

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

FILE: B-166159

DATE: June 3, 1975

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MATTER OF: Consolidated Diesel Electric Company

DIGEST:

Where contractor submitted invoices which stated discount terms of 1/8 of 1 percent for payment within 20 days, although contract provided for discount of 1/10 of 1 percent for 20 days, and Government paid within 20 days and took discount offered on invoices, contractor may be refunded difference between discount rates in amount of \$7,908.87, as record indicates discount rate on invoices resulted from clerical error and not from voluntary increase in rate and contractor did not acquiesce in deduction of higher rate.

Consolidated Diesel Electric Company has claimed a refund of \$7,908.87, representing alleged excess discounts taken under contract No. DAAE07-68-C-2606 (MYP). The contract provided for a prompt payment discount of 1/10 of 1 percent for payment within 20 days. However, the invoices stated the terms as 1/8 of 1 percent for payment within 20 days. This rate was specially typed on the invoice. There is no dispute between the parties as to the facts. The Government made all payments in question within the 20 day period, thereby earning a discount for prompt payment. The only issue presented is which discount rate was the Government entitled to.

The Defense Supply Agency (DSA), contends that the disputed discount rate (1/8 of 1 percent) was correctly taken pursuant to Defense Supply Agency Manual (DSAM) 7000.1, paragraph 100602(e), (f). The cited sections read in pertinent part as follows:

"e. If the discount terms of the contract are not in agreement with discount terms offered on the invoice, the discount most advantageous to the Government will be taken.

f. When a discount is taken on the basis of preprinted discount terms on the contractor's commercial invoice which differs from the terms in the contract and the contractor requests a refund, refund will be made in the appropriate amount."

PUBLISHED DECISION
54 Comp. Gen.....

However, since DSAM 7000.1, is not published in the Federal Register, it does not have the force and effect of law. The regulation in question is merely an internal instruction and not binding on the claimant.

DSA also relies upon 25 Comp. Gen. 890 (1946), which held that a discount provision on invoices may be properly taken by the Government if otherwise earned even where the contract had no provision for a prompt payment discount. The case distinguished 5 Comp. Gen. 739 (1926) on the basis that the discounts were taken on numerous occasions over a 3-year period without objection by the contractor thereby amounting to acquiescence on his part, whereas the claimant in the earlier case brought the error to the attention of the Government within a short period of time.

The general rule is that a printed offer on a contractor's regular billhead does not constitute an express offer of discount amending the contract. 2 Comp. Gen. 83 (1922). The rule was extended to discounts specially typed on the invoice where it was shown to have been in error and no express offer or discount was intended. 5 Comp. Gen. 739, supra. On the other hand, if the erroneous discount is specially typed and the contractor accepts the reduced payments over a long period of time without complaint, and there has been some conduct on the part of the contractor tantamount to abandonment, waiver or estoppel, he is said to have acquiesced in such discounts. 25 Comp. Gen. 890, supra.

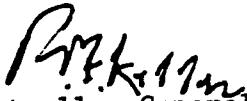
Although the higher discount rate was taken over a time span of approximately 1 year and 9 months before the contractor caught the error, something more than acceptance of a smaller amount due without protest must be shown to constitute acquiescence. St. Louis, Brownsville & Mexico Railroad Company v. United States, 268 U.S. 169 (1925). The rule of acquiescence was developed in cases where no discount was provided in the contract and the Government by making payment within the stated discount period performed in a manner which benefited the contractor and which was not required by the contract. This, coupled with the contractor accepting the reduced payments over an extended period of time, was determined to estop the contractor from claiming error. 25 Comp. Gen. 890, supra. Here, while the Government was not under a duty to make payment within the discount period, the contract provided for a prompt payment discount if payment was made within such period. The discount period of 20 days was the same under the contract or invoice terms, only the discount rate varied. Therefore, we do not

B-166159

believe that the Government was encouraged to make payment within the discount period merely because of the higher rate. The rule of acquiescence, then, is not applicable to this case, and the Government should not reap the benefits of the contractor's error by retaining the money deducted on the basis of the higher erroneous rate.

In view of the foregoing, refund in the amount of \$7,908.87 should be made, if otherwise correct.

Deputy


Comptroller General
of the United States