

DECISION



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

50831

97146

FILE: B-182789

DATE: June 26, 1975

MATTER OF: Clark Manufacturing, Inc.

DIGEST:

1. GAO has no authority to consider request for no-cost cancellation of contracts on equitable basis; further, contracts in question are fixed-price contracts which do not contain escalation provisions to allow increase in contract price due to unanticipated rises in costs.
2. Where under one contract low bid price was \$357.61 and other bid was \$389.00 and previous price paid for item was \$329.00; and where under second contract low bid price, although 20 percent to 30 percent lower than prices offered by next low bidder, depending on destination, was higher than price paid for same item in 1973 and 1972 and was 7.5 percent higher than price of recent contract for same item awarded to same firm, request for relief for mistakes in bids alleged after award is denied, since contracting officer was not on actual or constructive notice of possibility of error in bids.

This matter concerns the request of Clark Manufacturing, Inc. (Clark), for cancellation of contract No. DSA400-74-C-9037 at no cost to Clark or, in the alternative, for reformation of this contract to increase the unit price to \$575.55 per unit. Clark also requests reformation of contract No. DSA400-74-C-5931 to increase the unit price to \$446.31.

Invitation for bids (IFB) DSA400-74-B-4378 (under which contract -5931 was awarded) was issued on November 13 and opened on December 14, 1973. The IFB invited bids for supplying f.o.b. Memphis, Tennessee, or f.o.b. origin 200 Mobility Cargo Bins, NSN7125-00-872-1285, in accordance with a cut sheet for FSN7125-872-1285 dated February 19, 1971. The abstract of bids discloses that two bids were received as follows:

<u>Bidder</u>	<u>Amount</u>
Clark Manufacturing, Inc.	358.61 357.61 *
Barron Industries	394.00 389.00 *

*waiver of first article testing

On January 29, 1974, Clark was awarded contract -5931 as the low responsive bidder in the total amount of \$71,522.00. Delivery was required on or before June 30, 1974. On February 14, 1974, the contracting officer, pursuant to the option provision of the contract, increased the quantity to 400 bins and the price to \$143,044 with delivery by September 28, 1974. Clark completed delivery of this order by November 15, 1974.

IFB DSA400-74-B-7024 (under which contract -9037 was awarded) issued on March 22, 1974, invited offers for supplying f.o.b. origin or f.o.b. four stock locations, a total of 484 Mobility Cargo Bins. Bids were opened on April 23, 1974, and the abstract of bids discloses the following:

<u>Bidder</u>	<u>F.O.B. Destination</u>			
	<u>Tracy California 99 ea.</u>	<u>Columbus Ohio 30 ea.</u>	<u>Memphis Tennessee 202 ea.</u>	<u>Richmond Virginia 153 ea.</u>
Clark Manufac- turing, Inc.	\$385.00	\$385.00	\$385.00	\$385.00
Atlas Hospital Equip. Co., Inc.	549.00	479.00	500.00	479.00
Barron Industries	690.96	690.96	690.96	690.96
Dehler Manufactur- ing, Co., Inc.	620.00	580.00	580.00	580.00

The bid abstract indicates that Atlas also submitted an f.o.b. origin bid of \$449 each and Dehler Manufacturing Co. Inc., submitted an f.o.b. origin bid on all items. The contracting officer reports that during the previous 18 months two contracts had been awarded for the same item at prices of \$329 each for 191 bins and \$357 each for 200 bins. The latter contract was contract -5931 awarded to Clark which was in production when it submitted its bid under IFB DSA400-74-B-7024. On May 30, 1974, the contracting officer accepted Clark's offer without verification by awarding contract -9037 in the total amount of \$186,340. Delivery was required by January 31, 1975.

By letter dated June 11, 1974, Clark advised the contracting officer that it had underbid both of the contracts awarded and would sustain substantial losses in performance. The following factors were cited by Clark:

"a. Unwillingness of suppliers to deliver at previously quoted prices.

"b. A decline in unemployment in the Wellington, Kansas, area making it necessary to hire and train inexperienced manufacturing personnel.

"c. Necessity of paying higher wages for labor than anticipated.

"d. Inaccurate estimates of labor hours required due, at least in part, to the fact that the firm was using inexperienced personnel.

"e. Material cost estimates for Contract DSA-400-74-C-9037 which were based on material delivered in March 1974.

"f. Inability to make accurate estimates of material costs for Contract DSA-400-74-C-9037 because of delays in the receipt of material for Contract DSA-400-74-C-5931."

By letter dated June 19, 1974, to the contracting officer, Clark further alleged a mistake in its bid under Contract -9037 resulting from the erroneous omission of \$110.07 per unit fabrication labor cost and a total of \$7,000 freight cost from its bid. The contracting officer denied Clark's request for relief in a letter dated August 9, 1974.

Subsequently, Clark submitted an application for extraordinary contractual relief pursuant to Public Law 85-804. This request for relief was denied on September 26, 1974, by the Counsel, Defense General Supply Center. This decision was affirmed by Counsel on November 14, 1974, after being reconsidered at Clark's request.

By letter dated November 22, 1974, and subsequent correspondence, Clark requested our Office to permit cancellation of contract -9037 or reformation thereof and requested reformation of contract -5931.

To the extent Clark's request for relief is for an upward price adjustment, we note that the contracts in question are fixed-price contracts which do not contain any escalation provisions to allow increase in contract price due to unanticipated rises in costs. Further, our Office has no authority to consider requests

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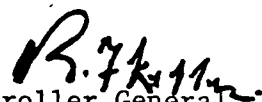
for a no-cost cancellation on an equitable basis. See The R.H. Pines Corporation, B-181599, December 26, 1974.

We do note that legislation has been introduced in the Congress which would grant relief to small businesses which presently have fixed-price Government contracts and have encountered significant and unavoidable difficulties during the performance of their contracts because of the energy crisis or rapid and unexpected cost escalation. See H.R. 2879, 94th Cong., 1st Sess. (1975); S. 1259, 94th Cong., 1st Sess. (1975).

With regard to Clark's claim of mistake alleged after award, our Office will grant relief only if the mistake is mutual or the contracting officer was on actual or constructive notice of the error prior to award. 48 Comp. Gen. 672 (1969). Constructive notice is said to exist when the contracting officer, considering all the facts and circumstances of a case, should have known of the possibility of an error in bid. 44 Comp. Gen. 383, 386 (1965).

There has been no showing that the contracting officer was on actual notice of an error in Clark's bid and the record does not indicate that he was on constructive notice of the existence of a mistake prior to the award of either contract. In that connection, Clark's \$357.61 price on contract -5931 was in line with the other bid on the procurement and the price of \$329.00 paid in 1973. Although Clark's price on contract -9037 was 20 percent to 30 percent lower than the prices offered by the next low bidder, depending on destination, the price offered was higher than any price paid for the same item in 1973 and 1972 and was 7.5 percent higher than the price of contract -5931 which had recently been awarded to Clark for the same item. The contracting officer states that he was not aware that Clark was encountering any difficulty in performing the earlier contract. Since Clark was already producing the same item under another Defense Supply Agency contract, the contracting officer contends that he could reasonably assume that economies were available to the firm which were not available to the other bidders. Under these circumstances, we do not believe that the contracting officer was on constructive notice of the possibility of an error in either of Clark's bids.

In the circumstances, we find no basis for granting relief to Clark under either contract.


Deputy Comptroller General
of the United States