

IN THE SENATE OF THE UNITED STATES.

JUNE 30, 1886.—Ordered to be printed.

Mr. WHITTHORNE, from the Committee on Claims, submitted the following

REPORT :

[To accompany bill S. 1342.]

The Committee on Claims, to whom was referred the bill (S. 1342) for the relief of H. W. Shipley, have considered the same, and report thereon as follows :

That it is shown that on the 26th day of July, 1880, H. W. Shipley made and entered into a contract in writing with Charles D. Warner, United States Indian agent, by the terms of which the said Shipley undertook and agreed—

To erect, and furnish the necessary machinery therewith, two buildings known as a saw and flour mill, * * * such buildings to be erected at the Nez Percé Agency, Idaho, * * * on [by] February 1, 1881.

This contract embodied as part of its terms and conditions certain plans and specifications, which were to be followed by the contractor, and contained, among other provisions, these, to wit :

(1) The contractor agrees—

To make any such change in the plans, specifications, or machinery as *he and the United States agent shall agree and deem to the best interest of the Government*, and such extras or changes shall be without extra charges to the Government ; that all machinery shall be of the kind specified in the annexed specifications, subject to the proviso above mentioned.

(2) The parties covenant in the fifth article of the contract—

That it is expressly agreed and stipulated between the parties to this contract that, upon *mutual agreement*, it may be changed, altered, modified, or abrogated in whole or in part ; but no such change, alteration, modification, or abrogation shall entitle the said party of the second part to increased rates of compensation over the rates herein specified.

In the specifications which are embodied in the contract, and made a part thereof, as aforesaid, occur these words, viz :

It is to be understood that anything necessary to the full and complete execution of the work according to general intent and meaning of these plans and specifications is to be done, and all materials furnished, so as to complete the work in a good and workmanlike manner, whether herein particularly described or not.

It was provided that the work was to be under the supervision of the United States agent, who was to have the power of rejecting any materials or labor which he might deem not to be in accordance with the plans and specifications.

Mr. Shipley entered upon the performance of his contract. He procured from the Indian Office three extensions of time in which to com-

plete it. It is very apparent from the records in this case (which is the file of correspondence, &c., in relation to said contract, as appears from the originals, in the Indian Office) that from the commencement of the work to its close an unhappy and unfriendly state of feeling existed between Shipley and the agent. There appears to have been an utter absence of that accord which leads to and produces "mutual agreement."

Mr. Shipley early after completion of his contract filed with the Commissioner his claim for extra work, materials, &c. He then claimed items amounting to the sum of \$3,711.05. This claim, so filed was, under the order and instructions of the Commissioner of Indian Affairs, referred for investigation and report to Charles E. Monteith, United States Indian inspector, who, under date August 19, 1883, makes report, in which, among other things, he says:

The claim of Mr. Shipley, as transmitted to me, is based upon certain alterations made in the construction of the mills in question, while the same were in course of erection; [and] in comparing the mills, as they now stand, with the original plans, specifications, and contract, one can readily see the *justice* of Mr. Shipley's claim in many particulars, *unless* the following extract from the specifications is intended to cover a multitude of omissions.

He then quoted the words hereinbefore-cited, as taken from the recitals in the specifications.

After a full examination by Mr. Monteith of the work and the witnesses offered by Mr. Shipley in support of his claim, which, however, he had then increased from \$3,711.05 to \$7,748.55, in addition thereto for compensation for services rendered by himself and two sons for over twelve months, amounting to \$4,037.50. Mr. Monteith concludes his report as follows:

If it is the desire of the Department to ascertain whether or not Mr. Shipley is an actual loser, in fulfilling the terms of the contract, I am not satisfied with the above result as to amount (the "above result" being in amount the sum named by Shipley in his original claim, and that of his claim for services of himself and sons), hence concluded to pursue a different course in the examination of said claim, and ascertain what the contractor's actual disbursements amounted to in the erection and completion of said mills, and have him substantiate the same by receipted bills, and affidavits where receipted bills were not available. As a result of said examination I present herewith, papers marked Ex. H, which places the claim at \$6,524.88, or \$1,223.67 less than Mr. Shipley's claim as transmitted by Department, with services of contractor and his two sons added.

I think sufficient evidence is herewith transmitted to enable the Department to judge for itself whether contractor Shipley is entitled to additional compensation or not.

While I do not pretend to claim that legally he is entitled to additional compensation, still I do not hesitate to recommend additional compensation in the sum of \$4,037.50, being the amount of Mr. Shipley's "supplemental claim," covering services rendered by himself and two sons, which amount falls far short of the contractor's loss, in my opinion.

All of which is respectfully submitted.

CHAS. E. MONTEITH,
United States Agent.

After this report of Mr. Monteith, the then Commissioner of Indian Affairs, Mr. Price, reviewed the items and charges of Mr. Shipley's claim, in a letter to the Secretary, of date February 12, 1885, in which he fairly states the controversy between Indian Agent Warner and the contractor Shipley. In this letter occurs the following statement:

The items embraced above comprise work and materials furnished in addition to what was called for in the specifications of the contract. The clause in the specification reading "It is understood that anything necessary to the full and complete execution of the work, according to the general intent and meaning of the plans and specifications, is to be done and all material furnished, so as to complete the work in

a good and workmanlike manner, whether herein particularly described or not," is obviously so ambiguous and broad in its meaning as to admit of the Indian agent compelling the contractor to perform work and furnish material, as he said, even if not specified directly in the plans or specifications, and it being evident from correspondence on file in this office, that there was an unfriendly feeling existing between Agent Warner and Mr. Shipley, the question of an additional allowance for this work and material furnished, as specified in the above items, depends upon the construction placed upon the extent of the legitimate meaning of the above-mentioned clause.

Now, it is obvious to the committee that in construing the above quoted clause from the contract of Mr. Shipley, it is simple justice to him to consider his rights and powers, as evidently he intended to secure them, in articles 1 and 2 of the contract, in which the question of necessity for changes, &c., were reserved for the *mutual agreement of the agent and contractor*. In regarding this contract in all of its parts, and after duly considering the report of the inspector Monteith, and weighing the proof taken before him, and being satisfied that extra work and materials were furnished by the contractor, this committee agree with Commissioner Price, in his concluding criticism in his letter of February 12, 1885, hereinbefore referred to, that "while the contractor, in equity, may be entitled to some additional compensation, the amounts claimed under several of the items above mentioned, should not not be allowed."

This committee being, then, of opinion that Mr. Shipley has in part a claim of merit for additional compensation, the question is, in what manner the amount thereof shall be ascertained.

It will be seen that Inspector Monteith adopted the rule of ascertaining the actual outlay or expenditures made by the contractor, and from that deducted the amount called for in the contract. From this rule it appears, from the Exhibit H, filed with Mr. Monteith's report, that the actual expenditures of Mr. Shipley in and about the construction of the saw and flour mills at Nez Percé Agency was \$13,366.38. The Government contract was \$10,879. Wherefore it appears that Mr. Shipley has expended \$2,487.38 in the erection and construction of said mills more than he has received, the value of which the United States or its wards enjoy. In equity this committee believe Mr. Shipley is entitled to receive this amount, and with the bill so amended they recommend its passage.