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D. Winkoff
Proc II



DECISION

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

FILE: B-193552

DATE: January 11, 1980

MATTER OF: MKB Manufacturing Corporation

DLG03604

DIGEST:

1. Relief for mistake in bid alleged after award can be granted where supplier quoted bidder erroneous price if contracting officer should have been on notice of possibility of mistake in bid.
2. Contracting officer is on constructive notice of probability of error in bid which is more than 25 percent below next lowest bid, 42 percent below average of the next three bids which are within close range, and more than 28 percent below Government estimate. Therefore, contracting officer's acceptance of bid without seeking verification in bid does not result in valid and binding contract.
3. Where agency rejects bid from defaulted contractor on reprourement contract because bid price exceeds defaulted contract price, subsequent finding by GAO that initial contract was not binding on contractor because of contracting officer's failure to seek verification of bid price does not render improper rejection of reprourement bid since at time of rejection agency had reasonable basis for its action.

MKB Manufacturing Corporation (MKB), a defaulted contractor under contract number N60921-77-C-0206 (-0206) issued by the Naval Surface Weapons Center, White Oak (Weapons Center), protests the award of a reprourement contract to any other bidder under invitation for bids (IFB) number N60921-79-B-0002 (-0002). The procurements involve the purchase of base couplings which are essential components of a firing device. MKB also claims a mistake in bid under the defaulted contract. We allow MKB's mistake in bid claim and deny its protest for the reasons stated below.

AGC00817

[Protest INVOLVING REPROCUREMENT]

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BACKGROUND

The solicitations for both contracts provided that a single award would be made for the entire quantity being procured. For contract -0206, MKB submitted a bid of \$50,037.70. In addition to an amount for item 1 (10 first articles), MKB bid \$8.23 for each of the 5,990 production units. The other bids, in total and for the production quantity, were as follows:

	<u>Total bid</u>	<u>Unit price item 2</u>
Eastern Manu- facturing Corp.	\$ 66,689.50	\$11.05
Hamilton Associ- ates, Inc.	69,180.00	11.53
Ram Enterprises, Inc.	77,844.50	12.96
Alton Iron Works	120,500.50	19.95
Sentinel Manu- facturing Corp.	321,465.00	53.50

The Government estimate for the entire quantity was \$70,000. On September 9, 1977 the contracting officer awarded contract -0206 to MKB without requesting verification of MKB's bid.

MKB, through counsel, first alleged a mistake in bid in a telephone conversation with the contracting officer on September 26, 1977, confirmed by a letter dated October 20, 1977. MKB alleged that prior to submitting its bid it received from a subcontractor an erroneous oral quotation. MKB used the quote, \$.175 per unit for gold plating, in calculating its price for item 2. After the award, the subcontractor sent MKB a written confirmation of its oral quotation dated September 14, 1977, indicating a unit price of \$1.75, not \$.175. Pursuant to Defense Acquisition Regulation (DAR) § 2-406.4(b)(1976 ed.), pertaining to corrections of mistakes in bids, MKB requested that the contract be reformed and the contract price increased by \$9,420.00 to reflect MKB's increased costs.

Because MKB encountered difficulties in performing the contract, the contracting officer, under the default provisions of the contract, sent MKB a show cause letter on October 18, 1977. See DAR § 7-103.11. Therefore, on October 28, 1977, MKB withdrew its request for reformation and requested rescission under DAR § 2-406.4. MKB later indicated its willingness to withdraw the request for rescission if the Navy would agree to reform the contract.

The contracting officer recommended reformation of the contract based upon the contractor's mistake in bid and the contracting officer's failure to notice a significant deviation between MKB's bid and the prices offered by other bidders. However, the final determination reached by the Deputy Commander, Procurement Management, Naval Supply Systems Command, on July 28, 1978, denied MKB's mistake in bid claim on the basis that the disparity between oral and written quotations discovered after award is outside the scope of existing remedies for mistakes in bids.

On three occasions, MKB delivered first articles which failed to meet first article approval under the contract, and on October 5, 1978, its contract was terminated for default. MKB appealed the default termination to the Armed Services Board of Contract Appeals (ASBCA) and claimed the costs of constructive changes in the contract resulting from allegedly defective specifications. The appeal is still before the ASBCA. *AAC 00300*

After the default determination, the contracting officer decided to formally advertise the reprocurement and issued IFB -0002 on October 26, 1978. Although MKB was the low bidder, at \$77,091.30, the contracting officer determined that award to MKB would be improper. This determination was based on our decision in PRB Uniforms, Inc., 56 Comp. Gen. 976 (1977), 77-2 CPD 213, in which we held that:

"* * * a repurchase contract may not be awarded to the defaulted contractor at a price greater than the terminated contract price,

because this would be tantamount to modification of the existing contract without consideration." 56 Comp. Gen. at 978.

The Navy awarded a contract to the second low bidder, Hamilton Associates, Inc. (Hamilton), on March 23, 1979.

MISTAKE IN BID CLAIM

MKB requests that we " * * * review a determination by the Naval Supply Systems Command regarding a mistake in bid claimed by MKB in the previously terminated contract." MKB's attempt to recover the cost of changes due to allegedly defective specifications does not preclude it from filing this mistake in bid claim. Bromley Contracting Co., Inc., B-189972, February 8, 1978, 78-1 CPD 106. Neither does the pendency of the appeal before the ASBCA. 53 Comp. Gen. 167 (1973).

In denying MKB's request for relief, the Navy concluded that there was not clear and convincing evidence of a mistake for which relief could be granted under the mistake in bid rules. The Navy found "that MKB [did not intend] to bid anything other than what was bid" and that MKB would have confirmed its bid had it been requested to do so, so that MKB "cannot reasonably contend that the contracting officer should have been on notice of a possible mistake". We do not agree.

Errors made by a bidder's supplier or subcontractor are cognizable under the mistake in bid procedures even though in a technical sense, the bid initially submitted to the contracting agency is what the bidder intended to submit since at the time the bidder was unaware of the supplier's error. See Finast Metal Products, Inc., B-179915, May 3, 1974, 74-1 CPD 224; see also Robert E. McKee, Inc., B-181872, November 5, 1974, 74-2 CPD 237; B-169901, June 19, 1970. As we said in Robert E. McKee, Inc., supra, "the fact that the mistake in bid is found in erroneous quotations from suppliers is not a bar to relief". Recognizing this, we believe there is clear and convincing evidence that the claimed mistake was made, since MKB's bid worksheet shows gold plating computed at \$0.175 unit while the confirming written subcontractor quotation was \$1.75 per unit.

The general rule, of course, is that the responsibility for the preparation of a bid rests with the bidder. Therefore, a bidder who makes a mistake in a bid which has been accepted in good faith by the Government must bear the consequences of it unless the mistake was mutual or the contracting officer had either actual or constructive notice (the contracting officer either knew or should have known) of the mistake prior to award. J.B.L. Construction Co., Inc., B-191011, April 18, 1978, 78-1 CPD 301.

Since in this case the mistake was not mutual and the contracting officer did not have actual knowledge of it prior to award, the question is whether the contracting officer was on constructive notice of the mistake prior to award. DAR § 2-406.1 provides that where the contracting officer has reason to believe a mistake may have been made, he must request verification of the bid from the bidder. Our Office has held that no valid and binding contract is consummated if the contracting officer should have known of the probability of error, and neglected to seek verification of the bid prior to award. Cargill, Inc., B-190924, January 17, 1978, 78-1 CPD 43.

The contracting officer believes that she was on constructive notice of MKB's mistake because of the more than a 25 percent difference between MKB's low bid and the next lowest bid. Her superiors do not agree, arguing that bids 25 percent lower than the next low bids are often accepted without verification and that the resulting contracts are not legally objectionable on that basis.

It is true that bid disparities ranging from 5 to 38 percent may be insufficient, standing alone, to charge a contracting officer with constructive notice of a possible mistake. See, e.g., Paul Holm Co., B-193911, May 2, 1979, 79-1 CPD 306. Here, however, there are additional factors which when considered with the 25 percent difference, should have placed the contracting officer on notice of a possible error in MKB's bid. Those factors include an approximately 42 percent difference between MKB's bid and the average of the next three low bids which were within a narrow range. The second and third bids were

within a very narrow range of less than 4 percent, and the second through fourth bids were in a range of less than 14 percent. (After the fourth bid there was a sharp departure from the reasonable progression of bids.) We have recognized that such a bidding range is a factor in determining whether a contracting officer was on constructive notice of an error. Philadelphia Corrugated Container Co., B-194662, May 24, 1979, 79-1 CPD 375.

In addition, there was a significant disparity between the Government estimate and the prices bid. MKB's bid was 28 percent below the Government estimate while all other bids were within 5 percent of the estimate or exceeded it. This too is indicative of constructive notice. See Williams & Co., B-189926, December 27, 1977, 77-2 CPD 506; Charles E. Weber & Assoc., B-186267, May 12, 1976, 76-1 CPD 319.

Although the Navy suggests that even if the contracting officer had asked MKB to verify its bid, the mistake would not have been detected and MKB would have verified its bid, this possibility does not excuse the contracting officer's duty to seek verification of the bid once she was on notice of a possible error. See, e.g., Y. T. Huang and Associates, Inc., B-192169, December 22, 1978, 78-2 CPD 430 (where we allowed a post-award mistake claim even though it appears that the bid there too might well have been verified had the contracting officer made a proper verification request). Moreover, while here MKB might have verified its bid had it been asked, it also might have checked with its supplier and learned of the error. In short, the validity of a post-award mistake in bid claim is based not on what the bidder might have done upon receipt of a verification request, but on whether the contracting officer adequately discharged the verification duty.

Here, we agree with the contracting officer that she failed in her verification duty. Consequently, MKB is entitled to appropriate relief. See Vogard Printing Corp., B-186126, April 20, 1976, 76-1 CPD 268.

BID PROTEST

MKB protests rejection of its bid on the reprocurement contract on the basis that defective specifications in the defaulted contract should excuse its nonperformance. The Navy rejected MKB's bid because it was higher than the defaulted contract price. Although we hold that MKB is entitled to relief in light of the contracting officer's error, we believe that at the time the reprocurement contract was awarded the Navy had a reasonable basis to consider MKB's bid ineligible for award under PRB Uniforms, supra. Therefore, we will not legally object to the rejection of MKB's bid.



For The Comptroller General
of the United States