DECISION

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

60789

FILE: B-185385 DATE: April 22, 1976

MATTER OF: Walter Motor Truck Company

99032

DIGEST:

1. Where sole bid of $41,280 received on procurement was in excess of Government cost estimate ($35,000), contracting officer was not on preaward constructive notice as to possibility of mistake alleged after award.

2. Where Government estimate (approximately 18 percent less than award price) is not shown to be unreasonable or that performance of contract could not be accomplished at approximately same price as bid price, and where mere allegation is that completion of contract in alternate manner would cost contractor approximately 33 percent more than award price, contract is enforceable and not unconscionable.

3. Price in fixed-price contract without price adjustment clause may not be increased due to inflation having increased cost of doing work.

Invitation for bids No. DSA700-74-B-0387 was issued on July 31, 1973, by the Defense Supply Agency, Defense Construction Supply Center for one truck-mounted snowplow in accordance with MIL-S-17794C (as modified by the invitation). The Walter Motor Truck Company (Walter), the sole bidder, submitted a bid of $41,280. Because the bid contained descriptive literature of a particular Walter model, which might or might not have indicated technical deviations from the specifications, the contracting officer asked Walter to confirm that the model conformed to the specifications. The reply was in the affirmative, and award was made to Walter on November 8, 1973. Delivery was scheduled for 370 days after date of award.

In October of 1974, almost 1 year after contract award, Walter informed the Defense Contract Administration Services District, Hartford, Connecticut, that its axle supplier had rescinded the certification of the front axle Walter intended to use "due to overloading and high gear stresses." As Walter later explained, the decision to rescind the certification (allegedly certification had been given previously) was due to stricter enforcement of existing Federal highway safety laws. Walter offered two alternatives: (1) use of a heavier front axle from its supplier along with certain specification changes, or (2) use of a Walter-manufactured axle plus certain specification changes. Walter suggested acceptance of the second alternative to lessen the anticipated delay in delivery and cost increase, allegedly $13,048. Walter was advised that no basis existed for the acceptance of either alternative and that it would be necessary to perform the contract as awarded.

Walter requests that our Office grant relief on the basis either that a mistake in bid had occurred or that the terms of the contract have become unconscionable and, therefore, unenforceable. Walter also requests relief from the "abnormal cost escalation" since contract award which has increased the cost of contract completion.

With regard to mistakes alleged after contract award, the general rule is that the bidder must bear the consequences of the mistake unless the contracting officer knew or should have known of the possibility of mistake at the time the bid was accepted. 48 Comp. Gen. 672 (1969). In this instance, the contracting officer clearly was not on actual notice. Nor do we believe that he was on constructive notice since the Walter bid was the only bid received and was higher than the Government estimate of $35,000. Therefore, there is no basis for relief on the theory of a mistake in bid. See Titan Environmental Construction Systems, B-180329, October 1, 1974, 74-2 CPD 187; Martin W. Juster, B-181797, May 15, 1975, 75-1 CPD 297.

In addition, we conclude that the contract may not be rescinded on the basis of unconscionability. In order to show that a contract is unconscionable, it must be demonstrated that the Government would by enforcement of the existing contract receive something for nothing. 53 Comp. Gen. 187 (1973). We have found contracts to be unconscionable where the second low bidders' prices have been 280 and 300 percent greater than the awardees' prices. See 53 Comp. Gen., supra; B-177405, November 29, 1972. On the other hand, differences of 58 percent and

53 percent were insufficient to demonstrate the unconscionability of resultant contracts. See Porta-Kamp Manufacturing Company, Inc., 54 Comp. Gen. 545 (1974), 74-2 CPD 393; and Aerospace America, Inc., B-181439, July 16, 1974, and May 27, 1975, 74-2 CPD 33 and 75-1 CPD 313. Compare Yankee Engineering Company, Inc., B-180573(1), June 19, 1974, 74-1 CPD 333.

In this case, there is nothing in the record to indicate that the Government estimate, which Walker exceeded, was unreasonable at the time of bid opening or award and, consequently, that Walter could not have performed the contract at least approximately for the price bid. The difference between the Walter bid and contract price and the Government estimate--the only available basis for comparison because no other bids were received--was only approximately 18 percent. Walter has attributed the alleged cost increases to the failure to receive the axle certification and to inflation. Whatever part of the increase was due to inflation would have no bearing on the unconscionability of the contract at the time of award. Further, as the contracting officer points out, Walter has submitted no proof as to the extent of any loss it would have incurred by performance in accordance with the contract specifications.

In this regard, the only specific monetary allegation made is that use of the Walter axle would have required an increase in the contract price of $13,048. That alternative and the other offered by Walter involved changes to the specifications, which preclude their use as evidence of alleged unconscionability. In any event, the amount is only approximately 33 percent of the original contract price, and, therefore, not indicative of the Government receiving something for nothing. Consequently, on the record, we must agree with the contracting activity that the contract as awarded has not been shown to have been unconscionable and is, therefore, enforceable.

As regards the alleged increased costs for contract performance caused by "abnormal cost escalation," the price of this fixed-price contract with no price adjustment clause may not be increased because the cost of doing the work has increased between contract award and contract completion. Capitol Aviation, Inc., B-184238, July 30, 1975, 75-2 CPD 68.

R.F. Keller

Deputy Comptroller General
of the United States