M. Eaton
Part II

DECISION

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

7577

FILE: B-188304 DATE: September 8, 1977

MATTER OF: Zip-O-Log Mills--Reconsideration

DIGEST:

1. Where parties to timber sale contract have not agreed in writing before work in addition to that clearly required by contract is performed, design change clause permitting increase in purchaser credit does not apply. Contractor therefore may recover reasonable value of work on basis of quantum meruit.

2. GAO recommends Secretary of Agriculture consider adding changes clause similar to that in construction contracts to standard form timber sale contract.

Zip-O-Log Mills (Zip-O) and the Forest Service have requested our opinion of a proposed $22,000 settlement to cover Zip-O's construction of a landing used in removing timber from the Suislaw National Forest, Douglas County, Oregon.

Zip-O is the approved assignee of Coon 75 Timber Sale Contract No. 03660-4. Under that contract, the Forest Service had intended the purchaser to reconstruct an access road and construct the landing, thereby earning credit which would be applied to amounts due for the timber. However, the only reference to the landing in contract documents was an inconspicuous notation on a bar graph which showed its location and indicated that 4,900 cubic yards of excavation would be required. The Forest Service had failed to include excavation costs in estimates and contract tables specifying maximum purchaser credit.

When the omission was discovered, the Forest Service insisted that Zip-O proceed with the landing, but refused to increase purchaser credit because the contract did not contain any provision for adjustment due to error. Zip-O, needing the timber, built the landing but indicated that it expected additional compensation; it subsequently filed a claim with our Office.

Zip-O sought $33,607 to cover its $25,994.60 in subcontractor costs for excavation, plus overhead and profit. The Forest Service argued that payment, if any, should be limited to $14,460, the amount which its worksheets indicated should have been included in purchaser credit for excavation in connection with the landing.

In our first decision on the matter, Zip-O-Log Mills, Inc., B-188304, July 14, 1977, 77-2 CPD 25, we found that construction of the landing had not been clearly required by the timber sale contract. We held, however, that the work might be treated as a design change, defined in section CT5.254 as a "change of other than a minor nature in location; road cross section; quantities of bituminous material; or structures, other than culverts, described in drawings and specifications." That language, we stated, was broad enough to cover changes such as construction of a landing. Since the section permits increases in cost estimates, which would be reflected in purchaser credit, we stated that the claim might be paid in an amount determined according to CT5.254.

On the basis of our decision, the Forest Service offered Zip-O $18,040, an amount determined by using cost data which had been in effect during June 1976, when the work was performed. Zip-O rejected this offer and resubmitted its claim to our Office.

Zip-O argues that the design change clause of the timber sale contract cannot be applied in this case because there was no agreement in writing between the purchaser and the Forest Service, as required by section CT5.524. Moreover, Zip-O argues, the clause

is limited to slight contract modifications, such as increases or decreases in quantity of material to be excavated or other work which the purchaser already was obligated to perform, but does not apply to wholly new construction requirements. For these reasons, Zip-O argues, it should not be paid according to the design change clause. Instead, because it performed work which benefited the Government, Zip-O contends it is entitled to recover the reasonable value of that work on the basis of quantum meruit.

The Portland, Oregon, Regional Office of the Forest Service, in comments to our Office, argues that while advance written agreement generally is required, the scope of the design changes clause is not restricted to slight modifications of existing requirements. Both Zip-O and the Government benefited from construction of the landing, the Regional Office states; it therefore urges that the claim be settled under terms of the contract.

The Chief of the Forest Service, however, agrees with Zip-O that the design change clause does not apply in this case, stating:

> "The timber sale contract, developed jointly by the Forest Service and the timber industry, never contemplated that the design change provisions of the contract would be used to correct mistakes in contract construction. Rather, it is a mechanism which facilitates adjusting work specified in plans to on-the-ground conditions, or to adjust for unforeseen conditions which are encountered during construction. Because the Forest Service is not able to furnish full-time supervision of timber sale road construction, the provision for advance agreement on design changes is essential to avoid undesirable changes in planned construction.
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> "For the foregoing reasons, our interpretation of the timber sale contract would exclude from

> the design change provision (CT5.254) such fundamental errors of omission. We would construe the design change provision to be applicable to reasonable alterations of agreed upon contractual requirements. To include under the design change provision work requirements inadvertently left out of plans and specifications would appear to go beyond the intent of contracting parties, since the provision requires agreement between the purchaser and the Forest Service on any change.
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> "Accordingly, we have negotiated with the purchaser in a manner suggesting a mutual mistake and have agreed upon a quantum for the value of the work done."

The requirement for written agreement between the parties was noted but not discussed in our previous decision. The design change clause itself does not require agreement in advance of the work. However, the Forest Service Manual, 2451.52(e), implementing that clause, specifically states that a design change must be agreed to in writing before construction work on such a change begins. Since in this case there was no such advance agreement, we will consider whether Zip-O may now be paid the $22,000 which the Forest Service states is the reasonable value of the landing.

When services are rendered on the request or order of an officer authorized to contract for the United States, the Government is obligated to pay for such services upon an implied contract for quantum meruit. Our Office has permitted payment on this basis if (1) the Government received a benefit and (2) its acceptance was ratified by cognizant contracting officials. The amount which has been administratively recommended may be approved when it is reasonable. Louisiana-Pacific Corporation, B-191029, March 30, 1978, 78-1 CPD 253, and cases cited therein.

In this case, the Government has received a benefit from Zip-O's construction of the landing, since according to the Regional Office, the excavated area will serve as a turnaround for log trucks and will be a permanent feature of the road, used in future timber sales. The recommendation by the Chief of the Forest Service as to the quantum meruit settlement constitutes ratification.

As for the amount of the quantum meruit settlement, the Regional Office argues that although the contract may not have required construction of this particular landing, with 4,900 cubic yards of excavation, Zip-O knew or should have known that it would have had to construct some sort of landing in the immediate area in order to log the sale. Zip-O responds that it built four temporary landings in connection with the Coon-75 sale, and would have used one of these or constructed a fifth one at a cost of about $150 - 200. It never contemplated building a permanent landing of the type actually required by the Forest Service, Zip-O concludes. The Forest Service was given an opportunity to comment on this figure, and declined to do so.

We find that if Zip-O should have included some amount for a fifth landing in its bid, regardless of whether purchaser credit was given, the reasonable value of its work will be the additional amount spent in order to meet Forest Service specifications. If this was considered by the Forest Service in agreeing to pay Zip-O $22,000, it may be paid as administratively recommended.

In approving this settlement, we note that the standard form timber sale contract contains no provision similar to the changes clause in construction contracts (Paragraph 3, Standard Form 23-A). Nor is the changes clause incorporated by reference, since its inclusion in timber sale contracts is not required by the Federal Procurement Regulations. Consequently, the contracting officer may not order changes, and the contractor is not entitled to an equitable adjustment of the contract price even though additional work is performed.

The Department of Agriculture's Board of Contract Appeals has jurisdiction in disputes if a breach is alleged and the timber sale contract provides a remedy which is not reformation, monetary damages, or a discretionary extension of the term of the contract. 7 C.F.R. 24.4(e) (1977). However, the Board does not recognize constructive changes. It has construed the design change clause narrowly, and where there is no other contractual provision capable of supporting relief, will refuse to adjust purchaser credit. See Boise Cascade Corporation, AGBCA 76-166, January 3, 1978, 78-1 BCA 63,169, involving road reconstruction over a greater distance than that required by the timber sale contract; B.J. Carney and Company, AGBCA 76-166, December 30, 1976, 77-1 BCA 59,122, involving a Forest Service error in estimated quantities of rock; cf. Edward Hines Lumber Co., AGBCA 75-125, April 26, 1976, 76-1 BCA 56,787, in which a modification providing credit for the contractor's use of crushed rock in excess of the Forest Service estimate was rescinded.

Where, as here, the parties do not agree in writing to changes, but the work is performed, the filing of a claim with our Office may be the only method by which the contractor can attempt to recover the cost of such work. This, we believe, unnecessarily complicates and delays adjustments which might otherwise be made by the contracting officer or resolved according to the disputes clause.

By letter of today, we are advising the Secretary of Agriculture of our views and recommending that he consider adding a changes clause similar to that in construction contracts to the standard form timber sale contract.

P.F. Kelly

Deputy Comptroller General
of the United States