PL-1

DECISION

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

10,834
10,839

FILE: B-193788 **DATE:** July 24, 1979

MATTER OF: McDonald & Little DLG 2262
[Request for Reformation of Contract Modification]

DIGEST:

Contract modification may not be reformed to increase contract price on basis of mutual mistake because of contractor's negligence in failing to inform agency of two items of incurred costs during negotiation and prior to execution of modification.

McDonald & Little (M&L) requests the reformation of contract modification No. 6 under Consumer Product Safety Commission contract No. CPSC-C-76-0065 to increase the price of such modification by $10,092. The request for reformation is based upon an asserted mutual mistake in the negotiation of the modification because of the failure to consider two costs which had been incurred prior to the execution of the modification.

For the reasons indicated below, we will not grant reformation since M&L has not shown that a mutual mistake was made to justify such relief.

The Consumer Product Safety Commission (CPSC) issued request for proposals No. CPSC-P-76-612 for the "planning and development of a nationwide public service advertising campaign on product safety awareness and education" on October 23, 1975. M&L was the successful offeror and was awarded the contract on June 28, 1976. The contract is a cost-plus-fixed-fee (CPFF) type contract and, as originally executed, M&L was to be reimbursed a total of $358,880 (estimated cost of $334,880 plus fixed fee of $24,000). However, during the course of performance, six modifications were executed to reflect changes to the original requirements. As of modification No. 5 (effective August 25, 1977), the amount to be paid M&L had risen to $459,652.31 (estimated cost of $434,754.49 plus fixed fee of $24,897.82). The alleged mistake which forms the basis for M&L's claim occurred during the negotiations for modification No. 6.

These negotiations were conducted during August 1977. The modification was conditionally executed by M&L on October 12, 1977, was finally executed on November 17, 1977, by CPSC, and contained the following language:

> "The ceiling established for total direct labor and indirect costs is hereby deleted. In consideration for deletion of this ceiling, the Contractor understands and agrees that (1) no costs nor fee shall be billed for by the Contractor or reimbursed by the Government in excess of the amount of $487,652.31 and that (2) all work specified in Modifications Nos. 1 through 6 shall be completed."

According to M&L, the purpose of this modification was "to establish a final estimated cost whereby M&L would be reimbursed for all costs incurred in performing the work, as amended, and to establish the corresponding fixed fee." M&L questions whether a fixed ceiling was negotiated. M&L submitted certain documents to CPSC in August 1977 which at the time M&L believed included all costs which had been and would be incurred in the performance of the contract. M&L maintains that two cost categories which had been necessary for the performance of the contract were inadvertently omitted from these documents. The first item was for the cost ($7,300) of a research tracking study performed by an ~~M&L~~ subcontractor which M&L says had been completed and submitted to CPSC in August 1977, but was not billed to the agency until late September 1977. The other item omitted ~~from M&L's cost estimates~~ was for talent and travel expense costs ($2,792) for the individual acting as the spokesperson for the CPSC "Home Safe Home Campaign." M&L claims that both these costs were in effect approved by CPSC before August 1977 and were only left out of the negotiations because both parties were unaware that M&L had failed to include them in its cost estimates. Based on this, therefore, M&L argues that there has been a mutual mistake which should be corrected by reforming the contract to increase the estimated cost by $10,092.

CPSC states that its intent in negotiating modification No. 6 was not, as M&L indicates, to reimburse M&L for all its costs in performing the contract plus establish the appropriate fixed fee, but rather to: (1)

negotiate and fund an overrun of the contract; (2) release M&L from a ceiling amount of $114,055.30 for total direct labor and indirect costs; and (3) as consideration for the release of this ceiling, negotiate a new ceiling for the entire contract (later fixed at $487,652.31) beyond which amount M&L would bear the risk of any additional costs. In support of this position, CPSC notes the above-quoted language from modification No. 6.

Having stated its intent in negotiating modification No. 6, CPSC presents a number of reasons for denying the request for reformation. First, it argues that, contrary to both commercial and Government contract principles, reformation would require the Government to relinquish a right (the ceiling on the total contract price) which it had obtained in negotiation as consideration for relinquishing another right (the ceiling on direct labor and indirect costs). Further, CPSC states that if a new ceiling had not been negotiated, M&L would have incurred approximately $25,000 in direct labor and indirect costs which the Government would not have been required to reimburse. CPSC contends, therefore, that before modification No. 6 was negotiated M&L faced the likelihood of suffering an actual loss on the contract, but now, since the parties have agreed to the modification, denial of the requested relief will only have the effect of reducing the amount of M&L's profit.

CPSC also argues that based on the documents M&L submitted to show its estimated costs, the agency had no reason to believe that M&L had failed to include the cost of the subcontractor tracking study or part of the talent and travel expense costs. In the agency's opinion, the burden is on the contractor ~~in this situation,~~ not the Government, to insure that it has accounted for all its costs. CPSC also denies M&L's contention that had both parties been aware of the omissions CPSC would have readily agreed to their inclusion in the estimated cost established by modification No. 6. CPSC maintains that this is mere conjecture on M&L's part since had M&L proposed $10,000 more in costs CPSC would have most likely taken a harder negotiation position. Lastly, CPSC also rejects M&L's argument that had the

parties intended M&L to assume the risk for any and all costs beyond the modified contract price the modification would have stated so in clear and unambiguous language. In the agency's opinion, such language does appear on page 6 of the modification where a ceiling of $487,652.31 is established for the completion of all work specified in modifications Nos. 1 through 6.

From the facts presented, it is apparent that a mistake has been made. However, not every mistake in the formation of a contract is a basis for reformation. See 17 Am. Jur. 2d Contracts 146 (1964). The purpose of reformation is to make a mistaken writing conform to the agreement which the parties actually made; it is not available for the enforcement of terms to which one of the parties never consented. Blake Construction Company, Inc., B-187386, November 15, 1976, 76-2 CPD 414. Reformation of a contract is authorized where by reason of mutual mistake the contract does not reflect the actual agreement of the parties, and it can be established what the agreement, was, or would have been, had the mistake not been made. 39 Comp. Gen. 660 (1960); 30 Comp. Gen. 220 (1950); ACTION Request for Reformation of Contracts, B-190620, January 6, 1978, 78-1 CPD 13; Reformation of Contract, B-183926, June 19, 1975, 75-1 CPD 373.

Although M&L questions whether a fixed ceiling was established and argues that there has been a mutual mistake, the above record supports CPSC's denial. The record indicates that modification No. 6 clearly established a ceiling, and that CPSC reasonably expected the negotiations to encompass all of M&L's estimated costs. Furthermore, M&L has admitted that it was unaware itself at the time it submitted the documents outlining its cost estimates that the two cost categories in question had not been included. Thus, other than its belief that at the time negotiations were conducted CPSC was or should have been aware that these two costs of performance were not included in the estimates, M&L has not presented any evidence which shows that CPSC had actual or constructive knowledge that the two items were omitted from the cost estimate. In this regard, we attach significance to the agency's notation of the relatively small

amounts of the omitted costs as opposed to applicable contract costs--$7,300 vs. $394,556 in costs to date, and $2,792 vs. $73,000 in costs for final campaign. We also note the length of time which the contents of the allegedly deficient modification were known to M&L and not subjected to question. See Blake Construction, Company, Inc., supra.

In light of this, we believe that modification No. 6 reflects precisely the agreement which the parties intended, and that the failure to include the two additional cost items in the agreement was due entirely to M&L's own negligence. See Blake Construction Company, Inc., supra. Consequently, M&L's claim may not be allowed.

R. F. Keller

Deputy Comptroller General
of the United States