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DECISION



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

FILE: B-186301

DATE: January 6, 1977

MATTER OF: OMNI Research, Inc. - Reconsideration

DIGEST:

To sustain claim of unconscionability, evidence must show that Government took advantage of contractor in awarding contract to it. Mere showing that contractor suffered contract losses does not justify claim.

OMNI Research, Inc. (OMNI) requests reconsideration of our decision B-186301, October 19, 1976, 76-2 CPD 341. The decision held in part that in spite of the disparity between OMNI's price of \$6.40 per test sample and the next lowest proposed price of \$13.59 per test sample, no relief could be granted on grounds that the price was unconscionable. We noted that OMNI had been given ample opportunity to verify its proposed price prior to award, and we concluded that it could not justifiably claim that the contracting agency had superior knowledge as to the inadequacy of its proposed price.

OMNI contends however, that the record amply demonstrates unconscionability. It points out that relief has been granted by this Office without regard to fault of the contractor. It states as follows:

"* * * OMNI's actual cost of performing the required analyses, which is far in excess of the contract price, indicates the unconscionability of the contract price. The actual cost of performance, \$23.30 per sample, is almost four times the contract price of \$6.40 per sample. Even if one were to assume some inefficiency on OMNI's part (and there is absolutely nothing to suggest any inefficiency), the magnitude of the difference clearly establishes that the Government is getting something for nothing.

"Thus, the evidence before your Office indicates that:

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(a) OMNI's contract price is significantly lower than the price offered by any other company;

(b) the Government has admitted that under the contract they received, 'a larger volume of reliable data than could have been obtained elsewhere at even double the cost';

(c) OMNI's contract price is significantly lower than the prices it has subsequently received for trace chemical analyses of fish and fish products; and

(d) OMNI's contract price is significantly lower than its actual cost of performance.

"None of this evidence has ever been denied or refuted by the Government. Based on this record, the Comptroller General can only conclude that OMNI's contract price is unconscionably low, and that the Government in fact 'got something for nothing'."

In support of its position, OMNI cites our decision in Yankee Engineering Co., Inc., B-180573, June 19, 1974, 74-1 CPD 333, where the protester states that we granted relief notwithstanding verification by the bidder of its price which was 65 percent of the next low bid. Finally, OMNI contends that because relief from an unconscionable price "rests upon equitable considerations" this Office should consider such equitable factors as OMNI's inability to absorb the losses incurred, the benefits received by the Government and the fact that OMNI is a small business with a laboratory in Puerto Rico where its staff is composed entirely of minority employees.

The Department of Commerce, in reply to OMNI's request for reconsideration, contends that the request for reconsideration which was filed on November 17, 1976, is untimely under our Bid Protest Procedures, 4 C.F.R. § 20.9(b) in view of the October 19th

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issuance date of the decision. However, as the prior decision points out, the time constraints of the Bid Protest Procedures do not apply to claims such as this.

OMNI points to events subsequent to the contract award to demonstrate that the contract price was unconscionable. However, we find no legal support for the proposition that high costs of contract performance or economic hardship may justify a claim of unconscionability. As recognized in Yankee Engineering Company, Inc., B-180573, supra, the essential element of unconscionability is that the Government was aware or should have been aware at the time of contract award that it was taking advantage of the contractor. In that case, a bidder mistakenly computed its bid price based on 6,025 feet of track as against the contract specification of 10,180 feet. Based on this evidence of record, we held that the Government should have realized that it was "getting something for nothing".

Here, as noted in our prior decision, OMNI did not make a mathematical, typographical or clerical mistake in bid. It merely underestimated the costs of performance. However, at the time of award it was able to convince the contracting agency that its proposed price of \$6.40 per sample was reasonable. Aside from the disparity of the proposed prices which were received from the offerors, there were no essential facts unknown to OMNI which were known or should have been known to the agency. As noted in our prior decision, offeror's prices are not publicly revealed during the course of a negotiated procurement. However, OMNI was asked to verify its proposed price. After OMNI verified its price on two occasions prior to award, the agency decided to defer to OMNI's seemingly superior knowledge as to its own capabilities, facilities and proposed testing techniques. On this record it may be said that the agency's original doubts concerning the reasonableness of OMNI's proposed price were well founded. It cannot be said, however, that the agency acted unconscionably or should have known that OMNI could not profitably perform the contract at its proposed price. Therefore, we do not find that our decision in Yankee Engineering justifies relief in this case.

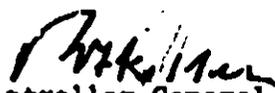
While the doctrine of unconscionability does rest upon equitable considerations, we cannot grant relief under this doctrine merely because a contractor has suffered contract losses and is a small business with a staff composed of minority employees.

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In the absence of a showing that the Government took advantage of OMNI, we find no basis to grant relief because of unconscionability.

Accordingly, our prior decision is affirmed.

We note, however, that OMNI has an appeal pending before the Department of Commerce's Contract Appeals Board based on impossibility of performing this contract. It seems to us that a number of OMNI's arguments made with its claim of mistake or unconscionability may be more suitably presented in connection with its appeal before the Board.


Deputy Comptroller General
of the United States

