

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D.C. 20548 *6AO 00048*

O. Eastwood

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FILE: B-192169

DATE: December 22, 1978

MATTER OF: Y. T. Huang and Associates, Inc.

DLG 000485

DIGEST:

1. Claim of mistake in bid after award is not precluded by bidder's prior attempt to recover under defective specifications claim before contracting agency board of contract appeals based upon the same facts since board does not have jurisdiction over claim of mistake in bid, and mistake in bid claim and defective specifications claim are based upon different theories of recovery.
2. *Where* Where contractor called contracting officer inquiring as to the low bidder, the amounts of the other bids, and the Government cost estimate, and the contracting officer did not divulge the amounts of the other bids, the large disparity between the contractor's low bid and the next low bid, nor the exact amount of the Government estimate, but did obtain a verification from the contractor of his bid price, request for verification was inadequate, *therefore, & under...*
3. Where contract is entered into after bidder verifies prices in response to inadequate request for verification, no binding contract is created. Since an increase in contract price based upon factors not considered in original bid is not proper, and rescission is not possible since contract has already been performed, relief may be granted on a quantum meruit or quantum valebant basis not to exceed the price that was offered by the second low bidder.

Y. T. Huang and Associates, Inc. (Huang), has filed a [claim alleging a mistake in bid after contract award] Huang was awarded Veterans Administration (VA) Contract No. V611C-60 for alterations to the fifth floor of the Veterans Administration Hospital in Marlin, Texas. Bids from five other bidders were received in these amounts: \$63,342; \$51,139; \$48,816; \$47,800; and \$46,251. Huang was the low bidder at \$29,679.38. The next low bid to Huang's was 55.8 percent higher, and the highest bid was 113.4 percent higher than Huang's. The original Government estimate was \$32,331, later recalculated at \$48,409.

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Sometime after bid opening Huang called the contracting officer inquiring as to the low bidder, the amounts of the other bids, and the Government cost estimate. The contracting officer refused to divulge the exact amount of the Government estimate, stating only that it was as stated in the Commerce Business Daily--between \$25,000 and \$50,000. He also did not divulge the amounts of the other bids, merely stating that an abstract of bids would be sent later, but during the conversation he did ask for and receive from Huang a verification of the bid price of \$29,679.38.

Huang received the abstract of bids before the preconstruction conference but not until after the contract had been awarded. It did not learn until the preconstruction conference that the Government intended to release the fifth floor worksite in partial increments rather than as a total entity, and this is the basis for the mistake in bid claim.

Immediately after beginning contract performance Huang notified the contracting officer that he considered this release of worksite in partial increments a changed condition and filed a claim. The claim was denied, and Huang filed an appeal with the Veterans Administration Contract Appeals Board (VACAB). VACAB denied Huang's claim of changed conditions, and after the board disposed of a motion for reconsideration, Huang filed its claim for mistake in bid here.

Decisions rendered on disputes by the boards of contract appeals under the disputes clause are final and conclusive and not subject to review by our Office absent fraud or bad faith. S & E Contractors, Inc. v. United States, 406 U.S. 1 (1972). However, our Office is not precluded from considering Huang's claim of mistake because of Huang's attempt to recover under a constructive change theory before VACAB inasmuch as VACAB would not have had jurisdiction over a claim of mistake in bid. (VACAB specifically declined to take jurisdiction over Huang's claim of mistake.) The bases of the two theories of recovery are entirely different. See Bromley Contracting Co., Inc., B-189972, February 8, 1978, 78-1 CPD 106.

Huang has not presented work papers showing that it made a mistake in its bid. However, the agency report does not deny that Huang made a mistake, and the disparity in the bids as well as sworn testimony in the VACAB proceedings indicate a mistake. In fact, the contracting officer admitted in the VACAB proceedings that there must have been a mistake. We conclude that the record sufficiently establishes that Huang made a mistake in his bid.

When a mistake is alleged after award of a contract, our Office will grant relief only if the mistake was mutual or the contracting officer was on actual or constructive notice of a unilateral error prior to award. No valid and binding contract is consummated where the contracting officer knew or should have known of the probability of error, but failed to take the proper steps to verify the bid. See John P. Ingram, Jr., B-191867, November 8, 1978, 78-2 CPD _____.

The contracting officer stated in the VACAB proceedings that he had no particular reason--except that there was a considerable difference between Huang's bid and the next low bid--to suspect a mistake in bid when he requested Huang to verify his bid during the telephone conversation previously mentioned. He also stated that it was the VA's practice to verify bids when, as here, there was considerable difference between the low bid and the next low bid. However, he did not even apprise Huang of this disparity during the conversation. The only information he divulged to Huang was that Huang was the low bidder.

Section 1-2.406-1 of the Federal Procurement Regulations (1964 ed.) requires that a bidder must be informed of the specific reason for the request that he verify his bid prices. Since the reason for the verification request in this case was the large disparity between the low bid and next low bid, VA violated section 1-2.406-1 when it did not disclose this disparity. We also note, as mentioned before, that in the course of the verification request, the contracting officer refused to disclose the precise Government estimate, which was lower than Huang's bid, and failed to indicate the wide disparity in the bids generally. We must conclude that the request for verification was inadequate. Department of Agriculture - Francisco Ojeda, B-190704, January 9, 1978, 78-1 CPD 16. Under these circumstances, the acceptance of the bid did not consummate a valid and binding contract. Williams and Company, Inc., 57 Comp. Gen. 159 (1977), 77-2 CPD 506.

Appropriate relief for Huang could not include a recalculation of the contract price according to what Huang says he would have bid if he had understood the incremental release of the worksite because it would be based upon factors not considered in submitting the original bid. Ace Window Cleaning Co., B-183380, June 23, 1975, 75-1 CPD 379. Normally, the contract would be rescinded, but since Huang has already performed the contract, making rescission impossible, he may be paid on a quantum meruit or quantum valebant basis. Ace Window Cleaning Co., supra.

Huang contends that the actual expenditures in performing the contract were \$65,973, which should be used as the proper measure of relief. However, it is not certain that this is the reasonable value for the services Huang rendered. Huang may be paid the reasonable value of its services not to exceed the price that was offered by the second low bidder. Advanced Equipment Company, Inc., B-190598, January 18, 1978, 78-1 CPD 47; Colonial Oil Industries, Inc., B-189514, December 7, 1977, 77-2 CPD 437. Since the Government's corrected estimate was \$48,409, we recommended that Huang be paid an additional \$17,814.47--the difference between the payment to Huang on the contract and the second low bid of \$46,251.



Deputy Comptroller General
of the United States