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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Fru-Con Construction Corporation

File: B-253882

Date: October 1, 1993

Stephen B. Hurlbut, Esq., and Timothy B. Harris, Esq., Wickwire Gavin, P.C., for the protester.
Lester Edelman, Esq., Department of the Army, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The General Accounting Office will not consider a post-award mistake in bid allegation raised by the contractor that received the award because allegation is essentially a claim "relating to a contract" within the meaning of the Contract Disputes Act of 1978, and should be resolved pursuant to that Act.

DECISION

Fru-Con Construction Corporation, the awardee, protests the Department of the Army's decision, after bid opening but before award, to deny Fru-Con's request to correct a mistake in its bid under invitation for bids (IFB) No. DACW69-92-B-0054. The IFB sought bids to rehabilitate the Gallipolis Locks and Dam on the Ohio river.

We dismiss the protest.

The Army issued the IFB on December 3, 1992, and bids were opened on March 17, 1993. Fru-Con's bid ($35,582,600) was approximately 10 percent below the second low bid ($39,610,590), and about 25 percent below the government's estimate ($47,146,000). In a letter dated March 19, the agency requested Fru-Con to verify its bid, specifically directing the firm's attention to approximately 40 line items. In response, Fru-Con stated that it had identified a mistake in its bid of approximately $1.6 million and that, although it would be requesting an upward correction to its bid, the firm desired award. By letter to the Army dated April 6, Fru-Con submitted a formal request to correct its bid upward in a total amount of $1,642,716. In its bid correction request, Fru-Con reiterated that even if the

agency denied its request, the firm nevertheless desired award of the contract.

The parties continued to correspond and meet to discuss Fru-Con's correction request. After reviewing the protester's submissions in support of the mistake allegation, in a written decision dated June 11, the agency denied Fru-Con's correction request. The agency awarded the contract to the protester at its uncorrected bid price on June 18. In a June 23 letter to the Army, Fru-Con acknowledged award of the contract to the firm. Fru-Con then filed this protest in our Office on June 24, protesting the agency's decision denying its correction request.

Under the Competition in Contracting Act of 1984, our Office considers bid protest challenges to the award or proposed award of contracts. 31 U.S.C. § 3552 (1988). Consequently, we generally do not review matters of contract administration, as they are within the discretion of the contracting agency and for review by a cognizant board of contract appeals or the U.S. Court of Federal Claims. 4 C.F.R. § 21.3(m)(1) (1993). A mistake in bid allegation brought to our attention by the firm that received the award is a matter of contract administration because it is a claim "relating to a contract" within the meaning of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1988 and Supp. III 1991), not for review by our Office. Alliance Properties Inc., 64 Comp. Gen. 330 (1985), 85-1 CPD ¶ 286; Fire Guard Inc., B-217470, Jan. 17, 1985, 85-1 CPD ¶ 50; Rainey's Sec. Agency, Inc., B-214653, July 2, 1984, 84-2 CPD ¶ 6.

Fru-Con argues that we should consider its allegation because it reserved its right to protest to our Office in a June 2 letter submitted to the Army prior to award. In its letter, under a section entitled "Acceptance of Award With Reservation of the Rights," Fru-Con included the following statement:

> "The [General Accounting Office] has recognized that a bidder who has requested bid correction may accept an award of a contract at an uncorrected bid price subject to a reservation of the right to an appeal or review of the decision refusing to grant correction as requested. [Citations omitted.] In the event the [Army] determines that bid correction is unwarranted or warranted in an amount less than requested by Fru-Con, Fru-Con hereby advises that it will accept award of the contract at such price subject to a reservation of all rights Fru-Con may have to appeal or contest, in an

> appropriate forum, the [Army's] decision on Fru-Con's request for bid correction."
> (Emphasis added.)

The protester maintains that by awarding the contract to Fru-Con after receipt of its June 2 letter, the Army essentially consented to our review of the mistake allegation.[1] The protester asserts that if we decline to exercise jurisdiction here, contracting agencies may be encouraged to award contracts in the face of bid correction requests to avoid our review.

Although Fru-Con characterizes its protest as a request for review of the agency's pre-award denial of its bid correction request, Fru-Con's protest is essentially a claim against the government under its contract. Fru-Con simply alleges that the government owes the firm more money under its contract because it made a mistake in its bid.

The cases relied on by the protester were decided before March 1, 1979, the date the Contract Disputes Act became effective, and are not useful here. Prior to the Act's enactment, the boards of contract appeals consistently declined to exercise jurisdiction over appeals involving post-award mistake in bid allegations. See, e.g., The Handy Tool & Mfg. Co., Inc., ASBCA No. 22659, Feb. 26, 1979, 79-1 BCA (CCH) ¶ 13,723; National Line Co., Inc., ASBCA No. 18739, July 16, 1975, 75-2 BCA (CCH) ¶ 11,400, and cases cited therein. Such appeals were generally dismissed even where the alleged mistake was brought to the agency's attention after bid opening but before award, leaving such questions to be decided by other forums. See Gibbons and Reed Co., Eng. BCA No. 2658, Aug. 2, 1965, 65-2 BCA (CCH) ¶ 5047.

For example, in National Line Co., Inc., involving a contractor's appeal from a default termination and excess reprocurement costs, the appellant argued that it was not liable for the excess costs because it had made a mistake in its bid, which was or should have been known to the agency prior to award of the contract. The Board dismissed the appeal, holding that the contractor's mistake allegation was

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[1]In its letter, Fru-Con referred to our decisions in Guy F. Atkinson, The Arundel Corp., Gordon H. Ball, Inc. and H.D. Zachry Co. (A Joint Venture), 55 Comp. Gen. 546 (1975), 75-2 CPD ¶ 378; 49 Comp. Gen. 446 (1970); and B-161024, July 3, 1967 (unpublished letter). In its June 23 letter to the agency acknowledging award of the contract, the protester also repeated the "reservation of all rights" phrase quoted above, and indicated its intent to protest the agency's decision denying Fru-Con's correction request to our Office.

outside its jurisdiction. The Board noted, however, that appellant was not without a forum in which to present its case, including the "Contract Adjustment Boards" (then established within the Department of Defense), federal courts (district courts and the former Claims Court), and our Office. Thus, prior to March 1, 1979, there were several forums available to contractors seeking relief after award due to a mistake in their bids.

The Act established new procedures for reviewing post-award disputes between contractors and the government. The Act specifically provides that "[a]ll claims by a contractor against the government relating to a contract shall be . . . submitted to the contracting officer for a decision." 41 U.S.C. § 605(a) [emphasis added]. The purpose of the Act was to divest district courts and regional circuits of jurisdiction over government contract claims and to concentrate that authority in the contracting officer, the boards, or the United States Court of Federal Claims, at the contractor's option, with appellate review vested in the Court of Appeals for the Federal Circuit. See generally McDonnell Douglas Corp. v. United States, 754 F.2d 365 (Fed. Cir. 1985). Consistent with the Act's intent, the boards of contract appeals have consistently exercised jurisdiction over post-award disputes involving mistakes in bids, even where, as here, the alleged mistake was discovered before award. See, e.g., Central Mechanical, Inc., ASBCA Nos. 26543, 26584, Oct. 5, 1984, 85-1 CPD (CCH) ¶ 17,711; West Point Research, Inc., ASBCA No. 24891, July 30, 1982, 82-2 BCA (CCH) ¶ 15,980; JAL Constr., Inc., AGBCA No. 80-117-3, Dec. 17, 1980, 81-1 BCA ¶ (CCH) 14,850.[2]

Given the Act's purpose, our Office is not the proper tribunal for resolving post-award claims between contractors and the government. See, e.g., Alliance Properties Inc., supra; Commercial Transfer Sys., Inc., 63 Com. Gen. 338 (1984), 84-1 CPD ¶ 532. Fru-Con's pre-award June 2 letter ostensibly "reserving" its right to appeal the agency's decision regarding its correction request to an "appropriate forum" simply does not supplant the Act's mandatory filing and appeal procedures, nor confer jurisdiction on our Office to review its claim.[3]

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[2]Compare B&M Constr., Inc., AGBCA Nos. 91-132-1, 90-165-1, Jan. 10, 1991, 91-2 BCA (CCH) ¶ 23,670 (boards have no jurisdiction to review pre-award disputes involving bid correction or withdrawal, or for that matter any pre-award dispute).

[3]The protester relies on our decision in Alliance Properties Inc., supra, to argue that by awarding Fru-Con the contract

(continued...)

Fru-Con's "bid protest" is clearly a claim against the government. Fru-Con does not challenge the award to the firm. While the protester identified an alleged mistake in its bid after bid opening but prior to award, Fru-Con did not ask to withdraw its bid; nor does Fru-Con argue that it should have been permitted to do so.[4] On the contrary, after Fru-Con discovered the alleged mistake before award, the firm expressed its willingness to accept the contract at its uncorrected bid price; after award Fru-Con acknowledged the award; and the agency has informed us that Fru-Con is eager to perform the contract. The protester does not argue that the contracting officer overreached his authority by awarding it the contract; that award to the firm is unconscionable; or that it cannot perform at its bid price. Since the only relief Fru-Con requests is an increase in its price, i.e., reformation of its contract, that issue can and should be decided pursuant to the Contract Disputes Act.

The protest is dismissed.

for James F. Hinchman
General Counsel

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[3](...continued)
after receipt of its June 2 letter, the agency agreed to our review of its allegation. That decision stated that we would review a post-award mistake allegation raised by the awardee where both the contracting agency and the contractor agree to our review. We are not aware of any case in which this Office has implemented the policy stated in Alliance Properties Inc., and there is no need to address the matter here. Fru-Con's unilateral statement in its letter does not show that the parties mutually agreed to our review. At most, the protester's pre-award letter simply informed the agency that Fru-Con would appeal an adverse contracting officer's decision regarding its claim to an "appropriate forum," which, as discussed above, is not our Office.

[4]See Gunco, Inc., B-238910, July 17, 1990, 90-2 CPD ¶ 46 (low bidder which prior to award protested to our Office contracting agency's denial of its request to correct alleged bid mistake, and which submitted clear and convincing evidence of mistake and intended bid, may be permitted to withdraw its bid or accept award at corrected bid price).