DECISION

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

FILE: B-187441 DATE: November 12, 1976

MATTER OF: Creative Printing, Inc.

DIGEST:

1. GAO lacks authority to allow modification of contract price based solely upon contractor's claim of hardship.

2. Request for modification of contract price due to alleged error in bid claimed after award cannot be allowed when contracting officer adequately discharged bid verification duty by calling to bidder's attention variance in bids received and bidder verified bid.

3. Where low bid is 75 percent of next low bid, enforcement of contract at that price is not unconscionable, since mistake is not so great that Government can be said to be "obviously getting something for nothing."

On the basis of a mistake in bid alleged after award, Creative Printing, Inc. (Creative) requests modification of its contract awarded under jacket (IFB) No. 217-700, issued by the United States Government Printing Office (GPO), Washington, D. C. Creative does not contest the issue of whether a legally enforceable contract exists, but rather asks for relief based upon hardship. However, our Office lacks the authority to grant relief based solely upon hardship. Day v. United States, 245 U.S. 159 (1917); Damascus Hosiery Mills, Inc., B-182406, June 3, 1975, 75-1 CPD 336. We will, however, examine the record for grounds upon which legal relief might be based.

Creative's director of sales was present at the bid opening on August 18, 1976, when Creative submitted the low bid of $39,873. The two other bids received were $53,039 and $59,283. Since Creative's bid was substantially (approximately 25 percent) lower than the next lowest bid, the contracting officer requested that Creative review and verify its bid because of the substantial variance. Creative verified its bid by telephone on August 18, 1976, and sent a letter of verification on the same date. The contract was awarded to Creative on August 18, 1976 on the basis of the oral verification.

On August 20, 1976, Creative notified the GPO that an error had been made in the preparation of the bid. In estimating the cost of paper an M weight factor of 140M was used, rather than the 242M weight required by the GPO invitation. This error resulted in the bid being underestimated by $4,074. Creative now seeks to have the contract price adjusted to $43,947; still $9,092 below the next lowest bid.

The general rule applicable to a mistake in bid alleged after award is that the sole responsibility for preparation of a bid rests with the bidder, and where a bidder makes a mistake in bid it must bear the consequences of its mistake unless the mistake is mutual or the contracting officer was on actual or constructive notice of error prior to award. See Ames Color File Corporation, B-185873, March 26, 1976, 76-1 CPD 199. With regard to the issue of constructive notice, Federal Procurement Regulations (FPR) § 1-2.406-1, provides, in part, that:

> "After the opening of bids, contracting officers shall examine all bids for mistakes. In cases of apparent mistakes and in cases where the contracting officer has reason to believe that a mistake may have been made, he shall request from the bidder a verification of the bid, calling attention to the suspected mistake. * * *."

When verification is requested, the bidder must be informed of the specific reasons for the request, and any particular errors suspected. See Porta-Kamp Manufacturing Co., 54 Comp. Gen. 545 (1975), 75-2 CPD 393; Atlas Builders, Inc., B-186959, August 30, 1976, 76-2 CPD 204. If, however, the contracting officer's only cause for suspecting error is the disparity between bids, his verification duty is discharged if the bidder knows the basis for the request for verification. See Atlas Builders, Inc., supra; and Ames Color File Corporation, supra.

Since Creative's alleged error in computation was not apparent or capable of being discovered from the bid, the contracting officer had no basis for suspecting the specific nature of the possible error. Therefore, the contracting officer's verification duty was adequately discharged when it was brought to Creative's attention that the possibility of an error existed in its low bid due to the variance between it and the other bids received.

In appropriate cases, however, even proper bid verification does not preclude relief for mistakes in bid. If the mistake was so gross that it could be said the Government "was obviously getting something for nothing," relief from the consequences of the mistake may be granted. See Yankee Engineering Co., Inc., B-180573, June 19, 1974, 74-2 CPD 333, citing Kemp v. United States, 38 F. Supp. 568 (1941). Enforcement of a contract based on such a gross mistake would be "overreaching unconscionable conduct on the part of the Government." Yankee Engineering Co., Inc., supra.

While there is no exact quantitative definition of the magnitude of mistake required to qualify under this test, some approximation is suggested by the cases. The mistakes in the following cases were considered gross enough to render enforcement of the contracts unconscionable, and to permit relief: Kemp v. United States, supra, (low bid was less than 33 percent of next two low bids); 53 Comp. Gen. 187 (1973) (low bid was 26 percent of next two low bids); 45 Comp. Gen. 305 (1965) (low bid was less than 10 percent of price of previous similar procurements).

In Yankee Engineering Co., Inc., supra, however, the relief was granted where the low bid was 65 percent of the next low bid. While this could suggest that errors of smaller magnitude than those in the above cases might permit relief, Porta-Kamp Manufacturing Company, supra, points out that Yankee turned on evidence in the record indicating that the Government "realized it was essentially getting something for nothing." (Emphasis added.) In Porta-Kamp the low bid was 45 percent of the next low bid and enforcement of the contract at that price was held not unconscionable.

In the present case, Creative's bid is 75 percent of the next low bid. A comparison with the above cited cases requires the conclusion that this difference is not of sufficient magnitude to find that the Government is "obviously getting something for nothing." Also, there is no evidence in the record to suggest that the Government realized that it was getting something for nothing, as in Yankee Engineering. Therefore, enforcement of Creative's contract at the agreed upon price is not unconscionable.

Accordingly, Creative's request to modify its contract price is denied.

Deputy Comptroller General of the United States