

094-770

DECISION



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

40780

FILE: B-181356

DATE: July 26, 1974

MATTER OF: / Dayton Supply Corporation P. 3757

DIGEST: Contracting officer was not on constructive notice of error alleged after award of requirements contract when successful bidder's pattern of bidding did not vary substantially from that of second low bidder or from previous prices for items.

Since it was low bidder on all 20 items of invitation for bids DSA 700-73-B-1971, Dayton Supply Corporation (Dayton) was awarded Defense Construction Supply Center (DCSC) requirements contract No. DSA 700-73-D-0099 to furnish various amounts and types of toilet seats to various destinations. Previously, by authority of P.L. 85-804, DCSC canceled items 0001-0005 due to a mistake in Dayton's bid. In the instant case, Dayton requests cancellation of items 0014, 0015 (FSN 4510-00-247-1365), 0019, and 0020 (FSN 4510-00-247-1370), also due to a mistake in bid. These items are item 0001 of delivery order No. DSA 700-73-D-0099-0001 and items 0001 and 0002 of delivery order No. DSA 700-73-D-0099-5005, respectively.

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Dayton contends that in calculating its bid it did not include the cost of palletization of items 0014, 0015, 0019, and 0020, as required by the contract. If it is forced to palletize, Dayton alleges that it would suffer a loss in excess of \$2,000 per shipment. The above request was denied by DCSC on January 25, 1974. The Assistant Counsel, Defense Supply Agency, concurs in the disposition.

When a mistake in bid is alleged after award of a contract, the primary question is not whether an error was made in the bid, but whether a valid and binding contract was consummated by acceptance of its bid. B-175386, June 1, 1972. Where, as here, a mistake has been alleged after award of the contract, our Office will grant relief only if such mistake was mutual or if the contracting officer had actual or constructive

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[ALLEGED Mistake IN Bid]

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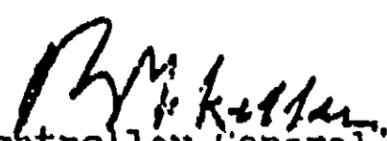
notice of the error prior to award. B-176941, November 28, 1972; B-173666, October 1, 1971; 45 Comp. Gen. 700, 706 (1966).

In this case, neither criterion has been met. In its letter of November 12, 1973, to DSA, Dayton admits the mistake was due to its unilateral misreading of the solicitation. There is no contention that the contracting officer had actual notice. Dayton alleges that the contracting officer should have been put on constructive notice of a mistake in bid. Dayton's bid and the second lowest bid for the disputed items were as follows: 0014--\$6.52, \$6.565; 0015--\$6.54, \$6.565; 0019--\$2.82, \$2.828; 0020--\$2.82, \$2.828. Bids were equally close on items other than those requiring palletization: 0016--\$2.82, \$2.828; 0017--\$2.82, \$2.828; 0018--\$2.82, \$2.828. In view of the closeness of bids received on both disputed and undisputed items, we cannot conclude that the contracting officer should have been on constructive notice of a possible mistake in Dayton's bid. Nor would the prices on previous purchases indicate a possible mistake in bid. FSH-1365, items 0014 and 0015, were purchased at \$6.00 for 955 units, \$6.59 for 5,200 units, \$7.40 for 873 units, and \$8.52 for 180 units. FSH-1370, items 0019 and 0020, was \$2.67 for 5,000 units, \$2.74 for 4,954 and 6,145 units, and \$2.77 for 6,755 units.

In connection with the prior administrative cancellation of items 0001 through 0005 under authority of Public Law 85-804, one of the considerations in charging the contracting officer with constructive knowledge of a mistake in Dayton's bid was the disparity between the three low bids and the three high bids. The bids for item 0001 are illustrative: \$2.47, \$2.475, \$2.70 and \$5.47, \$5.57, \$5.79. For items 0014, 0015, 0019, and 0020, the bid increases were gradual and would not indicate a mistake in bid. The bidding pattern for the first increment of item 0014 is representative of all four items: \$6.52, \$6.565, \$6.92, \$7.12, \$7.30, \$7.33. Therefore, acceptance of the bids under the circumstances consummated a valid and binding contract which fixed the rights and liabilities of the parties. B-173417, July 29, 1971.

Accordingly, we concur in the administrative recommendation that the request for cancellation of items 0014, 0015, 0019, and 0020 of contract DSA 700-73-D-0099 be denied.

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Deputy Comptroller General
of the United States