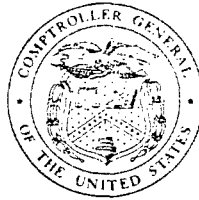


PL-1

DECISION



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

9680

FILE: B-193399

DATE: April 5, 1979

MATTER OF: Sierra Pacific Industries--Reconsideration]

[REQUEST for

DIGEST:

Bidder is justified in placing reasonable reliance on estimates stated in purchaser road credit portion of timber sale contract; if, as here, agency negligently states unreasonable estimate for road clearing, mutual mistake as to accuracy of estimate exists and reformation of contract to allow additional compensation for doing required clearing work is proper. Prior denial of claim is reversed.

Sierra Pacific Industries (Sierra) requests reconsideration of our decision in Sierra Pacific Industries, B-193399, December 5, 1978, 78-2 CPD 390, in which we denied the firm's claim of \$13,804 for road-clearing work done in connection with Cook Timber Sale under Department of Agriculture contract No. 017753. The basis of Sierra's request for reconsideration is that the legal principle of mutual mistake allows reformation of the contract and payment of the claim.

As indicated in the previous decision, Sierra was required to construct certain roads for hauling logs as part of the timber sale. The purchaser road credit limit for road No. 28N02 was \$127,902, of which \$6,960 was allotted for clearing land which the contract specified as being an estimated six acres. When Sierra constructed road No. 28N02, it alleged that it cleared 17.9 acres, resulting in costs exceeding the allotted amount for clearing by \$13,804. The agency does not dispute that the contract specified an estimated six acres for clearing, nor does it dispute that this amount was an error--apparently typographical.

In initially denying Sierra's claim, we pointed out that the prospectus for the timber sale under item 7 put bidders on notice that estimates were not guaranteed and

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that the contract contained detailed specifications for road No. 28N02. Based on this admonition and "since this figure [approximate acreage for clearing] could easily be determined from these specifications" we held that reformation was not proper.

The decision was in accordance with our decision in B-176649, January 24, 1973. In that case we were asked to grant reformation of a timber sale contract because a clerical error by the agency resulted in the road construction credit being reduced from \$50,560 to \$36,230. We declined to find reformation an appropriate remedy by pointing out that common industry practice was for bidders to examine all contract forms and appraisal forms as well as to physically inspect the timber sale site before submitting bids. Thus, we concluded that the amounts for road credits were treated simply as estimates and not solely relied on by bidders.

However, a recent decision of the Court of Claims indicates that reformation would be appropriate under the circumstances of this case.

In Timber Investors, Inc. v. United States, No. 61-75 (Ct. Cl. November 15, 1978), the court had occasion to consider the legal principle of mutual mistake in regard to the road construction aspect of a timber sale contract. The court noted that a mutual mistake justifying reformation would exist where the purchaser and the Forest Service believed that the estimates were reasonably accurate and where, in fact, performance showed unreasonably inaccurate estimates due to a mistake on the Forest Service's part. There is a mutual mistake because both parties are mutually mistaken as to the accuracy of the estimates. This is so, noted the court, even though the prospectus warned potential bidders that estimates were not guaranteed because the Government is not insulated from liability where contract estimates are grossly erroneous due to negligence on the Forest Service's part. See Timber Investors, Inc. v. United States, supra., note 4 at page 5, and citations therein.

In concluding its discussion of the legal principle of mutual mistake as it relates to road construction estimates, the court stated:

" * * * under the purchaser road credit provision the Forest Service estimates the cost of the road construction work to be performed. Contractors have no say in the matter. Successful purchasers of Forest Service timber must perform the road construction work called for by the timber sale contract at the estimated cost price set forth by the Forest Service. Under these circumstances, the contract representation * * * would lead reasonable and prudent bidders to view the * * * contract work and cost estimates, as reliable and reasonably accurate. It would also serve to justify reliance by a timber purchaser and/or road contractor on such estimates as being reasonably accurate." Id. at page 10.

Thus, the court stated that reliance by the bidder on the Forest Service's estimates is justified and that an egregious error, as here, in the estimates will support reformation. See also Morgan Roofing Company, 54 Comp. Gen. 497 (1974), 74-2 CPD 358, in which reformation was allowed where prior to award a Government representative indicated to a roofing contractor that a certain roof was not included in the work to be performed even though the specifications in the solicitation, which was in the contractor's possession, clearly showed that work on this roof was to be part of the contract.

Accordingly, the prior decision is reversed and the claim may be paid upon verification by the agency of the costs incurred by reason of the excess acreage which was cleared. However, payment should be limited to an amount which would not result in displacement of the second high bidder.

T. F. K. 1144
Deputy Comptroller General
of the United States