DECISION

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

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FILE: B-184172 DATE: May 4, 1976

MATTER OF: F & H Manufacturing Corporation

DIGEST:

1. Protest by contractor regarding termination for default is not proper matter for protest to GAO, but rather matter to be resolved by contracting parties under "Disputes" clause of the contract.

2. Defaulted contractor cannot be awarded reprocurement contract at increased price since to do so would be tantamount to modification of defaulted contract without any consideration therefor to Government.

3. GAO finds no basis to conclude agency denial of bid correction to include prompt payment discount is unreasonable since evidence does not clearly and convincingly establish existence of mistake and bid actually intended.

4. Offer of defaulted contractor who is low bidder on reprocurement solicitation to voluntarily reduce price to that of defaulted contract price in order to be eligible for award may not be accepted as such principle applies only where bid is otherwise low acceptable bid, which is not case here as bid price is greater than defaulted contract price.

On February 5, 1974, F & H Manufacturing Corporation (F & H) was awarded contract No. DSA100-74-C-1235, by the Department of the Army. The contracting officer terminated the contract for default on May 1, 1975, since F & H failed to make delivery within the contract delivery schedule. Reprocurement for the defaulted contract was solicited under invitation for bids (IFB) No. DSA100-75-B-1148, pursuant to which F & H was the lowest bidder. The Army has denied award of the reprocurement contract to F & H since it bid the contract at a higher price than the defaulted contract price.

However, F & H alleges that the higher bid price is the result of a mistake in bid, which it seeks to correct or, in the alternative, to reduce its bid to the defaulted contract price. The specific

bases of F & H's protest are that: (1) the contracting officer did not comply with the default procedures set forth in the Armed Services Procurement Regulation; (2) its contract was unfairly terminated; (3) it is entitled to award under the protested solicitation; and (4) it should be allowed to correct its mistake in bid or reduce its bid.

It is reported that F & H filed a timely appeal from the default termination with the contracting officer under the "Disputes" clause in the contract and the appeal was duly forwarded to the Armed Services Board of Contracts Appeals (ASBCA), the proper forum for resolving such disputes. In Ampex Corporation, 53 Comp. Gen. 572, 573 (1974), we stated: "The propriety of a default termination must be resolved by the contracting parties pursuant to any applicable contract provision and is not a proper matter for protest to [the] General Accounting Office."

Since matters (1) and (2) above concern the propriety of a default determination, they will not be considered by this Office as grounds for a bid protest.

With regard to whether award should be made to F & H as low bidder under the reprocurement, our Office, in B-171659, November 15, 1971, held,

> "* * * that where a defaulted contractor submits a bid for a repurchase contract at a price higher than the price for which he was bound under the defaulted contract, his bid should not be accepted. Acceptance of such a bid would be tantamount to a modification of the defaulted contract to provide for an increase in the contract price without any consideration therefor to the Government. 27 Comp. Gen. 343 (1927); B-165884, May 28, 1969."

Thus, we find no basis to object to the contracting officer's rejection of F & H's bid as submitted.

With regard to the alleged mistake in bid, the Army has denied correction of F & H's bid pursuant to Armed Services Procurement Regulation (ASPR) § 2-406.3(a)(3)(1975 ed.), which provides for correction only where clear and convincing evidence establishing

both the existence of a mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself. The Army applied ASPR § 2-406.3(a)(3), supra, as opposed to ASPR § 2-406.3(a)(2)(1975 ed.), which allows consideration of evidence outside of the invitation and bid in support of a mistake in bid contention, because correction of F & H's bid would substantially affect the rights of other bidders. If F & H was allowed to correct its otherwise unacceptable bid, the low acceptable bidder would thereby be displaced. See 37 Comp. Gen. 210 (1957). Under these circumstances, we agree with the Army that the standard of proof for application here is that of ASPR § 2-406.3(a)(3), supra, and therefore, that the existence of a mistake and the bid actually intended must be ascertainable substantially from the invitation and bid itself. Here the mistake in F & H's bid allegedly occurred when the President of F & H accidentally failed to transpose a discount provision of "1/2-20 days" from contract No. DSA100-74-C-1235 (the defaulted contract) to the IFB, on the day of bid opening.

The Army's position is that neither "* * * the evidence of mistake * * * [nor] the intended bid can be ascertained from the invitation and bid document. The bid as submitted does not suggest the possibility of an error, inasmuch as the absence of a discount provision is not unusual. In addition, even if it were assumed that a mistake is proper, the intended bid cannot be ascertained from the face of the bid."

In cases such as this, where an agency has made an administrative determination denying correction of a mistake in bid, GAO will not question the determination unless it is without a reasonable basis. See 54 Comp. Gen. 340 (1974). Here, we agree with the Army that it is not unusual for a bid not to contain a discount provision. We further agree that neither the existence of a mistake nor the bid actually intended can be ascertained from the face of the bid. Thus, it is our opinion that there is a reasonable basis for the Army's determination and that this determination was therefore proper under the authority of the cited regulation.

Finally, although our Office has long recognized and followed the holding in Aleck Leitman v. United States, 104 Ct. Cl. 324, 341 (1945) (see, e.g., B-74013, March 9, 1948), that a low bidder may voluntarily decrease the amount of his bid, we have also

recognized that the low bid must be otherwise acceptable and responsive before such a decrease may be accepted. 45 Comp. Gen. 228 (1965). Such is not the case here.

Although counsel for F & H has questioned the determination of urgency by the Army pursuant to ASPR § 2-407.8(b)(3)(1975 ed.) and the subsequent award of a contract to Century Metal Parts, Inc., pursuant thereto, in view of our above conclusions it is unnecessary for us to consider these allegations.

Accordingly, the protest is denied.

Deputy Comptroller General
of the United States