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DECISION

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

FILE: B-194941 DATE: August 27, 1979

MATTER OF: R.B.S., Inc.

DLG 00086

DIGEST:

1. Contract may not be reformed on basis of mutual mistake where contract reflects parties' actual agreement, and there is no evidence of misrepresentation by Government that induced mistake.

2. No legal basis exists for reformation of contract based on claim of unilateral mistake in bid alleged after award, since comparison of low bid with other bids received provided no basis for contracting officer to suspect mistake in low bid, and acceptance of bid resulted in valid and binding contract.

3. Bidders are charged with notice of United States statutes and of regulations published in Federal Register.

R.B.S., Inc., requests for increase in the contract price of contract No. DLA600-78-D-1654 awarded to the firm on November 10, 1977, by the Defense Logistics Agency (DLA) for 45,000 tons of bituminous coal, on the basis of an error in its bid discovered after the award. R.B.S. contends that it mistakenly failed to include in its bid price a $.35 per ton reclamation fee required by section 402(a) of the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 457 (1977) (the Act), which provides:

> "All operators of coal mining operations subject to the provisions of this Act shall pay to the Secretary of the Interior * * * a reclamation fee of 35 cents per ton of coal produced by surface coal mining * * *."

For the reasons set forth below, the request is denied.

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The Act became effective on August 3, 1977, over two months before the October 18 bid opening under the solicitation for the coal. R.B.S. states that it was not aware that it would have to pay the reclamation fee under the subject contract until it received a copy of the December 13, 1977, Federal Register, in which final rules and regulations for implementing the Act were published. 42 Fed. Reg. 62713 (proposed rules were published in the Federal Register on September 7, 1977, 42 Fed. Reg. 44956). R.B.S. also suggests that the contracting officials may not have been aware of the applicability of the Act at bid opening, and that if they were they should have informed prospective bidders of the necessity to consider the reclamation fee in their bids. Finally, R.B.S. contends that a price adjustment would be appropriate under clause L28 of the contract, which provides:

"FEDERAL, STATE AND LOCAL TAXES

"(a) * * *the contract price includes all applicable Federal, State and local taxes and duties.

"(b) Nevertheless, with respect to any Federal excise tax or duty on the transactions or property covered by this contract, if a statute, court decision, written ruling, or regulation takes effect after the contract date, and --

(1) results in the Contractor being required to pay or bear the burden of any such Federal excise tax or duty or increase in the rate thereof * * * the contract price shall be increased by the amount of such tax or duty or rate increase * * *.

* * * * *

(e) As used in paragraph (b) above, the 'Contract Date' means the date set for bid opening * * *."

We have consistently held that the responsibility for the preparation of a bid rests with the bidder. 48 Comp. Gen. 672, 674 (1969). Therefore, when a mistake in bid is alleged after the award of a contract, our Office will grant relief only if the mistake was mutual or, in the case of a unilateral mistake, if the contracting officer was on actual or constructive notice of the error prior to award. Smith Decalcomania Co., Inc., B-182414, January 27, 1975, 75-1 CPD 54.

The essence of mutual mistake is that the contract as reduced to writing does not reflect the actual agreement of the parties, but see B-154920, August 21, 1964; 30 Comp. Gen. 220 (1950). Here, it is clear that the contract in fact represented the parties' actual agreement. Moreover, we do not consider it relevant that the contracting officials may have known of the applicability of the Act before bid opening but failed to communicate that knowledge to prospective bidders, since R.B.S. is charged with notice of the Act's provisions, Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947), and there is no evidence in the record to suggest that the contracting officials misrepresented to R.B.S. that the reclamation fee in fact did not apply. Rust Engineering Company, B-180071, February 25, 1974, 74-1 CPD 101.

With respect to the above, it is not relevant that final rules under the Act were not published in the Federal Register until December 13, 1977, since section 402(b) of the Act states that the fee referenced in section 402(a) "shall be paid no later than thirty days after the end of each calendar quarter beginning with the first calendar quarter occurring after the date of enactment of this Act * * *." (emphasis added.) In addition, R.B.S. is also considered to have been on notice of the pro-

posed rules under the Act which were published in the Federal Register more than one month before bid opening, 42 Fed. Reg. 44956, and which provided that the "fee for coal produced during the fourth quarter, 1977, will be due no later than January 30, 1978."

Concerning whether relief would be appropriate on the basis of a unilateral mistake, a valid and binding contract is consummated by the Government's acceptance of a responsive bid unless the contracting officer knew or should have known of the probability of an error in the bid but failed to take proper steps to verify it. Dunbar & Sullivan Dredging Co., B-188584, December 23, 1977, 77-2 CPD 497. In determining whether a contracting officer had a duty to verify a bid price, we have stated that the test is whether under the facts and circumstances of the particular case there were any factors which reasonably should have raised the presumption of error in the mind of the contracting officer. R.E. Lee Electric Co., Inc., B-184249, November 14, 1975, 75-2 CPD 305. If appropriate, the contract price is ordinarily corrected upon presentation of evidence establishing error and the intended price. Charles E. Weber & Associates, B-186267, May 12, 1976, 76-1 CPD 319.

Here, the only possible basis upon which to conclude that the contracting officer should have suspected a mistake in R.B.S.'s bid is to compare it with the other bids received by DLA. See Galion Manufacturing Division, Dresser Industries, Inc., B-193335, June 19, 1979, 79-1 CPD 436; Sunland Refining Corporation, B-191272, August 30, 1978, 78-2 CPD 154, at p. 10. However, R.B.S. bid $31.50 per ton, and the other acceptable bids received were $32.00, $33.50, $42.00 and $47.00 per ton. Under these circumstances, we do not consider that the contracting officer was on constructive notice of the alleged mistake.

Finally, even if the reclamation fee can be considered a "Federal excise tax or duty" within the meaning of clause L28 of the contract, the contract price clearly could not be adjusted pursuant thereto, since the clause by its terms authorizes

a price increase only where a contractor's cost is increased by a statute that takes effect after bid opening. As stated above, the Act became effective on August 3, 1977, and bids were opened under the solicitation for the coal on October 18 of that year.

In view of the above, the request for an increase in the contract price was denied. Accordingly, it is not necessary to consider evidence presented by R.B.S. to show why and how the alleged mistake was made or the intended bid. Galion Manufacturing Division, Dresser Industries, Inc., supra.

John D. Heller

For the Comptroller General
of the United States