

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

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FILE: B-214004**DATE:** January 10, 1984**MATTER OF:** Fed Con Corporation**DIGEST:**

1. Post-award mistake in bid claim is a matter "relating to" a contract, and it therefore must be resolved according to the procedures set forth in the Contract Disputes Act of 1978.
2. In procurement by formal advertising, when the government accepts a bid and notifies the bidder, a binding contract is created, even though a formal contract is to be executed and a performance bond is to be furnished at a later date.

Fed Con Corporation protests the Corps of Engineers' termination for default of contract No. DACA67-84-C-0008, contending that because of a mistake in bid discovered after Fed Con had received a Notice of Award, the award itself was improper. We dismiss the protest.

The record indicates that the Seattle District of the Corps opened bids for a flight simulator building at Fort Lewis, Washington, on October 20, 1983. Fed Con's apparent low bid, \$2,984,000, was significantly less than either of the next-low bids, \$3,637,162 and \$3,649,000, and approximately 40 percent less than the government estimate of \$5,011,000. The contracting officer therefore requested verification, providing Fed Con with a copy of the abstract of bids.

On October 31, Fed Con confirmed its bid price, and on November 8 the Corps issued the Notice of Award. Fed Con, however, refused to sign and return the contract or to provide payment and performance bonds, required within 10 days of receipt of the award. Instead, on November 15, it orally advised the Corps that it had omitted a \$96,000 subcontractor quote, as well as sales taxes for subcontractor

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materials and Washington State use taxes, from its bid price. Two days later the firm submitted a written request for withdrawal.

The Corps determined that the documentation provided by Fed Con did not constitute clear and convincing evidence of either the existence of a mistake or the firm's intended bid price. Accordingly, on November 23, it directed Fed Con to show cause why its contract should not be terminated for default. Fed Con subsequently met with the Corps and, by letter dated December 6, urged it to treat the matter as "in a pre-award stage." The firm argued that the mistake should have been obvious despite the verification; it also contended that the government would not be injured by permitting withdrawal, since performance had not yet begun and the 60-day bid acceptance period had not yet expired, so that award to the second-low bidder would still be possible.

On December 12, however, the contracting officer wrote Fed Con, stating that its contract had been terminated and that Fed Con would be liable for any excess costs of reprocurement, as well as for the liquidated damages specified in its contract.

Fed Con has incorporated all of the arguments made to the Corps in its protest to our Office. We find, however, that Fed Con's proper forum is the Armed Services Board of Contract Appeals. This is because both the mistake in bid claim and the protested default termination are matters "relating to" the contract. Under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 - 613 (Supp. IV 1980), such matters are to be decided by the contracting officer, with appeal to the appropriate Board of Contract Appeals. Moreover, our Office specifically has ruled that post-award mistake in bid claims are matters "relating to" a contract. Tri-States Service Company, B-208567, January 17, 1983, 83-1 CPD 44; Broken Lance Enterprises, B-202085, August 21, 1981, 81-2 CPD 164.

We reject Fed Con's contention that the contract is in a pre-award stage. In procurement by formal advertising, it is well established that when the government accepts a bid and notifies the bidder, a binding contract is created. See, e.g., 49 Comp. Gen. 431 (1970) and cases

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cited therein. This is so even though formal contract documents will be executed and a performance bond will be furnished later. Id. See also Aetna Casualty & Surety Co. v. United States, 526 F.2d 1127 (Ct. Cl. 1975), cert. denied, 425 U.S. 973 (1976); R. T. Madden Company, Inc., ASBCA No. 11999, August 7, 1981, 81-2 BCA ¶15,311 (both holding that a construction contractor's failure to furnish required Miller Act bonds breached an existing and enforceable contract).

As the Corps advised Fed Con on December 12, any appeal from the contracting officer's rejection of the mistake in bid claim and any challenge to the protested default termination must be filed with the Armed Services Board of Contract Appeals. The protest is dismissed.

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