DECISION

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

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FILE: B-175325 DATE: July 11, 1974

MATTER OF: M & M Precision Systems, Inc.

DIGEST: Contract canceled on basis of error in bid upon request of contractor several months after contracting officer and contractor had knowledge of error should not be reinstated notwithstanding principle that party desiring to rescind contract on grounds of mistake must announce intention at once or be bound by contract, since contractor who might have relied on such defense chose instead to seek cancellation for error and only relied on such defense after cancellation was granted.

The issue in this case is whether a contractor, M & M Precision Systems, Inc. (M & M), which had its contract N00156-72-C-1115 with the Naval Air Engineering Center canceled because of an error in bid, is entitled to have the contract reinstated in order that it may pursue as a termination for convenience claim the expense incurred in work, modification changes and engineering and material costs allegedly incurred prior to the cancellation of the contract.

In decision of August 9, 1972, our Office considered the initial claim of the contractor that the contract should be canceled and sustained the claim. Subsequently, by decision of December 21, 1972, the contractor's claim for $24,000 for expenses allegedly incurred under the contract was denied on the grounds that no tangible benefits were received by the Government. The facts and circumstances considered in connection with those claims are set forth in the referenced decisions and will not be repeated here.

The contractor has subsequently requested reconsideration of the decisions substantially on the basis that the contract should not have been canceled, but rather terminated for the convenience of the Government with the contractor reimbursed its out-of-pocket expenses. In support of the contention that

the contract should not have been canceled, the contractor relies upon several cases holding that where a party desires to rescind a contract on the grounds of mistake, he must announce his intention at once upon discovery of the facts or else be held bound by the contract. It is upon this basis that the contractor contends that upon the Navy's discovery of the contractor's error it was required to take action to cancel the contract or to remain bound for failing to do so. However, while it may be that the contractor could have availed itself of such a defense if the Government had attempted to cancel the contract after it was allowed to stand for a long period after discovering the error, the fact remains that it was not the Government, but the contractor, that initiated the claim for cancellation. What the situation amounts to is that after requesting cancellation of the contract and having been successful in obtaining that relief, but learning that the remedy is without recompense, the contractor is contending that the contract should have never been canceled as it requested.

Although the record indicates that prior to award the contracting officer should have been on notice of an error in the bid upon which the contract is based, it does not appear that the contracting officer had actual notice of the error until after award. The contract was awarded on September 28, 1971. By letter of October 11, 1971, subsequently brought to the attention of the contracting officer, the contractor indicated the error that had been made in the preparation of the bid and requested that an engineering change be made in a contract drawing. The contractor made no contention that the contract was unenforceable. It treated the contract as valid, requesting only, as indicated above, an engineering change. The contracting officer responded by letter of October 22, 1971, that the drawing was correct and that it did not require an engineering change. The dialogue between the contracting officer and the contractor over whether the drawing needed to be changed continued for several months. Only after the contracting officer issued a letter to the contractor on February 18, 1972, indicating that it would be subject to default termination if it did not show what progress it had made under the contract within 10 days, did the contractor seek to be relieved from the contract by letter of February 29, 1972, to our Office "filing a claim for mistake in bid" and "to ask for a mistake in bid, which would result in complete termination of this contract at no fault of M&M." In a subsequent letter of March 23, 1972, to our Office, M & M reiterated its claim for relief: "We ask the Navy to immediately cancel this contract at the least expense to all concerned."

Thus, it was not the Government, but the contractor who sought the cancellation of the contract. As a result of the claim, a report was requested from the Navy in accordance with standard practice. The Navy concurred in the cancellation. As a result of the circumstances considered in the August 9 decision, our Office concluded that the contract should be canceled, and the Navy acted upon such advice by issuing a cancellation notice. Only after the issuance of the notice and the subsequent denial of its claim for costs did M & M contend that the contract should not have been canceled.

In retrospect then, this is a situation where the contractor, faced with a choice between possible cancellation for a mistake in bid or a possible termination for default, chose to seek the former relief and after having been granted the remedy sought and being disappointed in that recovery for costs was not also possible in that event attempted to have the contract reinstated. We do not believe that the principle now relied on by the contractor against the cancellation of the contract pertains to the immediate circumstances and the contractor will not now be heard to complain that the contract should not have been canceled.

We might also observe in passing that if the contract had not been canceled there would have been no assurance that the contractor would be successful in obtaining a termination for convenience settlement. The contractor was facing a possible termination for default. Had that occurred, the contractor would not have recovered the costs of performance and would have been liable for any excess costs resulting from reprocurement.

R. F. Keller

Deputy Comptroller General
of the United States