DECISION

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

60113

FILE: B-184014 DATE: November 3,1975

MATTER OF: Nevada Fleet Service

97581

DIGEST:

1. The fact that a contractor improvidently bid "no charge" for a substantial number of items in a requirements-type contract provides no basis for questioning the validity of the contract when the contractor was the low, responsive bidder, its bid prices were twice confirmed before award and no error therein has been alleged, and it had been determined to be responsible after a preaward survey.

2. Where matter of alleged inadequate number of orders by Government under a requirements contract was considered and resolved by ASBCA in the course of contractor's appeal of default termination, GAO will not consider matter on merits inasmuch as there does not exist another tier of administrative review. S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972).

The contractor has requested our legal opinion as to the validity of its defaulted requirements contract F04626-72-C-0020 with the Department of the Air Force, Travis Air Force Base, California, awarded in 1971. The contract was awarded pursuant to invitation for bids F04626-71-B-0783 for washing, corrosion treatment, and interior cleaning of various military aircraft for the period of August 1, 1971 through July 31, 1972.

We have been advised by the Air Force that bids were opened on June 25, 1971, evidencing responses from six bidders. Prices ranged from the contractor's low bid of $171,118 to a high of $677,128. The invitation's schedule reportedly contained 41 items, and the contractor is stated to have indicated "no charge" for 25, thereby alerting the contracting officer to the possibility of a mistake in bid. Of particular concern was the contractor's entry of "no charge" for a complete corrosion control on C-5 aircraft although it bid a unit price of $80.00 for the same work on the smaller C-141.

On the day of bid opening, the contracting officer sent a letter to the contractor requesting verification of its bid, calling attention in particular to the "no charge" items and the fact that the bid was substantially below the other bids. By letter of August 5, 1971, the contractor reportedly advised that it had reviewed its bid and confirmed its prices. It is also reported that a second confirmation was obtained from the contractor as part of the subsequent contract approval by Headquarters, Military Air Command, prior to award. In view thereof, and of a preaward survey recommending award to the contractor, the agency states that the execution of the contract with the contractor was considered appropriate.

It is reported that the contractor was unable to complete performance of the contract because its costs substantially exceeded its revenues, with the consequence that the contract was terminated for default and excess costs of reprocurement were assessed in the sum of $68,367.08. Upon appeal, the Armed Services Board of Contract Appeals (ASBCA) held that the Government's good-faith ordering of "no-charge" items under the contract was not an excusable cause of the default and that the charges of the reprocurement contract were reasonable. Nevada Fleet Service, ASBCA Nos. 17198, 17859, April 9, 1974, 74-1 BCA 10,610.

The contractor does not allege that the losses it incurred under the contract resulted from a mistake in bid: its bid prices including "no charge" items were as it intended. Relief from an alleged mistake in bid would have been precluded in any event in view of the fact that the bid was twice confirmed prior to award. See 54 Comp. Gen. 509 (1974), 74-2 CPD 376.

Rather it appears that the contractor chose the stratagem of bidding "no charge" for a number of items in an effort to win the contract. In its letter to our Office, the contractor has argued that the Government should have protected it from its own judgment by rejecting its bid and making award to the next low bidder. However, we agree with the agency's position that after Nevada's low, responsive bid had been twice confirmed and the firm had been determined to be responsible after a preaward survey, the contracting officer was obligated to make award to it. We see no basis for questioning the validity of the contract.

The contractor further alleges that its losses were attributable in part to the fact that Government orders for services under the contract were substantially below the estimated quantities.

This contention was considered by the ASBCA in its decision of April 9, 1974, which noted that the contract was of the "requirements" type in which the Government was required only to utilize the contractor's services for its needs. The Board further found that the contracting agency acted in good faith in placing its orders thereunder, and in so finding, the Board rejected the contractor's argument that the Government must be compelled to place orders in quantities which will reimburse a contractor for at least its costs, regardless of the Government's actual requirements. Accordingly, the Board concluded there was no requirement that the Government assure that a contractor earn its expenses, and held that the misfortune of failing to make a profit from a requirements type contract does not constitute an excusable cause for nonperformance.

Since the foregoing issue was resolved by the ASBCA pursuant to its authority under the Disputes clause of the contract, our Office will not assume jurisdiction thereover inasmuch as the Supreme Court had declared that there does not exist another tier of administrative review. See S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972).

In view of the foregoing, the record does not afford a basis upon which this Office may grant the relief sought by the contractor.

Deputy Comptroller General
of the United States