

11325 Proc I

DECISION



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

FILE: B-192965

DATE: September 6, 1979

MATTER OF: Aydin Energy Systems *DLG 02692*

DIGEST:

Where low offer is 39 percent lower than only other offer received and is close to Government estimate, contracting officer was not on constructive notice of error and there is no legal basis for increasing alleged erroneous unit price.

Aydin Energy Systems (Aydin) has filed a claim for \$624,204 alleging a mistake in its offer upon which contract N00039-75-C-0331, awarded by the Naval Electronic Systems Command, is based. *AGC 00445*

The procurement was negotiated under the authority of 10 U.S.C. § 2304(a)(2) (1976). Two offers were received. Aydin submitted an offer of \$2,866,808. RCA submitted an offer of \$3,989,790, \$1,122,982, or 39 percent, more than Aydin's offer. Award was made on the basis of initial proposals.

Aydin contends essentially that the 39-percent difference between the offers should have alerted the contracting officer to the possibility of an error in the Aydin offer and that, therefore, the offer should have been verified before award.

Initially, Aydin sought relief under P.L. 85-804, 50 U.S.C. §§ 1431-1435 (1976), which was denied. The denial is not reviewable by our Office so far as entitlement to relief under the statute is concerned. 52 Comp. Gen. 534 (1973). However, the denial does not preclude our Office from considering whether a contractor is entitled to relief because of an error made in its offer. Id.

[ALLEGATION of a Mistake in Bid]

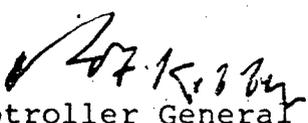
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Where a mistake is alleged after award of a contract, our Office will grant relief only when the mistake was mutual or the contracting officer was on actual or constructive notice of an error prior to award. Dunbar & Sullivan Dredging Co., B-188584, December 23, 1977, 77-2 CPD 497. No allegation is made in this case that the mistake was mutual or that the contracting officer had actual notice of error prior to award. The only question is whether the contracting officer was on constructive notice of mistake. The test for constructive notice is whether under the facts and circumstances of the particular case there are any factors which reasonably should have raised the presumption of error in the mind of the contracting officer. United Sound, Inc., B-187273, January 19, 1978, 78-1 CPD 50.

Although the difference between the offers in the immediate case was 39 percent, the Aydin unit price of \$158,800 was about \$4,000 more than the initial Government engineering estimate of \$155,000 per unit and about \$3,000 less than the \$162,134 Government unit price estimate based on an inflation factor made for business clearance purposes prior to award. Aydin contends that the approximate agreement of its own price and the Government's estimate did not negate the possibility of error in the two. However, there is no evidence that the \$155,000/\$162,134 Government estimate was wrong. In Allied Contractors, Inc. v. United States, 159 Ct. Cl. 548 (1962), the court held that the discrepancy between offers did not put the Government on notice of error in the low offer where it was close to the Government's estimate of the cost. Since the Aydin offer was close to the Government estimate, the contracting officer was not on constructive notice of the alleged error.

Therefore, the acceptance of the offer consummated a valid and binding contract and there is no legal basis for increasing the unit price in the circumstances. 52 Comp. Gen. 534 (1973).

Accordingly, the claim for relief is denied.


Deputy Comptroller General
of the United States