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H. Nordell

DECISION

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

PL R 1

FILE: B-190342

DATE: January 26, 1978

MATTER OF: Anabolic, Inc.

DIGEST:

Request for upward modification of contract price due to alleged error in bid claimed after award cannot be allowed when contracting officer was not on constructive notice of possibility of error despite great disparity between only two bids received since there are other indices that provide more reliable basis for comparison of bids (prior procurement history) and contracting officer does not have the duty to know entire market place for item to extent that cost of raw materials is involved.

Anabolic, Inc. (Anabolic), requests that our Office reconsider Veterans Administration (VA) Administrative Determination No. 77-14, August 3, 1977, denying Anabolic's request for a price adjustment due to a mistake in bid discovered after award, under VA contract No. V797P-5691d, awarded January 26, 1977, for Colchicine Tablets.

Solicitation No. M5-24-77 requested bids for 34 items, but we are only concerned with item 18, the summary bid for furnishing items 15-17 on an "all or none" basis. There were only two bids received for item 18, Anabolic's \$0.495 per unit and Danbury Company's \$1.10 per unit. Purchase Order No. 77-MC-50201, totaling \$18,693, was issued to Anabolic for 37,764 bottles of the tablets on January 26, 1977.

On February 1, 1977, Anabolic notified the VA that Anabolic's unit price offer of \$0.495 on item 18 was in error and the price should have been \$0.687. The reason given for the error was that "an administrative error was made in calculating the costs of raw materials necessary to manufacture the Colchicine Tablets." Anabolic pointed to two contracts for the tablets that it was awarded by the Defense Supply Agency (DSA), now the Defense Logistics Agency, as follows:

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	<u>Contract</u>	<u>Date</u>	<u>Quantity</u>	<u>Unit Price</u>
(a)	DSA120-76-M-BE92	July 20, 1976	8,928 bottles	\$0.68
(b)	DSA120-77-M-DF09	March 10, 1977	7,776 bottles	1.14

In regard to these contracts, Anabolic stated:

"The prices contracted for on both of the DSA contracts referenced above illustrate the approximate cost that Anabolic would normally quote on this product."

Additionally, Anabolic stressed that the \$0.687 does not include any profit and is less than factory costs. Further, Anabolic submitted the original computer printout sheet with the error noted on page 2. The VA, in its Administrative Determination, decided that there was "[no] basis upon which to allow Anabolic's request for price adjustment."

Anabolic takes the position that the contracting officer was on constructive notice of the mistake by virtue of the 75-percent disparity between the only two bids received for item 18 (by our calculation, the disparity is approximately 124 percent) and should have verified Anabolic's low bid. Since verification did not occur, Anabolic argues that no valid and binding contract was consummated. Moreover, Anabolic states that it "continued to process the order relying on the reformation of the contract to include a reasonable adjustment of price."

Anabolic has submitted a list of prices from two major suppliers of the raw material, colchicine, to demonstrate how the price for colchicine has increased from 1975 to the present. It is Anabolic's contention that had the contracting officer been aware of the marketplace, she would have known of the increase in price and realized that a mistake had occurred.

Prior to award, the contracting officer noted the Federal Supply Schedule (FSS) price (\$2.39), the Defense Personnel Support Center (DPSC) price (\$0.72) and the previous price paid by the VA (\$0.43 - October 31, 1975) for colchicine on the abstract of bids. The prior procurement history (5 years and 5 months) was also available to the contracting officer and provided:

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Date of Purchase	Quantity Ordered	Unit Price
05/25/70	7,380	\$0.42
10/30/70	6,480	0.45
09/17/71	11,196	0.449
11/04/71	2,230	0.449
04/27/72	20,508	0.35
09/07/72	16,764	0.34
11/01/73	25,548	0.33
10/17/74	30,216	0.447
10/31/75	45,700	0.43

Anabolic's offer of \$0.495 in comparison with the latest price paid by VA for colchicine was approximately 15 percent higher. The contracting officer, after reviewing the prior procurement history, more specifically comparing Anabolic's offer with the latest price paid, and other information, contends that she initially did not find any basis for questioning Anabolic's price and still cannot find such a basis.

In response to Anabolic's reference to the DSA contracts, above, the contracting officer inquired about the first (-BE92) and was advised that there was an additional requirement placed on the supplier's (Anabolic) commercial process, converting the subject of the procurement from an ordinary commercial end product (as in the VA contract) to a special item, making it extremely difficult to compare the DSA contract with the VA contract. Additionally, the contracting officer notes the difference in the quantity solicited by each contract, apparently reemphasizing the difficulty of comparing them. With reference to the second contract (-DF09), it was the contracting officer's opinion that no comments were warranted since the contract was issued after the VA contract was awarded.

Concerning Anabolic's contention that the contracting officer has a duty to know the entire marketplace, the contracting officer states:

"If the Contracting Officer was involved in the procurement of the raw material (colchicine), then the Contracting Officer would have been knowledgeable of the element of the marketplace.

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Unfortunately, the Contracting Officer's responsibilities involve the procurement of the end product. Her knowledge, experience, etc., are directed to that element of the marketplace. Therefore, it would be unreasonable to demand that she be as knowledgeable of this element of the market as Anabolic."

The general rule is that the sole responsibility for preparation of a bid rests with the bidder. Penn Electric Motor Company, Inc., B-185703, July 9, 1976, 76-2 CPD 25. Therefore, where the bidder makes a unilateral mistake in bid it must bear the consequences of its mistake unless the contracting officer was on actual or constructive notice of the error prior to award. 48 Comp. Gen. 672 (1969); Penn Electric Motor Company, Inc., supra. The test for constructive notice is one of reasonableness--whether under the facts and circumstances of the particular case, there are factors which could have raised the presumption of error in the mind of the contracting officer. Morton Salt Company--Error in Bid, B-288392, April 19, 1977, 77-1 CPD 273; Wender Presses Inc. v. United States, 170 Ct. Cl. 483, 486 (1965).

In support of its contention that due to the disparity between Anabolic's unit price and Danbury's the contracting officer was on constructive notice, Anabolic cites 53 Comp. Gen. 30 (1973) where it was held that "standing alone" a 70-percent variance between two bids was sufficient, in itself, to place the contracting officer on constructive notice of a possible error. However, the "standing alone" analysis is inapplicable in a situation where, as here, other indices provide a more reliable basis for comparison. Penn Electric Motor Company, Inc., supra.

In the present case, the contracting officer used the prior procurement history to evaluate Anabolic's bid which evidences no consistency in the unit price fluctuations in relation to the date the item was purchased or the quantity purchased. In comparing Anabolic's bid with the prior prices, the contracting officer determined that it represented an approximate 14-percent increase over the last award, which did not raise any inference of a possible mistake. The procurement history is specifically concerned with the VA's procurement of colchicine tablets under VA specifications

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and, therefore, the contracting officer's reliance upon it was appropriate. Since there was only a small increase in price from the last VA award and the FSS and DPSC prices concerned other agency procurements and, as we have been advised, are basically used as ceiling prices above which no award would be made, the contracting officer could not reasonably be expected to have had constructive notice of Anabolic's alleged mistake in this regard.

With respect to the alleged duty to know the entire marketplace to include raw material costs, it is our view that to require a contracting officer to know the entire marketplace to this extent in these circumstances would impose an unreasonable and unnecessary burden. R. E. Lee Electric Co., Inc., B-184249, November 14, 1975, 75-2 CPD 305; 39 Comp. Gen. 36 (1959) and id. 405 (1959).

Accordingly, Anabolic's request for a price adjustment is denied.


Deputy Comptroller General
of the United States