

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548****FILE:** B-210808**DATE:** May 24, 1984**MATTER OF:** McGraw-Hill Information Systems Company

DIGEST: Contractor who provided unauthorized services at request of agency employee may be paid on quantum meruit basis because services constituted a permissible procurement, Government received and accepted their benefit, contractor acted in good faith, and amount claimed represents reasonable value of benefit received.

The F. W. Dodge Division of the McGraw-Hill Information Systems Company (McGraw-Hill) requests that the General Accounting Office (GAO) authorize payment of a claim for \$92,954.25 for services provided to the Minority Business Development Agency, U.S. Department of Commerce (MBDA). McGraw-Hill's claim is for information services provided to MBDA from January 1 to September 30, 1981, as an "extension" of a previous grant from the Department of Commerce, although there was neither a new grant nor a formal contract for the services provided during this period. To assist us in evaluating this matter we requested and have received a report from MBDA. Based on this information and our review, it is our conclusion that McGraw-Hill is entitled to a quantum meruit recovery of the amount claimed.

FACTS

The record in this case indicates that for several years prior to 1980, MBDA contracted with McGraw-Hill for construction data for use by minority businesses. However, in 1980, grant funding was used instead of a contract. In January 1980, McGraw-Hill received a grant of \$138,837 (Grant No. 98-20-60110-00) to provide a complete information system to assist minority construction contractors for the period January 1 to December 30, 1980.

In late 1980, the process for a 1-year renewal of the grant was begun. In February 1981, the proposed grant was submitted to the then newly formed Department of Commerce Financial Assistance Review Board. On March 24, 1981, the Review Board ruled that a contract, rather than a grant, should be used to fund the information system. At that point, MBDA began preparation of the paperwork necessary to support issuance of a contract.

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According to McGraw-Hill's submission, beginning in December 1980, and continuing through early 1981, Mr. Frank Carpenter, then MBDA's National Director for Construction Contractors, requested that McGraw-Hill continue to provide information services in anticipation of renewal of the 1980 grant. Based on these requests and Mr. Carpenter's assurances that funding was available, McGraw-Hill continued to provide the services without interruption. In July 1981, McGraw-Hill was advised by an MBDA official that the services would be funded through a contract, rather than a grant renewal.

Also in July 1981, Mr. Carpenter resigned from MBDA and the information system project was reassigned to Mr. Roy Mixon. In late August 1981, Mr. Mixon met with McGraw-Hill representatives and requested a statement of charges through September 30, 1981, on which date McGraw-Hill was instructed to stop providing the information services. McGraw-Hill responded with a letter itemizing the services provided through September 30, 1981, and quoting a total price of \$92,954.25.

APPLICABLE LAW

41 C.F.R. § 1-1.405 authorizes Federal agencies to ratify unauthorized commitments under certain circumstances. The regulation provides:

"Execution of otherwise proper contracts made by individuals without contracting authority, or by contracting officers in excess of the limits of their delegated authority, may be later ratified. To be effective, such ratification must be in the form of a written document clearly stating that ratification of a previously unauthorized act is intended and must be signed by a person authorized to ratify such acts. Generally such ratification may be made only by an official on whose behalf the contract was made and then only (a) if he could have given authority to enter into the contract before it was awarded and (b) if he still has power to do so at the time of ratification."

In applying this provision, there has been some variation in how agencies have interpreted "otherwise proper contracts."

In our view "otherwise proper" does not necessarily connote "otherwise perfect." Where the ratification is of a contract made by an unauthorized, and presumably inexperienced, individual, procedural defects (in addition to the lack of authority) are not unlikely. Therefore, if § 1-1.405 is to have any practical application, ratification of an unauthorized contract which also contains other minor deviations must be considered within the scope of agency discretion. On the other hand, if the defects are such that the contract could not have been properly made at the time, § 1-1.405 ratification is inappropriate.

As an administrative determination, ratification does not require GAO's approval or certification. If an agency decides not to ratify an unauthorized contract, however, and payment is requested by the contractor, referral for GAO's consideration is the required procedure.

There is a well-established rule that the Government is not bound by the unauthorized acts of its employees. (Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).) Where a valid written contract was never executed and the agency is unable to ratify the informal agreement retroactively, the Government has no legal obligation to pay contractors who have provided goods and services. However, under GAO's claims settlement authority (31 U.S.C. § 3702), the Comptroller General may authorize payment on a quantum meruit basis.

Where a performance by one party has benefited another, even in the absence of an enforceable contract between them, equity requires that the party receiving the benefit should not gain a windfall at the expense of the performing party. The law thus implies a promise to pay by the receiving party whatever the services are reasonably worth. See, e.g., Bouterie v. Carre, 6 So.2d 218, 220 (La. App. 1942); Kintz v. Read, 626 P.2d 52, 55 (Wash. App. 1981). Before GAO will authorize a quantum meruit or quantum valebat payment, we must make a threshold determination that the goods or services would have been a permissible procurement, had the formal procedures been followed. Next we must find that (1) the Government received and accepted a benefit, (2) the contractor acted in good faith, and (3) the amount claimed represents the reasonable value of the benefit received. See 33 Comp. Gen. 533, 537 (1954), 40 Comp. Gen. 447, 451 (1961), and B-207557, July 11, 1983.

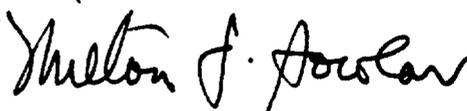
DISCUSSION

As outlined above, this case does not involve an unauthorized or procedurally defective contract, but rather a situation where a contract, although promised, was never issued. However, whether a contract is unauthorized, procedurally defective, or nonexistent the goods or services provided are similarly unauthorized. Absent agency ratification, payment for such goods or services will depend on whether we find a quantum meruit recovery appropriate. In this case administrative ratification was considered, but MBDA decided not to ratify Mr. Carpenter's unauthorized commitment to McGraw-Hill. In December 1982, MBDA formally declined payment of the claimed amount, and referred McGraw-Hill to GAO.

First, we have no reason to question that the procurement would have been permissible had proper procedures been followed. McGraw-Hill had in fact provided similar services by contract for several years previously, and we are aware of no statutory or other legal impediment. The decision to return to the use of a procurement contract after the 1-year "deviation" to the use of a grant was, we assume, made in order to comply with the Federal Grant and Cooperative Agreement Act, 31 U.S.C. §§ 6301-08. This, in our opinion, was the correct decision. See 61 Comp. Gen. 637 (1982).

Next, MBDA has determined that a benefit was received and accepted by the Government as a result of McGraw-Hill's services; that although aware of the risks of performing without a written agreement, McGraw-Hill acted in good faith in delivering the services; and that the amount claimed represents the reasonable value of the services received. Based on our review of the record, we concur in MBDA's findings.

Accordingly, payment of \$92,954.25 to McGraw-Hill is authorized. As a bona fide need of the year in which the services were rendered, this expenditure is a proper charge against MBDA's appropriation for fiscal year 1981.
B-207557, July 11, 1983.

for 
Comptroller General
of the United States