

**DECISION**



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

10,018

FILE: B-194632

DATE: May 17, 1979

MATTER OF: Telectro Systems Corp.

DIGEST:

1. Questions concerning termination of contract for default are properly resolved under disputes clause of contract and not Bid Protest Procedures of GAO. However, both our Office and Armed Services Board of Contract Appeals (ASBCA) have held that where termination of contract for default is also subject of claim of mistake in bid, issue of mistake in bid is not under jurisdiction of ASBCA but is for review by our Office or courts.
2. Denials of claims by Government agencies for relief under Public Law 85-804 will not be reviewed by this Office so far as entitlement to relief provided by cited statute is concerned. However, factual findings made in course of considering such claims are not binding in connection with consideration of any other form of remedy and this Office may consider claim as we would any other claim based upon alleged mistake in bid.
3. Contractual relief pursuant to ASPR § 2-406-4(b) is precluded where contracting officer properly satisfies error detection and verification obligations with regard to apparent mistake in bid pursuant to ASPR § 2-406.3(e), which further requires contracting officer upon verification to consider bid as originally submitted. Nor is alleged mistake mutual where, as here, contract clearly expresses intention of the parties.

*CNG02140*  
Telectro Systems Corp., (Telectro) requests that our Office grant it relief from the denial of its consolidated appeals by the Armed Services Board of Contract Appeals (ASBCA) on the issues of the propriety of the termination for default of contract No. DSA 900-75-C-0375 (ASBCA No. 21976) and the assessment of re-procurement costs in the amount of \$9,731.66 incurred

*ACC 00300*  
~~005344~~

[Request for Relief for Contract Default]

as the result of the repurchase of the defaulted supplies (ASBCA No. 22217). Counsel for Telectro asserts that it made an obvious mistake in the bid in question, which the contracting officer should have recognized. This fact, counsel urges, makes the mistake mutual and qualifies Telectro for contractual relief under Public Law 85-804, which in turn would preclude the assessment of reprocurement costs.

The record on review is a composite of Telectro's factual analysis and legal arguments along with copies of the two referenced decisions of the ASBCA--one dated September 28, 1978 (ASBCA Nos. 22217 and 21976), and the other, an affirming decision on reconsideration of the consolidated appeals, dated December 5, 1978. Although it is our general practice to request and obtain a fully documented report from the contracting agency when a claim is filed, we have not done so in the present case where it was apparent from the face of Telectro's submission that there was no legal basis for granting the relief requested on those issues properly before this Office. James B. Nolan Company, Inc., B-192482, February 9, 1979, 79-1 CPD 89. A brief history of the procurement will facilitate an understanding of those issues which are properly presented for review by us.

#### Background

Contract No. DSA 900-75-C-0375 required Telectro to manufacture and deliver 274 permanent magnet loudspeakers for use in shipboard announcing systems. Telectro's bid price of \$124.1241 per unit included the cost of first article testing and resultant data. This bid price was substantially lower than that submitted by the next low bidder, a prior manufacturer of the item. This price disparity caused the contracting officer to question the validity of the bid price, and on two separate occasions the contracting officer advised Telectro of the price disparity and requested that Telectro review its bid. Each time, Telectro affirmed the correctness of its bid price as submitted. A pre-award survey conducted by the Defense Contract Administration Services at the request of the contracting officer showed that Telectro was an experienced small

business manufacturer of electronic communication and control equipment which had successfully performed previous Government contracts for other types of loudspeakers. The survey also indicated that Telectro could furnish the item in conformance with the required specifications, and further recommended a complete award to Telectro under the invitation for bids (IFB). The contracting officer awarded the contract to Telectro on July 25, 1974, for a total price of \$34,010, with first article submissions due within 120 days of the award date.

Telectro was unable to accomplish a timely delivery of the requisite first articles. Telectro requested and was granted a delivery extension for the first articles until August 1, 1975. In return for this contract extension, Telectro agreed to a price reduction of \$3.64 per unit. Further delays resulted in the contracting officer advising Telectro on September 30, 1976, that it had until November 1, 1976, to accomplish the first article submittal or be subject to termination for default. On October 5, 1976, Telectro was advised that its first articles had failed proper testing. On November 18, 1976, Telectro advised the contracting officer that it had exceeded its contractual budget and was financially unable to develop acceptable first articles. Telectro requested that it be relieved of its contractual obligations because it had made a mistake in its bid. Telectro confirmed its renunciation of the contract and request for relief in a letter dated December 7, 1976. By letter dated January 27, 1977, Telectro was advised that a termination of the contract for default was being deferred pending a resolution of its request for contractual relief. Telectro's request for relief was considered pursuant to Public Law 85-804 and was officially denied on February 8, 1977. The contract was terminated for default on March 4, 1977, based on Telectro's failure to perform.

Telectro appealed the termination for default, and while that action was pending, procurement costs of \$9,731.36 were subsequently assessed and demanded from Telectro on July 1, 1977. This action was appealed and Telectro's consolidated appeals were heard by the

ASBCA, which rendered its decision on September 28, 1978. While Telectro's appeals were essentially denied, the ASBCA refused to consider the allegation of mistake in its bid by stating in part that:

"The appellant's request for extra-contractual relief was duly considered and denied by those officials empowered to consider such requests. Mistakes in bid and P.L. 85-804 claims are beyond the jurisdiction of this Board. We confine our review to those administrative questions which have been presented for decision within our jurisdiction."  
Telectro Systems Corp., ASBCA Nos. 21976 and 22217, 78-2 BCA ¶ 13,480 (September 28, 1978).

#### Jurisdiction

The principal issue to be addressed at the outset is the jurisdictional authority which our Office may exercise in the present case. Procedural considerations serve to define the scope of our review in considering Telectro's comprehensive appeal and its request for relief from procurement costs under a defaulted contract. In Harry C. Partridge, Jr. & Sons, Inc., B-191808, May 11, 1978, 78-1 CPD 366, we set forth our approach to issues of contract administration by stating:

"The authority of this Office does not include intervention between a contractor and a contracting agency for the purpose of resolving a dispute arising under a contract. This is a matter for settlement pursuant to the procedures set out in the 'Disputes' clause which is contained in standard Government contracts. Those procedures provide for a decision by the contracting officer, with the contractor having a right of appeal from the decision to the head of the agency concerned. Both the contractor and the Government are bound to follow the procedure set out in the contract for the administration of disputes arising out of the contract, and the contractor must exhaust its administrative remedies under the 'Disputes' clause before resorting to the courts. \* \* \*

"Furthermore, it should be noted that as a result of S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972), this Office no longer reviews decisions rendered under the 'Disputes' clause. In that case, the United States Supreme Court held that, absent bad faith or fraud, a final agency settlement or decision, rendered under the 'Disputes' clause, is not subject to further administrative review."

In view of this policy consideration we have held that questions concerning termination of a contract for default are properly resolved under the procedures set forth in the disputes clause of the contract in question and are not for resolution under our Bid Protest Procedures which are reserved for considering whether an award, or proposed award, of a contract complies with statutory, regulatory, and other legal requirements. Engineering Service Systems, Inc., B-191538, April 13, 1978, 78-1 CPD 285; Pure Water & Ecology Products, Inc., B-186067, April 5, 1976, 76-1 CPD 225.

While decisions on disputes rendered 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, our Office is not precluded from considering Telectro's claim of mistake in bid which calls into question the propriety of the contract award. Both our Office and the ASBCA have consistently held in cases such as this, where a contract is terminated for default for the failure of a contractor to supply an item which is also the subject of a claim of mistake, that the issue of mistake is not under the jurisdiction of the ASBCA and that the matter is for our Office or the courts to decide. Stainless Piping Supply Company, B-184780, December 23, 1975, 75-2 CPD 407, and cases cited therein.

Concerning Telectro's request for review of the Government's denial of Telectro's claim under Public Law 85-804, which authorizes amending or modifying contracts to facilitate the national defense, we have held that denials of claims by Government agencies under that statute are not subject to review by our Office

so far as entitlement to the relief authorized by that statute is concerned. See Edfield Research, Inc., B-185709, June 28, 1976, 76-1 CPD 413, and cases cited therein. However, we stated in 48 Comp. Gen. 672 (1969) that:

"\* \* \* factual findings made in the course of considering such claims are not endowed by any contractual or statutory provision with any attribute of finality which would require them to be considered as binding in connection with the consideration of any other form of remedy, and we therefore may consider the claim as we would any other claim based upon alleged mistake in bid."

Accordingly, our review of Telectro's appeal in the present case is confined to those issues raised by the alleged mistake in bid.

#### Mistake in Bid

In support of its allegation of mistake in bid, Telectro has submitted the following factual account, which it feels demonstrates that the contracting officer knew in all probability that there was a mistake in the bid prior to award. The submission states:

"2.\* \* \* The contracting office noted the referenced disparity between Telectro's bid and Dynalec's. Dynalec was a previous manufacturer of the I.F.B. item. The contracting officer pointed out the disparity in bid to [Telectro] and requested it to check its bid for a possible mistake. [Telectro] responded stating it had reviewed its pricing data applicable to the bid and reaffirmed the prices bid.

"3. The contracting officer again requested verification of bid price in a TWX to Telectro July 12, 1974 as follows:

"Due to the great difference between your bid on subject I.F.B., \$115.00 and the next low bidder \$183.00, it is requested that you again review your price and confirm the same in writing to this Center Attn: PA/152. A further indication that your price should be reviewed and confirmed is the following list of prior procurements showing the quantity, the unit price and the date the awards were released from this Center.

Quantity	Prior Awards	
	Unit Price	Date
78 each	\$195.00	10-11-73
188 each	143.10	9-26-72
208 each	149.84	10-26-71
284 each	127.86	6-26-69

The above reveals that your bid price is lower than the price paid for a similar quantity back in 1969. Please reply ASAP.'

"4. [Telectro] in its letter of July 18, 1974 replied to the contracting officer's TWX of July 12, 1974 stating it had again reviewed its cost data and again confirmed its bid price. \* \* \*"

#### Legal Analysis

The general rule applicable to mistakes in bid alleged after award is that the sole responsibility for the preparation of a bid rests with the bidder and that unless the mistake is mutual or the contracting officer is on actual or constructive notice of the mistake, the bidder must bear the consequences of its mistake. Ohiocraft Printing, Inc., B-194056, February 22, 1979, 79-1 CPD 127, and cases cited therein. In accordance with this reasoning and in support of its present request, Telectro urges that relief be granted under the provisions of the Armed Services Procurement Regulation (ASPR) § 2-406.4(b) (1974 ed.) which state in pertinent part that contracts may be rescinded or reformed on the basis of a disclosure of mistakes in a bid after a contract award where there is clear and convincing evidence that:

"(i) a mistake in the bid was made by the contractor,

"(ii) the mistake was mutual or the contracting officer was, or should have been, on notice of the error prior to the award, \* \* \*"

While we recognize that Telectro may well have made the mistake it alleges, we do not find, for the reasons which follow, that such a mistake was mutual, nor do we find that the contracting officer was on actual notice of the error prior to the award within the meaning of this regulation.

✓ ASPR § 2-406.3(e) (1974 ed.), applicable to the procurement in question, provided the following procedures in regard to a suspected mistake in bid prior to award of the instant contract:

"(1) In the case of any suspected mistake in bid, the contracting officer will immediately contact the bidder in question calling attention to the suspected mistake, and request verification of his bid. The action taken to verify bids must be sufficient to either reasonably assure the contracting officer that the bid as confirmed is without error or elicit the anticipated allegation of a mistake by the bidder. To insure that the bidder concerned will be put on notice of a mistake suspected by the contracting officer, the bidder should be advised, as is appropriate, of (i) the fact that his bid is so much lower than the other bid or bids as to indicate a possibility of error, (ii) important or unusual characteristics of the specifications, (iii) changes in requirements from previous purchases of a similar item, or (iv) such other data proper for disclosure to the bidder as will give him notice of the suspected mistake. If the bid is verified, the contracting officer will consider the bid as originally submitted."  
(Emphasis added.)

Having followed these procedures and obtained verification from the bidder, the contracting officer must consider the bid as originally submitted, and can no longer reasonably consider the bid to be in error. In fact, as we noted in Peterman, Windham & Yaughn, Inc., 56 Comp. Gen. 239 (1977), 77-1 CPD 20, after reaffirmation and verification of the bid, "the contracting officer was not only justified in accepting the bid but would have failed in his duty had he done otherwise." See also, 37 Comp. Gen. 786 (1958) and 36 Comp. Gen. 27 (1956).

To the extent that Telectro relies on a theory of mutual mistake, we believe that it misapplies the term. As we stated in Peterman, Windham & Yaughn, Inc., - Reconsideration, B-186359, January 9, 1978, 78-1 CPD 14, "a party cannot set up his own negligence and call it a mutual mistake." Ellicott Machine Company v. United States, 44 Ct. Cl. 127 (1909). In the present case the contract clearly expresses the intentions of the parties, and there is no basis on which to conclude that both the Government and Telectro were mistaken as to the intent and identity of the requirement at the time of award.

Consistent with the requirements of ASPR § 2-406.3(e) our Office has held, in circumstances such as those presented, that where an error is apparent or where there is reason to believe that an error has been made, a contracting officer is required to request verification of the bid. A.L.M. Construction Company, B-191630, June 8, 1978, 78-1 CPD 424. Proper verification requires that in addition to requesting confirmation of a bid price, the contracting officer must apprise the bidder of the mistake which is suspected and the basis for such suspicion. General Time Corporation, B-180613, July 5, 1974, 74-2 CPD 9. However, the contracting officer's duty to seek verification is discharged if the bidder knows the basis for the request for verification. Atlas Builders Inc., B-186959, August 30, 1976, 76-2 CPD 204. Thus, where the bidder alleging the mistake has been adequately advised of all known facts which suggest the possible occurrence of a mistake and verifies that the original price is

correct, the subsequent acceptance of the bid by the Government creates a valid and binding contract which will not be disturbed by a later allegation of error. J.D. Shake Construction Co., Inc., B-190623, April 25, 1978, 78-1 CPD 318, citing Peterman, Windham & Yaughn, Inc., supra. Here, the record is clear that the contracting officer properly fulfilled his verification duty.

#### Conclusion

We therefore conclude that the acceptance of Telectro's low bid consummated a valid and binding contract, which, under the circumstances presented, was neither improper nor unconscionable. Consequently, rescission or reformation of the contract to preclude procurement costs would not be proper. See, Boise Cascade Envelope Division, B-185340, February 10, 1976, 76-1 CPD 86, and Reaction Instruments, Inc., supra.

Accordingly, there is no legal basis for our Office to grant Telectro any relief.



Deputy Comptroller General  
of the United States