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Proc. 11.

DECISION



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

FILE: B-189514

DATE: December 7, 1977

MATTER OF: Colonial Oil Industries, Inc.

DIGEST:

Relief may be granted because of unilateral mistake in bid where record indicates that Government should have been aware of possibility of mistake prior to making award. However, amount of relief granted for each item may not exceed price of next acceptable bid. Award should be rescinded and requirements resolicited.

Colonial Oil Industries, Inc. (Colonial) requests relief for an alleged mistake in its bid price under contract No. DSA 600-77-D-2004, awarded on March 4, 1977 by the Defense Fuel Supply Center (DFSC).

The Invitation for Bids (IFB) called for bids to provide certain fuel oil requirements to various Federal installations. Price adjustments were permitted in the event of any changes in the contractor's established or posted prices after bid opening. The IFB provided, however, that if the price change occurred prior to bid opening, but after the bid was received, the bidder must modify its bid prior to bid opening in order for the change to be considered. Colonial states that a change occurred in its stated price the day after submission of its bid and that it failed to modify its bid price prior to bid opening to reflect the increase, believing that a price adjustment could be made after award for changes occurring prior to bid opening. Insofar as is pertinent here, an established or posted price is one which is established in the usual and ordinary course of trade and is included in a regularly maintained catalog of prices at which sales currently are being made to the general public.

Colonial states that it mailed its bid on December 2, 1976, that it received from its suppliers notice of a posted price increase of 45 cents per 42 gallon barrel on December 3, 1976 and that on the same date, it called the DFSC buyer to inquire if it was necessary to give notice to DFSC of this posted price increase. Colonial states that its copy of the solicitation did not contain the form which required that bid prices be modified prior to bid opening

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and that it was told by the DFSC buyer that no such modification was required until after contract award. The firm made no attempt to modify its bid price to reflect the 45-cent price increase of its suppliers and the 8-cent per barrel price increase resulting from the Federal Energy Administration's (FEA) reduction in the Old C-1 Entitlement Allowance in December 1976. This allowance comes within the term "temporary voluntary allowance" as used in the IFB and will be referred to herein as "allowance."

The DFSC buyer in question states that she does not recall receiving such a phone call from Colonial prior to bid opening. Be that as it may, the record does show that after bid opening another bidder protested to the procuring activity on the basis that Colonial was not offering all of its customers an allowance of \$.01883 per gallon as offered in its bid. Thereafter, DFSC requested that Colonial verify whether the allowance was being applied to all customers. Colonial replied by letter of January 12, 1977 enclosing copies of its price change notices, including one dated December 3, 1976. These notifications list posted prices, the deduction for entitlement allowance and the net price for each fuel grade. To ascertain whether the allowance was being applied equally to the Government, the contracting officer would have had to compare the allowance indicated in the bid with the allowance indicated in the pertinent notification dated December 3. The verification would have shown that the then current December allowance of \$.01643 was not reflected in the bid price submitted but, rather, the November allowance of \$.01883 was used for bidding purposes. Thus, it should have been apparent to DFSC that the bidder had not offered the Government the same allowance it was offering other customers at the time of bid opening. The contracting officer should have observed that Colonial offered the Government a more advantageous allowance and a price based on the November price list and we believe she should have ascertained whether the bidder mistakenly or intentionally had done so. B-151963, August 16, 1963; B. R. Abbot Construction Company, B-186263, May 26, 1976, 76-1 CPD 344.


Instead Colonial was awarded a contract for an estimated 48,236,000 gallons of fuel on March 4, 1977. On March 24, 1977, it notified DFSC of all price increases which occurred from the time of bid submission until contract award. DFSC refused to accept the posted price increase of December 3, 1976 and the increase resulting from the FEA's December reduction in the allowance. Colonial seeks an increase in its bid price of 53 cents per barrel consisting of the 45 cents increase in posted price and 8 cents resulting from the change in allowance.

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The general rule applicable to a mistake in bid alleged after contract award is that the sole responsibility for preparation of a bid rests with the bidder and, where a bidder makes a mistake in bid, it must bear the consequences of its mistake unless the mistake is mutual or the contracting officer was on actual or constructive notice of error prior to contract award. Boise Cascade Envelope Division, B-165340, February 10, 1976, 76-1 CPD 86. Constructive notice is said to exist when the contracting officer, considering all the facts and circumstances of a case, should have known of the possibility of an error in bid. 44 Comp. Gen. 383, 386 (1965).

This Office had held that no valid and binding contract is consummated when the contracting officer knew or should have known of the probability of error, but neglected to take proper steps to verify the bid. Terminex, Inc., B-188510, June 30, 1977, 77-1 CPD 467. Thus, when a contracting officer is on constructive notice of a unilateral mistake and does not verify the bid prices prior to award, this Office will grant relief. 37 Comp. Gen. 398 (1957). Such relief, however, must be limited to an amount not exceeding the next acceptable bid. In this case, Colonial has been making deliveries on all items awarded to it since April 1, 1977. On some items, payment of the intended price would still be below the next highest bid. On other items, it appears that the intended price would be above the price of another bidder and must be limited so as not to exceed the next high bid.

Accordingly, it is recommended that Colonial be paid additional compensation not exceeding 53 cents per barrel or the price of the next lowest acceptable bidder whichever is less. It is further recommended that the agency's requirements be resolicited.


Deputy Comptroller General
of the United States