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B-86211, July 26, 1949

Number: B-86211

Date: 1949-07-26

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Mr Stine M Dunkel c/c S.L. Skeel, Esquire Insurance Building Seattle 4, Washington

Dear Mr. Dunkel:

Reference is made to letters of March 22 and April 20, 1949, from S.L. Skeel, Esquire, concerning your indebtedness to the United States arising out of contract No. N406a-22725, dated June 20, 1947, and your claim asserted thereunder.

Under the contract you agreed to purchase garbage accumulating at the Naval Station, Naval Receiving Station and Naval Supply Depot, Seattle, Washington, at a price of $12 per net ton during the period from July 1, 1947, to June 30, 1948, and to remove said garbage daily. In connection with the execution of the contract from July 1, 1947, up to and including September 8, 1947, when you informed the Navy Department of your refusal to proceed further. You were then advised of your liability under Article 4 of the contract which reads as follows:

"4. If the purchaser of its employees fail to remove the refuse at the time stipulated in paragraph 2 hereof, or fail to keep the refuse stands, the territory surrounding them, or the collection vehicles as set out in paragraphs 2 and 3 hereof, or if the purchaser or its employees do not conduct themselves properly and in accordance with regulations prescribed by the officer in charge or any duly authorized member of the Naval Establishment, or if the purchaser of its employees fail to comply in any other respect with the provisions of this contract, the Government may terminate this contract, resell the material, and any loss suffered by the Government shall be charged to the purchaser. Any deposit in the hands of the Government may be retained by the Government on account of said loan."

Upon your continued refusal to perform the agreement, new bids were solicited and contract No. N406a-23339 covering the same subject matter was awarded to the highest bidder, Donald J. Kruger, at a price of $4.50 per net ton. Mr. Kruger completed his contract, removing a total of 460,953 net tons of garbage in the period of September 9, 1947, through June 30, 1948, and paying therefore the sum of $2,074.29. Had you removed the same amount and paid for it at your contract price, the Government would have received a total amount of $5,531.44. After allowing credit for the deposit posted by you, the loss to the Navy Department by reason of your breach of the contract was $2,305.15.

In the letter of March 22, 1949, it is contended that there is no liability on you part for the reason that:

"*** The officers of the Navy were advised and knew that said food garbage was purchased to be used as food for hogs on a farm owned and operated by Mr. Dunkel and that it was not permissible under the contract to include the food garbage refuse from other sources, whether or not suitable for this purpose. In fact, this refuse was not suitable and as a result his hogs were poisoned, resulting in the death of hogs to the value of $1,800.00"

This position is unsound both factually and legally. The facts are that you had fed this garbage to your hogs for more than two months without harmful results and that the succeeding contractor, Mr. Kruger, fed the same material to his hogs for at least nine months without complaint. Even if competent, the evidence in the record here is that the garbage was the cause of the death of your hogs is weak and unconvincing and is more than offset by the fact that after complaint by you, the garbage in question was passed both by the United States Department of Agriculture and the Federal Food and Drug Administration.

Legally, your claims is entirely without support. The contract contained the following provision:

6. There is no warranty, express or implied, that the material delivered under this contract will be pure or wholesome. It may contain a percentage on non-food refuse. The description in this contract (and any statements, oral or written with respect to the material heretofore made) are statements of opinion only, and are not binding on the Government and confer no rights on the purchaser. This is not a sale by sample."

Assuming that everything you say regarding representations made prior to the execution of the contract is true, such representations could in no wise bind the Government in view of the contract provision just quoted.

It is elementary that oral statements or representations made prior to the signing of a written contract are inadmissible to vary the terms of such contract when no ambiguity exists. See Williston on Contracts, Revised Edition, Volume 3, Section 629, and cases where cited. It is likewise fundamental that valid contracts are to be enforced and performed as written, and the fact that unforeseen difficulties are encountered which render performance more burdensome or less profitable then contemplated, or even occasion a penury loss, will neither excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful, no entitle him to additional compensation unless otherwise specifically provided in the contract. Columbus Railway, Power and Light Co. v. Columbus, 249 U.S. 3991 Blauner Construction Company v. United States, 94 C. Cls. 503; Penn Bridge company v. United States, 59 C. Cls. 892. Increased cost of performance, whether foreseen or unforeseen, is one of the hazards of a contract which neither excuses nonperformance nor entitles the contractor to additional compensation. Satterlee, Administatrix v. United States, 30 C. Cls 31.

Accordingly, the settlement of March 10, 1949, is sustained, and the counterclaim for $1,800 is disallowed. Unless the amount due the United States is received in this Office within 30 days from the date of this letter, the matter will be referred to the Department of Justice for collection in the usual manner.

Very truly yours,

(Signed) Frank L. Yates Acting Comptroller General of the United States