



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

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B-177658

April 30, 1973

Taipei Company, Incorporated
1/211, Serikyaku
Urasoe City, Okinawa

Attention: Mr. Yeichi Nakamura
Vice President

Gentlemen:

Reference is made to your letter of December 12, 1972, and subsequent correspondence, requesting consideration of a claim against the United States in the amount of \$20,488.53. This amount reportedly represents severance pay and administrative expenses incurred in connection with dismissal of 54 of your employees. The employees were dismissed when the requirements for packaging, crating and preservation services at Camp Smedley D. Butler, Okinawa, were reduced under contract No. N57400-71-C-0073.

Denial of the instant claim by the contracting officer was the subject of an appeal by your firm to the Armed Services Board of Contract Appeals (ASBCA No. 17123, October 24, 1972). The Board determined that " * * * payment of the appellant's claim is not permitted by any of the contract provisions." It was, however, suggested by the Board that you might have a claim based on the theory of mutual mistake or innocent misrepresentation on the part of the contracting officer. Since the ASBCA lacks authority to consider such claims, your appeal on these grounds was dismissed. Nevertheless, you were advised in the Board's decision that relief based on these theories might be obtained from the General Accounting Office. Accordingly, you requested this Office to consider the merits of your claim.

Initially, we should note that, based on the Supreme Court's decision in B & B Contractors, Inc., v. United States, 406 U.S. 1 (1972), we no longer review Board of Contract Appeals decisions pursuant to the disputes clause of a contract, absent a showing of fraud or bad faith. B-174899, June 1, 1972. Since you do not allege fraud or bad faith, we are bound to follow the Board's determination denying your appeal pursuant to the terms of the contract.

[Claim for Severance Pay and Administrative Expenses]

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The other bases suggested upon which relief might be granted are mutual mistake and innocent misrepresentation. It is our conclusion, however, that the facts of the case fail to substantiate either of these theories.

The administrative report states that the solicitation in question was issued on May 1, 1971. Because of the possibility of a slowdown in the Vietnam conflict the request for proposals included the following provisions:

"SC-24. GUARANTEED MINIMUM: The Government, recognizing the uncertainties in quantities under this contract, will guarantee to pay the contractor a sum equal to his labor and overhead cost, not including profit, for any given month that quantities offered are below the level of the aforesaid costs. The contractor will compute his charges on the cubic foot unit and if the total invoice is less than the guaranteed minimum then the Government will pay this minimum to the contractor. If the total invoice is in excess of the minimum then the total invoice price will be paid."

"SC-25. The contractor certified that his costs, plus overhead, less profit for any given month will be \$. This amount represents the total labor costs for those labors [sic] that the contractor intends to employ and who were present for the total available labor hours required to perform under this contract."

Three proposals were received, and the Taiei Company, Incorporated, the successful offeror in prior years, was low again. Taiei inserted \$35,000, in the blank provided in paragraph SC-25. Negotiations were then conducted with Taiei. Although no written estimate of the requirements was included in the solicitation, it was apparently assumed by both parties that requirements would continue at approximately the same rate as during the previous year. Payments for services rendered under the prior contract averaged about \$35,000 per month. However, it was apparently recognized by both parties that the actual requirements were contingent upon the level of the conflict in Vietnam.

It is reported that during negotiations, Mr. Kakamura stated that with a guarantee of \$25,000 per month Taiei could furnish 200 men and that based upon past experience this would be sufficient to meet the Government's needs. Therefore, the parties agreed to include a \$25,000 per month minimum in the contract. It is reported that the contract was signed on June 8, 1971 (with performance to commence on July 1, 1971). On June 28, 1971, both the contracting officer and the

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contractor were informed that the Government's requirements were not to exceed \$25,000 per month. It appears from the record that at that time you had not hired any additional employees in anticipation of performance of the subject contract and that the length of service of the dismissed employees ranged from 0.1 to 4.6 years. There is no indication that the contracting officer, or any other responsible Government personnel, had any knowledge prior to contract award that the Government's requirements were to be other than anticipated. Furthermore, there is no indication that the negotiations were conducted other than in good faith.

In regard to your claim for relief based upon mutual mistake, the facts and circumstances of this case do not establish that a mistake recognizable as a basis for reforming the contract was made. As stated previously, the contract provided for payment to your firm of a monthly minimum of \$25,000, regardless of requirements, even though it was anticipated that the Marines' requirements for fiscal 1972 would be about \$35,000 per month, because it was recognized by both parties that the need for services was dependent in part on the level of activity in the Vietnamese conflict. Both you and the contracting officer made certain assumptions concerning the continued level of the conflict, and the contract specifically provided for this contingency. As we stated in one decision " * * * everyone who contracts in reliance upon opinions or beliefs concerning the future knows that these opinions and beliefs are conjectural, and makes his agreement in view of the well-known fact that they may turn out to be mistaken, and assumes the chances that they will do so." B-167951, April 21, 1970. Reformation is available when the written instrument does not correctly express the agreement of the parties. 3 Corbin on Contracts § 614 (1950). Here, the written contract did express the intent of the parties. Therefore, we must conclude no legal relief is available under the theory of mutual mistake.

With regard to the claim for relief based upon misrepresentation, this Office has consistently held that " * * * there is no basis for relief when, during the term of a requirements contract, the buyer's actual requirement does not correspond with the estimated needs, unless it can be shown that the estimates were not based on the best information available, or bad faith, fraud, or misrepresentation was exercised in estimating the requirements." B-176612, February 5, 1971; see also 47 Comp. Gen. 355 (1955); 37 Comp. Gen. 683 (1953). After reviewing the record, we can find no evidence to indicate that the Government's

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estimate of its requirements was based on other than the best information available to the contracting officer at the time. Accordingly, there is no legal basis upon which we may authorize payment of your claim.

Sincerely yours,

Paul G. Demblin

For the Comptroller General
of the United States

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