

Form - L - Cont



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

27

B-169959

AUG 3 - 1970 /

Dear Dr. Paine:

Reference is made to a letter (your reference KDA-2) dated June 1, 1970, from the Director of Procurement, forwarding to our Office a documented file relative to the claim of Western Gear Corporation for ABW09528 a \$38,343.78 increase in price under contract No. NAS1-3161(C). The amount claimed represents sales and use taxes paid by the contractor to the Commonwealth of Virginia in connection with the work performed pursuant to the contract; the record shows that the bid upon which the contract was awarded included no allowance for Virginia sales and use taxes.

In response to an invitation issued on February 2, 1968, by the Langley Research Center, Hampton, Virginia, the bids of Western Gear and three other concerns were opened on April 9, 1968. Western Gear's bid was the lowest received and that company was awarded the subject contract on May 9, 1968.

Near the top of the first page of the invitation for bids the following parenthetical language appeared in boldfaced type: "(CONSTRUCTION CONTRACT)." The work covered by the invitation and the resulting contract was described at the bottom of page 1 as follows:

"Construction of Buildings, Test Section and Auxiliaries for the V/STOL Transition Research Tunnel in the West Area of Langley Research Center, Langley Station, Hampton, Virginia, in accordance with NASA Specification L-2473 dated February 2, 1968 and drawings listed therein. The job includes a test section with removable walls, ceiling and floor section, boundary layer exhaust system, moving ground board, and model support system; reentry lip; insulated test chamber and control room; model preparation area; mechanical and electrical equipment room; instrumentation and power wiring; mechanical and electrical utilities; dismantling and demolition of existing wind tunnel."

Also appearing on the first page was this information to bidders:

"This purchase is exempt from Virginia and local retail sales and use taxes in accordance with 61-45(a) of the

B-169959

Virginia Retail Sales and Use Tax Rules and Regulations dated August 1, 1966. Department of Taxation Form ST-12 must be on file with the vendor; if Form required so indicate on bid form."

We are advised that this representation is erroneous in that the cited Virginia tax regulation applies only to purchases of tangible personal property. The regulatory provision properly applicable in the instant circumstances appears to be section 1-27, which states in part:

"§ 1-27 Contractors.--Any person who contracts to perform construction, reconstruction, installation, repair, or any other service with respect to real estate or fixtures thereon, and in connection therewith to furnish tangible personal property, is deemed to have purchased such tangible personal property for use or consumption by him. This means that tangible personal property incorporated in real property construction which loses its identity (status) as tangible personal property is deemed to be tangible personal property used or consumed by the contractor. Any sale, distribution, or lease to or storage for such a contractor is deemed a sale, distribution, or lease to or storage for the ultimate consumer (the contractor), and not for resale by the contractor; and the dealer (supplier) making the sale, distribution, or lease to or storage for such a contractor is obligated to collect the tax from him. No sale to such a contractor by his supplier is exempt on the ground that the other party to the contract is a governmental agency, a non-profit school, or a non-profit hospital, or on the ground that such contract is a cost-plus contract, or on any other ground.
* * *."

There is disclosed by this record no basis to believe that the Government's misrepresentation as to the applicability of the Virginia taxes was made with intent to deceive, or that it was anything other than innocent and inadvertent.

On May 10, 1968, the contracting officer executed Form ST-12, the Sales and Use Tax Certificate of Exemption. This document states in relevant part:

"The Virginia Retail Sales and Use Tax Act provides that the Virginia sales and use tax shall not apply to

B-169959

tangible personal property for use or consumption by this State, any political subdivision of this State, or the United States. * * *

"The undersigned, for and on behalf of the governmental agency named below, hereby certifies that all tangible personal property purchased or leased from the above named dealer on and after this date will be for use or consumption by a governmental agency, that each such purchase or lease will be supported by the required official purchase order, and that such tangible personal property will be paid for out of public funds: (Check proper box below.)

* * * * *

3. Tangible personal property for use or consumption by the United States."

By letter dated May 29, 1968, Western Gear advised the contracting officer's representative that it had become aware of the possibility that the company would in fact be liable for Virginia sales and use taxes. On June 13, 1968, the contractor informed the procurement personnel at Langley that the State taxes were indeed applicable to materials and supplies used in performing the subject contract. Additional correspondence followed, including an affidavit by an official of the contractor which, among other things, represented that "the sole cause for the failure to include liability for such taxes * * * resulted from the belief that in accordance with the Invitation for Bids, no such amounts would be payable."

The contractor, by letter of July 29, 1969, formally requested that its contract be modified to increase the price by the above-stated amount. The contracting officer forwarded the matter to the National Aeronautics and Space Administration (NASA) Headquarters on September 29, 1969, recommending denial of the claim. In the opinion of the contracting officer, the contractor should have been aware of the applicability of the State tax to purchases of materials for use in connection with the construction contract. By memorandum of November 20, 1969, the Office of the General Counsel referred the matter back to Langley for further consideration of the points raised in the memorandum. On April 15, 1970, the matter was again forwarded to NASA Headquarters, this time with the recommendation that the case be submitted to our Office for decision. The Chief Counsel

B-169959

of the Langley Research Center expressed doubt that the contractor's reliance on the Government's innocent misrepresentation was justifiable.

The matter has been referred to us for consideration, presenting the question, in the words of the Director of Procurement, "whether it was reasonable for the contractor to rely on the erroneous provision." The Director also expressed the following opinion:

"Although the question in this case is a close one, our recommendation on the balance is against allowance of the claim, on the ground that the inapplicability of the provision that the 'purchase' was exempt from taxes should have been apparent to this experienced contractor."

There can be no question but that the parties to this contract entered into the agreement under the mistaken expectation that the Virginia sales and use taxes would not be applicable to the contract performance. Similarly, we do not doubt that the situation is properly characterized as one involving a mutual mistake of law caused by the Government's misrepresentation. It is frequently said that equitable relief, by way of reformation or otherwise, is not available to remedy a mistake of law. The policy basis is found in the obligation of each person to know the law--hence the maxim: ignorantia juris non excusat. Textual criticism has been leveled at this rule. See generally the discussions of mistake of law as a basis for equitable relief in 27 Am. Jur. 2d, Equity, sections 36-43, and Corbin on Contracts, sections 616-621 (1960).

We believe that the following statement from section 618 of Corbin on Contracts is applicable in the present circumstances:

"If the mistake of law that induced the making or the performance of a contract by one party was caused by a fraudulent misrepresentation of the law by the other, or by his innocent misrepresentation if the relations of the parties are such as to make it reasonable for the one to rely upon the representations of the other, the appropriate relief by rescission, restitution, or reformation will be given to the injured party. Doubtless, this statement represents a variation from older views and earlier decisions; but it is believed to be in harmony with modern notions of justice and with the trend of recent decisions."
(Underscoring added.)

As noted in the November 20, 1969, memorandum from the Office of the General Counsel to the Langley Research Center, there are two decisions of our Office which are in accord with the views of Professor Corbin: B-159066, May 6, 1966, and B-153472, December 2, 1965. The memorandum includes the observation that a court might well grant relief in this case "if the contractor can successfully assert that it reasonably relied upon the representations of the Langley Research Center."

It is necessary to consider the degree of proof generally required by a court before it will decree reformation of a contract. To quote from Corbin, section 615:

"Reformation will not be decreed unless the facts required for such a decree are proved convincingly and to the entire satisfaction of the court. A mere preponderance of the evidence is said not to be enough. * * *."

This requirement for a higher degree of proof in cases where reformation is requested was not the subject of discussion in either of our two decisions cited above.

The administrative record in this case is not dispositive of the question whether Western Gear's reliance on the erroneous representation in the invitation for bids was reasonable under the circumstances. In our view, reliance is reasonable where a bidder has no reason to question the representation of the Government that a particular state tax is not applicable to the work advertised. Cf. Harrison Engineering and Construction Corp. v. United States, 107 Ct. Cl. 205 (1946). In this connection, Western Gear's previous experience with Federal construction contracts in Virginia appears to be a factor. It is to be noted that the contractor has been described to us as "experienced." Further, although Western Gear has its executive offices in California, its construction department was primarily responsible for bidding on the project and performing the resulting contract; the record indicates that the contractor's construction department is located in Virginia.

In order to ascertain the degree of Western Gear's experience with construction projects in Virginia, we directed an inquiry to the company. We received the following response in a letter dated July 10, 1970:

"This is to verify that the Western Gear office in Hampton, Virginia is a field office set up solely to handle the V/STOL Project for NASA and will be discontinued with the termination of the project. At no time has it been used

