



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

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April 20, 1973

The Honorable Howard J. Phillips
Acting Director
Office of Economic Opportunity

AGCO 957

Dear Mr. Phillips:

Reference is made to a letter dated January 16, 1973, with enclosures, from the Associate Director for Administration, relating to an alleged mistake arising under a 1-month extension to ~~the~~ contract OEO-2476, a Job Corps Center contract with AVCO Economic Systems Corporation (hereinafter referred to as Avco), wherein he concurred with the administrative contracting officer's recommendation that Avco's request for reformation be denied. DLC 06414

The cost-plus-a-fixed-fee contract, calling for the operation of the Moses Lake Center with a capacity enrollment of 515 corpswomen, was negotiated in March 1967, for the period April 4, 1967, through June 30, 1968. The contract originally provided for an estimated cost of \$4,283,711 and a fixed fee of \$191,711. By letter dated January 24, 1969, OEO informed Avco that the Government wished to exercise its option to renew the contract for a period of 1 year beginning on July 1, 1968. On March 20, 1968, the contractor submitted its proposal in response to OEO's letter, again basing its cost and fixed-fee figures on a capacity enrollment of 515 corpswomen. On June 5, 1968, Avco executed a modification (No. 3) to contract OEO-2476, with an effective date of February 19, 1968, which partially funded a projected cost overrun of approximately \$400,000. The modification increased the sum presently available for payment by \$232,951 but it did not change the estimated cost or fixed fee of the contract. Immediately thereafter, by letter dated June 7, 1968, OEO asked Avco to submit another proposal for the follow-on contract, but requested that it be based upon a capacity enrollment of 400 instead of 515. Negotiations were targeted for the week of July 15. In the same letter, OEO expressed its intention to extend contract OEO-2476 for an additional 31 days, through July 31, 1968, in order to provide Avco with adequate time to prepare a carefully considered proposal for the follow-on contract. On June 20, 1968, Avco revised its estimated cost overrun to \$328,000 and requested the necessary funding in addition to that provided by modification No. 3. By modification No. 4, executed by Avco on June 25, 1968, and effective July 1, 1968, the estimated cost of contract OEO-2476 was increased by \$353,835 and the sum presently available for payment was increased by \$220,075. The \$220,075 increase in the sum presently

[Mistake Under Contract Extension]

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available for payment and \$220,875 out of the \$353,835 increase in estimated cost were for the extended operations during the month of July. The remaining \$132,961 of the increase in estimated cost was included because modification No. 3, which increased the sum presently available for payment, did not increase the estimated cost. On the same date, June 25, 1953, Avco also executed modification No. 5. It increased the sum presently available for payment and the estimated cost by an additional \$200,000 in order to fund the balance of the contractor's cost overrun. Modification No. 4 was silent as to an adjustment of the fixed fee.

Avco now contends that modification No. 4 to contract OEO-2476 did not express the true intention of the parties. It alleges that a mutual mistake was made in not allowing the fixed fee on the 1-month extension in the amount of \$9,915 and it requests that the contract be reformed to permit the fee.

In support of Avco's contention, its attorney states in his letter dated November 17, 1972, that "There is no evidence that the OEO intended to deny fee to the contractor * * *." The burden, however, is not on the Government to come forward with evidence that it intended to deny the fee. There is a strong presumption of law that a written instrument was carefully prepared and executed, that the parties knew and understood its contents, and that it sets forth fully and correctly their final agreement. Thus, the burden is on the party seeking reformation to produce evidence sufficient to overcome such a presumption. B-163524, March 15, 1953, copy enclosed.

Avco's attorney emphasizes that its controller stated in his letter of September 24, 1953, to the OEO contracting officer that the contractor "failed to notice this omission "of [the] fee" at the time of signing the supplement due to the commingling of the \$220,875 with an amount of \$132,961 carried forward from Modification No. 3, which latter amount was not to include a fee." Furthermore, he contends that the letters and memoranda written by the contractor's officers subsequent to the execution of modification No. 4 evidence both Avco's and the Government's intent to include the fee for July 1953 in the modification. However, in order to support reformation, the evidence must show that the instrument is not the true expression of the agreement. It must show that the deficiency of the instrument is the result of a mutual mistake, not merely the mistake of one of the parties. Moreover, a contract will not be reformed on the alleged ground of mistake when subsequent events show something desired was omitted.

In order to establish a mutual mistake, the evidence must be of the clearest and most satisfactory character--proof that is convincing beyond reasonable controversy. The evidence must show conclusively that a mistake was made, what it consisted of and how it occurred so as to leave

no room for doubt that there was in fact a bona fide mutual mistake, 31 Comp. Gen. 183 (1951); 9 id. 339 (1930); B-171144, February 2, 1972.

We do not believe that the strong presumption arising from the terms of the written agreement has been sufficiently rebutted.

While there are neither memorandums of negotiation nor an explicit proposal for the 1-month extension included in the record, the record does contain a letter dated December 14, 1972, from OEO's contract negotiator, wherein he concluded that the omission of the fee for the 1-month continuation was intended and that the contractor agreed to the omission because of its forecasted overrun of some \$400,000 for the initial contract.

By letter dated February 5, 1973, Avco's attorney states that some time after November 17, 1972, he and the contract negotiator met to discuss modification No. 4 and that during the meeting the contract negotiator remarked that the modification should not have been signed because it omitted any statement concerning the fee. This, Avco states, corroborates its claim that there was a mutual mistake in the omission of the fee. Our Office sent a copy of Avco's letter to the contract negotiator and requested a reply. In his letter dated February 23, 1973, the contract negotiator states that although he does not recall the specific details of the discussion, the meaning of his remarks was clear--namely: "AVCO should not have signed the modification if there was a question in their mind as to its intent."

Against this background, little weight can be given to the letters and memoranda of the contractor's officers, because where the only direct evidence of mutual mistake is that of one of the parties to the contract, reformation cannot be granted or sustained. For the same reason, little weight can be given to the contractor's undated worksheet which allegedly verifies that the fee was included in the \$220,075 in question. Furthermore, we are of the opinion that valid inferences which do not support the contractor's contentions may be drawn from the gross figures used by the contractor in its computations.

The most Avco has shown conclusively is that it alone has made a mistake and has entered into an unfavorable contract. It has not proven with the necessary clear and convincing evidence that the Government intended to include anything in modification No. 4 other than that which was embodied in the terms of the written instrument itself.

Avco's attorney cites our opinion in B-174502, December 9, 1971. In that case, although both parties to the contract had agreed to delete certain requirements for their mutual benefit, they failed to

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notice that the deletions were not made upon reduction of the contract to writing. Our Office allowed reformation to reflect the actual intent of the parties at the time they entered into the agreement. However, the decision was based upon the fact that the Government project officer corroborated the contractor's allegation that the scope of work contained in the contract was not the scope of work agreed upon during negotiations of the contract. Both parties thereafter executed a new scope of work statement which both parties agreed was the one contemplated by them. In the instant case, the situation is quite different. There is no corroboration by the Government of the alleged mutual mistake. The Government's contract negotiator concluded that the omission of the fee was intended and that the contractor agreed to forego the fee for the 1-month continuation of the contract. Without clear and convincing proof to the contrary, the terms of the written instrument must control.

Accordingly, Avco's request for reformation of modification No. 4 of contract QEO-2476, increasing the fixed fee by \$9,915 and reducing the estimated cost by \$9,915 is denied.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States

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