

DECISION

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

27138

FILE: B-211160**DATE:** December 30, 1983**MATTER OF:** Koch Fuels Inc.**DIGEST:**

A supplier to section 8(a) business concern claims that the Small Business Administration (SBA) failed to properly perform a duty, created by enforceable promises, to monitor and manage a special bank account which contained advance payments extended by SBA to the 8(a) concern. As a result, the claimant has been unable to collect the \$488,000 it is owed by the 8(a) firm for supplies used to perform an 8(a) subcontract. The claim is denied because the statements by the SBA which allegedly constitute enforceable promises were made in connection with advance payments made on three previous occasions, not to the particular advance payment to which the supplier now claims a right.

Koch Fuels, Inc. has submitted a claim against the Small Business Administration (SBA) for \$488,000, an amount owed Koch by Tri-Par Combustion Corp., a participant in the SBA's section 8(a) program. Koch contends that the SBA failed to meet its obligation to monitor and control a special bank account established to administer funds advanced to Tri-Par by the SBA. As a result of this alleged failure, Tri-Par was unable to pay Koch for fuel oil delivered for Tri-Par's account during August and September 1981. Koch argues that SBA should be required to pay Koch the \$487,500 owed by Tri-Par, plus interest.

We conclude that Koch has no valid claim against the government with respect to this matter.

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Section 8(a) of the Small Business Act authorizes the SBA to enter into contracts with any government agency that has procuring authority and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. 15 U.S.C. § 637 (a) (1982). Pursuant to this authority, the SBA on September 29, 1980, entered into a requirements contract with the Defense Fuel Supply Center for the delivery of fuel oil to various government installations during fiscal year 1981. The same day, SBA entered a subcontract with an estimated value of \$10.8 million to have Tri-Par, an eligible 8(a) firm, deliver the fuel oil.

In January 1981, Tri-Par, which was experiencing difficulty in securing financing to purchase the required quantities of fuel, requested advance payments on the subcontract pursuant to 13 C.F.R. § 124.1-2 (1982). On January 20, 1981, SBA issued a modification to the contract under which it agreed to advance Tri-Par \$4.2 million. The funds were deposited in a special bank account. In accordance with applicable regulations, the modification and bank account agreement allowed withdrawals by Tri-Par only upon the countersignature of SBA and required all proceeds received by Tri-Par under the subcontract to be deposited to the special account until the liquidation of the advance payment. The modification also established a paramount lien on the part of SBA and permitted SBA to unilaterally withdraw the funds from the account.

It appears that Tri-Par complied with the conditions of the modification until late summer 1981, when an examination of bank statements revealed irregularities in the account. When subsequent investigation confirmed that Tri-Par had been depositing subcontract payments to its general account rather than to the special account as required, SBA issued a stop payment order to all activities doing business with Tri-Par. As of October 1, 1981, \$4.2 million had been paid out of the account and \$2.9 million had been deposited. The SBA immediately applied the \$2.9 million in the account to Tri-Par's debt, leaving a balance of \$1.3 million owed to SBA. SBA recouped about one-half of this amount by applying sums due Tri-Par under this subcontract and recouped the remainder by applying funds due Tri-Par under another 8(a) subcontract.

Koch has been supplying fuel to Tri-Par for its 8(a) subcontracts since 1976. At that time, Koch believed that Tri-Par was not credit worthy, but was persuaded to deliver fuel to Tri-Par on the basis of a letter in which the SBA informed Koch that it would furnish an advance payment to Tri-Par in connection with its 8(a) contract for fiscal year 1977. The letter stated that the payment would be deposited in a special bank account under the control of the SBA and requested that Koch extend Tri-Par the requisite credit to perform the contract.

In October 1978, the SBA sent a similar letter to Koch concerning the 8(a) contract for the 1979 fiscal year. In this letter the SBA disclosed that it had established a bank account under its control in order to assist Tri-Par in its purchase of fuel.

Finally, in December 1979, Koch again received from the SBA "promises and assurances," as Koch describes it, this time by telephone. Koch has not disclosed any details concerning the conversation, but it can be reasonably inferred from Koch's statement that the conversation was in substance similar to the discussions contained in the two previous letters, and that the conversation concerned advance payments for Tri-Par's fiscal year 1980 contract. This was the last communication between SBA and Koch before the claim arose.

Koch asserts that in reliance on these promises or assurances, it continued to deliver fuel to Tri-Par through September 1981 when it learned of Tri-Par's financial problems. Invoices for deliveries made in August and September amount to \$495,543.22, of which \$488,043.22 remains outstanding. Koch believes that SBA should have notified Koch of the account irregularities in August 1981 so that it could terminate its deliveries. Koch also contends that SBA acted improperly when it applied the \$2.9 million remaining in the account to Tri-Par's debt to SBA rather than first allowing payment to Koch from these funds. Koch argues that SBA is liable to Koch for Tri-Par's entire outstanding indebtedness, plus interest, on the basis of the following theories: (1) express contract--SBA promised that Koch would receive payment from the special bank account in exchange for Koch delivering fuel to Tri-Par; (2) promissory estoppel--SBA promised

payment from the account and reasonably foresaw the likelihood of Koch's reliance on that promise. The promise induced Koch to deliver oil and in Koch's view injustice would result unless the promise is enforced; (3) equitable estoppel--SBA made representations upon which Koch relied to its detriment; or (4) quantum valebat--Koch conferred a benefit on the government and is entitled to receive the value of the goods (or services) delivered.

We are not certain whether the statements made by the SBA constituted enforceable promises or were merely declarations of facts which were intended for use by Koch to determine Tri-Par's credit worthiness, but we need not decide this issue at this time. However these statements are characterized, it is clear that they did not relate to the \$4.2 million in advance payments made to Tri-Par in 1981.

Under the SBA's regulations, of which Koch was on constructive notice, advance payments are extended only with regard to a specific 8(a) contract and the use of the funds is limited to satisfying the immediate needs of that subcontract. 13 C.F.R. § 124.1-2(a) and (d). The statements on which Koch relies respectively concern advance payments under Tri-Par's 1977, 1979 and 1980 contracts. There is no indication in the letters or in Koch's brief summary of the telephone conversation that SBA promised to provide advance payments to Tri-Par in future years in connection with future contracts, nor is there any express or implied request that Koch extend credit to Tri-Par on future subcontracts.

Thus, the SBA's last promise, if it was a promise, was satisfied with the conclusion of the 1980 subcontract, and we do not see how its scope can be expanded to include any advance payments which may have been made under the 1981 subcontract. Therefore, even assuming the 1979 communication created a contract between the two parties, the events upon which the claim is based is outside the scope of that contract. See Security Bank & Trust Co. v. United States, 2 Cl. Ct. 646 (1983).

The next two theories advanced by Koch similarly fail since the promises or representations upon which Koch now relies did not relate to the advance payments to which Koch believes it is entitled. Significantly, Koch concedes that it was not even aware that the \$4.2 million in advance payments had been requested or granted. Since as far as Koch knew, no advance payments were provided to Tri-Par under the then-current subcontract, it is difficult to perceive how Koch relied upon the availability of funds in extending credit to Tri-Par. To the extent that Koch relied on statements relating to previous advance payments, that reliance was not reasonable. Since reasonable reliance on the government's representations or conduct is an element which must be established to recover under promissory estoppel (see Restatement of Contracts § 90) or equitable estoppel (see United States v. Georgia-Pacific Company, 421 F.2d 92, 96 (9th Cir. 1970)), Koch's claim cannot be sustained on these legal theories.

Lastly, recovery on the basis of quantum valebat or quantum meruit is not appropriate. Quantum valebat and quantum meruit are based on the doctrine of unjust enrichment. Where one party has received a benefit from another party, the law will imply a promise to pay in the absence of a formal promise to do so if it would be unjust to allow the party to retain the benefit without compensating the other party. See Lloyd X. Smith - Claim Against the FHLBB, B-203638, December 23, 1981, 82-1 CPD 1. Here, however, the government has not been unjustly enriched by Koch. While Koch supplied fuel that was ultimately delivered to the government, the government in turn paid Tri-Par, its fuel contractor, for the fuel. The problem arises because Tri-Par did not pay Koch, its fuel supplier. If anyone was unjustly enriched, it was Tri-Par, not the government.

The claim is denied.

for Harry R. Van Cleave
Comptroller General
of the United States