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DECISION

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

FILE: B-194799 DATE: January 14, 1980

MATTER OF: Department of Transportation, Federal Highway Administration--request for opinion

DIGEST:

No basis is seen to conclude that one Government agency is liable to second agency for cost of latter's disputes clause claim settlement with contractor, even where first agency's error was basis for settlement, since record does not disclose any agreement or mutual understanding between agencies covering situation.

63 The Department of Transportation, Federal Highway Administration (FHWA), requests our opinion on the propriety of the Department of Agriculture, United States Forest Service (Forest Service), reimbursing FHWA for costs ($53,925.49) incurred by FHWA in settling the highway construction claim of the Fred H. Slate Company (Slate). Since a Forest Service error generated the Slate claim, FHWA believes the Forest Service should bear the cost of the settlement. On the other hand, the Forest Service takes the position that FHWA improperly settled the claim and that it should not have to reimburse FHWA for the erroneous settlement.

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We are presented with two issues: (1) whether the Forest Service should reimburse FHWA; and (2) whether FHWA properly settled Slate's claim. Regarding the first issue, we see no basis on this record for concluding that the Forest Service is required to reimburse FHWA. This renders moot the second issue.

FHWA's request involved the FHWA/Forest Service practice of cooperating in the construction of forest highways. 23 U.S.C. § 204 (1976). Under this practice,

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road contractors operating within national forests are contractually required to purchase, for a fixed sum, the merchantable timber found on the road right-of-ways. The fixed sum the contractor must pay is determined by a Forest Service appraisal of the right-of-way timber. The collateral details of the timber sale are covered by a separate timber settlement agreement (TSA) between the Forest Service and the road contractor. The practice embodies a longstanding Government policy of disposing of Government timber at its appraised value. See 16 U.S.C. § 476 (1976). Forest Service regulations, 36 C.F.R. § 223.1(h) (1978), require payment for right-of-way timber, except in certain circumstances not applicable here, at its appraised value.

The Slate claim arose when Slate discovered that it had paid more for the timber than it was currently worth. The discrepancy between purchase price and the resale value of the timber is attributable to the Forest Service's inclusion of an "overbid factor" in its appraisal. The factor inflates the current appraisal value for the purpose of reflecting the future estimated worth of the timber. Use of the factor is normally restricted to long duration timber sales (2 to 6 years) where it increases the probability that the Government will receive full market value for its timber in an inflationary market. The Forest Service reports that it does not normally apply the factor where, as here, Federal funds are paying for the road construction since contractors include the fixed cost of purchasing the timber in the price bid for the total project.

Slate's claim was submitted to FHWA under the disputes clause of the construction contract. We have sanctioned this approach since, in our view, the TSA is not an independent instrument, but merely an adjunct to the construction contract. B-171131, March 17, 1971.

FHWA took the view that the inflated appraisal constituted a mutual mistake of fact justifying reformation of Slate's contract to reflect the true intent of the parties. Underlying the FHWA position is its admitted lack of expertise in timber appraisals. FHWA contends that both Slate and FHWA relied upon the Forest

Service to use its timber appraisal expertise to establish the lump-sum price of the right-of-way timber. FHWA therefore effectively reformed the erroneous payment made to the Forest Service to the intent of both Slate and FHWA that the contractor not pay the amount included in the appraisal for the "overbid factor."

The Forest Service, which advised FHWA that the claim should not be paid, contends: (1) that the claim should not have been honored; and (2) that, even if it is assumed that it should have been, the claimant was overpaid. Because of this, the Forest Service believes that it should not have to reimburse FHWA for the cost of settling Slate's claim. The Forest Service reports that the proceeds of the timber sale have been deposited in the United States Treasury's National Forest Fund Account.

In reviewing the claims of one Federal agency against another, we examine the record for evidence that the Federal agencies have arrived at a mutual understanding which governs the subject matter of the claim. For example, in Soil Conservation Service and Small Business Administration Contract No. AG18scs-00100, B-185427, September 21, 1977, 77-2 CPD 208, where one Federal agency was asserting a claim for excess costs of reprocurement against another, the mutual understanding was expressed in a "section 8(a)" contract. Because the contract contained a disputes clause, we deferred consideration of the claim until the agencies had attempted to resolve the claim under the clause. When that was accomplished, we reviewed the terms of the "section 8(a)" contract and determined that the one agency was not liable to the other since it had met its obligations under the contract. Similarly, in Transfer of Power Plant by Department of the Army to Panama Canal Company, B-114839, April 27, 1979, we examined the terms of a use agreement between the Army and the company in order to determine whether there was a basis for the Army's reimbursement of the company for certain costs it had incurred. Since the company had incurred the costs in order to meet third-party contractual obligations and not to meet its obligations under the use agreement, we decided that there was no basis for Army reimbursement of the company.

We do not believe that the Forest Service is required to reimburse FHWA for the cost of settling Slate's claim. The record does not indicate the existence of any agreement or mutual understanding between FHWA and the Forest Service concerning what occurred here. Both the FHWA and the Forest Service appear to have performed their respective statutory duties. Therefore, despite the Forest Service error, in the absence of any understanding on this matter there is no basis for FHWA's claim against the Forest Service.

Milton J. Socolar

For the Comptroller General
of the United States