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

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MAY 11 1966

Dear Mr. Secretary:

Reference is made to a letter dated April 27, 1966, with enclosure, from the General Counsel, Office of the Chief of Engineers, concerning an error made by Hanley Dawson Chevrolet of Detroit, Michigan, in submitting its bid under invitation for bids No. CIVENG-20064-66-35, as a result of which a contract was awarded to the company. AB409524

The contract covers the procurement of a new step-van truck for the U.S. Army Engineer District, Lake Survey, and was awarded March 17, 1966, to the company by the U.S. Army Engineer District, Detroit, as the procuring agency, in the amount of $4,682.34.

In the contracting officer's findings of fact it is reported that, prior to the issuance of the invitation, representatives of the U.S. Lake Survey District, in an effort to promote competition for the motor vehicles to be advertised, visited the contractor's sales office and requested and received a written quotation on the step-van truck of $4,682.34, on which it was expressly stated that Federal excise tax, Michigan sales tax and license fees were excluded. Sales to the Government and its agencies are stated to be exempt from the Michigan sales tax on tangible personal property as are motor vehicle license fees (Michigan Statutes Annotated, Sections 7.524 and 9.1916). It is reported that the quotation did not include Federal excise tax; although applicable, because the contractor was advised by a representative of the U.S. Lake Survey District that such tax was not applicable to Government purchases of motor vehicles. It was learned also that this contractor had little knowledge concerning Government procurement.

Because of the disparity between the bid of the contractor and the bid of the only other bidder in the amount of $6,036.94, verification of its bid was requested of Hanley Dawson by telephone on March 17, 1966. It is reported that while the contractor verified its bid price, it was evident that this was only a verification of the previously quoted price to the requesting agency which was based on the misrepresentation by a representative of that district as to the applicability of the Federal excise tax. Prior to award of the contract the Detroit District as procuring agency was not aware of the incorrect information given to the contractor concerning exclusion of the Federal excise tax.

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Upon receipt of the award the contractor advised the contracting officer by telephone on March 22, 1966, that the Federal excise tax was not included in its bid and confirmed the conversation by letter dated March 23, 1966. Subsequently, the contractor furnished a sworn statement dated March 31, 1966, alleging that due to misinformation from a representative of the U.S. Lake Survey District, it had mistakenly excluded the Federal excise tax in the amount of $261 from its bid. A copy of the quotation given to Lake Survey District showing the excluded taxes was enclosed with the statement.

The contract contains the standard clause entitled "Federal, State, and Local Taxes (Aug. 1961)," required by ASPR 11-401.1(c)(1) providing inter alia that, "except as may be otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties." The contractor has made no effort toward performance and is not claiming any performance costs. It requests correction of the contract price. No payment has been made under the contract and it has been informally ascertained, on the basis of information from the Internal Revenue Service, that the amount stated as Federal excise tax, $261, is a correct representation of the Federal excise tax due on this purchase, payable at the time of sale. On the basis of the reported facts, the Office of the Chief of Engineers joins the contracting officer in recommending reformation of the contract by increasing the contract price to include the Federal excise tax.

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

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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. Accordingly, it is concluded that the contract properly may be reformed to include the amount of $261, the amount of the applicable Federal excise tax on the transaction as administratively recommended.

The submitted papers are returned herewith.

Sincerely yours,

FRANK H. WEITZEL

Assistant Comptroller General
of the United States

Enclosures

The Honorable
The Secretary of the Army