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DECISION



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

Marilynn Eaton

Proc. II

FILE: B-107718

DATE: December 15, 1976

MATTER OF: Bureau of Reclamation,
Department of the Interior

DIGEST:

When mistake in bid was due solely to misunderstanding between bidder and its supplier, valid contract is created by acceptance. Contract may not be rescinded as unconscionable since mistake was not so great that Government obviously is getting something for nothing. Termination for convenience is not recommended since that provision is designed primarily for Government's benefit and not as means for relieving contractors from burden of contract performance.

The Department of Interior has requested a decision by this Office as to whether a Bureau of Reclamation contract awarded to North Pacific Lumber Company (North Pacific) of Portland, Oregon, may be rescinded or terminated for convenience on grounds of a mistake in the price bid due to a misunderstanding between the contractor and its supplier.

The contract, No. 14-06-700-8486, covering laminated wood crossarms for power transmission lines was awarded to North Pacific on July 23, 1976, for \$22,140. On July 30, 1976, North Pacific advised the contracting officer that its bid had been based upon its supplier's quotation for solid wood crossarms and that the correct bid price for laminated crossarms would be \$47,000. The Department of Interior recommends rescission of the contract as unconscionable, or alternatively, termination for convenience as in the best interest of the Government.

The record shows that invitation for bids (IFB) No. 6-01-04560 was issued by the Bureau of Reclamation's Lower Missouri Region on June 28, 1976. It sought bids for 200 each "Crossarms, Douglas Fir, laminated, * * * and Drawing * * *" in 21 and 25 foot lengths, to be delivered FOB Mills, Wyoming. The specifications stated

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that the crossarms should be "structural-glued laminated timber," employing a waterproof type adhesive and with top and bottom laminations free of loose knots and open knotholes.

The four bids received by the July 20, 1976 closing date were as follows:

North Pacific Lumber Company	\$22,140.00
Niedermeyer-Martin Company	\$23,960.00
Webster Lumber Mills, Inc.	\$27,712.44
Cascadian Company, Inc.	\$32,496.00

One additional bid, also in the low \$20,000 range, was rejected as late. The contracting officer notes that these prices were considered competitive; no price lists are published because the lumber market fluctuates. For this reason the Government estimate of \$28,600 was considered unreliable.

Worksheets and other documents submitted by North Pacific reveal that its bid price was based on a telephone quotation from its supplier, Frank Brooks Manufacturing (Brooks) of Bellingham, Washington. Pacific assumed that Brooks was aware that the specifications called for laminated wood because Brooks had reported an inquiry from another distributor; actually, Brooks believed the inquiry was for solid wood and quoted on that basis. The discrepancy was not discovered until Brooks received North Pacific's July 26, 1976 purchase order with a copy of the specifications.

The question for consideration here is not whether North Pacific made an error in its bid, but whether a valid and binding contract was consummated by acceptance of the bid.

As a general rule, where after award, the contractor alleges a mistake in bid that was not induced or shared by the Government, he must bear the consequences of the mistake. Porta-Kamp Manufacturing Company, Inc., 54 Comp. Gen. 545 (1974), 74-2 CPD 393, and cases cited therein; Vee See Construction Company, Inc., 54 Comp. Gen. 507 (1974), 74-2 CPD 373, and cases cited therein; 48 Comp. Gen. 672 (1969); Walter Motor Truck Company, B-185385, April 22, 1976, 76-1 CPD 272; Robert McMullan and Son, Inc., 7-185032, March 18, 1976, 76-1 CPD 185.

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Our Office had held that if the IFB clearly states the Government's needs, responsibility for bid preparation lies with the bidder. Unless the contracting officer knew or had reason to know of the mistake prior to the award, we have considered it a unilateral mistake and have refused to grant relief either by reformation or rescission. Law Brothers Contracting Corporation, B-187512, October 19, 1976, 76-2 CPD ____.

The rule applies even when the mistake stems from misinterpretation of or an error in a supplier's quotation. In a 1950 decision, we stated that if a bidder had:

"* * * submitted a bid based upon a quotation of its supplier without definite knowledge that said quotation covered material meeting its specifications, that is a matter with which the Government is not concerned and the bidder must assume the consequences thereof or look to the supplier for adjustments in the matter."

See Robert McMullan and Son, Inc., *supra*; B-179695, December 7, 1973; B-178675, July 9, 1973; B-177672, March 5, 1973; B-175386, June 1, 1972; B-172205, March 30, 1971, B-139619, August 2, 1966.

In the instant case, the IFB clearly and unambiguously specified laminated wood crossarms. There is no evidence to indicate that the contracting officer had actual knowledge of the error. On the contrary, in determining responsibility prior to award, the contracting officer spoke with a representative of North Pacific, who listed recent sales of crossarms and stated that his company was the largest supplier of this type of crossarm and "well aware of the high quality requirement of the Douglas fir."

Nor do we believe that the contracting officer had constructive notice of the possibility of error. The test for such notice is one of reasonableness, i.e., whether under the facts and circumstances of a particular case, there were any factors which reasonably could have raised the presumption of error in the mind of the contracting officer. Vee See Construction Company, Inc.,

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supra; Robert McMullan and Son, Inc., supra. The four bids received by the Bureau of Reclamation showed a reasonable upward progression. The differences among them were not so great as to put the contracting officer on constructive notice of any error or give rise to a duty to verify the bid as required by Federal Procurement Regulations § 1-2.406.1 et seq. (1964 ed.). See Porta-Kamp Manufacturing Company, Inc., supra, at 547; Law Brothers Contracting Corporation, supra; Robert McMullan and Sons, Inc., supra. North Pacific failed to question the accuracy of its supplier's quotation; there is even less reason to expect the contracting officer to question the bid.

In addition, we find that the contract cannot be rescinded on the basis of unconscionability. In order to find a contract unconscionable, we have stated that a bidder's mistake must be shown to be "so great that it could be said the Government was obviously getting something for nothing." 53 Comp. Gen. 187, 190 (1973); Porta-Kamp Manufacturing Company, Inc., supra; Walter Motor Truck Company, supra; White Abstract Company, B-183643, August 8, 1975, 75-2 CPD 98; Aerospace America, Inc., Request for Reconsideration, B-181439, May 27, 1975, 75-1 CPD 313 at 9, and court cases and decisions cited therein.

We have found unconscionability when the disparity in bids between the contractor and the next lowest bidder was 280 or 300 percent. On the other hand, differences of 53 and 58 percent have been considered insufficient to demonstrate unconscionability. Walter Motor Truck Company, supra; Aerospace America, Inc., Request for Reconsideration, supra. In cases involving less of a difference between bids, this Office generally has required additional factors, such as questions regarding the method of verification or suspicion of a specific mistake, before finding unconscionability. But see 53 Comp. Gen. 187, supra.

The lowest bid conforming to the specifications, that of Webster Lumber Mills, Inc., at \$27,712.44, is \$5,742.44 or 21 percent more than North Pacific's at \$122,140. We question North Pacific's unsupported allegation that to perform the contract according to specifications its price would have to be \$47,000, and

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cannot conclude that the Government obviously is getting something for nothing. Nor can we find any other factor which would justify rescission on the basis of unconscionability.

For the foregoing reasons, acceptance of the bid by the Bureau of Reclamation created a valid and binding contract which fixed the rights and liabilities of the parties. We do not recommend that North Pacific's contract be terminated for the convenience of the Government, since that provision is designed primarily for the Government's benefit and not as a means of relieving contractors from the burdens of contract performance. See Veterans Administration, S-108902, May 17, 1974, 74-1 CPD 262.


For the Comptroller General
of the United States