DECISION

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

60755

99066

FILE: B-185901 DATE: April 14, 1976

MATTER OF: Corps of Engineers--Request for reformation of contract with Sevier County, Arkansas

DIGEST:

GAO has no objection to Corps of Engineers' reopening and modification of completed contract for road relocation in connection with flood control project, in view of Corps' unilateral error in furnishing defective design specifications to local government, and fact that applicable statute provides for reimbursement of reasonable expenditures and does not restrict types or methods of contracting to be employed. Also, 33 U.S.C. § 701q may provide alternative basis for relief if appropriate determination thereunder is made by Chief of Engineers.

The Corps of Engineers, Department of the Army, has requested our decision on the proposed reopening and reformation of its completed contract No. DA-34-066-CIVENG-63-6 with Sevier County, Arkansas.

The contract was entered into April 1, 1963, in the amount of $352,446. It provided that the county was to convey or abandon to the Government its right, title and interest in certain lands and/or rights-of-way which interfered with the Millwood Dam and Reservoir flood control project. The county was also obligated to relocate certain of its roads.

The road relocation work was essentially completed, when, in April 1964, it was severely damaged by a flood. The parties amended the contract to provide for repair of the flood damage. Final payment was made under the contract and title to the land passed in 1966. However, a recordbreaking flood in 1968 and another flood in 1969 further damaged the relocated roads. The county requested the Corps' assistance to repair the roads. The cost of the repair work was estimated at $354,000 as of May 1975.

The Corps' submission to our Office points out that the flood damage resulted from delay in completion of a nearby project, the Gillham Dam and Reservoir. The Corps believes that the contractor is entitled to relief because of a mutual mistake of fact as to the adequacy of the road relocation design which it furnished at the time the contract was entered into. The Corps states that the design was defective because it anticipated that the upstream Gillham Dam would

be completed, thereby regulating the flow of water into the area where the roads are located. The Corps states that but for the completion of the contract in 1966, it would have undertaken the repairs by modifying the contract. After the 1968 and 1969 floods, the request to allow the road repair work was held in abeyance for several years until the Gillham Dam was completed.

The design documents in the record show that the effect of the proposed Gillham Dam was taken into consideration by the Corps in the original plans for the road relocation work in 1963. The documents indicate that it was anticipated that 5 to 10 years would elapse before completion of the Gillham Dam, and that during this time a "one-time 10-year flood should be considered as likely to occur."

It is conceivable that the foregoing facts could establish a mutual mistake by the parties in making the contract. See, for example, 51 Comp. Gen. 617 (1972), where the parties intended that crop insurance be effective throughout the growing season, but erred in their estimate of the earliest date when freezing weather would occur. However, the record here is sparse as to the intention of the county in entering into the contract. The terms of the contract itself dealt with the Millwood project, not the Gillham Dam, and we find that the county's understanding of the effect of the separate project on its own work is not entirely clear from the record. We think the better view is that there was a unilateral error by the Corps in furnishing defective design specifications. Under article 2.k. of the contract it was the Corps' responsibility to make necessary surveys, designs, plans and specifications for construction of the road relocation work. This obviously required judging the flood risk in the period pending completion of the Gillham Dam. The Corps admits that its judgment was erroneous and that the specifications which it established were inadequate to accomplish the purposes of the contract.

The completion of performance bars a contractor's subsequent allegation of mistake in making the contract. 39 Comp. Gen. 27 (1959). However, relief has sometimes been allowed after performance where it would be unconscionable to hold the contractor to the terms of the bargain. 45 Comp. Gen. 305 (1965). It is also for noting that the applicable statute (33 U.S.C. § 701c-1 (1970)) provides that the Army shall reimburse to States and localities the sums equivalent to actual expenditures deemed reasonable by the Secretary of the Army and the Chief of Engineers and made by them in acquiring lands, easements, and rights-of-way for any dam or reservoir project. We have expressed the view that reimbursement

under this provision extends to reasonable expenditures for highway relocation. B-146565, August 18, 1961. Also, we have observed that the statute contains no restriction on the "type or method of contracting or other forms of expenditure" in making the reimbursements. 39 Comp. Gen. 535, 537 (1960).

Under the circumstances of this case, our Office has no objection to the Corps' reopening and modification of the contract to provide for repair of the roads. Moreover, we believe there may be another basis available for relief to the county. In this regard, 33 U.S.C. § 701q (1970) provides as follows:

> "Whenever the Chief of Engineers shall find that any highway, railway, or utility has been or is being damaged or destroyed by reason of the operation of any dam or reservoir project under the control of the Department of the Army, he may utilize any funds available for the construction, maintenance, or operation of the project involved for the repair, relocation, restoration, or protection of such highway, railway, or utility: Provided, That this section shall not apply to highways, railways, and utilities previously provided for by the Department of the Army, unless the Chief of Engineers determines that the actual damage has or will exceed that for which provision had previously been made."

We have held that this provision is in the nature of an equitable statute. B-139843, July 20, 1959. If an appropriate determination is made by the Chief of Engineers, it would appear that the authority provided by 33 U.S.C. § 701q could serve as an alternative basis for performance of the proposed work.

Deputy Comptroller General
of the United States