

DIGEST - L-Cont A

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DECISION



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

FILE: B-180071

DATE: February 25, 1974

MATTER OF: Rust Engineering Company

**DIGEST:** Where representative of Department of Interior at prebid meeting innocently misrepresented that Pennsylvania sales and use taxes were not applicable to Federal project for building of a coal gasification plant, and bidder, relying on this, submitted bid not including any sales or use taxes, reformation of contract is allowable for the reimbursement of these taxes since there was a mutual mistake of law, and contractor is entitled to restitution on grounds of unjust enrichment.

On July 10, 1972, invitation for bids (IFB) No. KO133003, was issued by the Bureau of Mines for construction of a coal-to-gas prototype pilot plant. Eight bids were received and were opened on October 10, 1972. The contract was subsequently awarded to Rust Engineering Company, the low bidder.

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At the prebid meeting held on August 3, 1972, to answer questions concerning the subject solicitation, the issue of the applicability of Pennsylvania sales and use taxes was raised and discussed as follows:

"MR. LLOYD: My name is H. M. Lloyd. I am with Rust Engineering Company.

I have one question about sales tax. Has the Government or the Lummus Company had any conversations with the State of Pennsylvania about the exemption from sales and use taxes for this job?

MR. METHENY: I believe Mrs. Shapert can answer that.

MRS. SHAPERT: Being a federal agency, we are exempt from payment of any sales tax, and we can provide you with an exemption certificate. Now, Federal Tax, we are required to pay. But Pennsylvania State Tax, is that what you are referring to?

MR. LLOYD: Yes.

MRS. SHAPERT: We are exempt."

Rust Engineering relied upon the above representation in preparing its bid, and after award, in returning a signed copy of the contract, it noted that "the contract price does not include any sales or use taxes as stipulated at the pre-bid conference held August 3, 1972." At the same time, item 5 of the General Conditions applicable to the contract provides that "except as may be otherwise provided in this contract," contract price includes all applicable State taxes.

A Blanket Exemption Certificate was forwarded to Rust Engineering on February 5, 1973, but on February 21, the contractor advised the Government that it had determined that it may not be entitled, under Pennsylvania law, to use the exemption of the ultimate customer for which it is performing the contract and hence, may be required to pay sales and use taxes upon the property it consumes. Several days thereafter, Rust Engineering contacted a representative in the Legal Department of the Pennsylvania Department of Revenue who indicated that, in his opinion, Rust Engineering would be liable for payment of these taxes.

There can be no question but that the parties to this contract entered into the agreement under the mistaken expectation that the Pennsylvania sales and use taxes would not be applicable to contract performance. From our review of the available records we are convinced that the contractor did not include the State sales and use taxes in its bid price.

The Department of Interior has taken the position that under these circumstances, the contract should be reformed as follows to allow for reimbursement of taxes properly payable by Rust Engineering:

"Sales and Use Taxes Paragraph 5 of the General Conditions is amended by the addition of the following:

h. State and local sales and use taxes are not included in the contract price. State and local sales and use taxes will be reimbursed to the Contractor to the extent that such taxes are allowable under FPR 1-15.205-4. The Contractor should promptly request instruction from the Contracting Officer if it is felt that the Contractor is entitled to exemption from taxes or if it is felt that taxes are illegal or erroneously assessed."

*Addressed, etc,  
P. 696 omitted*

Reformation is properly available in cases where an innocent misrepresentation of the law by one party is reasonably relied upon by the other party to its detriment, and restitution may be obtained on the premise that it would be unjust to allow one who made the misrepresentation, although innocently, to retain the fruits of a bargain which was induced, in whole or in part, by such misrepresentation. See 3 CORBIN ON CONTRACTS §618 (1960 ed.); 12 WILLISTON ON CONTRACTS §§1500, 1509 (3d ed. 1970).

We have held that reliance is reasonable where a bidder has had no occasion to acquire prior knowledge of the applicability of the State sales and use taxes in question to Federal construction projects. B-169959, August 3, 1970. In this regard, we note that the Pennsylvania sales and use tax revisions had only recently been enacted at the time of the misrepresentation and reliance thereon, and that the contractor was not based in Pennsylvania but rather in Alabama, so that it was unlikely that it had gained any prior familiarity with the new law. Under these circumstances, it does not seem to us unreasonable that Rust Engineering chose to rely upon the Government's representations with respect to applicability of the Pennsylvania sales and use tax.

Moreover, it has been held that mere negligence on the part of a contractor which does not amount to breach of a legal duty is no bar to reformation of a contract. Harrison Engineering & Construction Corp. v. United States, 68 F. Supp. 350, 352 (Ct. Cl. 1946). Contract reformation so as to place the parties as nearly as possible in the position they would have occupied but for the mistake is therefore indicated.

Accordingly, we find no reason to object to the proposed reformation to contract number K0133003. We note that this conclusion is consistent with prior decisions of our Office that concerned similar fact situations. See B-153472, December 2, 1965; B-159064, May 11, 1966; B-159066, May 6, 1966; and B-169959, August 3, 1970.

*[Signature]*  
Deputy Comptroller General  
of the United States