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*Fitzmaurice*



**DECISION**

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

*[Entitlement to Contract Reformation]*

FILE: B-197170

DATE: March 16, 1981

MATTER OF: Booker T. Washington Foundation--  
Reconsideration

*DLG04981*

**DIGEST:**

Claimant is not entitled to reformation of contract since evidence available does not provide clear and convincing proof of existence of mutual mistake.

The Booker T. Washington Foundation (BTWF) requests reconsideration of our decision in the matter of Booker T. Washington Foundation, B-197170, July 28, 1980, 80-2 CPD 71.

BTWF entered into a cost-reimbursement contract with the Department of Commerce (Commerce) for an amount not to exceed \$725,000 covering the period December 1, 1975, through November 30, 1976. The period of performance was subsequently extended to November 30, 1977, and the amount increased to \$1,325,000. The purpose of the contract was to further Commerce's minority business enterprise program. *MAC*

Article XVI of the contract stated that BTWF could only be reimbursed for its indirect costs at a maximum rate of 33 percent of its total direct costs. BTWF argues that the 33-percent figure was intended to be only a temporary ceiling subject to later adjustment when the actual indirect costs became known. Thus, when it became apparent that the 33-percent rate would be inadequate to reimburse BTWF for its actual indirect costs incurred during the first year of contract performance, BTWF convinced the contracting officer to revise the allowable indirect cost rate upward to 42.8 percent. Despite this decision, BTWF still disputed the disallowance of certain salary adjustments and, as a result, appealed the contracting officer's final decision to the Department of Commerce Appeals Board (Board). The Government's answer to this appeal not only opposed the requested relief, but also challenged the authority of the contracting officer to alter the

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indirect cost rate of 33 percent without a compensating benefit to the Government. The Board accepted the Government position in its entirety and reinstated the 33-percent rate.

BTWF then filed a claim with our Office arguing that since neither it nor the contracting officer ever intended the 33-percent rate to be a permanent ceiling on indirect costs, a mutual mistake had occurred in the drafting of the agreement, thus requiring reformation of the contract to make it clear that the 33-percent rate was merely a provisional rate subject to adjustment based on actual experience. We held, however, that this was not a question of mutual mistake, but rather a matter of contract interpretation which had been brought before the Board to be settled pursuant to the procedures set out in the contract's "Disputes" clause. We concluded, therefore, that since this was a matter properly before the Board and since there was no indication that the Board had acted fraudulently or in bad faith, we had no basis to review the Board's decision regarding the 33-percent rate.

On reconsideration, BTWF argues that the question presented does not involve the resolution of a factual dispute under the contract, but rather a question of law--that is, whether a mistake occurred in the drafting of the agreement so that no binding contract ever came into existence. Such a determination, according to BTWF, is properly for our Office to consider and not for the consideration of a Board of Contract Appeals. In light of this, BTWF maintains that a mistake by the draftsman did occur in reducing the parties' intentions to writing and that even if the Board made a finding as to the question of mistake, it is not binding upon our Office.

We agree that the question presented is properly for our consideration. Nevertheless, under the evidence available, we do not believe that BTWF is entitled to contract reformation.

In BTWF's opinion, a mistake occurred when the agreement was reduced to writing. However, not every mistake in the formation of a contract is a basis for

reformation. The purpose of reformation is to make a mistake in writing conform to the agreement which the parties actually made; it is not available for the enforcement of terms to which one of the parties never consented. Blake Construction Company, Inc., B-187386, November 15, 1976, 76-2 CPD 414. Thus, reformation of a contract is only authorized where by reason of mutual mistake the contract does not reflect the actual agreement of the parties, and it can be established what the agreement was, or would have been, had the mistake not been made. McDonald & Little, B-193788, July 24, 1979, 79-2 CPD 52. Moreover, the burden of proving the existence of a mutual mistake rests on the party seeking reformation; and since there is a presumption of law that a written instrument was carefully prepared and accurately reflects the parties final agreement, relief by way of reformation will not be granted unless the proof of mutual mistake is of a clear and convincing nature. 26 Comp. Gen. 899 (1947).

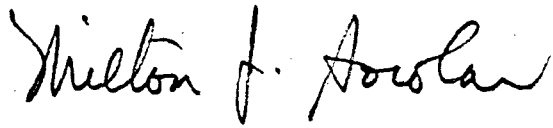
Therefore, BTWF must show that at the time the contract was formed, both parties--Commerce and itself--intended the 33-percent rate to be only a temporary ceiling but, due to poor draftsmanship, article XVI transformed this 33-percent rate into an absolute ceiling on indirect costs.

BTWF argues that by going outside the written instrument, there is sufficient evidence that the 33-percent rate was provisional. Commerce, on the other hand, maintains that the 33-percent rate was both a provisional rate and a ceiling--that is, the rate could be adjusted below 33 percent, but not above it.

From the record presented, it is unclear exactly what Commerce's contracting officials intended in regard to the 33-percent rate. Their various statements in the record are contradictory--sometimes speaking of the rate as provisional, at other times speaking of it as a ceiling. BTWF interprets these statements as proof of the provisional nature of the 33-percent rate. However, from the record presented, we cannot conclude that at the time the parties reached their agreement, Commerce intended the 33-percent rate to be a temporary ceiling

subject to later upward adjustment. Therefore, we do not believe that the evidence available provides the clear and convincing proof of a mutual mistake which is required for the reformation of a contract. 26 Comp. Gen. 899, supra; McDonald & Little, supra.

In view of the above, BTWF's claim may not be allowed.

A handwritten signature in cursive script that reads "Milton J. Aroslan". The signature is written in dark ink and is positioned above the typed name and title.

Acting Comptroller General  
of the United States