

DOCUMENT RESUME

03288 - [A2293411]

[Request for Reformation of Purchaser Road Credit]. B-188867.  
August 10, 1977. 4 pp.

Decision re: SWP Plywood Co.; by Robert F. Keller, Deputy  
Comptroller General.

Issue Area: Federal Procurement of Goods and Services;  
Reasonableness of Prices Under Negotiated Contracts and  
Subcontracts (1904).

Contact: Office of the General Counsel: Procurement Law I.  
Budget Function: General Government: Other General Government  
(806).

Organization Concerned: Forest Service.

Authority: 39 Comp. Gen. 363. 39 Comp. Gen. 660. 39 Comp. Gen.  
664. B-189128 (1977). B-186775 (1976). B-183926 (1975).

The petitioner requested reformation of the purchaser road credit for road construction set out in a timber sale contract to reflect the cost data in effect at the time of the award rather than at the time of the bid because of the unusual delay in award of the contract. The original awardee assigned the contract to the petitioner through a third party agreement approved by the agency. Neither the original awardee nor the petitioner requested a change in the purchaser road credit at the time of the agreement. Reformation of the purchaser road credit would not be proper if the timber sale contract and the third party agreement expressed the actual intent of the contracting parties. (Author/SC)

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**DECISION**



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

**FILE:** B-188867 **DATE:** August 10, 1977

**MATTER OF:** SWF Plywood Company

**DIGEST:**

Reformation of purchaser road credit is not proper where timber sale contract and third party agreement express actual intent of contracting parties.

SWF Plywood Company (SWF) requests reformation of the purchaser road credit for road construction set out in the Thompson timber sale contract No. 020540, which pertains to the sale of timber on the Klamath National Forest in California, to reflect cost data in effect at the time of award rather than at the time of bid because of the unusual delay in making the award of the contract. SWF made a similar request to the Forest Service which was denied.

The advertised purchaser road credit was \$559,366. This is the total amount which the purchaser of timber could apply as a credit against its purchase price for constructing access roads required by the terms of the contract.

For the reasons stated below, the requested reformation of the purchaser road credit would not be proper.

On November 29, 1974, the Forest Service advertised the Thompson timber sale contract. The Forest Supervisor subsequently issued an amendment to the timber sale prospectus which stated as follows:

"14. Special Information

"K. The Sierra Club has filed an appeal requesting administrative review by the Regional Forester of my decision to sell the Thompson Timber Sale. As a consequence, no action will be taken on awarding the sale until 15 days after the date of the Regional Forester's decision, but no later than 2/15/75. Bid opening date and all other considerations of sale remain as stated in the advertisement dated 11/29/74."

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On December 31, 1974, the Forest Supervisor conducted an oral auction for the Thompson timber sale. Eight bidders participated in the auction. Sierra Pacific Industries (Sierra) was the high bidder.

Resolution of the Sierra Club appeal delayed the award of the contract until January 15, 1976. Because of the delay in making the award, Sierra requested that the contract termination date be changed from December 31, 1980, to December 31, 1981. The Forest Supervisor granted the request. Sierra, however, did not request any change in the purchaser road credit.

On January 22, 1976, the Forest Supervisor approved a third party agreement, whereby Sierra's contract was assigned to SWF. Neither Sierra nor SWF requested a change in the purchaser road credit.

The Forest Service states that the purchaser road credit should not be reformed. According to the Forest Service, Sierra was aware of the effect of the delay in awarding the contract. The Forest Service and Sierra considered the extension of the contract termination date to be adequate recognition of the delayed contract award. Also, timber purchasers commonly delay logging and road construction for more than 1 year after bidding date.

In addition, the Forest Service points out that road construction costs are based on independent estimates prior to bid date and there is no advertised commitment or contractual provision to adjust the purchaser road credit, either upward or downward, based on actual construction costs. Thus the Forest Service argues that by entering into the third party agreement, SWF agreed to complete the performance of the Thompson timber sale contract in accordance with all of its terms, including the purchaser road credit, which SWF did not question prior to executing the third party agreement.

In response to the Forest Service's reasons for recommending against reformation of the purchaser road credit, SWF states in substance that it does not know why Sierra did not request an increase in the purchaser road credit, considering the unusual delay in making award. SWF did not request an adjustment in the purchaser road credit before it executed the third party agreement because there was insufficient data concerning road construction costs. However, SWF evidently realized after it had signed the third party agreement that the purchaser road credit presented a problem.

SWF also contends that the costs incident to delay in logging and road construction by timber purchasers are possibly taken into consideration in submitting a bid. However, where, as here, the delay is caused by the Government and is unexpected, the result is entirely different.

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SWF also states that road construction costs increased during the time that Sierra was precluded from constructing the required roads. The unusual delay experienced by Sierra is the basis of its request for contract reformation.

In Coos Head Timber Company, B-189128, July 15, 1977, which involved a contract for the purchase of timber and the construction of an access road, we found that it would be proper to reform the contract because the contract was based on an inadvertent defect in the prospectus, and the contract did not reflect the intent of the parties. In that decision, we stated in pertinent part that:

"\* \* \* A contract may be reformed where it is shown that by reason of a mutual mistake the contract does not reflect the actual agreement of the parties, and it can be established what the contract was or what it would have been if a mistake had not been made. 39 Comp. Gen. 363 (1959); B-183926, June 19, 1975, 75-1 CPD 373.

"It is clear from the record before us that because of a mutual mistake of fact concerning the accuracy of the prospectus, the existing contract between the parties here is not the intended one."

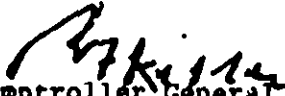
Edward Hines Lumber Company, B-186775, October 7, 1976, 76-2 CPD 322, also involved a request for reformation of a timber sale contract. In that case, the Forest Service inadvertently required a higher than normal slash disposal deposit. A slash disposal deposit is an amount of money deposited by the purchaser of national forest timber which is equal to the estimated cost to the Government of disposing of brush and other debris resulting from logging operations. Hines did not question the amount of the required deposit until well after the award of the contract. In considering the request for reformation, we observed that:

"[t]he purpose of reformation is not to make a new agreement between the parties, but, rather, to establish the true existing one; that is, to make the contract express the real agreement of the parties. In order to justify reformation of any instrument, the mistake must have been in drawing the instrument and not in making the agreement itself. The mistake must occur in reducing to writing the contract upon which the parties agreed. Reformation is not authorized even if it be clearly shown that the parties would have come to a certain agreement had they been aware of the actual facts. See section 1548, Williston on Contracts (Rev. Ed.), 39 Comp. Gen. 660, 664 (1960)."

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We went on to find that the contract as written should not be reformed, unless the Government received additional consideration, since the contract embodied the agreement of the parties.

Based on the record before us, we must conclude that the Thompson timber sale contract, as executed by the Forest Service and Sierras, and the third party agreement, as executed by the Forest Service and SWF, express the actual intent of the contracting parties. No mutual mistake has been alleged or shown. Consequently, reformation of the purchaser road credit as proposed by SWF would not be proper.

  
Deputy Comptroller General  
of the United States