DECISION

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

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FILE: B-184780 DATE: December 23, 1975

MATTER OF: Stainless Piping Supply Company

DIGEST:

1. Where contract is terminated for default for failure of contractor to supply item which is also subject of mistake claim, issue of whether mistake exists is not under jurisdiction of Armed Services Board of Contract Appeals but for GAO or courts to decide.

2. Contractor alleging mistake in bid after award is not entitled to relief where contracting officer had no actual or constructive notice of mistake prior to award. Variation of approximately 12.7 percent between low and next low bid and fact that manufacturer cited on bid allegedly does not produce required item are not sufficient to constitute constructive notice of mistake.

Stainless Piping Supply Company (Stainless) requests that our Office grant it relief from a decision of the Defense Construction Supply Center, Defense Supply Agency (DSA) denying Stainless' claim of mistake alleged after award of contract DSA700-75-C-4896.

The contract resulted from IFB DSA700-75-B-1708 which calls for the delivery of pipe of various diameters. Items 0001 and 0002 call for welded pipe while Item 0003 and option Item 0004 call for seamless pipe. Stainless was the lowest of eight bidders on Item 0001, welded pipe, as well as on Item 0003, the seamless pipe, for which it bid $4.16 per foot. The next lowest bid on seamless pipe was $4.69 per foot. On March 27, 1975, DSA exercised the option quantity under Item 0004 and awarded contract DSA700-75-C-4896 for Items 0001, 0003 and 0004 to Stainless. The award of Item 0001 is not in controversy.

Shortly after the award Stainless wrote the agency and alleged that its bid on Item 0003 was erroneous in that it was based on furnishing welded rather than the seamless pipe required by the IFB. The agency responded by issuing a 10-day "cure notice" and informing Stainless that since its price was "in line" with the others received there was no basis to charge the contracting officer with knowledge of the mistake. The agency also warned Stainless that a valid contract existed obligating it to deliver the required seamless pipe.

Subsequently, on April 29, 1975, Stainless disputed the agency's finding that no relief could be granted and requested that the matter be further reviewed. By letter dated May 14, 1975, the contracting officer agreed to hold termination for default action in abeyance pending resolution of Stainless' request for relief from its alleged mistake in accordance with Public Law 85-804 as implemented by Executive Order 10789, November 14, 1958 and Armed Services Procurement Regulation (ASPR) Section XVII and offered Stainless an opportunity to submit additional evidence in support of its relief claim.

Stainless replied by restating its position that the mistake occurred in bidding on welded rather than seamless pipe and supporting that position by submitting a price list used in formulating its bid and contending that it indicated on the face of its bid that the pipe would be supplied by a firm which Stainless insisted does not manufacture seamless pipe.

By decision dated June 4, 1975, the agency denied Stainless' request that the agency cancel Items 0003 and 0004 of the contract on the basis that the contracting officer had no actual or constructive notice that Stainless had submitted a mistaken bid. Stainless again requested the agency to reconsider its determination but this request was denied. Shortly thereafter the agency terminated Stainless' contract for default because Stainless had not delivered the pipe as required by the contract.

It is Stainless' position that it should not be obligated to deliver the seamless pipe because it made an honest mistake in quoting welded instead of seamless pipe. In support of this position Stainless notes that the supplier named on its bid does not manufacture seamless pipe and argues that its price was considerably lower than the second low bid. Stainless argues that it is unreasonable for the agency to force it to either supply the pipe or bear the responsibility for any excess costs which may result from a reprocurement of this pipe since Stainless clearly made an honest mistake without attempting to deceive the Government.

The agency contends that Stainless' mistake was not so obvious from the face of its bid that the contracting officer was or should have been on notice of the possibility of mistake. In any event the agency insists that the matter is not for consideration by our Office because the contract was terminated for default on June 30, 1975, prior to Stainless' filing this request with this Office, and Stainless did not appeal the contracting officer's final decision to the Armed Services Board of Contract Appeals (ASBCA). The agency concludes that in view of such a default termination the question of mistake is moot.

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, Martin W. Juster, B-181797, May 15, 1975, 75-1 CPD 297; National Line Company, Inc., ASBCA No. 18739, July 16, 1975, 75-2 BCA 11400, and decisions cited therein. Since the ASBCA would not have decided Stainless' mistake claim even if the contractor had raised the issue in contesting the termination of its contract the issue of mistake remains viable notwithstanding the uncontested termination of the contract. We do not purport to review the agency's decision denying relief under Public Law 85-804, but are considering Stainless' claim as we would any other claim based upon alleged mistake in bid. 52 Comp. Gen. 534 (1973).

Where a mistake in bid is alleged after award, Armed Services Procurement Regulation (ASPR) § 2-406.4 (1975 ed.) provides, in part, that corrective action may be taken: "where evidence is clear and convincing 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, * * *"

Likewise, it has been consistently held by the courts and our Office that where a bidder or offeror has made a mistake in its bid or offer that was not induced or shared by the Government, the bidder or offeror must bear the consequences of its mistake, unless the contracting officer was on actual or constructive notice of the error prior to the award of the contract. Saligman v. United States, 56 F. Supp. 505 (E.D. Pa. 1944); Chernick v. United States, 372 F.2d 492 (Ct. Cl. 1967); D. G. Machinery & Gage Co., B-181230, January 27, 1975, 75-1 CPD 50; 48 Comp. Gen. 672 (1969). The test is one of reasonableness, whether under the facts and circumstances of the particular case there were any factors which reasonably could have raised the presumption of error in the mind of the contracting officer. Wender Presses, Inc. v. United States, 343 F.2d 961 (Ct. Cl. 1965); D. G. Machinery & Gage Co., supra.

In this instance the second low bid was $4.69 or about 12.7 percent higher than Stainless' bid. According to the agency, past procurement history on this type of seamless pipe reveals prices ranging from $2.92 to $4.98. In the circumstances we do not believe that the disparity between Stainless' bid and that of the next low bidder and those prices bid in the past are sufficient to constitute constructive notice of the possibility of error. Capitol Aviation, Inc., B-184238, July 30, 1975, 75-2 CPD 68. Nor do we think it is reasonable to conclude that the contracting officer was on notice of the fact that Stainless' supplier allegedly does not manufacture seamless pipe.

Therefore, there is no legal authority for our Office to grant Stainless any relief.

Deputy Comptroller General
of the United States