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DECISION

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

[Request for Contract Reformation]

FILE: B-196796

DATE: May 22, 1981

MATTER OF: Bromley Contracting Company, Inc.

DIGEST:

1. GAO will consider error in bid claim filed after effective date of Contract Disputes Act of 1978 where contract was entered into before effective date of act, since contractor had option of filing claim with either GAO or contracting agency in the circumstances.

2. Claim for reformation of contract is denied where contracting officer amended contract after contract was performed to correct mutual mistake as to amount of work and contractor was compensated on basis of contract unit price of which contracting officer had no notice of error when contract was awarded.

Bromley Contracting Company, Inc. (Bromley), seeks reformation of a contract for masonry repairs which it performed for the Department of the Army at Fort Dix, New Jersey (Army). At issue is the amount which should be paid for the removal and replacement of 5,569 bricks. Bromley argues that it is entitled to reformation based upon alternative theories of defective specifications and mistake in bid. We deny the request for reformation.

On June 30, 1975, Bromley and the Army entered into contract No. DABT35-75-C-0367 for the repair of exterior brickwork on various permanent buildings at Fort Dix, New Jersey. The specifications provided that brick 11-1/2 x 3-5/8 x 2-1/4 inches in size should be used for the exterior facing and drawings indicated that a total of 244 square feet of brick would need to be removed and replaced. The Government

estimated that 160 cubic feet of brickwork, at a construction cost of $54 per cubic foot, would be required. This was based on an estimated cost of $8,640, which represented a quantity of 4,320 bricks at $2 per brick. (The source of the figure 4,320 is not disclosed.) Bromley submitted a bid of $49 per cubic foot and the contract unit price schedule provided for payment of $7,840 (160 cubic feet at $49 per cubic foot) for the work.

The contract was modified on March 10, 1976, following a decision by the contracting officer which denied Bromley's claim for compensation in the amount of $92,745.87. The modification increased the estimated quantity of brickwork to 337.5 cubic feet and the amount to be paid to $16,537.50. This increase reflected the fact that Bromley had installed 5,569 bricks, considerably more than the Government estimate of 4,320, and that since the bricks were 8 x 3-1/2 x 2-3/4, rather than 11-1/2 x 3-5/8 x 2-1/4, conversion ratios of 5-1/2 per square foot and 16-1/2 per cubic foot were appropriate.

Bromley appealed the contracting officer's decision to the Armed Services Board of Contract Appeals (ASBCA), alleging that the Army's specifications were defective. The contractor cited the following errors in the bid package: a misrepresentation of solid brick construction, a misstatement of brick size in the specifications and, as scaled on the drawings, a duplication in work areas shown by legend on the gymnasium elevations, a gross underestimate of brick replacement work in these and other buildings, and the use of an erroneous unit of measure in the pricing schedule. The ASBCA found that the size of the brick was misstated, both in the specifications and as scaled on the drawing, and refused to charge the contractor with constructive knowledge of the error solely by reason of the site investigation clause or the requirements of the contract. However, ASBCA rejected the assertion that the use of cubic feet in the price schedule was a mistake and reasoned that a series of miscalculations by the contractor had led it to the erroneous conclusion that the 160 in the price schedule was to be read as square feet rather

than cubic feet. The ASBCA further noted that the price schedule estimate of 160 cubic feet could be harmonized with the drawing's representation of 244 square feet:

> "* * * The only way to give meaning to the 160 cubic feet is to read the table on Sheet 3 and the work schedule on Sheet 2 to require some indefinite, but estimated for the purpose of bidding, number of bricks to be removed and replaced, as indicated both by the circle and the cross hatching, on all the elevation drawings. The drawings, with their legends (Sheet 3) and schedule (Sheet 2) are not models of clarity, but this is a permissible, and in the context of the entire bid package the only, reasonable interpretation."

The ASBCA concluded that the contractor had been fully compensated for all work in excess of the initially estimated quantities and was not entitled to more on any theory. Accordingly, the appeal was denied.

On May 2, 1979, Bromley submitted a claim for reformation of the contract to the contracting officer under the Contract Disputes Act of 1978. The contracting officer declined to consider the claim on the basis that the Contract Disputes Act of 1978 did not apply to the contract. Subsequently, Bromley submitted to our Office "a claim for reformation of the above contract to reflect the reasonable value of work as performed in accordance with the Government's interpretation of the contract requirements."

We begin by considering whether this claim is correctly before us. The Army argues that, since Bromley has not alleged the existence of fraud, capriciousness, bad faith or that the ASBCA decision is not supported by substantial evidence, there is no legal basis for our review. We agree in part and disagree in part. We will not consider Bromley's claim that the bid specifications were defective since the ASBCA rendered a decision with regard to that

claim and we will not review the ASBCA decision absent a showing of fraud or bad faith. Booker T. Washington Foundation, B-197170, July 28, 1980, 80-2 CPD 71. We will consider Bromley's claim of mistake in bid, however. Prior to the effective date of the Contract Disputes Act of 1978 [March 1, 1979], ASBCA did not have jurisdiction to hear claims of mistake in bid and, thus, Bromley could not have raised a claim of mistake in bid in its appeal to ASBCA. Under such circumstances, our Office is not precluded from hearing the claim. Y. T. Huang and Associates, Inc., B-192169, December 22, 1978, 78-2 CPD 430. As we noted in a previous claim by Bromley on another contract:

> "We fail to see how Bromley is precluded from asserting a claim of mistake by the mere fact of pursuing a claim of defective specifications before GSBCA or by GSBCA's holding that Bromley 'neither intended to nor did verify any dimensions of the existing window closures.' While the facts upon which Bromley bases its claim of mistake are the same as those upon which Bromley based its claim of defective specifications before GSBCA, a claim of mistake and a claim of defective specifications can be viewed as mutually exclusive. A bidder may have a claim of mistake where its bid is based upon an unreasonable interpretation of unambiguous specifications if the bid is based upon a mistaken belief as to what the specifications call for. * * *" Bromley Contracting Co., Inc., B-189972, February 8, 1978, 78-1 CPD 106.

Thus, we concluded that, although a claim for defective specifications based upon the facts in Bromley's case might fail, a claim based upon mistake might not.

We further note that the contracting officer was incorrect in concluding that the Contract Disputes Act of 1978 would not apply to the contract in question. Section 16 of the act, in relevant part, provides:

> "* * * Notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter."

In this case, the claim with regard to mistake in bid was initiated after the effective date of the act and, therefore, the contractor had the option of electing to proceed under the act. However, since the contractor also had the option of declining to proceed under the act and instead filing a claim with our Office, we will consider the claim.

A bidder who makes a mistake in a bid which has been accepted in good faith by the Government must bear the consequences unless the mistake was mutual or the contracting officer had either actual or constructive notice (the contracting officer either knew or should have known) of the mistake prior to award. J.B.L. Construction Co., Inc., B-191011, April 18, 1978, 78-1 CPD 301; MKB Manufacturing Corporation, B-193552, January 11, 1980, 80-1 CPD 34. Bromley argues both that the mistake was mutual and that the contracting officer had notice of the possibility of error prior to award. We will deal with the two theories in turn.

Where, in connection with a Government contract, the Government apparently negligently misstated a material fact and thereby misled the contractor to its damage, and where the contractor was negligent in not discovering the misstatement and ascertaining for itself what the facts were before submitting its bid, the position of the parties is that of persons who have made a mutual mistake as to a material fact relating to the contract which should be reformed by putting the parties in the position they would have occupied but for the mistake. Virginia Engineering Co., Inc. v. United States, 101 Ct. Cl. 516 (1944). The general rule is that a contract made through mutual mistake as to material facts may either be rescinded or reformed. Douglas Studs, Inc., B-195049, July 9, 1979,

79-2 CPD 20. The size of the brick was admittedly misstated in this case and the number of bricks to be replaced underestimated. But the parties have already been placed in the position that they would have occupied but for these mistakes by the contract modification of March 10, 1976. A conversion ratio of 16-1/2 bricks per cubic foot took into account the smaller size of the bricks, and the contractor was compensated for all 5,569 bricks which it replaced and not merely the estimated number. (337.5 cubic feet multiplied by 16-1/2 yields approximately 5,569.)

Where a unilateral mistake in bid is alleged after the award of a contract, our Office will grant relief only if the contracting officer was on actual or constructive notice of the error prior to award, but failed to take proper steps to verify the bid. R.B.S., Inc., B-194941, August 27, 1979, 79-2 CPD 156; Honor Guard Security Services, B-196112, October 24, 1979, 79-2 CPD 289. Defense Acquisition Regulation § 2-406.1 (1976 ed.) requires that a contracting officer request verification of the bid where he has reason to believe that a mistake may have been made, and we have held that no valid or binding contract is consummated if the contracting officer neglects to seek such verification under circumstances in which he should be aware of the probability of error. Cargill, Inc., B-190924, January 17, 1978, 78-1 CPD 43; MKB Manufacturing Corporation, supra.

Bromley argues that the disparity among the bids submitted in response to the Army's solicitation should have put the contracting officer on notice of the possibility of a mistake in bid. We were confronted with widely varying bids in another, previously noted, claim by this contractor, and there held that:

> "* * * In view of the wide range [among] all the bids submitted, indicating no uniformity or consistency, we do not believe that the C.O. [Contracting Officer] acted unreasonably in relying on the Government's revised estimate and failing to verify Bromley's bid. See B-155389, October 28, 1964." Bromley Contracting Company, Inc., supra.

The Government estimate in this case was $54 per cubic foot and Bromley submitted a bid of $49 per cubic foot. The disparity between the two was not enough to place the contracting officer on constructive notice of the possibility of error in bid.

In the circumstances, we deny Bromley's claim for reformation of the contract.

Milton J. Socolar

Acting Comptroller General
of the United States