DECISION

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

50704 97073

FILE: B-181439 DATE: May 27, 1975

MATTER OF: Aerospace America, Inc., Request for Reconsideration

DIGEST:

1. Contracting officer's telegraphic verification of bid, which stated that firm's bid prices were "considerably lower than Government estimate" and that considerable disparity between firm's bid prices and those submitted by other bidders existed, comported with ASPR requirements. Request for bid verification need not be in specific language set out in ASPR.

2. Where contracting officer states that request for verification disclosed bid prices to low bidder but bidder-claimant does "not recall any such disclosure" on balance, statements must be accepted as correct since bidder-claimant has not specifically denied them but relies on lack of recollection and absence from its files of any confirming memorandum some 18 months after the event.

3. Failure to disclose Government's budgetary estimate in course of bid verification is not fatal to contracting officer's fulfillment of his verification duty where disparity between low bid and bid of next low bidder is greater than disparity with estimate.

4. Where bidder's verification of bid responded to only one suggested area of possible mistake but contracting officer was satisfied that all other cost elements of bid had been reviewed and confirmed prices were in line with average bid prices received in preceding four solicitations, it was not incumbent upon contracting officer to seek reaffirmation.

5. Contract awarded to low bidder where percentage difference between its price and next low bidder's was 53 percent is not unconscionable.

6. Award of contract cannot be set aside at the insistence of contractor on ground that it was not entitled to award since it was nonresponsible. This is ground available to those injured by award action, not to party which benefits by it.

7. Where nearly one month elapsed between request for verification of bid and award, arguments that bidder lacked sufficient time to verify its bid are not persuasive.

This is a request for reconsideration of our decision in Aerospace America, Inc., B-181439, July 16, 1974. In that case we concluded that there was no legal basis to grant Aerospace's request for correction of its contract price.

The pertinent facts as restated from our earlier decision are as follows:

> "Invitation for bids (IFB) No. DACW87-73-B-9036, issued on April 6, 1973, by the Army Corps of Engineers, Huntsville, Alabama, sought bids on a number of mail chutes for bulk mail centers. The procurement was divided into five schedules, each relating to the ultimate delivery point of the items, and bidders were advised that they could bid on any one or more of the bid schedules.
>
> "Upon bid opening, May 30, 1973, the following bids were received:

	"Schedule I	Schedule II	Schedule III	Schedule IV	Schedule V
Diamond 'E' Industries Fort Worth, TX	1,137,549	-0-	-0-	-0-	-0-
Aerospace America, Inc. Bay City MI	714,000.21	632,203.07	511,913.50	713,558.51	535,072.16
Butz Engineering Azusa, CA	1,309,831	1,311,380	1,041,360	1,394,252	943,783
California Blow-pipe & Steel Escalon, CA	-0-	-0-	-0-	-0-	837,560
Mid-States Ornamental Iron Kansas City, MO	1,051,752	1,002,175	808,586	1,055,495	881,396
Docutel Corp. Dallas, TX	1,223,150	1,269,852	772,615	1,449,998	955,146
A Joint Venture Paramount, CA	1,270,337	1,389,964	1,018,849	1,410,907	890,981

"The Army, on June 1, 1973, sought verification of Aerospace's bid and indicated to the bidder that:

> "'Your firm's bid prices are considerably lower than the Government estimate. Also, there is considerable disparity between the prices submitted by your firm and those of the other bidders on this solicitation.

"'It is recommended that the following cost elements of your bid be carefully reviewed:

a. The F.O.B. Destination requirement.

b. The requirement for incremental deliveries.

c. The total requirement of sheet metal required.'

The Army requested that information in this regard be furnished it by the close of business on June 5, 1973.

"By telegram of June 6, 1973, Aerospace advised that it was unable to confirm its prices for schedule I and schedule V but that it did confirm its prices for schedules II, III, and IV. Aerospace subsequently requested and was allowed to withdraw its bid on schedules I and V.

"While Aerospace related that it had made an error in computing freight rates for all schedules, by letter of June 20, 1973, Aerospace related how it could combine shipments to the delivery points in schedules II (Springfield, Massachusetts), III (Philadelphia, Pennsylvania), and IV (Pittsburgh, Pennsylvania) from its plant in Michigan to take advantage of the quantity freight rate used in computing its bid. Aerospace therefore reconfirmed its original bid prices for the three schedules."

After a preaward survey and affirmative determination of Aerospace's responsibility, a contract for schedules II, III and IV was awarded to Aerospace on June 28, 1973.

Aerospace alleges that our previous decision was erroneous in law and fact in a number of areas and that all cognizant facts were not presented to us in the previous case.

Specifically, Aerospace points to:

1. the lack of specificity of the contracting officer's request for verification;

2. the contracting officer's failure to disclose all relevant information when requesting verification;

3. the contracting officer's failure to receive verification from Aerospace in each of the specific areas where he suspected a mistake;

4. the insufficiency of the time given Aerospace to verify its bid;

5. the unconscionability of the bargain; and

6. the inadequacy of the preaward survey, and other matters which led to an improper determination of responsibility and hence a "snapping up" of Aerospace's low offer.

The agency states that in addition to the above-noted June 1, 1973, telegram to Aerospace, a telephonic request for bid verification was made on June 1, 1973, at the contracting officer's request by a procurement specialist. Moreover, on June 2, 1973, the contracting officer himself called Aerospace's vice president (the signatory of the bid) relative to the verification request.

Aerospace argues that the contracting officer's June 1 verification was defective since the words "considerably lower than the Government estimate" and "considerable disparity" between other bid prices received were not specific. Aerospace further submits that the contracting officer failed to disclose specific information available to him such as the abstract of bids and the Government estimate, in contravention of Armed Services Procurement Regulation (ASPR) § 2-406.3(e)(1) (1972 ed.), which states:

> "(1) In the case of any suspected mistake in bid, the contracting officer will immediately contact the bidder in question calling attention to the suspected mistake, and request verification of his bid. The action taken to verify bids must be sufficient to either reasonably assure the contracting officer that the bid as confirmed is without error or elicit the anticipated allegation of a mistake by the bidder. To insure that the bidder concerned will be put on notice of a mistake suspected by the contracting officer, the bidder should be advised, as is appropriate, of (i) the fact that his bid is so

> much lower than the other bid or bids as to indicate a possibility of error, (ii) important or unusual characteristics of the specifications, (iii) changes in requirements from previous purchases of a similar item, or (iv) such other data proper for disclosure to the bidder as will give him notice of the suspected mistake. * * *"

However, as we stated in Porta-Kamp Manufacturing Company, Inc., B-180679, December 31, 1974, 54 Comp. Gen.____, verification of a bid requires no special language or magic words. Thus, while the contracting officer did not use the specific language set out in ASPR § 2-406.3(e)(1), the general request for verification, and the referenced disparity both between Aerospace's bid and the other bids and also the Government estimate, lead us to conclude that the contracting officer's request for verification in this respect comported with ASPR § 2-406 (1972 ed.) and was not improper.

With regard to the issue of whether all relevant information was given to Aerospace in accordance with ASPR § 2-406.3(e)(1)(iv), supra, the agency's report states that during the course of the June 2, 1973, telephone conversation between the contracting officer and Aerospace's vice president, that gentleman "requested and the Contracting Officer disclosed to him the bid prices of the next low bidders on each schedule." However, Aerospace's vice president does "not recall any request for nor any disclosure of bid prices by * * * [the contracting officer]." Moreover, it is stated that "The records of Aerospace do not disclose any handwritten (or typed) notes of such important information purported to be disclosed in the telephone call." On balance, we must accept the contracting officer's statements as correct since Aerospace has not specifically denied them and relies rather on a lack of recollection and the absence from its files of a memorandum some 18 months or so after the fact. Moreover, upon a reasonable reconstruction of the events,[1] we find it difficult to believe that (1) an experienced contracting officer would not at some point have divulged the bid prices and (2) that an experienced and reasonable contractor would not similarly have requested them or otherwise obtained them where specific reference was made to the disparity between its price and the prices of the other bidders.

[1]See Fink Sanitary Service, 53 Comp. Gen. 502 (1974).

As to the failure to disclose the Government's budgetary estimate, while ordinarily a contracting officer should disclose such information as part of his duty to verify, the failure to do so is not necessarily fatal to the contracting officer's fulfillment of his duty under ASPR § 2-406, supra; Porta-Kamp, supra. Here, we feel the failure to disclose the budget estimate is not critical for on each and every schedule the disparity between Aerospace's bid and the next low bidder is greater than the disparity that existed between its bid and the budget estimate. Therefore, upon disclosure of the bid prices,[2] disclosure of the budgetary estimate became nonessential.

Aerospace argues that its confirmation of June 6, 1973, covered only one of the contracting officer's suggested areas of error (transportation cost) and explained only a portion of the total price disparity. Thus, it concludes that the contracting officer's doubts regarding its bid could not have been dispelled by the verification.

Our original decision stated that:

> "In a similar situation, 47 Comp. Gen. 732 (1968), where the bidder alleged that it had erroneously estimated some costs and omitted others in computing its bid price while its costs of performing the contract had increased by virtue of difficulties experienced with its suppliers, we held that a contracting officer need not determine before contract award whether every production cost element had been considered in connection with the bidder's price in order to discharge his duty to verify under ASPR 2-406."

Aerospace attempts to distinguish 47 Comp. Gen., supra, from the instant case on the following grounds:

a. the bidder there was at bid opening;
b. the Government estimate was disclosed;
c. the contracting officer did not suspect an error in bid; and
d. the bidder there found no error in its bid.

[2]See discussion, supra.

As noted above, since we feel that the agency did advise Aerospace of the bid prices and since the abstract of bids was available for public inspection in accordance with ASPR § 2-403 (1972 ed.), we do not feel that Aerospace's nonattendance at the bid opening is a basis to distinguish 47 Comp. Gen., supra. Neither do we feel that the failure of the agency to disclose the Government's budgetary estimate is a distinguishing factor. See our discussion, supra, at page 7.

We also note that in 47 Comp. Gen., supra, we stated:

> "* * * evidence in the case shows that * * * [the bidder] was informed that a bid verification was necessary because the bid appeared to be too low and was out of line with other bids received and the prices previously paid by the Government. * * *"

Therefore, Aerospace's argument about the lack of a suspicion of error in that case is not a basis to distinguish 47 Comp. Gen., supra. Moreover, while on June 6, 1973, Aerospace did indicate a gross freight error with regard to schedules I and V (from which it withdrew its bid), Aerospace also confirmed its bids on schedules II, III and IV and indicated that its prices for those schedules were correct. It should be noted, however, that in a letter dated June 11, 1973, Aerospace again confirmed its price for schedules II, III and IV although noting that even on these three schedules it had made certain relatively small freight rate errors.

The agency states that even though Aerospace in its confirmation addressed only one of the three cost areas wherein the contracting officer had indicated a mistake might lie, and even though the errors absorbed by Aerospace as set out in its June 11 letter did not equate to the difference between Aerospace's prices and the Government's budgetary estimate or the other bids, "he was satisfied that all other cost elements of the bid had been reviewed and Aerospace had determined that no further errors existed."

In this regard, we note that a comparison of Aerospace's confirmed prices for schedules II, III and IV with the low bids received in response to four similar invitations issued between August 21, 1972, and January 13, 1973, reveals the following:

Aerospace's average bid price per schedule awarded - $619,225
Average bid price received per schedule in preceding four solicitations - $640,312

As set out in our earlier decision:

> "In B-177405, November 29, 1972, we stated that even after a verification, where the facts clearly and convincingly establish that the contracting officer was or should have been on notice that the bidder could not have recognized the significance of the request for verification of the bid, the contracting officer should request a reaffirmation of the bid. Moreover, in Matter of Yankee Engineering Co., Inc., B-180573, June 19, 1974, we held that notwithstanding the verification of a bid approximately one-third below both the Government's estimate and the next low bid, it would be unconscionable to require contract performance at the mistaken bid price. See, also, 53 Comp. Gen. 187 (1973)."

In this regard, Aerospace further states that no number of reaffirmations will make an unconscionable bargain anything else unless the grounds for the reaffirmation are changed.

Based on our review of the June 6, 1973, confirmation, the subsequent clarifying correspondence dated June 11, 1973, and the past history of similar bids received, we do not believe that it was incumbent upon the contracting officer to seek a reaffirmation of Aerospace's bid.

As recognized by Aerospace, in order to show that a contract is unconscionable, it must be demonstrated that the Government was obviously getting something for nothing. Porta-Kamp, supra; Yankee Engineering Company, Inc., supra; see Kemp v. United States, 38 F. Supp. 568 (D. Md. 1941); 53 Comp. Gen., supra, 45 id. 305 (1965). Aerospace argues that under the facts and circumstances of this case, it should be concluded that the contract in question, awarded to it at only 53 percent of the next low bidder's price, should be found unconscionable. In this regard, a number of decisions are cited, including B-170691, January 28, 1971; B-177405, November 29, 1972; B-178795, September 26, 1973; and Yankee Engineering Co., Inc., supra, where our Office has found contracts unconscionable. As noted

in Aerospace's brief, B-177405, supra, and B-178795, supra, involved situations where the disparity in bid prices between the contractor and the next low bidder was 300 percent and 280 percent, respectively. However, here, the percentage difference was, as in Yankee Engineering Co., Inc., supra, only 53 percent, while we note that in Porta-Kamp, supra, a 58-percent difference was not deemed as resulting in an unconscionable contract. While it is true that in B-170691, January 28, 1971, there was only a 28.2-percent difference between the low and second low bidder, this was only one factor in our finding of unconscionability. Other factors included a verification which may not have stated why verification was sought or that a specific mistake was suspected and the fact that the low price was only 36 percent of the lowest previous purchase price paid for the item. Accordingly, we feel that B-170691, supra, is distinguishable, and that the precedent established in Porta-Kamp, supra, mandates our affirming that the contract in question was not unconscionable as there has been no showing that the Government was obviously getting something for nothing.

Aerospace contends that contrary to the statement made in our earlier decision, its letter of June 20, 1973, was not an "unsolicited reaffirmation" of its bid "explaining in some detail how Aerospace expected to be able to perform at its bid price." Rather, it states that the June 20 letter was a response to what was a negative preaward survey finding in the area of its financial capacity. This factor we do not believe is critical for it still demonstrated Aerospace's belief that performance could have been accomplished at its bid price and with no loss.

Aerospace also raises a number of other arguments, including (1) the inadequacy of the preaward survey; (2) Aerospace's failure to furnish the agency with a material commitment for the entire contract; (3) the fact that contrary to Aerospace's letter of June 20, 1973, it could not meet the shipping requirement without violating the specifications; (4) Aerospace's procurement schedule of long leadtime or critical items was left completely unsettled; and (5) the post-preaward survey guarantee of a loan of $450,000 to Aerospace by a shareholder (who was not aware of all the facts and circumstances) was not binding and hence should not have been considered by the contracting officer in finding Aerospace responsible and resulted in a "snapping up" of Aerospace's bid.

For the reasons which we have outlined above, we do not feel that there was any "snapping up" of Aerospace's bid. Moreover, while Aerospace attempts to argue its alleged nonresponsibility as a reason to rescind this contract, we have held in 49 Comp. Gen. 761 (1970) that the award of a contract cannot be set aside at the insistence of the contractor on the ground that it was not entitled to the award. "This is a ground available only to those injured by the award action, not the party who benefits by it." 49 Comp. Gen., supra, at 764. Furthermore, we have held in Central Metals Products, 54 Comp. Gen. 66 (1974), that our Office will no longer review affirmative determinations of responsibility such as the present one unless there has been an allegation or demonstration of fraud.

Aerospace lastly contends that it lacked sufficient time from the initial telephonic request for verification on June 1, 1973, to verify its bid. (Note the contracting officer had requested the verification to be submitted by the close of business on June 5, 1973.) The agency responds that Aerospace (1) obviously did not consider the June 5, 1973, deadline as mandatory since its response was not sent until 4 p.m. on June 6, 1973; (2) could have requested more time; and (3) had ample time up to the date of award, June 28, 1973, to explore the possibility of additional mistakes in its bid. In Porta-Kamp Co., Inc., supra, we held that since "on the spot" verification was not required, and there was more than 1 week between verification and award, an experienced contractor "had sufficient time to carefully review its bid for any possible mistakes." Here, nearly 1 month elapsed between the initial request for verification and award. Accordingly, we do not find Aerospace's arguments persuasive.

For the reasons set forth above, our earlier decision is affirmed.

Deputy Comptroller General
of the United States