DECISION

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

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FILE: B-183842 DATE: December 9, 1975

MATTER OF: Guy F. Atkinson Company, The Arundel Corporation, Gordon H. Ball, Inc., and H. D. Zachry Company (A Joint Venture)

DIGEST:

1. Where circuit court grants motion to vacate district court's judgment on issues contained in protest and remands cause to district court with direction to dismiss action as moot, district court's opinion is eliminated, is not res judicata, and is not bar to consideration of protest, since it cannot be considered to have been decided by district court.

2. Fact that issues contained in protest are also contained in protester's suit in district court would ordinarily be bar to consideration of protest absent request or expression of interest by court in GAO decision. However, protest will be considered, since Government has not filed answer, suit is not active and protester has indicated that, if suit will bar consideration of protest, it will have court action dismissed without prejudice under rule 41(a)(1) of Federal Rules of Civil Procedure.

3. Low bidder would not be precluded from waiving 10-day bid acceptance period after expiration, since, by offering to keep bid open for 60-day period contemplated by IFB, bidder assumed risk of price increases during period and did not gain advantage over other bidder.

4. Low bidder claiming mistake in bid and seeking correction is not required as condition to proper award to apprise agency prior to decision on correction of willingness to accept award at original bid price in event correction is disallowed.

5. Low bidder's reservation of right to contest in appropriate forum contracting agency's denial of request for correction of bid did not render agency's award to bidder improper.

6. Contractor's request for equitable relief by way of contract reformation is not subject to bid protest procedures.

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7. Nothing requires contractor seeking contract reformation to exhaust remedy in GAO before bringing action in court for relief.

Invitation for bids (IFB) No. DACW67-75-B-0020 was issued on October 25, 1974, by the United States Army Corps of Engineers, Seattle District. The IFB sought bids on a fixed-price basis for the construction of additional units for the powerhouse, Chief Joseph Dam, Columbia River, Washington. Bid opening occurred on March 5, 1975. The following two bids were received:

S. J. Groves & Sons Company Granite Construction Company (A Joint Venture)	$43,888,716
Atkinson et al.	$54,392,305

Due to the fact that Groves' bid was substantially lower than the other bid received and the Government estimate, which indicated the possibility of an error in bid, the contracting officer, by telephone on March 6, 1975, and by letter of March 10, 1975, sought verification of Groves' bid price.

By letter of March 13, 1975, Groves alleged that its bid was in error in the amount of $986,856. Groves therefore sought an upward adjustment of its bid price by this amount and submitted its original worksheets to the Corps of Engineers in support of its claim. By letter of the General Counsel, Corps of Engineers, dated April 24, 1975, Groves' request for the upward adjustment was denied for the reason that the intended bid price was not proven by clear and convincing evidence.

Thereafter, on May 7, 1975, Groves filed suit against the United States and the Seattle District Corps of Engineers in the United States District Court for the Western District of Washington, Civil Action No. C75-321S, seeking a declaratory judgment and injunctive relief. Groves requested (1) that the court declare that Groves' intended bid was $44,875,572 and that the Corps' rejection of its bid was arbitrary and capricious and without a rational basis or compelling reason; (2) that the court declare that the Corps had a duty to award the contract to Groves while reserving to Groves the right to contend a mistake was made in Groves' bid; and (3) that the Corps be enjoined to make an award under the solicitation. By telegram dated May 8, 1975, Groves also filed a protest in our Office against "the award of the subject solicitation to any other offeror."

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On May 13, 1975, the Government and Groves reached an agreement which provided that Groves would withdraw its motion for preliminary injunction and would present the Corps with a written notification that its bid which had expired May 5, 1975, would be extended. In return, the Government would agree to award the subject contract to Groves with the reservation contained in the award document that Groves has the right to appeal the Corps' decision in its mistake in bid claim. Thereafter, Atkinson filed a motion to intervene in the court action. This motion was granted on May 14, 1975, but because the court believed that the matter had been settled by the May 13 agreement and upon the request of Atkinson, the order was not filed and the judge's signature was stricken. Also, on May 14, Groves withdrew its protest in our Office although it reserved its claim for mistake in bid.

However, on May 16, 1975, Atkinson filed a protest in our Office alleging that:

> "The proposed award to Groves-Granite is improper and unlawful because the acceptance period of Groves-Granite's bid expired, and an award on the basis of a purported extension of an acceptance period, in the particular circumstances present here, would violate the integrity of the competitive bidding system. Moreover, the proposed award assumes and is based upon additional terms beyond those provided in the Invitation For Bids or otherwise."

Thereafter, on May 17, Atkinson filed suit against the Corps in the United States District Court for the Western District of Washington, also seeking injunctive relief on the grounds that:

> "(1) Groves' bid has expired and an award cannot legally be made on an expired bid, particularly under the circumstances of this case where such an award would be totally destructive of the integrity of the competitive bidding process; and
>
> "(2) The proposed award will grant additional terms, conditions and rights to Groves not included in the IFB or extended to other bidders * * *."

On May 19, 1975, Groves filed a motion to compel the Corps of Engineers to award a contract to it based in part upon the agreement of the defendant, Corps of Engineers, to award such contract to Groves without prejudice to its rights to contest

the Corps' ruling on the mistake claim. Accordingly, on May 20, 1974, the District Court issued the following memorandum and order, which, in pertinent part, states:

> "The court therefore finds that an agreement was entered into between the plaintiff and the defendant and that the agreement was stated for the record in open court and became the basis for settlement of the plaintiff's request for a preliminary injunction. The court finds that, according to the terms of the agreement, the defendant agreed to award the disputed contract to the plaintiff and to award it early in the week of May 19, 1975. The court finds that such an award has not yet been made and will not be made during the week of May 19, 1975. Now therefore,
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> "IT IS HEREBY ORDERED:
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> "1. On or before May 30, 1975, the defendant is directed to award the contract in IFB serial number DACW 67-75-B-0020 to the plaintiff.
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> "2. The award shall be made at the original bid price of forty three million, eight hundred eighty eight thousand, seven hundred and sixteen dollars ($43,888,716.00); the award shall be made without prejudice to the plaintiff's right to contest in an appropriate forum the issue of mistake in plaintiff's bid and without prejudice to the defendant's right to defend against such a contest.
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> "3. This order is entered subject to the following condition: This order will be stricken and rendered of no effect should the defendant, with or without the concurrence of the GAO, determine on or before May 30, 1975, to reject all bids and readvertise the project.
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> "4. This order constitutes final action by the court in this matter; the court directs the clerk of the court to enter final judgment and determines in accordance with FED. R. CIV. P. 54(b) that there is no just reason for delay in entry of judgment." (Emphasis added.)

Immediately thereafter Atkinson appealed the decision of the District Court to the Ninth Circuit Court of Appeals. Atkinson also filed motions for a temporary stay and stay pending appeal.

On May 22 Judge Sneed of the Ninth Circuit temporarily stayed the District Court's order until June 2, or until disposition by the Ninth Circuit of the motion for a stay pending appeal whichever occurs last. On the same day, the Department of Justice filed a motion to modify the order of the District Court so as to allow the Corps of Engineers to make an award in the exercise of its sound discretion on or before June 3, 1975 (the expiration date of Groves' renewed $43,888,716 bid to perform the contract). Atkinson also filed for a temporary restraining order and for an emergency stay. By order of the Court of Appeals for the Ninth Circuit of May 30, 1975, Atkinson's arguments were rejected. The Circuit Court held that:

> "The order of Judge Joseph Sneed dated May 22, 1975, granting a temporary stay pending appeal is vacated.
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> "The motions of the intervenor-appellant Atkinson for a temporary restraining order or an emergency stay are denied.
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> "The Corps of Engineers' motion to modify the temporary stay is now moot in view of the foregoing orders and the Corps of Engineers is free to proceed as indicated in its motion."

Subsequently, the Department of Justice, acting on behalf of the Corps of Engineers and with the consent of Atkinson, filed a motion in the Ninth Circuit to vacate the District Court's judgment and to remand the cause to the District Court with direction to dismiss the action as moot. This motion was granted on July 29, 1975. However, thereafter, Groves filed a petition for rehearing, which, in accordance with rule 41 of the Rules of Appellate Procedure, stayed the issuance of the court's mandate until disposition of the petition by the court. On November 13, 1975, the Ninth Circuit denied Groves' petition for rehearing and affirmed the July 29 order. By the terms of appellate procedures rule 41(a), the mandate of the court issued on November 20, 1975. Therefore, in accordance with United States v. Munsingwear, 340 U.S. 36 (1950), the District Court's opinion is eliminated, is not res judicata and is not a bar to our consideration of the matter, since it cannot be considered to have been decided by the District Court. The Supreme Court in Munsingwear, at pages 39-40, stated:

> "* * * The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in Duke Power Co. v. Greenwood County, 299 U.S. 259, 267, to be 'the duty of the appellate court.' That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. * * *" (Emphasis added.)

Since the Government has availed itself of the procedure outlined above, the issues here in question are free to be relitigated. Indeed, the issues appear to be in litigation in the Atkinson action against the Corps in District Court. While the pendency of a suit would ordinarily be a bar to our consideration of a protest on the same grounds in the absence, as here, of any request or expression of interest by the court in our decision, we will consider the Atkinson protest, since the Government has not filed an answer, the suit is not active and the protester has indicated that, if this Office believes that the suit will bar our taking jurisdiction, it will have its action dismissed without prejudice under rule 41(a)(1) of the Federal Rules of Civil Procedure.

The Atkinson protest challenges the validity of the award made to Groves on two bases: (1) that the award, made on a bid which expired and then was extended, is improper and (2) that the award made with a reservation of Groves' right to seek further relief on its mistake claim imposed an additional term beyond that contemplated in the IFB.

With regard to the first contention, this Office has held that, where a bid which contains the bid acceptance period provided in the IFB expires, the bidder may at his option accept award. B-143404, November 25, 1960; Environmental Tectonics Corporation, B-183616, October 31, 1975, 55 Comp. Gen. ____.

Specifically, in 46 Comp. Gen. 371, 372 (1966), it was stated:

> "The contracting officer's report states that while the extension was not requested or received prior to expiration of the original 60-day period, it was considered in the best interest of the Government to permit the bidder to waive the time

> limitation since, in his opinion, such time limitation was solely for the protection of the bidder and may be waived by him if he is still willing to accept the award. While we question whether the time limitation was solely for the protection of the bidder during the period from bid opening until expiration of the acceptance period set out in the bids, it is clear that expiration of the acceptance period operated to deprive the Government of any right to create a contract by acceptance action and to confer upon the bidder a right to refuse to perform any contract awarded to him thereafter. Thus, since the only right which is conferred by expiration of the acceptance period is conferred upon the bidder, it follows that the bidder may waive such right if, following expiration of the acceptance period, he is still willing to accept an award on the basis of the bid as submitted. * * *" (Emphasis added.)

The decision went on to distinguish situations such as 42 Comp. Gen. 604 (1963) where the low bidder deliberately selected a bid acceptance period shorter than that contemplated by the IFB and then sought to extend the expired bid. There we concluded that award should be made to the second low bidder. However, as stated in 46 Comp. Gen., supra, at page 373 (quoted with approval in Environmental Tectonics Corporation, supra):

> "* * * The issue presented [in 42 Comp. Gen., supra] was whether award should be made to the low bidder [who was willing to accept] not whether a valid award could be made since we recognized that if an award were made to the low bidder, it was probable the courts would hold that the resulting contract would be enforceable. * * *"

Atkinson argues that 42 Comp. Gen., supra, is applicable to the instant case in that in both situations it was the bidder's deliberate actions which caused the bid to expire (i.e., the selection of a short bid acceptance period in 42 Comp. Gen., supra, and Groves' failure to formally extend its bid after requested to do so by the agency). We do not agree. The cited decision is distinguishable in that there, instead of the 60-day acceptance period contemplated in the IFB, the low bidder deliberately selected a 20-day period and thus did not assume the risk of a price increase during

the following 40-day period whereas Groves offered to keep its bid open for the 60 calendar days contemplated by the IFB. Groves could have offered a shorter time period or the IFB could have provided for more than 60 days for the bid acceptance period, since the specific clause of Standard Form 21, Bid Form, states:

> "The undersigned agrees that, upon written acceptance of this bid, mailed or otherwise furnished within calendar days (calendar days unless a different period be inserted by the bidder) after the date of opening of bids, he will within calendar days (unless a longer period is allowed) after receipt of the prescribed forms, execute Standard Form 23, Construction Contract, and give performance and payment bonds on Government standard forms with good and sufficient surety." (Emphasis added.)

(The first blank is for the bidder to indicate the bid acceptance period if other than that specified by the contracting agency in the second blank.) However, Groves, by virtue of the fact that it offered to keep its bid open for the period contemplated in the IFB, did not gain any advantage over the other bidder, since, like the other bidder, it assumed the risk of price increases during the 60-day period contemplated by the IFB.

Further, the principle enunciated in 46 Comp. Gen., supra, is applicable. In reaching this conclusion, we do not agree with Atkinson's contention that the decision is distinguishable in that there the low bid was extended prior to expiration of the bid acceptance period. There the bids expired on Saturday, May 28, the first day of a Memorial Day weekend, and the extension was granted on the next working day, Tuesday, May 31. Atkinson contends that, since the bid expired on a weekend, the expiration date was the first working day thereafter, i.e., the date upon which the bid was in fact extended. However, the decision did not follow that approach, but rather was premised on the basis that the expiration date was May 28 and that the extension was granted after the expiration of the bid acceptance period.

In view of the above, Groves would not be precluded from waiving the acceptance time limit after it expired. Therefore, it is immaterial in this case whether the bid did not in fact expire as Groves alleges.

Atkinson also argues that the award to Groves was improper under the rationale in Teledyne McCormick Selph, B-182026, March 6, 1975, 75-1 CPD 136, and 52 Comp. Gen. 706 (1973), in that Groves did not apprise the Corps, before the Corps decided its claim for an upward adjustment in the bid price, that it was willing to accept award at the original bid price if correction was disallowed. It is contended that, unless such timely notification is given, the way is clear for bidders to seek correction after they know their competitive price position and to reserve the unilateral right to withdraw their bids or be bound by them after they know the agency's position on the correction of the claim. Atkinson states that the competitive bidding system should not tolerate giving bidders who claim mistakes such greater rights (i.e., this "option") than accorded bidders who do not claim mistakes and are thus bound by their bids.

Both Teledyne McCormick Selph and 52 Comp. Gen., supra, involved protests by apparent low bidders who sought correction of their bids prior to award. In both cases, the agencies involved denied correction and made awards to the next low bidder without further consideration of the protesters' uncorrected bids. In each case, the argument was made that the agency had failed to ask the original low bidder if it would accept the contract at the original bid price, thus rendering the award to another bidder improper.

As observed in 52 Comp. Gen., supra, at pages 710-711:

> "* * * our Office has permitted acceptance of an original bid where the bidder established that an error had been made in the bid, but has not established the intended bid price. The rationale of those decisions has been that where it is clear that the corrected bid would still have been lowest, even though the amount of the intended bid could not be clearly proved for the purpose of bid correction, no prejudice to the other bidders would result by acceptance of the original bid."

In the instant case, there is no question but that Groves would have been low either at its bid price or at the corrected price it sought. This was not the situation in Teledyne McCormick Selph, supra, or 52 Comp. Gen., supra. However, in those decisions, we stated that the procurement regulations, ASPR § 2-406.3 (1974 ed.) and NASA PR § 2.406-3, respectively, did not obligate the agency "* * * to consider the original mistaken bid or query the bidder

as to its willingness to accept an award at the original bid price, even where a reasonable review of the evidence showed its intended bid might very well have been clearly lowest." Teledyne McCormick Selph, supra, commenting on 52 Comp. Gen., supra.

Our Office indicated that the first suggestion the agencies had that the protesters in those cases desired to be awarded a contract at their original bid prices came after award had been made to another bidder. The decisions then proceeded to distinguish the situation where the bidders' desires were communicated to the agency after award from other cases cited by the protesters which involved the communication of the low bidder's desires not only prior to award, but prior to the agency's determination of the correction issue. However, neither Teledyne McCormick Selph, supra, nor 52 Comp. Gen., supra, established that a bidder must, as a condition precedent to award at its original bid price, notify the agency that it would accept such an award before its claim for an upward adjustment is decided. Rather, these decisions indicate that, as a precaution, the time to notify a contracting agency of an intention to accept award at the original contract price if correction is not authorized is prior to the agency decision on correction, since agencies have no duty after denying correction to question the low bidder as to its intention to accept award. Thus, the cited cases did not establish a requirement that bidders indicate their intention to the agency prior to resolution of the request for correction, but only recognized that it would be the prudent thing to do for bidders alleging error.

With regard to the propriety of the award made to Groves with a reservation of rights, we note that the reservation incorporated the language stated in paragraph 2 of the District Court's order set forth above. In that aspect, the instant case is analogous to the situation described in Fortec Constructors, B-179204, May 24, 1974, 74-1 CPD 285. Fortec sought an upward adjustment in the amount of $35,150. The difference between Fortec's mistaken bid price and the second low bid was $173,059.

The agency concluded that there was clear and convincing evidence of a mistake, but sufficient evidence had not been presented as to the bid actually intended.

Upon receipt of the agency's denial of its correction request, Fortec filed a protest with this Office. However, during the pendency of the protest, Fortec agreed to enter into the contract at its mistaken bid price reserving its rights to the upward adjustment as follows:

> "The Government and the contractor agree that in the event the Comptroller General favorably considers the contractor's claim for an upward revision of the contract price due to an alleged mistake in bid, the contract price shall be adjusted in the amount recommended by the Comptroller General. The contractor, by accepting award pending determination of his claim by the Comptroller General, expressly waives his rights to withdraw his bid, to disaffirm the contract, or to terminate performance due to denial of his claim by the Comptroller General, and agrees to perform the contract. It is the intent of the parties that the contractor shall not be foreclosed from such legal remedies for monetary relief as may exist following award in connection with mistake in bid claims."

The Fortec decision stated that Chris Berg, Inc. v. United States, 426 F.2d 314 (Ct. Cl. 1970), is not applicable to situations like the instant one where an agency merely denied a requested upward adjustment in bid price after considering the matter in accordance with applicable regulations, since the Court of Claims in Chris Berg was concerned solely with a situation where the agency in violation of ASPR § 2-406.3, supra, had refused to consider a bidder's claim for correction and the bidder entered into the contract at its original bid price reserving its right to request correction after award. The Fortec decision also indicated that Fortec's acceptance of award at its uncorrected bid price subject only to having its claim for upward revision considered by this Office merely had the effect of preserving Fortec's right to have the agency's determination reviewed and was intended to give Fortec no more rights than it already had. Such

reservations have been recognized by this Office as a permissible method of guaranteeing review of the question of upward adjustment. See B-161024, July 3, 1967; 49 Comp. Gen. 446 (1970); B-176760, January 22, 1973. Moreover, we have held that in the absence of a protest or some reservation of rights, the bidder by accepting the award at the mistaken bid price may be held to have agreed to absorb the error. B-177281, January 23, 1973; Sherkade Construction Corp., B-180681, October 30, 1974, 74-2 CPD 231.

However, Atkinson contends that Groves' reservation created specific rights which it would not have had absent the reservation. Atkinson states that: (1) the reservation eliminated the rule stated in 4 C.F.R. § 20.2 (1974) "* * * which requires a disgruntled bidder to protest an agency action to the General Accounting Office within five days of learning of that decision" and thus gave Groves a right to a hearing which it might otherwise not have had; (2) the reservation permitted GAO review and Groves would have no right to bring suit in court unless it had exhausted its administrative remedies, i.e., GAO; and (3) since unlike the Chris Berg case, supra, the agency did not act in violation of the regulations, it is doubtful that any forum other than GAO has reformation jurisdiction; however, the reservation seemingly relinquishes this defense to a court action since it provides for the right to contest the mistake in bid allegations "in any appropriate forum without prejudice."

Groves' request is for equitable relief by way of contract reformation and, therefore, is not subject to the bid protest procedures. B-176760, supra. Moreover, we know of nothing that requires a contractor seeking contract reformation to exhaust its remedy in this Office before bringing an action in court for relief. In that connection, Groves has not sought relief from this Office and has instead filed suit in District Court. For the reasons set forth, Groves' reservation of rights did not render the Corps' award improper.

Accordingly, Atkinson's protest is denied.

Deputy Comptroller General
of the United States