



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

316

B-159066

MAY 6 1966

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Dear Mr. Secretary:

Reference is made to letter ENGCC-C of April 25, 1966, from the General Counsel, Office of the Chief of Engineers, requesting that the contracting officer be authorized to reform contract DA-20-064-CIVENG-64-140 with McManara Construction of Manitoba Limited to provide for reimbursement of the Michigan use tax which the State taxing authority has advised the contractor will be assessed against it in connection with its performance on the subject contract.

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There was included in the April 20, 1964, invitation for bids upon which the contract is based a statement as follows:

"Michigan Use Tax. Contractors' purchases of materials which will be incorporated into the real estate or completely consumed in the performance of a construction contract for the Federal Government are exempt from the Michigan Use Tax."

The statement was included in the invitation by direction of DA circular 715-2-30 of February 18, 1964. The reason for the instructions to use the statement was that the Michigan courts had decided that the Michigan use tax was an unlawful discrimination against Federal construction. However, in May 1964, which was after the invitation was issued and before an award was made, the latter having been accomplished on June 30, 1964, the State legislature amended the use tax statute, effective August 28, 1964, to apply without discrimination to the United States and to discontinue the tax on materials incorporated in the work, although continuing it on materials consumed in performance of the contract. The contracting officer was not advised of the changes in the tax law. Thus the statement in the invitation regarding the Michigan use tax remained unchanged.

The General Provisions of the contract which were made applicable by the invitation contain the standard "Federal, State, and Local Taxes" clause of August 1961 which provides in section (a) that "Except as may be otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties." While the quoted

B-159066

portion provides for excepting taxes from the contract price, the balance of the clause makes no provision for paying State taxes which may have been excluded from the price.

In B-153472, December 2, 1965, there was considered another case where the Government had misled a contractor into believing that State taxes would not be applicable to the project which it constructed. In that decision, it was stated:

"Under the circumstances there is for consideration the principle of law that mistake on one side and misrepresentation on the other side, whether willful or accidental, constitutes a ground for reformation when the party deceived has relied on the misrepresentation of the other party. Where, as in the instant case, this occurs, restitution may be obtained on the premise that it would be unjust to allow one who made the misrepresentation, though innocently, to retain the fruits of a bargain which was induced, in whole or in part, by such misrepresentation. See Williston on Contracts, Rev. Ed., sections 1500 and 1509, and the cases therein cited; Virginia Engineering Co., Inc. v. United States, 101 Ct. Cls. 516; Harrison Engineering and Construction Corporation v. United States, 107 Ct. Cls. 295. False information as to a matter of law, even if given in good faith, may constitute grounds for reformation. Stafford v. California Canning Peach Growers, 78 P. 2d. 1150. Inasmuch as the contractor in the instant case relied on the Government's misrepresentation to his detriment, and the Government has benefited to the same extent, we are of the view such circumstances constitute a basis for contract reformation. 76 C.J.S., Reformation of Instruments, section 29."

In view of the foregoing, the request for authority to reform the contract to provide for reimbursement of the Michigan use tax is granted.

Sincerely yours,

FRANK H. WEITZEL

Assistant Comptroller General
of the United States

The Honorable
The Secretary of the Army