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

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B-153472

DEC 2 - 1965

Dear Mr. Secretary:

Reference is made to a letter dated August 21, 1964, with enclosures, from the Chief, Transportation, Loss, and Damage Division, Directorate of Adjudication, Air Force Accounting and Finance Center, concerning the claim of Southeastern, Inc., Tulsa, Oklahoma, for additional payment under contract No. AF 34(612)-281.

Southeastern, Inc., executed the contract on April 8, 1958, with the Department of the Air Force, together with certain mortgagees for the construction of 700 housing units under the Caphart Housing Program. The work was divided into four mortgage area projects which occupied approximately 300 acres of land located at the Altus Air Force Base, Oklahoma, and included the on-site utilities, streets and sidewalks. Construction was completed and final releases were executed by Southeastern at the closing of the mortgage areas during the summer of 1959, the last one being closed out on August 17, 1959. At that time Southeastern was paid \$10,732,599, which included increases for various changes required during the course of construction.

The release for mortgage area No. 10, in pertinent part, reads as follows:

"The undersigned, Eligible Builder of a Caphart housing project, the same being FHA Project No. 117-81010 Air #10, Altus Air Force Base, Oklahoma, constructed and erected under Housing Contract No. AF 34 (612)-281 hereby releases Altus AFB Housing No. Two, Inc., Mortgagor-Builder, and the Department of the Air Force from any and all claims against them or any of them arising under and by virtue of the said Housing Contract, except as stated in Exhibit 'A' attached hereto."

Releases for the remaining mortgage areas were similar except for the numbers pertaining to the mortgage areas and mortgage-builder corporations and the dates of execution. These releases were executed subject to reservations totaling \$318,000 as follows:

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	<u>Project Area 10</u>	<u>Project Area 11</u>	<u>Project Area 2</u>	<u>Project Area 12</u>
1. Sales taxes paid State of Oklahoma	\$30,000	\$30,000	\$30,000	\$60,000
2. Additional fees due	7,500	7,500	-	-
3. Claim for delay caused by acts of Government during construction	30,000	30,000	30,000	63,000
	<u>\$67,500</u>	<u>\$67,500</u>	<u>\$60,000</u>	<u>\$123,000</u>

On August 2, 1961, Southeastern filed an appeal with the Armed Services Board of Contract Appeals (ASBCA Nos. 7677 and 8614) from a decision of the contracting officer dated July 20, 1961, which denied 9 of 14 claims by the contractor in connection with the contract. Subsequently, the contracting officer disallowed the five remaining claims also. The contractor then filed a second notice of appeal with the Board on September 21, 1962. The two appeals were consolidated for consideration. The Board, in a decision dated September 23, 1963, allowed three of the contractor's claims (Nos. 4, 5, and 6). On February 8, 1964, Southeastern made the subject claim to the General Accounting Office in the total amount of \$265,973.77 covering four separate items identified as Claims 2, 8, 10, and 11.

Claim 2 is for reimbursement of sales and use taxes totaling \$117,079.77 assessed against the contractor by the State of Oklahoma. The Armed Services Board of Contract Appeals denied this claim on the basis that the standard tax clause in the contract placed the onus for payment of such tax on the contractor and that to set this clause aside on the grounds presented by the claimant would require the exercise of authority to reform the contract, which the Board lacks.

In connection with Claim 2, pertinent parts of the Invitation for Bids read as follows:

"11. The dollar amount of the acceptable bid will be divided, for mortgage purposes, in the same proportion as the FHA TOTAL ESTIMATED REPLACEMENT COST for each property or project as shown in each of the 4 Final Appraisal and Eligibility Statements issued by the Federal Housing Commissioner, copies of each being attached hereto for your information.

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"12. Bidders are advised that the maximum total of the insurable mortgages may not exceed the lesser of three items being (1) amount of the lowest acceptable bid, (2) FHA Total of the estimated replacement cost of the property or projects or (3) an average per family unit of \$16,500 less the estimated value of any usable utilities within the property or projects where owned by the Department or furnished by other than mortgage proceeds. Attention is invited to FHA's Final Appraisal and Eligibility Statements attached hereto. The bidder will be required to pay the fees and costs prescribed in such statements.

* * * * *

"16. Nothing in this Invitation for Bids shall be deemed to relieve the eligible builder of any liability for the payment of sales or use taxes properly levied.

* * * * *

"30. Bidders are cautioned that the numbered provisions of this Invitation for Bids are to be read in connection with the provisions of all other documents attached hereto or identified herein."

Paragraph 41(b) of the Housing Contract, a copy of which was attached to the Invitation for Bids reads as follows:

"Except as may be otherwise provided in this Housing Contract, the contract price includes all Federal, State and local taxes and duties in effect and applicable to this Housing Contract on the contract date, except taxes from which the eligible builder or the transactions or property covered by this Housing Contract are then exempt. Duties and Federal transportation taxes are included in the contract price unless otherwise specifically excluded."

Also attached to the Invitation for Bids were the Final Appraisal and Eligibility Statements for the four areas involved, which were prepared by the Federal Housing Administration in the name of the Federal Housing Commissioner. Schedule B of each contained a list of 13 items of costs and fees to be included by the bidder in his total bid. For 12 of the 13 items the Government provided an amount to be used by the bidder. However, the item numbered 11 was entitled "Sales Taxes (where

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applicable.)," and in the space provided for an amount opposite this item the Government had inserted an "X," rather than an amount.

The claimant has submitted evidence showing that it interpreted such omission of an amount for sales taxes, coupled with the insertion of an "X" in the space opposite item 11 on the Final Appraisal and Eligibility Statements, and the advice on the bid form that bidders would be required to pay the fees and costs prescribed in the Final Appraisal and Eligibility Statement, as constituting notice from the Government that sales taxes were not applicable and as such were not to be included in its bid. The claimant also alleges that, prior to signing the contract, it was told by the regional FEA Commissioner and the contracting officer that sales taxes were not to be included in the contract price.

Beginning in January of 1959, assessment was made by the State of Oklahoma for sales and use taxes. Southeastern informed the regional FEA Commissioner of the assessment, and by letter dated January 13, 1959, to the claimant, the regional FEA Commissioner stated the following:

"In reply to your question by telephone today pertaining to state sales tax on materials used in the construction of housing for the Air Corps on the Altus Air Force Base, please be advised sales tax is not taken into consideration in making our estimate of cost.

"In no instance of this kind have we ever included state sales tax, it being our understanding that such tax is not chargeable to the federal government and these houses are being built under contract for a branch of the federal government."

After unsuccessfully contesting the applicability of the taxes in the State courts, Southeastern was obliged to pay them in full. See Southwestern, Inc., v. Oklahoma Tax Commission, 351 P. 2d 739.

From our review of the available records we are convinced that the contractor did not include the State sales taxes in its bid price. Further, we are unable to conclude that the contractor acted unreasonably in interpreting the manner in which the Final Appraisal and Eligibility Statements were prepared as a representation by the Government that such taxes were not applicable to a contractor's purchases of supplies under the contract in question. In this connection, it should be noted that the total estimated replacement cost as shown on the Final Appraisal and Eligibility Statement constituted a ceiling on the maximum insurable mortgage, and on the maximum acceptable bid price. Since, it has now

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been determined that the taxes are applicable, it must be concluded that the placing of "X" as the amount of "Sales Taxes (where applicable)" in item 11 constituted a misrepresentation on the part of the Government, even though it was not deliberate.

Under the circumstances there is for consideration the principle of law that mistake on one side and misrepresentation on the other side, whether willful or accidental, constitutes a ground for reformation when the party deceived has relied on the misrepresentation of the other party. Where, as in the instant case, this occurs, restitution 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; Virginia Engineering Co., Inc., v. United States, 101 Ct. Cls. 516; Harrison Engineering and Construction Corporation v. United States, 107 Ct. Cls. 205. False information as to a matter of law, even if given in good faith, may constitute grounds for reformation. Stafford v. California Canning Peach Growers, 78 P. 2d 1150. Inasmuch as the contractor in the instant case relied on the Government's misrepresentation to his detriment, and the Government has benefited to the same extent, we are of the view such circumstances constitute a basis for contract reformation. 76 C.J.S., Reformation of Instruments, section 29.

Accordingly, we are today instructing our Claims Division to allow the claim of Southeastern Corporation for the amount of the sales taxes it was required to pay.

Claim 8 is based on the extra cost of substituting yellow pine boards for Kinderman processed roof sheathing because it was found after use of the sheathing that it was unsuitable. Claim 10 is based on extra work in connection with installation of an additional electrical receptacle in kitchens. Claim 11 is based on an alleged discrepancy in specifications with regard to medicine cabinets.

Paragraph 14(a) of the Housing Contract provides as follows:

"Upon completion and acceptance of all work required hereunder, the amounts due the eligible builder under this Housing Contract from mortgage proceeds will be paid by the mortgagor-builder. Final amounts shall be payable after the eligible builder shall have furnished the mortgagor-builder and the Department with a release, if required, of all claims against the Department and/or the mortgagor-builder arising under and by virtue of this Housing Contract,

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other than such claims, if any, as may be specifically accepted by the eligible builder from the operation of the release in amounts stated therein. All payments shall be subject to reduction for overpayments or increase for underpayments on preceding payments of the eligible builder. Any overpayments to the eligible builder shall, unless otherwise adjusted, be repaid upon demand." (Emphasis supplied.)

The claimant urges that the term "delays," as used in the exceptions set out in the releases it executed, was intended to encompass changes, so as to include the three claims in question thereunder. However, paragraph 1b(4) of the Housing Contract states that only such claims may be reserved as are specifically accepted. We find no specific reservations in the releases for changes. In fact, the record indicates that the attorney for claimant who drafted the releases stated as follows:

"I was just trying to reserve the rights of those people in the most general and unspecific way that I could. There was nothing in the way of a complaint or itemization of damage, it was a general reservation of rights."

See page 321 of the transcript of Proceedings before the Armed Services Board of Contract Appeals.

We therefore agree with the Armed Services Board of Contract Appeals that all of these claims are barred by the releases signed by the claimant.

Accordingly, Claims 8, 10, and 11 are denied.

Sincerely yours,

FRANK H. WEITZEL

Acting Comptroller General
 of the United States

The Honorable
 The Secretary of the Air Force

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