DECISION

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

60706

FILE: B-185427 DATE: April 2, 1976

MATTER OF: Soil Conservation Service--Request for decision concerning contract with Small Business Administration

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1. GAO view is that acceptance of bid consummates contract, unless parties' intention is otherwise, and that subsequent failure to furnish performance and payment bonds required for construction contracts by Miller Act does not render contract void. Moreover, FPR's provide that for contracts under section 8(a) of Small Business Act, bond requirements are not applied in 8(a) prime contract with SBA, but are applied in subcontract with small business concern. Therefore, where Soil Conservation Service awarded 8(a) construction contract to SBA, contract was in existence notwithstanding fact that subcontractor later failed to furnish bonds.

2. In deciding controversy between two Federal agencies, terms of agreement as reached by parties will be given effect by GAO, if they are authorized by and otherwise in accordance with applicable law.

3. Where contracting agency refers claim to GAO arising under contract disputes clause, contracting officer has not made final decision pursuant to clause, and unresolved factual questions are present, matter will be returned to agency for processing in accordance with disputes clause. Therefore, Soil Conservation Service contracting officer should render final disputes decision concerning claim against SBA (as section 8(a) prime contractor) for excess reprocurement costs arising from default of small business subcontractor.

The Soil Conservation Service (SCS), United States Department of Agriculture, has requested our Office's decision on several questions concerning its contract No. AG18scs-00100 with the Small Business Administration (SBA).

The contract was awarded to SBA on June 27, 1973, pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1970), for construction of a watershed fishway. On June 29, 1973, SBA

awarded a subcontract to Mills Enterprises Inc. (Mills), in the amount of $44,849 to perform the work. SCS states that 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, and SBA requested that its contract with SCS be terminated or canceled at no cost to either party. SCS denied the request and reprocured the work under contract No. AG18scs-00118 at an excess cost of $4,651.

SCS billed SBA for the excess cost of reprocurement. SBA refused to pay and stated that (1) since no payment and performance bonds were obtained, no valid contract between SCS and SBA was legally consummated; (2) there was therefore no valid subcontract with Mills, and subparagraph 22(b) of the prime contract provides for its no-cost termination if no subcontract is awarded; (3) SBA has no liability for claims under the 8(a) program, since the treatment of SBA as a prime contractor under the program is a fiction (citing Hopkins, Contracting with the Disadvantaged, Sec. 8(a) and the Small Business Administration, 7 PUBLIC CONTRACT LAW JOURNAL 169, 203-205 (1975)); and (4) the "TERMINATION FOR DEFAULT--DAMAGES FOR DELAY--TIME EXTENSIONS" and "DISPUTES" clauses (paragraphs 5 and 6, respectively, standard form 23-A (1969 ed.)) were erroneously included in the prime contract and are obviously inoperative between two agencies in the Executive branch of the Federal Government.

SCS's request to our Office makes the following points: (1) the termination for default and disputes clauses were properly included in the prime contract pursuant to Federal Procurement Regulations (FPR) § 1-1.713-4 (1964 ed. amend. 100); (2) the subcontractor's failure to furnish performance and payment bonds did not render the contract void, but merely voidable at the Government's option (citing 51 Comp. Gen. 733 (1972) and several contract appeals board decisions); and (3) SBA as prime contractor is liable for excess costs of reprocurement due to its subcontractor's default. SCS requests that we decide the foregoing issues.

A threshold question is whether any contract between SCS and SBA came into existence. SBA contends that there was no contract, because an award could not be legally completed until the payment and performance bonds were furnished, which never occurred in this case. SBA relies on Doral Construction Co., Inc., and Manson, Smith, McMaster,

Inc., ASBCA Nos. 13734 and 14128, 74-1 BCA para. 10,432. There, the Armed Services Board of Contract Appeals (ASBCA) held that the Miller Act clearly and unequivocally prohibits a contract award until the requisite bonds are furnished, and that a construction contract purportedly awarded without compliance with the act is plainly illegal, i.e., void. The ASBCA stated that notices of award which were sent prior to receipt of the bonds resulted only in "simple preliminary contracts," not "formal construction contracts containing the standard Disputes article," and therefore found no jurisdiction to consider claims for excess costs of reprocurement.

The position expressed in decisions of our Office is contrary to the ASBCA's view. We have held that an award made subject to the furnishing of a bond may create a contract where the parties so intend. See 49 Comp. Gen. 431, 433 (1970), and the authorities cited therein. This decision did not involve a construction contract subject to the Miller Act; see, however, B-176941, November 28, 1972, where we construed the language in standard forms 21 and 22 as indicating that upon written acceptance of the bid the construction contract came into existence. See, also, Natkin and Company, B-183580, September 24, 1975, 75-2 CPD 178; 38 Comp. Gen. 376, 379 (1958); Cf. 33 id. 291, 293 (1954).

Also, as SCS points out, decisions of other contract appeals boards are in accord with our view that bid acceptance consummates the contract and the subsequent failure to furnish Miller Act bonds renders the contract voidable at the Government's option, not wholly void. See Lindo Engineering Company, AECBCA No. 28-6-66, 66-2 BCA para. 6044; Kansas City Natural Slate Company, Inc., VACAB No. 1053, 73-2 BCA para. 10,094; and Urban Industries Corp., GSBCA No. 3050, 72-2 BCA para. 9604.

Further, the Doral decision did not involve an 8(a) construction contract. In this regard, FPR § 1-1.713-4(g)(1) provides: "No requirement for the SBA to furnish payment and performance bonds shall be included in the contract." FPR § 1-1.713-4(h)(1) provides: "A provision shall be included in the subcontract which requires the subcontractor to furnish a performance bond * * * and a payment bond * * * as required by the Miller Act * * *." The regulations clearly contemplate that award of a prime contract to SBA will be effected without regard to the Miller Act requirements, which are applicable

only in the subcontract; it follows from this that any difficulties experienced by reason of the subcontractor's failure to furnish the bonds are a matter arising during the course of administration of the prime contract with SBA.

Given the existence of a contract between SCS and SBA, the next question is the effect of its terms on the present transaction--particularly the significance of the disputes clause.

From time to time our Office has been called upon to decide controversies arising under agreements between two Federal agencies. In deciding such cases, we have indicated that the terms of the agreements as negotiated by the parties should be given effect, if they are authorized by and otherwise in accordance with applicable law. See, for example, 30 Comp. Gen. 295 (1951); 33 id. 565 (1954); 51 id. 766 (1972).

15 U.S.C. § 637(a)(1) (1970) empowers SBA to enter into procurement contracts with any Government "department, agency, or officer thereof having procurement powers * * * upon such terms and conditions as may be agreed upon between the Administration and the procurement officer." Pursuant to 15 U.S.C. § 637(a)(2) (1970), SBA arranges for the performance of such contracts by letting subcontracts to small business concerns. FPR § 1-1.713-4(g)(1) speaks of including in the contract those terms and conditions which are mutually agreed upon between SBA and the procuring agency and prescribes the incorporation in the contract of Standard Form 23-A, General Provisions (Construction Contract).

In the present case, the contract documents include standard form 23-A and the standard disputes clause contained therein. There are statements in the record by SBA alleging that the inclusion of the clause was erroneous. However, the presumption in law is that the terms of a written instrument set forth fully and correctly the final agreement of the parties. See 26 Comp. Gen. 899, 901 (1947). We need not consider at this time whether SBA could present sufficient evidence to overcome this presumption. For our present purposes, we need consider only the effect of the contract terms as written upon the issues presented.

Since the decision of the United States Supreme Court in S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972), the role of this Office in considering matters arising under the disputes clause has been limited. We have indicated, for instance, that decisions of the boards of contract appeals in favor of contractors are

conclusive and not subject to review by our Office "absent fraud or bad faith." 52 Comp. Gen. 63 (1972). See, also, 52 Comp. Gen. 196 (1972) which held that the S&E Contractors ruling is considered equally applicable to the scope of review of a final agency decision against a contractor.

Moreover, where a contracting agency refers or causes to be referred to our Office a contractor's claim pertaining to matters arising under the disputes clause, apparently involving disputed questions of fact, and the contracting officer has not yet rendered his final decision on the claim, we have returned the matter to the agency for processing under the disputes clause. See Bradley Mechanical Contracting, Inc., 53 Comp. Gen. 829 (1974), 74-1 CPD 229; B-179461, December 7, 1973.

In the present case, the claim concerns a termination for default and assessment of excess reprocurement costs--matters normally cognizable under the disputes clause--and we believe there may be unresolved factual questions. The record does not show that the contracting officer has made a final decision pursuant to the disputes clause. Also, we note that this matter was not submitted to our Office by the contractor (SBA), but by the contracting agency (SCS). Compare the circumstances considered in 53 Comp. Gen. 167 (1973).

In view of the foregoing, we believe that any attempt by our Office to consider at this time the jurisdictional or substantive issues involved in this matter would be premature. The action, if any, which our Office could take depends in the first instance upon the final decision of the contracting officer under the contract disputes clause and whether SBA appeals the contracting officer's decision.

Accordingly, we are advising the contracting agency that this matter should be processed under the disputes clause of the contract.

Deputy Comptroller General
of the United States