

DOCUMENT RESUME

02380 - [A1472482]

[Reimbursement of Overcharge Resulting from Computer Error].
B-188785. May 23, 1977. 3 pp.

Decision re: L. E. Hiser; by Robert P. Keller, Deputy
Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government
(806).
Organization Concerned: Forest Service.
Authority: B-183643 (1975). B-182257 (1974). B-163065 (1968).
B-159064 (1966).

The Secretary of Agriculture requested authorization to permit the Forest Service to reform a contract to allow payment to correct an error in volume determination resulting from a computer error. In light of the computer error, and the sampling frequency computation used to indicate the volume of red pine sawtimber, the contract may be modified to indicate the correct volume. GAO will not object to a refund of the overcharge based on the erroneous volume designation in the contract. (Author/SC)

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DECISION



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

FILE: B-188785

DATE: May 23, 1977

MATTER OF: L. Z. Hiser

DIGEST:

In light of computer error, and sampling frequency computation used to indicate volume of red pine sawtimber, contract may be modified to indicate correct volume. Consequently, GAO will not object to refund of overcharge based on erroneous volume designation in contract.

The Secretary of Agriculture has requested authorization from our Office to permit the United States Forest Service to reform the Headwaters Timber Sale Contract to allow payment to correct an error in volume determination. The timber purchaser, L. Z. Hiser (Hiser), was overcharged \$1,806 as a result of a computer error which expanded the volume of red pine sawtimber by a factor of 50.

The Headwaters Timber Sale was awarded to Hiser on April 10, 1974. The bid form, prospectus, and sample contract all contained the volume estimate of red pine sawtimber as 56 million board feet (MBF). There were three bidders on the sale; Hiser was the high bidder at \$8,447.

The Headwaters Timber Sale was made as a "lump sum" sale, whereby the bidder bid a price (lump sum) for each payment unit. These payment units were designated on a map with each unit containing various species of trees. The method of determining the board feet for appraisal and determining the minimum acceptable price for advertising the timber for sale was by measurement of each tree in advance of advertising. The form used to tally individual trees contained a column for sampling frequency. The volume of each sample tree was expanded by this number to obtain actual volume. Red pine which was to have been sampled at a 1:1 frequency was entered mistakenly as 1:50. The result was an erroneous volume designation for red pine sawtimber of 56 MBF.

The timber sale contract included provision CT6.8 "Measuring Methods." This provision stated that the sampling interval used for red pine was 1:1. A sampling frequency of 1:1 indicates that every single tree was

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measured. Even though the purchaser is expected to visit the sale area, reliance on a Forest Service estimate such as this which purports to be highly accurate is reasonable. Moreover, the failure of a contractor to make a preliminary site investigation does not preclude relief. White Abstract Company, B-183643, August 8, 1975, 75-2 CPD 98.

In Crawford Print Company, B-182257, November 20, 1974, 74-2 CPD 273, we permitted modification of the contract price where there was an erroneous representation by the Government concerning the work to be done, quoting from B-159064, May 11, 1966, as follows:

"It has been held that where, in connection with a Government contract, the Government apparently negligently misstated a material fact and thereby misled the plaintiff to its damage, and where the plaintiff was negligent in not discovering the misstatement and ascertaining for itself what the facts were before submitting its bid, the position of the parties is that of persons who have made a mutual mistake as to a material fact relating to the contract and the court should therefore, in effect, reform the contract by putting them in the position they would have occupied but for the mistake. Virginia Engineering Co., Inc. v. The United States, 101 Ct. Cl. 516. The general rule is that a contract made through mutual mistake as to material facts may either be rescinded or reformed. See 12 Am. Jur., Contracts, Sec. 126 and 17 C.J.S., Contracts, Sec. 144. Further, it is an additional rule that mistake on one side and misrepresentation, whether wilful or accidental, on the other, constitute a ground for reformation where the party misled has relied on the misrepresentation of the party seeking to bind him. 76 C.J.S., Reformation of Instruments, section 29. Restitution in these circumstances may be obtained on the premise that it would be unjust to allow one who made the misrepresentation, though innocently, to retain the fruits of a bargain which was induced, in whole or in part, by such misrepresentation. See Williston on Contracts, Rev. Ed., sections 1500 and 1509 and the cases therein cited."

Applying the same rationale here, the contract may be modified as administratively recommended.

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It should also be noted that B-163065, January 19, 1968, cited by the agency, will no longer be followed to the extent that it is inconsistent herewith.

R. F. K. Miller
Deputy Comptroller General
of the United States