to pay a reasonable value exceeding the contract -0009 price. "A meeting of the minds is as essential to the existence of a contract implied in fact as it is to an express contract. * * * Manifestly the making of a contract may not be implied in a case in which an express contract is forbidden. * * *" Johnson County Savings Bank v. City of Creston, 231 N.W. 705, 707 (Iowa 1930). It would be incongruous to hold that it was the apparent intention of DSA to pay the reasonable value of the pipe where it exceeded the contract -0009 price, since DSA was without authority to enter into an express contract with Ohio at a price that would be in excess of the contract -0009 price.

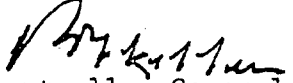
Any recovery to which Ohio is entitled must be based on a quasi-contract theory, or contract implied in law, as distinct from liability upon a contract implied in fact. A quasi-contract is an obligation created by law for reasons of justice. The reason that the law imposes upon the Government the obligation to make payment for goods received, even where no contract express or implied in fact exists, is that the Government would be unjustly enriched if it were allowed to keep goods without payment for them. Because recovery is based upon what would otherwise be unjust enrichment of the Government, as opposed to injury to the contractor, the correct quasi-contractual measure of recovery would be the benefit to the Government and not the cost of performance of the contractor.

The restriction against giving away the rights of the Government without corresponding consideration is intended to prevent improvidence in the procurement of goods and services. Such a limitation must be administered as to fairly and reasonably accomplish its important purpose. Such an extremely valuable safeguard to the public treasury should be enforced so as to uphold the policy behind the restriction. If the contractor is permitted a recovery in excess of the contract -0009 price for the pipe delivered, on the ground of a contract implied in fact or in law, then it follows that the restriction on giving away a vested right is evaded. To sustain Ohio's contention that it is entitled to recovery on a quantum meruit basis that exceeds the contract -0009 price would be to nullify the restriction against modifying contracts without corresponding consideration by indirection. Section 62 of the Restatement of Restitution (1937) states:

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"A person otherwise entitled to restitution of a benefit conferred by mistake is disentitled thereto if restitution would seriously impair the protection intended to be afforded by common law or by statute to persons in the position of the transferee or of the beneficiary, or to other persons."

Accordingly, the claim for compensation over and above the contract -0009 price is denied. However, it is noted that the contracting officer has indicated that an adjustment will be made by DSA for price escalation under contract -0009 if a claim is properly documented by the contractor.


Deputy Comptroller General
of the United States