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DECISION

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

FILE: B-190865 DATE: July 19, 1978

MATTER OF: Security Systems, Inc. - Reconsideration

DIGEST:

1. While contractor might not have been aware of applicability of Service Contract Act at time contracts were awarded, relief on basis of mutual mistake is not permissible since contracts express Government's intention and any mistake as to requirements of contracts was unilateral and not mutual.

2. Contracts cannot be reformed where bid prices were not so far out of line as to constitute notice of mistake and it was not apparent from examination of successful bids that no provision had been made for compliance with Service Contract Act.

3. Where bid on one contract was $24,127.16, second low bid was $32,612.16 and prior contract was $27,610 and bid on second contract was $26,906.88 and second low bid was $32,664.25, facts and circumstances preclude finding that contracts awarded were unconscionable.

In Security Systems, Inc., B-190865, February 1, 1978, 78-1 CPD 97, we found for the reasons stated therein that the denial by the Corps of Engineers of the Security Systems, Inc. (SSI), claim was proper. By letter of March 9, 1978, SSI indicated that it was not its intention to appeal the basis of the Corps' decision, but to obtain relief in connection with the performance of contracts DACW49-76-C-0005 and DACW49-77-D-0006 awarded by the Corps for guard services for the period July 1, 1975, to September 30, 1977, either on the basis of mutual mistake, unilateral mistake or unconscionability.

Due to an apparent misunderstanding concerning the applicability of the Service Contract Act, 41 U.S.C. § 351 (Supp. IV, 1974), SSI paid its employees the rate prescribed by the Fair Labor Standards Act, 29

U.S.C. §§ 201-219 (1970), rather than the higher rate prescribed by the Service Contract Act. SSI was informed by the Department of Labor that it was in violation of the Service Contract Act and owed its employees additional compensation representing the difference between the wages actually paid and the rates called for under the Service Contract Act. SSI subsequently requested the Corps to afford it extraordinary contractual relief under Public Law 85-804 for recovery of what it contends were unanticipated costs it was required to pay its employees. Subsequent to receipt of the Corps' denial of its request, SSI appealed to our Office.

The general rule as to a mistake in bid alleged after award is that the bidder must bear the consequences unless the mistake is mutual or the contracting officer had actual or constructive notice of the error prior to award. Reaction Instruments, Inc., B-189168, November 30, 1977, 77-2 CPD 424; Boise Cascade Envelope Division, B-185340, February 10, 1976, 76-1 CPD 86; Porta-Kamp Manufacturing Company, Inc., 54 Comp. Gen. 545 (1974), 74-2 CPD 393, and cases cited therein. No valid or binding contract is consummated where the contracting officer knew or should have known of the probability of error, but failed to take proper steps to verify the offer.

In our view, any misunderstanding SSI may have had regarding the applicability of the Service Contract Act constitutes a unilateral, not mutual, mistake and correction is not permissible unless the contracting officer was on notice of a possible mistake and failed to adequately fulfill his verification duty. The two solicitations in question contained identical provisions which advised bidders that the procurements were subject to the requirements of the Service Contract Act, as amended by Public Law 92-473, October 9, 1972. Bidders were advised to submit any questions regarding the extent of these obligations to the Department of Labor. The record does not indicate that SSI made any inquiries to the Department of Labor. Further, the solicitation incorporated Wage Determination No. 67-111

and the Service Contract Act general contract provision calling for the contractor to pay the wages and fringe benefits specified "in any attachment to this contract." Thus, at the time both contracts were awarded, any mistake SSI may have made was unilateral and not mutual.

Regarding SSI's claim of mistake on the first contract, the record indicates that nine bids were received ranging from SSI's low bid of $24,172.16 to $164,621.52. The second low bid was $32,612.16. Regarding SSI's claim of unilateral mistake on the second contract, the record discloses that the 10 bids received ranged from $24,888 to $42,355.34. The contracting officer permitted the low bidder to withdraw its bid in view of an obvious mistake. SSI was the second low bidder at $26,906.88. The next low bid was $32,664.25.

In our view, SSI's prices were not so far out of line as to constitute notice of mistake. Further, it was not apparent from an examination of either of SSI's bids that it had not made any provision for compliance with the Service Contract Act. Good faith acceptance of the bid therefore consummated a valid and binding contract.

SSI next contends that it should be allowed relief on the grounds that it is unconscionable for the Government to require performance at the mistaken bid price. A contract is unconscionable when a reasonable examination of the circumstances makes it obvious that the Government would be getting something for nothing. 53 Comp. Gen. 187 (1973). In this case, SSI's bids were not substantially lower than the prices the Government had paid for the same services in the past. SSI's low bid under contract DACW49-76-C-0005 was $24,127.16, as compared to the second low bid of $32,612.16, and the price the Government paid for the prior year's contract for the same services was $27,610. With regard to contract DACW49-77-B-0006, SSI's price was $26,906.88, as compared to the next

low bid of $32,664.25. Our Office has found contracts to be unconscionable where the second low bid was between 280 and 300 percent greater than the contract price; on the other hand, differences of 53 and 58 percent have been held insufficient to demonstrate unconscionability. Walter Motor Truck Company, B-185385, April 22, 1976, 76-1 CPD 272, and cases cited therein. In the present case, we believe that the above-mentioned facts and circumstances preclude a finding of unconscionability.

For the reasons stated, we conclude that there is no legal basis for reformation of SSI's contracts.

For The Comptroller General
of the United States