

COMPTROLLER GENERAL OF THE UNITED STATES

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B-178059

July 17, 1973

The Honorable Arthur F. Sampson
Acting Administrator
General Services Administration

Dear Mr. Sampson:

We refer to a letter dated February 16, 1973, from your General Counsel, concerning the request by Union Carbide Corporation, Linde Division of Birmingham, Alabama, for either rescission or reformation of contract GS-04S-19831 (item A0030) due to a mistake in bid alleged after award.

Union Carbide offered to supply an estimated 1,275,675 cubic feet of liquid oxygen to Fort Bragg Hospital in Fayetteville, North Carolina, at a price of \$0.0352 per cubic foot and, as low bidder, was awarded the contract. After award, Union Carbide asserted that it mistakenly used a page from the previous year's Federal Supply Schedule as an initial worksheet in preparing its bid. That worksheet indicated that storage facilities for the oxygen would be supplied by the Government, whereas the solicitation for bids for contract GS-04S-19831 required the contractor to furnish the storage facilities. In view thereof, Union Carbide asserts that its bid price should have been \$0.0072 per cubic foot. The only other bid received for item A0030 was \$0.0065 per cubic foot.

The contracting officer has advised us that the 70-percent disparity between the two bids received should have alerted her with notice of the probability of a mistake in bid. Your General Counsel and the contracting officer both assert that since the contracting officer did not seek verification of the low bid, no valid and binding contract was consummated upon its acceptance.

This position is at variance with the rule enunciated in 20 Comp. Gen. 286, 289 (1940), where we stated that:

* * * ordinarily no fair comparison with other bids can be made where only two widely variant bids are received, there being no more reason for considering the low bid too low than for considering that a mistake was made by the high bidder in quoting a price too high.

RECOMMENDED DECISION
23 Comp. Gen.

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In that case, we found that the contracting officer was not on notice of the probability of a mistake in bid, notwithstanding the fact that the only two bids received were in the amounts of \$4.25 per unit and \$12.50 per unit. We concluded that there was no basis for relieving the low bidder from the obligations imposed upon it by acceptance of its bid. If we apply that rule here we would be compelled to conclude that a valid and binding contract resulted from the Government's acceptance of the bid and the relief requested by Union Carbide would have to be denied.

However, we have reconsidered the rationale of our decision quoted above, and we believe that the decision is inconsistent with the concept of "constructive notice," which exists when the contracting officer, considering all the facts and circumstances of a case, should have known of the possibility of an error in the bid. 40 Comp. Gen. 326 (1960). It is the legal substitute for actual knowledge and results when the exercise of reasonable diligence would have produced actual knowledge.

Had Union Carbide submitted the only bid, no basis for comparison would have existed to put the contracting officer on notice of the possibility of an error. But here, a basis for comparison did exist because the contracting officer had two widely variant bids before her. Any reasonable person, acting in the position of a contracting officer, upon comparing the bids, should have been alerted immediately to the possibility of a mistake in one of the bids. We believe, therefore, that the contracting officer did not exercise reasonable diligence when she failed to request verification of the low bid. Had she done so, it is reasonable to conclude that she would have had actual knowledge of Union Carbide's mistake in bid. See B-17816, September 19, 1969.

We are of the opinion that the 70-percent difference in price between Union Carbide's bid and the only other bid received, standing alone, was sufficient to charge the contracting officer with constructive notice of a mistake in Union Carbide's bid. Since the contracting officer did not seek verification of the low bid, no valid and binding contract was consummated by its acceptance. B-167816, supra.

In view of the above, 20 Comp. Gen. 286 no longer will be followed by our Office in the consideration of cases similar to the present one.

Accordingly, contract GS-O&S-19881 for item A0030 may be rescinded as to the balance of oxygen covered thereby and payment may be made

to Union Carbide for the 97,941 cubic feet of oxygen already delivered on a quantum valchant basis limited to the amount of the next low bid. 37 Comp. Gen. 685, 686 (1958); B-177410, January 3, 1973.

Sincerely yours,

Paul G. Debbine

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For the

Comptroller General
of the United States