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

Settlement of Alleged Breach of Contract PLII

FILE: B-191329 DATE: September 16, 1980

MATTER OF: Buckhorn Rural Water Corporation

DLG05214

DIGEST:

1. Decisions in August Perez & Associates, Inc., 56 Comp. Gen. 289 (1977), 77-1 CPD 48 and System Development Corporation, B-191195, August 31, 1978, 78-2 CPD 159, do not preclude GAO review of breach of contract claim since those decisions only apply where parties are mutually agreed on liability of Government for alleged breach, and this is not such a case.

2. Government has not breached water service agreement by failure to construct connecting line and order water since agreement did not impose such requirement and Government otherwise has fulfilled all obligations incurred under agreement.

3. Termination of contract for convenience of Government does not constitute breach where agency determines that continuation of contract would be too costly for Government.

AGC00003

A certifying officer of the National Park Service (NPS) requests an advance decision pursuant to 31 U.S.C. 82d. (1976) on the legality of paying $24,305.57 to the Buckhorn Rural Water Corporation for settlement of an alleged breach of contract. For the reasons set forth below, we do not recommend payment.

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On September 20, 1968, NPS and the Buckhorn Rural Water Corporation (utility) entered into an agreement under which the utility agreed to provide water service to the Arbuckle Recreation Area (Area). Under the agreement, the utility was to construct an 8 inch water line from its water lines outside the Area to the Area's boundary and was to be solely responsible for maintenance, repair, and replacement of the line and any necessary equipment, facilities and pumps. The Government was to pay for the actual cost of the line's construction (up to a stated maximum).

In addition, the agreement provided in pertinent part that:

> "Article 5A. The PARK SERVICE shall purchase and pay for water service furnished hereunder in accordance with the terms and conditions of the WATER DISTRICT's applicable rate schedules, which rates are 40 cents per 1000 gallons * * * or a minimum charge of $50.00 per month, whichever is greater.
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> "Article 9. This agreement * * * shall remain in effect for a period of 40 years * * * provided that the PARK SERVICE may terminate the agreement or any renewals thereof by giving notice in writing to the WATER DISTRICT at least ninety (90) days prior to the date on which termination is to become effective."

In March 1970, the water system went into operation after the Government had paid the utility $122,000 as its share of the cost of construction. Three years later, NPS had given no indication that it intended to use the line; therefore, the utility installed smaller pumps and lines in order to conserve costs in servicing local residents. Ultimately, because the Area's needs were one-quarter of the original estimate, NPS decided to supply the Area's needs through existing Bureau of Reclamation facilities.

The Government continued to pay the $50 monthly minimum fee provided for in the contract until November 15,

1979, when it terminated the contract and proposed a settlement. Costs listed in the settlement proposal totaled $24,305.57 broken down as follows:

Operational cost-large pumps	$ 2,687.00
Installation of small pumps	1,019.00
Repairs to 8" line	3,613.00
Water losses	4,744.57
2" replacement line	2,092.00
Future maintenance of 8" line	17,000.00
SUBTOTAL	$31,155.57
Less payments made through effective date of contract termination	(6,850.00)
TOTAL	$24,305.57

The settlement proposal further provided:

> "If this amount is agreeable, please respond in writing on behalf of the corporation and as authorized by its Board of Directors and we will proceed to submit a voucher for payment to the corporation. Also, as discussed at the meeting in Sulphur [Oklahoma, on December 5, 1978], it may be necessary that this offer, if accepted, be forwarded to the Comptroller General for review prior to payment."

By letter of December 4, 1979, the utility accepted the NPS settlement proposal.

The certifying officer expresses concern that payment of costs under the settlement would not be legal because the contract was not breached prior to or upon termination of the contract. The utility maintains that NPS breached the contract by failing to construct a connecting line within the Area so that it could purchase water from the facility.

A threshold question to be determined is whether this Office should consider the question. In August Perez & Associates, Inc., 56 Comp. Gen. 289 (1977), 77-1 CPD 48, we stated that:

> "Our Office has carefully reviewed the precedents in this area, both from our Office and the courts, and believes the submission of claims for unliquidated damages for breach of contract by the Government in the future to be unnecessary where the contracting agency and the contractor mutually agree to a settlement."

We went on to discuss Utah Construction and Mining Company v. United States, 168 Ct. Cl. 522 (1964), aff'd. 384 U.S. 394 (1966), quoting that portion of the opinion holding that neither the contracting officer nor the head of the agency have jurisdiction to decide a dispute involving an alleged breach of contract and a claim by the contractor for unliquidated damages. We also noted the language of the court to the effect that any decision in that regard undertaken by such officials would have no binding effect.

We distinguished the situation in Utah Construction from that in Perez in the following manner:

> "We do not believe situations such as the one currently before our Office constitute a 'dispute' as that term is employed in the above quote. Where both parties agree as to the liability of the Government for the breach and agree to a settlement figure, there is no 'dispute.' Therefore, whether the settlement has a binding effect is irrelevant because both parties have agreed to the terms and even if the contractor later attempted to litigate the issue, the courts treat such an agreement as a binding accord and satisfaction. See Seeds & Durham v. United States, 92 Ct. Cl. 97 (1940), and Brock & Blevins, supra."

We have also held in reliance on Perez that where the parties have arrived at a negotiated settlement, we will not look behind the parties' agreement and independently examine the question of the Government's liability or whether we should allow the agreement to take effect.

System Development Corporation, B-191195, August 31, 1978, 78-2 CPD 159. In that case, the claim involved was one for proposal preparation costs and the agency had conceded liability to the contractor.

We do not believe that the principles announced in Perez and System Development Corporation are applicable to this case. It is clear that those decisions apply only where both parties agree as to the liability of the Government for the breach. This is not such a case.

The certifying officer has questioned the liability of the agency for the alleged breach and it is clear from the record that these concerns were recognized as legitimate ones by the other agency officials involved in the matter. This is reflected in the November 15, 1979 settlement proposal to Buckhorn as well as internal agency memoranda.

The Regional Field Solicitor in his June 13, 1977 memorandum concerning the Government's legal liability under the contract stated: "It is understandable why a certifying officer would have difficulty in certifying such payment for damages [i.e. damages for breach of contract], therefore, there is no objection that the matter be referred to GAO, even considering Perez * * *." Thus, it is apparent that reservations existed within the agency as to its liability for breach of contract, and it was clearly contemplated that the matter would be resolved by the certifying officer requesting a decision from this Office.

We believe it is also clear that Buckhorn was fully aware there was a question on the part of the agency as to its actual liability and that submission of the matter to this Office was contemplated. This is evidenced by the November 15 settlement proposal which clearly states that the NPS offer, if accepted, would be subject to review by this Office. According to agency officials Buckhorn was fully aware that a question as to the legality of payment had arisen which would require a decision by this Office prior to a final settlement of the matter.

Under these circumstances, we do not believe that the parties can be said to have agreed to the Government's liability for the alleged breach. Accordingly, we do not believe that the Perez and System Development Corporation cases are for application here.

Furthermore, for much the same reasons as stated above, we do not believe that the parties intended the November 15 settlement proposal and the December 4 acceptance thereof to operate as a binding accord and satisfaction. While the parties had agreed on a settlement figure in the event that an actual breach of contract was found, they had not agreed that such a breach did in fact occur or that the settlement would be final without further review. We therefore do not believe that there has been such a meeting of the minds as would support an accord and satisfaction. See United States v. General Petroleum Corporation, 73 F. Supp. 225 (S.D. Cal. 1946), aff'd 184 F. 2d. 802 (9th Cir. 1950).

We now turn to the question of NPS' liability for the alleged breach of its contract with Buckhorn. After a careful consideration of the agreement between the two parties, we are unable to conclude that NPS at any time breached the contract.

In our view, NPS had two obligations under the Water Service Agreement; first, NPS agreed to pay for the construction of the eight inch water line. This promise was performed. Second, the Government agreed that it "shall purchase and pay for * * * water service furnished * * * in accordance with the Water District's applicable rate schedules * * * or a minimum charge of $50.00 per month * * *." (Emphasis added.) Strictly construed, this provision does no more than establish the charges which the Government would be obligated to pay for any water actually furnished by the utility. Since the Area's anticipated water requirements did not materialize, the utility never furnished any water and thus the Government never incurred any obligation to pay for water service.

While we believe it is arguable that the use of the language "shall purchase" obligated the Government to "purchase and pay for water," it is clear that the Government agreed only to pay for water actually furnished or a $50

monthly minimum charge, whichever was greater. Since the Government in fact paid the $50 monthly minimum fee over the life of the contract, we believe it fulfilled any obligation to purchase and pay for water which arguably existed under the contract.

In addition, we find no merit in the utility's argument that NPS breached the contract by failing to construct a connecting line within the Area so that it could purchase water from the utility. We find no provision in the contract which could be construed as establishing such an obligation. Moreover, while we do believe that both parties originally contemplated that such a connecting line would in fact be constructed, we are satisfied that the utility has received payment for all that NPS agreed to under the contract. Even if the connecting line had been constructed, Buckhorn would have been assured of receiving no more than it in fact got: payment for the cost of construction of the eight inch line and the $50 monthly minimum fee for the life of the contract.

Furthermore, we agree with the certifying officer's contention that termination of the contract did not itself constitute breach. The termination provision in the agreement is in essence a termination for convenience clause which is found in most Government contracts. These clauses reserve to the contracting officer the fullest discretion to end the agreement, and absent bad faith, terminations pursuant to such a clause do not constitute a breach. See generally Colonial Metals Co. v. United States, 494 F. 2d. 1355, 1359 (Ct. Cl. 1974). In this respect, the Court of Claims had held that in order to support a finding of bad faith, the record must show "well-nigh irrefragable proof" that the agency had a malicious and specific intent to injure the complaining party. Kalvar Corporation Inc. v. United States, 543 F. 2d. 1298, 1301 (Ct. Cl. 1976).

Such an intent is clearly not present in this case. The record shows that during negotiation of the contract, NPS was planning development of additional campgrounds, motels and restaurants in the Area to meet a projected increase in the number of visitors. After the contract was made, budgetary restrictions prevent NPS from effectuating its plans. Consequently, the Area's estimated water requirements did not materialize and NPS determined that

connection of the line would be too costly since sufficient water could be acquired at less cost through existing facilities. Termination under these circumstances has been approved by the Court of Claims:

> "Among the 'host of variable and unspecified situations' calling for termination, it is entirely reasonable to include a post-contract recognition that the job is impossible or too difficult to perform or too costly for the Government if pushed to its conclusion." Nolan Bros., Inc. v. United States, 405 F. 2d. 1250, 1253 (Ct. Cl. 1969).

Also we have recognized the validity of termination based on an agency's determination that it could perform services "in-house" at lower cost. Kaufman DeDell Printing, Inc.--Reconsideration, B-188054, October 25, 1977, 77-2 CPD 321.

In our view, therefore, by reimbursing the utility for the cost of construction of the 8" water line, by paying the $50.00 monthly minimum charge as agreed, and by terminating the agreement as provided in the contract, the Government fully discharged all of the obligations required of it under the terms of the contract. We therefore find, on the basis of the information furnished, no grounds for any additional payment beyond the $50 monthly charge for the three months of the contract remaining after the notice of termination was furnished to the utility.

Harry R. Van Cleve

For the Comptroller General
of the United States