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DECISION



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

FILE: B-166201

DATE: October 19, 1976

MATTER OF: OMNI Research, Inc.

DIGEST:

1. GAO Bid Protest Procedures do not apply to claim of bid mistake filed after award. Therefore, claim may be considered on merits even though filed 4 months after facts giving rise to claim became known to claimant.
2. While procedures set forth in FPR 1-2.406 for verification of suspected mistakes in bid are applicable only to mistakes in formally advertised procurements, the principles therein apply to negotiated procurements to the extent that they do not conflict with required negotiation procedures.
3. Where offeror in negotiated procurement has been given two opportunities to justify capability to perform at proposed price, it cannot claim subsequent losses were due to superior knowledge of agency or that agency erred in not specifically informing it that mistake was suspected and that its price was low in relation to those of competitors.

OMNI Research, Inc. (OMNI) seeks relief from an alleged mistake it made in the preparation of its proposal submitted to the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce (NMFS) pursuant to request for proposals (RFP) 2-35403. OMNI contends that NMFS had actual or constructive knowledge of the mistake and that it failed to adequately seek verification of OMNI's proposed price. In the alternative, OMNI contends that because its price was unreasonably low, it is entitled to relief without regard to whether NMFS had constructive knowledge of the mistake or whether OMNI had verified its offer.

Initially, a question has been raised by NMFS as to the timeliness of the submission of OMNI's claim. There is no indication that OMNI ever alleged mistake to the contracting officer. However, it did submit a claim for a price adjustment based on impossibility of meeting the data requirements on a mass production basis without extending the state of the art. On August 20, 1975,

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the contracting officer issued a final decision denying the claim, and OMNI filed an appeal pursuant to the dispute clause in the contract with the Department of Commerce Appeals board. In pursuing this appeal, OMNI became aware in December 1975, for the first time of the disparity between its proposal price and that of the next highest offeror. It submitted its claim based on mistake to this Office on April 12, 1976. Our Bid Protest Procedures, however, do not apply to claims such as this. Further, we do not believe that the delay was unreasonable under the circumstances or that there has been any prejudice to the interests of the Government as a result.

The RFP specified a requirements contract with fixed unit prices for the testing of fish and fish products for 16 chemical trace elements such as mercury, lead, cadmium, etc. Because of a funding limitation, NMFS intended to limit the contract price to \$125,000. An earlier procurement for 310 samples tested for four elements had resulted in offers ranging from \$4,800 to \$90,000. Because it lacked a solid basis for a price estimate, NMFS structured the RFP to require alternative offers for testing 5, 12, or 16 trace elements and for sample quantities in the following ranges: 5000-8000, 8001-12,000 or 12,001-15,000. The contract specifications were of the performance type and did not require any specific testing method to achieve the desired result other than that the contractor follow the method proposed in its offer.

Twenty-six offers were received, 20 of which were considered to be technically acceptable. The unit prices of the 20 offers ranged from OMNI's low of \$6.40 per sample to a high of \$57.61 per sample. The second lowest unit price offered was \$13.59.

After receipt of the proposals, the staff of the NMFS conducted site visits to a number of the offerors including OMNI and samples were left for analysis. OMNI was among those who satisfactorily performed these tests. The record is clear that on at least two occasions OMNI was questioned about its capability to perform at the proposed price although there is no indication that it was ever specifically told that a mistake was suspected. However, it is also clear from OMNI's responses to the requests for confirmation of its offer that it realized that the reasonableness of its price was being questioned. In its responses, OMNI listed several economic advantages which allowed it to make such an unusually favorable offer, including:

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(1) The wages which OMNI would have to pay in Puerto Rico would be very low.

(2) Companies investing in Puerto Rico enjoy certain local tax advantages.

(3) The building occupied by OMNI had been erected by the local Government, leased at low rates by OMNI which, in turn, sublet a portion of it to another company.

(4) The company paid its officers only for expenses.

(5) Although a profit was anticipated, OMNI wanted to establish itself as a leader in the fish chemical analysis field.

(6) OMNI's experience on other programs in large scale chemical analysis gave it a competitive advantage.

The NMFS awarded a contract on June 28, 1972, to OMNI for a unit price of \$6.40 each for 15,000 samples and a total price of \$96,000. The period of performance was specified as 1 year from the date of award but was extended through successive contract modifications to March 31, 1976. One of the modifications, dated June 14, 1973, increased the contract price to a not-to-exceed figure of \$126,000, and the unit prices for six of the elements tested were also increased.

The record indicates that from the outset, OMNI experienced difficulties, that it switched from a wet ash to a dry ash process, that it was eventually able to perform satisfactorily and that it incurred a substantial loss in such performance. OMNI contends that its mistake was in assuming that successful performance could be achieved utilizing state-of-the-art methodology whereas, in fact, it was required to use a dry ash process and engage in considerable research and development to make it suitable for trace element testing on a mass production basis. On the other hand, NMFS asserts that no research and development was required and that OMNI's difficulties were caused by its carelessness in establishing and performing routine laboratory procedures. Part of the dispute revolves around the problem of adapting the necessary processes to mass production which OMNI describes as applied research and development and NMSF characterizes as the development of routine methods of chemical analysis.

There is no question that OMNI made a mistake in the preparation of its proposal price. It was not a mathematical,

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typographical or clerical mistake or one where the proposal submitted was in any respect not in accordance with the deliberate intention of the offeror. It was a mistake based on the erroneous assumption that it could perform at its proposed price. OMNI asserts that the fixed price nature of the contract, the limited performance period and the fact that the procurement was set aside for small business bolstered its belief that performance could be achieved by utilizing existing analytical procedures. However, we believe OMNI made a unilateral mistake in judgment which was not induced or shared by NMFS. It is well settled that absent unusual circumstances, fixed price contractors must shoulder the responsibility for unexpected losses as well as their failures to appreciate the problems of their undertakings. McNamara Construction Ltd. v. United States, 206 Ct. Cl. 1, 7-8 (1975); Sperry Rand Corporation v. United States, 201 Ct. Cl. 1, 7 (1975).

OMNI contends however, that since NMFS was aware that OMNI's proposed price was extremely low in relation to those of its competitors, it should have warned the offeror of this fact prior to award.

In this connection, we have stated that although the specific procedures set forth in the Federal Procurement Regulations (FPR) § 1-2.406 (1964 ed.) are applicable only to mistakes in formally advertised procurements, the principles therein have been applied to negotiated procurements to the extent that they are not inconsistent with the required negotiation procedures. Autoclave Engineers Inc., B-182895, May 29, 1975, 75-1 CPD 325. Under FPR 1-2.406(a) a contracting officer is required to request verification of a bid where he suspects a mistake in bid.

After at least two attempts at verification, NMFS became convinced that its doubts about OMNI's capabilities to perform at the proposed price were unfounded because of the unique position that OMNI claimed for itself. The record indicates that the only superior knowledge which NMFS had which was withheld from OMNI related to the competitive standings of the offerors. The regulations governing competitive negotiating procedures, however, prohibit revealing this information in situations such as in this case. FPR § 1-3.805.1(b) prohibits advising one offeror as to the relation of his price to those of his competitors, disclosing the number and identity

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of the offerors or giving any information which might give him a competitive advantage. Therefore, we cannot say that the contracting officer should have cautioned OMNI that its price was very low compared to the other offerors.

Finally, OMNI contends that the facts clearly demonstrate the unconscionability of the contract price and that therefore, it is entitled to relief without regard to any negligence on its part. Unconscionability is grounded on the theory that where a bidder's mistake is so great that it could be said the Government was obviously getting something for nothing, relief should be granted. In the absence of established market prices for the services, we do not believe that a low price by itself would necessarily establish unconscionability. The record provides no indication that NMFS realized or should have realized after OMNI's reassurances that OMNI's price would be substantially exceeded by its costs. The cases cited by OMNI, moreover, involve factual situations quite different from those present here. In 53 Comp. Gen. 187 (1973), for example, the claimant's bid included only a portion of the required items, and in Kemp v. United States, 38 F. Supp 568, the claimant's bid was based on a supplier's quotation which contained a substantial typographical error. As pointed out above, OMNI's proposal omitted nothing from the required scope of work. It contained no mathematical, typographical or clerical errors and was based on no erroneous vendor quotations. On at least two occasions, OMNI confirmed its ability to perform at the proposed price. We believe that NMFS did all that could reasonably be expected to protect OMNI from an action which turned out to be imprudent. Under these circumstances, we think that it cannot be said that NMFS was obviously getting something for nothing or was guilty of having snapped up an advantageous offer made by mistake.

For the reasons set forth above, this claim is denied.

Acting


Comptroller General
of the United States