

LUNTER

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DECISION

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

FILE: B-198630

DATE: October 5, 1981

MATTER OF: Freund Precision, Inc.

DIGEST:

1. Contractor under pre-March 1, 1979, contracts has filed "constructive change" claim originally made to contracting officer in March 1980. If, regardless of filing, contractor has made conscious election to proceed under Contract Disputes Act of 1978, GAO may not consider claim since consideration would give contractor a forum it would not otherwise have under act. Alternatively, if contractor has elected to proceed under disputes clause of its contracts, GAO may not consider claim because claim involves a question of fact.

2. Even though Army alleges that constructive change claim filed at GAO is time-barred, allegation does not entitle GAO to decide legal validity of defense. Fact remains that claim, on its face, is not for GAO's review since claim involves a question of fact; moreover, Armed Services Board of Contract Appeals (or Court of Claims) may ultimately decide legal validity of defense under all relevant factual circumstances.

Freund Precision, Inc. (Freund), has submitted a claim for losses allegedly incurred in the performance of Department of the Army contracts Nos. DAAA08-77-C-0035, DAAA08-78-C-0249, DAAA08-78-C-0321 and DAAA08-77-C-0085. These fixed-price contracts were awarded to Freund by the Army before March 1, 1979, for the supply of "gun shields and upper gun rotors."

By letter dated March 19, 1980, and received by the Army on March 27, 1980, Freund submitted a claim for costs of repairs and replacements required by the Army so that the gun shields would properly assemble

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on the Army's gun frames. According to Freund, the gun shields that it originally shipped met the basic drawing requirements contained in the contracts and "were not deficient in any way." Therefore, in Freund's opinion, the Army is responsible for the costs involved.

By letter dated April 21, 1980, the Chief of Adversary Proceedings Division in the Army's Office of Counsel responded to Freund's claim. The letter stated as follows:

"A review of the contracts indicates that final payments under contracts -0035 and -0085 were completed in 1978. Final payment under contract -0249 was made in March of 1979. The records also disclose that final payment under the last of your contracts, No. DAAA08-78-C-0321, was made on 25 March 1980.

"Although not stated as such in your letter, it is assumed that your claim for additional compensation is premised on the basis that a [constructive] change occurred due to drawing errors. Certain changes are, of course, compensable pursuant to the Changes clause of the contracts. However, your attention is called to the fact that the said clause provides that a claim for adjustment must be asserted within 30 days from the date of receipt by the contractor of the notification of change. The contracting officer, however, may receive and act upon any such claim asserted at any time prior to final payment under the contract.

"Accordingly, final payment is a total bar to the assertion of any claim that you may have otherwise submitted."

Freund contends that Army's disclaimer of any obligation to pay simply because final payment has been made is "incorrect." Freund believes that it has every right to further compensation for these costs.

Under section 16 of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (Supp. III, 1979), a contractor who initiates a claim after the effective date (March 1, 1979) of the Contract Disputes Act with regard to a contract made before the effective date of the act may elect to have its claim considered under the act rather than under the disputes clause of its contract.

In order to permit the contractor to make an informed decision as to which alternative remedy is to be chosen, section 6(a) of the act requires the contracting officer to "inform the contractor of his rights as provided in this act" when a contractor makes a claim to the contracting officer "relating to a contract." A contractor's subsequent "conscious election" of one of the alternative remedies is final. Cf. Tuttle/White Constructors, Inc. v. United States, Court of Claims No. 205-80C, July 29, 1981, where the court held that a contractor who had made a conscious election to proceed under the disputes clause was foreclosed from later electing to proceed under the act.

If, under the circumstances, Freund has made a conscious election to proceed under the act, we may not consider the claim because consideration of the claim would provide the contractor with a forum it would otherwise not have under the act. See Thurman Contracting Corporation, B-196749, June 13, 1980, 80-1 CPD 415.

If, on the other hand, Freund has made a conscious election to proceed under the disputes clause of its contract, it is still our view that the claim is not for our consideration. Prior to the act, we would not decide a claim involving a disputed fact, as here. See Consolidated Diesel Electric Company, 56 Comp. Gen. 340, 343 (1977), 77-1 CPD 93. Specifically, the "Changes" clause in Freund's contracts makes the "[f]ailure to agree to any adjustment a dispute concerning a question of fact." Thus, the claim for a constructive change involves a question of fact for resolution by the authorities described in the disputes clause and not by our Office.

Although the Army has asserted that the claim is time-barred, it is not appropriate for our Office to decide the validity of the defense since the claim, on its face, is not for our decision. Moreover, the Armed Services Board of Contract Appeals (ASBCA) has decided that it may determine, under all the relevant factual circumstances involved, whether a claim for a constructive change is time-barred by the mere fact of final payment as claimed by the Army here. See Adamation, Inc., ASBCA No. 22495, March 11, 1980, 80-1 BCA 14385. Ultimately, therefore, it may be appropriate for the Board (or the Court of Claims), not our Office, to decide the validity of the Army's defense to the present claim in deciding any possible appeal or suit that Freund may initiate.

Claim dismissed.

Harry R. Van Cleve
Harry R. Van Cleve
Acting General Counsel