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DECISION



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

FILE: B-186775

DATE: October 7, 1976

MATTER OF: Edward Hines Lumber Company

DIGEST:

Where agency inadvertently requires higher than normal deposit in both the terms of the solicitation and in the executed contract, contractor who agreed to those terms can not obtain reformation on the basis of the agency's unilateral mistake.

At the suggestion of the Forest Service, Department of Agriculture, Edward Hines Lumber Co. (Hines) has requested our decision as to whether contract number 04102-3, Stinger Creek Timber Sale, between the Forest Service and Hines may be reformed to reflect the alleged intention of the parties concerning the magnitude of the slash disposal deposit. The slash disposal deposit is an amount of money, equal to the estimated cost to the Government of disposing of brush and other debris resulting from logging operations, paid to the Government by purchasers of national-forest timber. By statute, 16 U.S.C. § 490 (1970 ed.), the Secretary of Agriculture may require timber purchasers to make such deposits which are upon receipt pooled in the Treasury where the deposits constitute a special fund which is considered as appropriated and available until expended. Under an earlier act of Congress, Act of August 11, 1916, ch. 313, 39 Stat. 446, 462, the Secretary of Agriculture was authorized to refund to the timber purchasers that portion of their deposits which exceeded the actual cost of the slash disposal. However, by Act of April 24, 1950, ch. 97, § 6, 64 Stat. 84, 16 U.S.C. § 490, Congress amended the earlier act by deleting the refund authorization and in its stead instituted a policy that:

"Any excess of deposits over the cost of disposing of the brush and debris should be transferred to the credit of the forest reserve fund in the Treasury rather than be refunded to the depositors, since the estimated cost of disposing of the brush has been taken into account as an operating expense in appraising the timber to be cut."

S. Rep. No. 1069, 81st Cong., 1st Sess. ____ (1949),
1950 U.S.C.C.S. 2161.

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Hines states, and the Forest Service agrees, that "the error is simply a matter of transcription" wherein the figure \$3.73/M was inserted, in both the bid advertisement and the timber sale contract, instead of the correct figure of \$0.69/M. It appears that neither the Forest Service nor Hines was aware of any mistake until over 2 months after the contract was executed. The Supervisor of the Ochoco National Forest then initiated action to modify the timber sale contract so as to correct the error; however, the Regional Office of the Forest Service advised its personnel at the Forest and District levels that the modification could not be executed because the Forest Service lacked authority to reform contracts.

The mistake complained of appears to be the unilateral mistake of the Forest Service. The Forest Service advertised that the required slash disposal deposit would be in the amount of \$3.73/M. The Forest Service then entered into a timber sale contract with Hines which also required a \$3.73/M deposit.

It appears that from December 16, 1975, when the contract was executed until over 2 months later, Hines thought that the contract it had was the contract it had meant to enter.

This Office has observed that:

"The purpose of reformation is not to make a new agreement between the parties, but, rather, to establish the true existing one; that is, to make the contract express the real agreement of the parties. In order to justify reformation of any instrument, the mistake must have been in drawing the instrument and not in making the agreement itself. The mistake must occur in reducing to writing the contract upon which the parties agreed. Reformation is not authorized even if it be clearly shown that the parties would have come to a certain agreement had they been aware of the actual facts. See section 1548, Williston on Contracts (Rev. Ed.)." 39 Comp. Gen. 660, 664 (1960).

The "actual facts" in this case are that the Forest Service put in a higher than usual slash disposal deposit requirement in the solicitation. Hines does not appear to have questioned the amount of the required deposit until well after award of the contract. We have no doubt that Hines would have sought a reduction in the amount of the deposit had they known the actual

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acts. However, because the actual facts were known only to the Forest Service it is impossible to argue that the actual facts provided the foundation for the real agreement of the parties.

It is the opinion of this Office that the contract as executed embodied the agreement of the parties. Moreover, given the above-cited legislative history, it is apparent that the cost of the deposit, whatever its magnitude, is a factor which a timber purchaser would work into its offer to the Government. Thus a reformation after award which lessened the cost of the deposit would of necessity result in a windfall to the timber purchaser. Thus the contract as written may not now be reformed as proposed without additional consideration.

Deputy

[Signature]
Comptroller General
of the United States