

DECISION



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

60420

FILE: B-185579

DATE: January 23, 1976

MATTER OF: Request for advance decision by
the Department of Agriculture

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DIGEST:

Where increased cost of performance of fixed-price contract for delivery of nonfat dry milk under Department of Agriculture price support program is attributable to acts of Government as sovereign in raising price support level and no price adjustment clause was included in contract, there is no legal basis to support upward price adjustment since Government as contractor is not liable for its acts as sovereign.

Our views have been requested by the Assistant Secretary, Department of Agriculture, as to the propriety of granting to A. Sturm and Sons, Inc. (Sturm), an upward price adjustment under contract MP(FF)54807 for bulk nonfat dry milk purchased by the Commodity Credit Corporation (CCC) of the Department. The request by Sturm for the adjustment is attributed to an increase by CCC in the price support level and purchase price of bulk nonfat dry milk effective January 4, 1975.

The contract was executed on November 19, 1974, for 1,320,000 pounds of bulk nonfat dry milk at \$0.6598 per pound. The price was based on the then current market price for nonfat dry milk, \$0.5660 per pound, plus packaging and processing allowances. The contract schedule required and delivery was made in accordance with the following:

- January 1, 1975 - January 15 - 316,800 pounds
- January 16 - January 30 - 316,800 pounds
- February 1 - February 15 - 316,800 pounds
- March 1 - March 15 - 369,600 pounds

By way of background information, the Assistant Secretary relates that on August 11, 1972, the CCC issued Announcement MP-M-45, which listed the terms and conditions under which

purchases of instant spray process nonfat dry milk would be made from time to time. Section 8 stated, as pertinent:

"The price to be paid for the milk shall be the offered price accepted by CCC which shall be on the basis f.o.b. * * *: Provided, however, That if, subsequent to the date offers are to be received under invitations issued pursuant to this Announcement, the U. S. Department of Agriculture announces a change in the purchase price of bulk packed nonfat dry milk under the price support program which will be effective during all or any part of the scheduled shipping period(s) set forth in the contract . . . the contract price resulting from any contract for instant nonfat dry milk purchased by CCC under the price support program pursuant to this Announcement shall be increased or decreased by an amount equivalent to the announced increase or decrease in support price for bulk packed nonfat dry milk produced during the period such change in support price is in effect. * * *"

On December 7, 1973, CCC issued amendment 4 to Announcement MP-M-45, which amended section 8 to read:

"The price to be paid for the milk shall be the offered price accepted by CCC which shall be on the basis F.O.B. cars or trucks (CCC option) at the shipping point(s) named in the contract."

This amendment was issued when dairy products were in short supply. Consequently, since the market price was substantially above the CCC purchase price, the price adjustment feature was removed from Announcement MP-M-45. Section 8, reflecting amendment 4, was the clause in effect on the date of Sturm's contract in November 1974. Also during this period, purchases were not effected under the price support program of the Agricultural Act of 1949 (7 U.S.C. § 1446 (1970)), but were made under authority of the Consumer Protection Act of 1973 (7 U.S.C. § 612(c)).

The Assistant Secretary states that it was not Agriculture's intention to resume purchases under the price support program until April 1975. Therefore, it did not reestablish the price adjustment clause. Our attention is invited to the latest amendment (10) to Announcement MP-M-45, issued February 28, 1975, as evidence of the Department's intention that purchases under the price support program contain the price adjustment clause. The preamble to amendment No. 10 states in part:

"* * * we understand there is considerable uncertainty in the industry regarding future prices, and this is to give assurance that contracts awarded in the future will be protected with respect to even the remotest possibility of price changes under the support program."

The substance of amendment 10 insofar as section 8 is concerned renders the section substantially the same as it was before the issuance of amendment 4, except that its application is also extended to purchases effected under other than the price support program.

Sturm has submitted evidence to show that it actually paid \$0.6050 rather than the \$0.6060 price announced by CCC for nonfat dry milk manufactured on or after January 4, 1975. Thus, Sturm requests a price adjustment of \$0.039 per pound for 475,200 pounds or \$18,532.80. CCC is willing to grant the increase.

Generally, where a Government contract contains an express stipulation as to the amount of compensation to be paid, and there is no price adjustment clause, no basis exists for an increase in the contract price because the cost of performance in accordance with the terms of the contract has become more expensive. Capitol Aviation, Inc., B-184238, July 30, 1975, 75-2 CPD 68. Moreover, where the Government acts in its sovereign capacity, it is not liable as a contractor for the consequences of its sovereign acts. Deming v. United States, 1 Ct. Cl. 190 (1865). As long as the actions of the Government as a contractor do not constitute undue interference, the contractor is not entitled to additional compensation. SIMMEL, Industrie Meccaniche Societa Per Azioni, B-181687, September 23, 1975, 75-2 CPD 167; 53 Comp. Gen. 157 (1973). Quoting from Penn Bridge Co. v. United States, 59 Ct. Cl. 892 (1924), in SIMMEL, Industrie Meccaniche Societa Per Azioni, *supra*, we stated that:

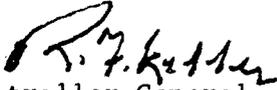
"* * * Contractual rights once fixed in a proper contract executed by authority are inviolate. They may be forfeited by one party or the other, construction is permissible if the terms are ambiguous, but in the absence of ambiguity or forfeiture of rights by conduct, such a contract cannot but be enforced as written. (Emphasis supplied)"

In Horowitz v. United States, 267 U.S. 458, 461 (1925), it was stated:

"Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. . . ."

There is no allegation here that, by raising the price support level, the Government was acting in other than its sovereign capacity on behalf of the general public. We have held such action attributable to the sovereign capacity of the Government. B-180054, December 6, 1973. The reasons that the price adjustment clause was removed from the general provision applicable to Sturm's contract do not alter the plain and unambiguous terms of the contract. Nor can they serve as a basis to modify the contract. Inasmuch as the increase in cost of performance is attributable to action of the Government taken in its role as sovereign, the Government, as contractor, cannot be held liable for those acts.

Consequently, there is no legal basis to support the requested price adjustment.


Deputy Comptroller General
of the United States