M. Eaton
Part II

GAO

United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-188304

[Relief Denied. Timber Purchaser Performing 8878 Additional Work without Advance Written Agreement]

January 18, 1979

Western Timber Association
211 Sutter Street
San Francisco, California 94108

Attention: Wesley R. Higbie, Staff Attorney

Dear Mr. Higbie:

CNG01445

This is in response to your letter of December 4, 1978, regarding reconsideration of a claim by Zip-O-Log Mills, B-188304, September 8, 1978, 78-2 CPD 178.

You question our finding that there must be an advance written agreement for a design change and state that the provision only requires agreement. The custom in some parts of the country, you add, is for the parties to agree to a change and to complete the paperwork after work has begun.

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You appear to be concerned that, under our decision, in the absence of an advance written agreement, relief would not be available to a timber purchaser who had performed additional work to which the Forest Service had informally consented. Although we cannot decide this except in the context of a specific case, this appears doubtful so long as the essential elements for a quantum meruit recovery--a benefit to the Government and an express or implied ratification by the contracting agency--are present.

In the Zip-O reconsideration, although the parties disagreed as to the application and scope of the Design Change Clause, there was no dispute as to the requirement for an advance written agreement. Similarly, Forest Service Headquarters and Zip-O both agreed that the Department of Agriculture Board of Contract Appeals (AGBCA) does not recognize constructive changes. In fact, at a meeting at our Office, counsel for Zip-O argued that this was one of the primary reasons for requesting reconsideration of the claim by our Office, rather than presenting it to the Board for resolution under the Disputes Clause of the contract as recommended in our decision of July 14, 1977. This position was supported

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by the cases cited in our decision, such as B.J. Carney and Company, AGBCA 76-114, December 30, 1976, 77-1 BCA 12,285, where the Board specifically noted that in the absence of the standard Changes Clause, relief is not available under a theory of constructive change.

It is too early to determine what effect, if any, the Contract Disputes Act of 1978 will have on matters such as the claim by Zip-O. In any case, our decision was issued prior to enactment of the November 1, 1978 statute, and we fail to see how that decision can "unnecessarily complicate or delay the proper adjustments which might otherwise be made by the contracting officer," as you have suggested.

Sincerely yours,

Milton J. Socolar
General Counsel