DECISION

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

60875

FILE: B-185705 DATE: May 13, 1976

MATTER OF: Montgomery Elevator Company 98947

DIGEST:

Sole source contractor, who alleged error in offer prior to award and then withdrew claim for correction based on misunderstanding that error in bid procedures for advertised procurements were being applied and that rules pertaining to unilateral errors alleged after award were applicable, is entitled to adjustment requested after award, since relief will be granted to injured party if making of contract by that party was caused by innocent misrepresentation of law by other party or other party has taken advantage of perceived mistake of law by injured party.

Contract No. 663P-766 in the amount of $1,269.21 per month was awarded June 19, 1975, to the Montgomery Elevator Company (Montgomery) on a sole-source basis (41 U.S.C. § 252(c)(10) (1970)) under request for proposals No. 663-9-76 for full maintenance service on 4 traction elevators, 1 hydro elevator, and 5 dumbwaiters at the Veterans Administration Hospital, Seattle, Washington. Prior to award, Montgomery alleged orally that a mistake had been made in that the dumbwaiter requirement had been overlooked and that the price for maintenance of both the dumbwaiters and elevators should be $1,631.13 per month. Subsequently, Montgomery decided to forego correction. However, after award, it advised that the main office insisted on claiming error and it submitted a claim. The Veterans Administration (VA) has submitted the matter for our consideration.

A review of the record indicates that although this was a sole-source negotiated procurement and the contracting officer was prepared to change the Montgomery offer upon the receipt of a revised written proposal, the discussions with Montgomery were conducted on the basis that the matter was being handled under error in bid procedures applicable to advertised procurements. Further, it appears

from a record of a conversation with the Montgomery representative that he believed that the rules pertaining to errors alleged after award were applicable in that he indicated that his reason for withdrawing the claim was that it was unilateral. Thus, the determination of Montgomery prior to award to accept the contract at the offered price was the result of a misunderstanding of the law with respect to the possible revision of its offer. Relief will be granted to an injured party if the making of the contract by that party was caused by the innocent misrepresentation of the law by the other party or the other party has taken advantage of a perceived mistake of law by the injured party. 3 Corbin on Contracts § 618 (1960 ed.); 13 Williston on Contracts § 1591 (3rd ed.). Therefore, Montgomery is entitled to relief in the circumstances.

Although Montgomery initially indicated that the unit price per month should be $1,631.13, in the renewed claim of error it indicated that was based upon partial, instead of full, maintenance of the hydro elevator and dumbwaiters. If full maintenance is required, Montgomery indicated the price would be $2,372.38. The agency report states that the solicitations for fiscal years 1974 and 1975 required full maintenance, but that the contracts were amended to provide for partial maintenance and in error the change was not incorporated into the immediate solicitation for fiscal year 1976. Montgomery has been furnishing full maintenance on all items in accordance with the contract. The VA now proposes to amend the contract to delete the requirement for maintenance of the hydro elevator and dumbwaiters completely and to obtain these services on an on-call basis as needed.

By reference to the price it offered on the prior contract with the VA Hospital, Montgomery has established that the price on the immediate contract is a little more than half the price it offered to charge the Hospital for similar services in the past. Further, by reference to previously offered prices and the escalation rates applied to arrive at the price for the immediate contract, Montgomery has reasonably established a $2,372.38 monthly price for a full maintenance contract.

While Montgomery initially claimed that the unit price should be $1,631.13 per month, we believe that, even if a revised offer in that amount had been received, the contracting officer should have questioned it, since Montgomery was in a sole-source status and it would

be unusual for an offeror in that position in an inflationary economy to offer to perform a full service contract at a lower price than it had offered in the past. In that connection, constructive notice is said to exist when the contracting officer, considering all the facts and circumstances of a case, should have known of the possibility of error. See Titan Environmental Construction Systems, Inc., B-180329, October 1, 1974, 74-2 CPD 187. Therefore, Montgomery should be paid on the basis of $2,372.38 per month for the work performed. Further, since it is now proposed that the contract be amended for the future to delete the requirement for maintenance of the hydro elevator and dumbwaiters (a matter of contract administration), and Montgomery is entitled to relief and has established that the contract price of $1,269.21 per month was not intended to cover that work, our Office will have no objection if the contract is amended prospectively to delete the work without a change in the price.

Deputy Comptroller General
of the United States