DOCUMENT RESUME

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[Request for Rescission because of Invalid Contract Award]. B-187365. July 18, 1977. 4 pp.

Decision re: R. G. Robbins & Co., Inc.; by Paul G. Dembling (for Elmer B. Staats, Comptroller General).

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).
Organization Concerned: Bureau of Indian Affairs; General Services Administration.
Authority: F.P.R. 1-1.1202. F.P.R. 1-1.1206. B-186625 (1976).

Protestor sought the rescission of the contract claiming it to be invalidly awarded since the contracting officer was allegedly on constructive notice of the mistake made by protestor in computing and submitting bid. The contracting officer does not have to investigate the responsibility of a subcontractor, so he was not on constructive notice in this case. (Author/QM)

DECISION

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

FILE: B-187365 DATE: July 18, 1977

MATTER OF: R. G. Robbins & Company, Inc.

DIGEST:

1. In arriving at responsibility determination, regulations do not require that contracting officer establish responsibility of subcontractor(s); only that he make affirmative determination of responsibility of contractor. Consequently, contracting officer was not on constructive notice regarding inability of subcontractor to perform work.

2. Allegation as to vague and ambiguous nature of contract language does not afford basis for rescission of contract, but rather is matter of contract interpretation for resolution under contract.

3. There is no basis for providing relief to contractor where items delivered were not properly treated and agency has stated it could not permit waiver of treatment.

4. Request for relief for items initially accepted under contract is for resolution under contract.

5. Where low bid price was less than 1 percent below second low bid price and approximately 10 percent below third low bid price, there was no constructive notice of mistake in low bid.

R. G. Robbins & Company, Inc. (Robbins), seeks the rescission of Federal Supply Service, General Services Administration (GSA), contract No. GS-10S-39605 under which it has been defaulted.

Rescission is requested primarily on the premise that the contract was invalidly awarded since the contracting officer was allegedly on constructive notice of the mistake Robbins made in computing and submitting its bid. Constructive notice allegedly existed since the contracting officer should have known that the plant in which the contract items would be manufactured was not one set up for use of

the treatment method actually desired (and if the contracting officer did not know this, then he allegedly was remiss in making the award without first conducting a preaward survey of the plant). It is alleged further that a sufficient disparity existed between the Robbins low bid price and the prices submitted by other bidders on the item to place the contracting officer on notice of error. Also it is contended that the invitation language was vague, confusing and nondescriptive, particularly since the Federal specification was cited as being TT-W-571I instead of the correct TT-W-571l (the Guide to Specifications and Standards of the Federal Government--June 1969--indicates that the capital letter "I" is not to be used to identify specification revisions) and since the treatment to be used was never mentioned as being that employing pentachlorophenal.

Robbins further notes that the above-outlined contentions are buttressed by the fact that the first 60 items manufactured under the contract were initially accepted (Form DD250) by the Government inspector, although that acceptance was subsequently revoked by a superior of the inspector, and requests some relief at minimum on these items since the Government originally accepted them. Robbins also argues that poles treated with the CCA treatment (the treatment the subcontractor of Robbins used) are superior to, and environmentally safer than, poles treated with pentachlorophenal. Finally, it is argued that the Government will save money by buying poles treated with CCA and that a comparison study of the two treatments should be made by the Government before further purchase of any pentachlorophenal-treated poles.

As regards the allegation that the contracting officer should have conducted a preaward survey, that in the process thereof he would have discovered that Robbins' subcontractor could not have accomplished the work, and that, consequently, the contracting officer should have been on constructive notice of the Robbins mistake, the Federal Procurement Regulations (FPR) (1964 ed. amend. 95) provide at § 1-1.1202 that:

> "(a) Purchases shall be made only from, and contracts shall be awarded only to, responsible prospective contractors * * *.
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> * * * * *
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> "(c) * * * A prospective contractor must affirmatively demonstrate his responsibility and, when necessary, the responsibility of his proposed subcontractors."

and at § 1-1.1206 that:

> "(a) To the extent that a prospective contractor proposes to perform the contract by subcontracting, determinations regarding the responsibility of prospective contractors may be necessary in order to determine the responsibility of the prospective prime contractor. Determinations concerning the responsibility of prospective subcontractors generally should be made by the prospective prime contractor * * *.
>
> "(b) Notwithstanding the general ability of a prospective contractor to demonstrate the responsibility of his prospective subcontractors, it may be in the best interest of the Government to make a direct determination of the responsibility of * * * prospective subcontractors * * *. Illustrations of such situations * * * include the following: * * * (3) supplies or services, a substantial portion of which will be subcontracted. * * *" (Emphasis supplied.)

Thus, while it is mandatory that a contracting officer make an affirmative determination of responsibility of a contractor, he may or may not investigate the responsibility of a proposed subcontractor. In other words, if the contracting officer is satisfied that the prospective contractor is responsible, he may presume, with nothing further, that the contractor has ascertained the responsibility of the subcontractor(s) to perform the work properly. Therefore, under these circumstances, the contracting officer may not be said to have been on constructive notice as to the mistake Robbins made.

Secondly, the allegation that the language in the contract awarded is vague, confusing and nondescriptive does not afford a basis for rescission of the contract, but rather is a matter of contract interpretation for resolution under the contract.

As regards the complaint against the use of the pentachlorophenal treatment, the Bureau of Indian Affairs, the agency for whom GSA was making the procurement, advised the contracting officer that the treatment requested was time-proven, that the CCA treatment was not, and that it could not afford to permit its project to be used as a "guinea pig" for the CCA treatment. Accordingly, there is no basis for providing relief on this ground of complaint.

As regards the allegation that the disparity between the Robbins bid price and the other prices offered placed the contracting officer on notice of the mistake, we must disagree. The bid prices received were—with the Robbins bid prices set forth first:

Unit price	Unit price	Total price
$46.68	$73.21	$28,646
53.55	64.05	28,875
60.70	66.00	31,410
56.50	77.15	32,380
54.20	80.70	32,400
56.55	80.40	33,045
54.85	86.50	33,755
53.30	90.65	34,120
61.80	85.05	35,550
59.25	92.75	36,325
61.75	90.39	36,603
66.95	92.55	38,595
69.15	100.60	40,865
69.75	109.10	42,745

The total Robbins bid price was less than 1 percent below the second low bid price and approximately 10 percent below the third low bid price. We do not believe these differences are sufficient to have placed the contracting officer on constructive notice that Robbins had made a mistake in its bid. Schurr & Finlay, Inc., B-186625, July 7, 1976, 76-2 CPD 18.

As to the request for relief regarding the 60 poles initially accepted by GSA, that is a matter for resolution under the contract and will not be considered by our Office.

Accordingly, the claim for rescission is denied.

For the Comptroller General
of the United States