

DECISION



A. Feldman
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548
7884

FILE: B-190150

DATE: October 3, 1978

MATTER OF: California Meat Company--
Reconsideration

DIGEST:

Fact that contractor terminated for default had no control over replacement contractor's efforts to deliver the goods, required that there be established a maximum period for which liquidated damages could be assessed against the terminated contractor, but provides no further equitable basis for remitting damages within the agreed maximum period.

California Meat Company (California) and the Secretary of Agriculture request reconsideration of our decision in California Meat Company, B-190150, February 9, 1978, 78-1 CPD 112. In that decision we denied the agency's request for partial equitable remission of liquidated damages assessed against California for delivery delinquency. The matter was submitted to GAO pursuant to 41 U.S.C. § 256(a) (1970), which authorizes the Comptroller General, upon the recommendation of the head of any Federal agency to remit the whole or any part of liquidated damages assessed for delay as in his discretion may be just and equitable.

A contract was awarded to California on January 14, 1976, requiring delivery of frozen ground beef for the week of February 22, 1976. The contract was terminated by telegram dated February 11, 1976, because of the Government's summary withdrawal from California of Federal meat grading and acceptance services (based on the firm's alleged violations of applicable regulations), and because of the firm's advice to the contracting officer of its inability to meet the delivery

date. On the following day the contracting officer placed an order for its terminated requirements with Salem Packing Co., requesting shipment for the week of March 21, 1976. The reprocured items were not delivered by Salem until some time after March 21, 1976, and more than 45 days after the original delivery date.

The contract provided for assessment of liquidated damages for failure to meet the shipment date "until such time as [the] Agency obtains or could have obtained shipment of a similar commodity elsewhere" up to a maximum of 45 days. Liquidated damages were assessed against California for 45 days because the Government did not obtain delivery of the commodity from Salem before the expiration of 45 days after the original delivery date, even though the reprourement contract with Salem provided for delivery 15 days before the 45 day period for assessing liquidated damages. Although the contract provided for assessing liquidated damages until such time as the agency "could have obtained" the commodity, the contracting officer considered this provision as applicable only where reprourement is not effected. He, therefore, assessed damages for the full 45 day period even though the reprourement contract anticipated an earlier delivery which did not materialize.

In requesting reconsideration, California argues and Agriculture agrees that it is inequitable to charge California for the 15 day delay after March 21, 1976, because California had no way of insuring delivery of the product by the reprourement contractor by that date. In addition, Agriculture argues that "it seems clear that USDA 'could have obtained'--and should have obtained--the replacement product by March 11 at the latest * * *."

The validity of the contracting officer's interpretation of the Government's right to assess liquidated damages for 45 days where there is a reprourement and delivery is not made within that time is a matter which at this time is properly before the Board of Contract Appeals and we are not required to decide the question. The fact that the terminated contractor

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had no control over the replacement contractor's efforts to deliver the goods, required that there be established a maximum period for which liquidated damages could be assessed, but provides no further equitable basis for remitting damages within the agreed maximum period. Equity is implicit in the maximum 45 day period.

Accordingly, our prior decision is sustained.

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Deputy Comptroller General
of the United States