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DECISION

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

FILE: B-189961 **DATE:** May 26, 1978

MATTER OF: Providence Philadelphia Dispatch, Inc.

DIGEST:

Rate tenders, issued pursuant to section 22 of the Interstate Commerce Act, 49 U.S.C. §§ 22, 317(b) (1970), are continuing offers to perform transportation services for stated prices. They are effective until withdrawn by a communication which expressly or by implication notifies the offeree that the offeror no longer intends to perform. See Ct. cases cited.

This decision is in response to a letter of August 18, 1977, from Providence Philadelphia Dispatch, Inc. (Providence), requesting review of numerous notices of overcharges sent to Providence by the General Services Administration (GSA). Further action by GSA in connection with these overcharges is being held in abeyance pending this review. The review is being made under 49 U.S.C. § 66(b) (Supp. V, 1975) and 4 C.F.R. § 53.3 (1977), since GSA has agreed that its action in this case constitutes finality of administrative consideration. See 4 C.F.R. § 53.1 (b)(3) (1977).

Providence is a freight forwarder subject to regulation under Part IV of the Interstate Commerce Act. Under Section 22 of that Act, as amended, 49 U.S.C. 22 (1970), made applicable to freight forwarders by Section 405 of the Act, 49 U.S.C. 1005 (1970), Providence submitted to the Department of Defense (DOD) several offers to transport property at rates less than the forwarder's tariff rates otherwise applicable to DOD shipments.

The offers involved in this case are Providence's Tender Nos. 25, 28 and 29. Each contains a schedule of rates, a description of the services and territories covered and numerous conditions and instructions. One of the conditions in each tender requires in part that it may be canceled or modified by written notice of no less than thirty days by either party to the other.

Rate tenders like these are considered to be continuing offers to perform transportation services for stated prices. 43 Comp. Gen. 54, 59 (1963); 39 id. 552 (1959); 37 id. 753, 754 (1958). As continuing offers they create in the person to whom the offers are made (the offeree) the power to make a series of separate contracts by a series of independent acceptances, and that power is good until effectively revoked by the person making the offers. Corbin on Contracts, section 38; Williston on Contracts, 3rd Ed., section 58; Restatement of Contracts, section 44.

GSA's notices of overcharge are based on the application of the rates and charges in Tender Nos. 25, 28 and 29; Providence contends that those tenders have been canceled and that rates in later issued tenders are applicable.

Tender Nos. 28 and 29 were issued June 14, 1972, to become effective July 17, 1972. On June 1, 1973, Providence issued Tender No. 31 to cancel Tender No. 28 and Tender No. 30 to cancel Tender No. 29. Both tenders had effective dates of June 4, 1973, and were returned by the Military Traffic Management and Terminal Service (MTMTS) Headquarters in Washington because the attempted cancellations or revocations were not in accord with the condition in each tender requiring thirty days written notice of termination or modification.

On August 28, 1973, Providence again issued Tender Nos. 31 and 30 to become effective September 27, 1973; they were returned by MTMTS in Washington on September 4, 1973, because of a clerical error--both tenders canceled Tender No. 28.

On May 10, 1974, Providence issued Tender No. 31 to cancel Tender No. 28 and Tender No. 30 to cancel Tender No. 29 to become effective June 10, 1974. The Washington Headquarters of MTMTS claims that it never received these tenders. Finally, on March 7, 1975, Providence issued a Blanket Supplement canceling 12 tenders, including Tender No. 25, Tender Nos. 30 and 31 to be effective June 4, 1973, and Tender Nos. 30 and 31, to be effective September 27, 1973. Although the Blanket Supplement was filed with the Interstate Commerce Commission on March 10, 1975, and with MTMTS in Bayonne, New Jersey, both Bayonne and the Washington Headquarters of MTMTS claim never to have received it.

GSA notified Headquarters, MTMTS, of the Blanket Supplement on May 4, 1977, and of Tender Nos. 30 and 31 (the issuance to become effective June 10, 1974) on August 24, 1977.

The question presented here is when were the continuing offers in Tender Nos. 25, 28 and 29 effectively revoked. Providence contends that the offers in Tender Nos. 28 and 29 were revoked on June 10, 1974, by Tender Nos. 30 and 31 and that the offer in Tender No. 25 was revoked by the Blanket Supplement, effective April 11, 1975. It argues that by mailing Tender Nos. 30 and 31 and the Blanket Supplement, which had the effect of increasing the rates then in effect, Tender Nos. 25, 28 and 29 were revoked.

GSA contends that the tenders were not revoked until 1977 because written notice of revocation was not actually received by Headquarters, MTMTS, until 1977, when GSA notified Headquarters, MTMTS, of the existence of Tender Nos. 30 and 31 and the Blanket Supplement.

It is settled that to be effective the offeror's revocation of an offer must be communicated to the offeree (Headquarters, MTMTS). United States v. Sabin Metal Corporation, 151 F. Supp. 683, 687 (1957), affirmed 253 F. 2d 956; Corbin on Contracts, section 39; Williston on Contracts, sections 56, 89; Restatement of Contracts, sections 41, 69; 51 Comp. Gen. 541 (1972).

The general rule is summarized in Corbin on Contracts, section 39, Notice of Revocation Necessary, pages 165-66, which reads in part:

> "If there has been no express provision as to the mode of revocation, either in the terms of the offer as originally made or by some other communication to the offeree, a power of revocation exists none the less. The decisions have established the rule in such cases, however, that revocation is not effective unless it has been communicated to the offeree. It is not enough merely to mail a notice of revocation, properly addressed to the offeree; his power of acceptance will remain unaffected until the letter has been received by him. It has not yet been determined whether, in order to be effective, the letter of revocation must have been actually read by him. It is here suggested,

> however, that it should be held effective as soon as the offeree has had a reasonable opportunity to open and read the letter after it has been put into his hands or has been delivered at his business or home address.
>
> " * * * Unless a power of revocation without notice is expressly reserved * * * a message of revocation is not effective to terminate the power of acceptance until it is received.
>
> " In this respect a revocation of offer differs from an acceptance of offer; and it is reasonable that they should differ. An offeror invites an acceptance by the offeree and, because of the custom of men, has reason to know that the offeree will regard his expression of acceptance as closing the deal and as justifying immediate steps toward performance or other action in reliance. The offeree, on the other hand, has never invited a revocation of the offer and usually has no reason to expect one. This is again considered in discussing acceptance by post."

See, also, 17 C.J.S. Contracts, section 50d. Cf. Corbin, section 78, page 340:

> " so, also, where in an already completed contract, a power of revocation or termination by notice is not operative until actually received."

Furthermore, the use in the "TERMINATION OR MODIFICATION" paragraph of each offer of the phrase "written notice" likely would be construed to mean a communication received. See N.L.R.B. v. Vapor Recovery Systems Company, 311 F. 2d 782, 785 (1962); United States v. Continental Casualty Co., 245 F. Supp. 871, 873 (1965); cf. Corbin on Contracts, section 78.

The rule, that to be effective the offeror's revocation of an offer must be communicated to and received by the offeree, has an exception. The exception applies where there is knowledge on the part of the offeree that the offeror is no longer willing to enter into such a contract, although knowledge comes not from the offeror himself or with his cognizance, but through other channels. Williston on Contracts, sec. 57, 3rd Ed. (1957).

Also involved here is the fundamental principle of law that the Government acts only through its agents with power delegated and defined by statutes or regulations. Watt v. United States, 123 F. Supp. 906, 913 (1954); Helton v. United States, 309 F. Supp. 479, 483 (1969); cf. United States v. Thompson, 293 F. Supp. 1307, 1313 (1967). And by regulation, the Government's agent for the receipt of voluntary or unsolicited tenders like those involved here was the Commander, Military Traffic Management and Terminal Service, located in Washington, D.C. Paragraphs 107004 and 201001k of Military Traffic Management Regulation DSAR 4500.3, March 1969. Thus, for the Government's purposes, the tenders were offered to the Commander, MTMTS, and any revocation must be communicated to him.

According to these principles of law, it seems apparent that Providence's attempt to revoke its offer in Tender No. 25 was not effective until it was communicated by GSA to Headquarters, MTMTS, on May 4, 1977.

It is also apparent that Providence was successful in revoking Tender No. 28 by the issuance of Tender No. 31 on August 28, 1973, to become effective September 27, 1973. Even though Tender No. 31 was returned with Tender No. 30 by Headquarters, MTMTS, because of a clerical error, the "error" was that Tender No. 30 also revoked Tender No. 28.

We also believe that Providence successfully revoked Tender No. 30 effective September 27, 1973. Nothwithstanding the clerical error, it seems clear that Tender No. 30, received by Headquarters, MTMTS, by implication revoked Tender No. 29. An offer may be withdrawn by a communication prior to acceptance which expressly or by implication notifies the offeree that the offeror no longer intends to perform the contract. See Emmons v. Ingebretson, 279 F. Supp. 558, 573 (D.N.D. Iowa 1968). And it has been held that revocation of an offer also is permitted by an act which is inconsistent with the continuation of the offer and which is brought to the attention of the non-revoking party. See McCauley v. Coe, 37 N.E. 232 (Ill. 1894). It seems clear that Providence's communicated actions with respect to Tender No. 30 not only impliedly

revoked the offer in Tender No. 29 but was inconsistent with the continuation of the offer in Tender No. 29.

GSA's action on the notices of overcharge sent to Providence should be consistent with this opinion.

R. F. Keller

Deputy Comptroller General
of the United States