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DECISION

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

FILE: B-189789 DATE: May 17, 1978

MATTER OF: Wolverine Diesel Power Company

DIGEST:

1. In deciding issue of mistake in bid, the General Accounting Office (GAO) is not bound by prior Armed Services Board of Contract Appeals (ASBCA) decision on same case finding mistake, as result of which no contract came into being, where ASBCA has declared in National Line Company, Inc. ASBCA No. 18739, 75-2 BCA ¶ 11, 400 (1975), that it lacks jurisdiction to decide mistake in bid questions. Existence of contract and mistake upon which relief may be granted is question of law upon which ASBCA's decision is not final under 41 U.S.C. §322 (1970) and implementing procurement regulation and will be decided de novo by GAO.

2. Where solicitation provides that written acceptance of offer otherwise furnished to bidder within bid acceptance period shall result in binding contract and bidder took no exception to provision in its bid, contract was effective on timely issuance of telegraphic notice of award and bidder's assertion of mistake to procuring activity after issuance of notice was therefore allegation made after award.

3. Procuring activity is not precluded from making multiple awards where solicitation expressly reserves Government's right to do so and bidder does not qualify its bid for consideration only on "all-or-none" basis. Agency's requests for extensions of bid acceptance period were not inconsistent with provision to make multiple awards and extensions granted, without limiting language to the contrary, preserve Government's right to so award intact.

4. Bidder's assumption that award would be made in the aggregate, notwithstanding solicitation's provision for multiple awards, was error in judgment; bidder's misinterpretation, of which Agency was not aware before issuance of notice of award, is therefore unilateral, rather than mutual, mistake.

5. Contracting officer did not have actual notice of mistake in bid prior to award where bidder's statement to preaward survey team concerning unacceptability of partial award was neither included in survey report nor otherwise communicated to him before notice of award was issued and bidder did not assert mistake until after issuance of notice of award.

6. Bidder's statement to preaward survey team that partial award would be unacceptable did not serve as constructive notice of mistake to contracting officer; survey was conducted on basis of total quantity, survey report recommended total award, and bidder's statement was not included in report or otherwise communicated to contracting officer prior to issuance of notice of award.

7. Contracting officer cannot be charged with constructive notice of mistake in bid where nothing in record indicates that in light of all facts and circumstances he should have known of the possibility of error in the bids prior to the issuance of notices of award. Therefore, request for relief for mistake in bids made after award is denied.

Wolverine Diesel Power Company (Wolverine) has requested relief in the amount of $13,501 for alleged mistakes in its bids in response to invitations for bids (IFB) Nos. DSA-400-74-B-4924 (IFB-4924) and DSA-400-74-B-5193 (IFB-5193) for mounting assemblies, on

the basis of which Wolverine was awarded contracts Nos. DSA-400-74-C-8790 (Contract 8790) and DSA-400-74-C-8827 (Contract 8827) by the Defense Logistics Agency (DLA), Defense General Supply Center, Richmond, Virginia.

DLA subsequently terminated both contracts for default, and Wolverine appealed to the Armed Services Board of Contract Appeals (the Board). The Board upheld the default actions, but dismissed the appeal to the extent that it concerned a mistake in bid. Wolverine Diesel Power Company, ASBCA No. 19967, 75-2 BCA ¶ 11,453 (August 19, 1975), aff'd. ASBCA No. 19967 October 7, 1975. DLA repurchased its requirements from another supplier and demanded excess reprocurement costs of $64,403.41 from Wolverine, which the firm appealed to the Board. The Board found that DLA's delay in effecting the reprocurement precluded assessment of reprocurement costs on the basis of the price of the reprocurement contracts, and sustained the appeal to the extent that the Government was not entitled to any amount in excess of $13,501. Wolverine Diesel Power Company, ASBCA No. 20609, 77-2 BCA ¶ 12,551 (May 18, 1977). In so doing, however, the Board stated:

> "In deciding an original appeal from the terminations for default, we dismissed the case to the extent it concerned a mistake in bid citing * * * National Line Company, Inc., ASBCA No. 18739, 75-2 BCA ¶ 11,400. The Board has before it only the Rule 4 file and the pleadings of the parties. We were barred from pursuing the mistake in bid as a result of the National Line Company decision * * *. We now have before us clear and convincing proof of a mistake in bid as found above. Appellant bid on a certain quantity while the Government's acceptance was predicated on a far lesser quantity. There was no meeting of the minds, no striking of a bargain; consequently, from a factual point of view, no contract came into being. In view of the National Line Company decision, however, we are obligated to reiterate that appellant has no remedy for a mistake in bid in this forum. Such relief can properly be sought from the Comptroller General of the United States or the United States Court of Claims." (Emphasis added.)

PROCEDURAL ASPECTS

The initial issue for resolution is whether and to what extent our Office is bound by the Board's findings concerning mistake in bid in its May 18, 1977, decision. Counsel for Wolverine asserts that the facts set forth in the decision, quoted above with emphasis, are binding on the parties under the doctrine of res judicata. Counsel further contends that the Board's determination of mistake must stand unless that finding was fraudulent, arbitrary, capricious, so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, citing inter alia, 41 U.S.C. § 321 (1970); Armed Services Procurement Regulation (ASPR) § 7-103.12 (1973 ed.); United States v. Bianchi & Co., 373 U.S. 709 (1963); Woodcrest Constr. Co. v. United States, 408 F.2d 406 (Ct.Cl. 1969); 46 Comp. Gen. 441 (1966); 49 id. 782 (1970).

DLA, however, takes the position that the Board's findings concerning mistake in bid and the validity of Wolverine's contracts are not binding and that in light of the National Line decision, the issue of mistake in bid should be decided de novo by our Office.

We think it significant that the Board cited National Line as controlling in its discussion of Wolverine's alleged mistake in bid in both the 1975 and 1977 decisions, for we find the language of that case dispositive as the Board's own statement of its authority with respect to the issue of mistake in bid. The case involved an appeal from a default termination and resultant assessment of excess reprocurement costs for which the appellant-contractor contended the firm was not liable due to an alleged mistake in bid of which the contracting officer should have known. The Board dismissed the appeal for lack of jurisdiction to decide questions concerning mistake in bid stating that:

> "One of the Board's leading cases * * * on the subject of the Board's broad jurisdiction over appeals involving claims by the Government is Harrington & Richardson, Inc., ASBCA No. 9839, 72-2 BCA ¶ 9507, and in that decision * * * the Board stated that bid mistake relief was a

> recognized exception to the Board's jurisdiction. We are unaware of any case in which this Board or its predecessors have asserted jurisdiction under the Disputes article to decide the merits of mistake in bid questions. To the rare extent such questions have been decided as threshold jurisdictional issues under the authority of our Charter, such decisions are hereby overruled." National Line Company, Inc., ASBCA No. 18739, 75-2 BCA ¶ 11,400 (July 16, 1975). (Emphasis added.)

Consequently, we view the Board's conclusions with regard to the issue of mistake in bid as dicta, not binding on our Office. Moreover, the questions of the existence of the contracts and of mistakes in bid upon which relief may properly be granted are matters of law and, as such, the decision of the Board in this regard is not and cannot be considered final. 41 U.S.C. § 322 (1970); ASPR § 7-103.12(a)(b)(1973 ed.); 49 Comp. Gen. 782, 783 (1970); 53 id. 167, 169 (1973).

HISTORY OF PROCUREMENTS

A review of the history of the procurements is initially requisite to an understanding of the issue now before our Office. DLA issued IFB-1924 for a total of 220 mounting assembly power units, Federal Stock Number (FSN) 6115-763-6335, on January 8, 1974. Bids were solicited freight on board (f.o.b.) origin or, in the alternative, f.o.b. various destinations. Bid opening, originally scheduled for February 7, 1974, was extended by amendment to February 19, 1974. Four responsive bids were received; unit bid prices before discount were as follows:

BIDDER	F.O.B. Origin (Items 1-6)	F.O.B. Destination (Items 1-6)
Wolverine	$ 643.40	No Bid
John R. Hollingsworth Co.	$ 740.00	No Bid
	$ 733.00 *	
Essex Electro Engineers	$1,145.00	No Bid
A.C. Ball Co.	$3,245.00	$3,437.00

* (Bid with waiver of first article testing)

IFB-5193 for a total of 225 mounting assembly power units, FSN 6115-873-3915, was issued on January 23, 1974. The two eligible bids received at the bid opening on February 22, 1974, were priced as follows:

BIDDER	F.O.B. ORIGIN (Items 1-7)
Wolverine	$1,355.00
John R. Hollingsworth Company	$1,484.00
	$1,480.00 *

* (Bid with waiver of first article testing)

On March 28, 1974, DLA requested a partial preaward survey of Wolverine's premises. See ASPR § 1-905.4(b) (1973 ed.). The survey was conducted on the basis of the total quantities of DLA's requirements on April 4 and April 5, 1974; the survey report, dated April 10, 1974, recommended complete award to the firm on each of the solicitations. The record shows that during the course of the survey DLA's industrial specialist asked Wolverine personnel whether a lesser quantity would be acceptable to the firm, to which Wolverine responded in the negative. That information is not, however, recorded in the survey report.

DLA's contracting officer subsequently determined that Wolverine was the low bidder on items 1 and 2 of of IFB-4924 for a total of 60 units at $38,604 and that John R. Hollingsworth Company (JRHC) was the low bidder on items 3 through 6 for a total of 160 units (on the waiver basis) at $117,280. During the interim, DLA requested and received extensions of Wolverine's and JRHC's bids to May 1 and May 10, 1974. DLA telegraphically notified Wolverine of the award of Contract 8790 for 60 units on May 9, 1974.

Similarly, Wolverine's bid was deemed low on items 5 and 6 of IFB-3915 for a total of 65 units at $88,075; JRHC was the low bidder on the remaining items for a total of 160 units (on the waiver basis) at $236,800. Meanwhile, the bidders had complied with DLA's request that their bids be extended for acceptance to May 10, 1974, and a telegraphic notice of the award of Contract

8827 for 65 units was sent to Wolverine on that date. Contracts 8790 and 8827 were mailed to Wolverine on May 23 and June 18, 1974, respectively .

However, by telegram of May 13, 1974, Wolverine advised DLA that it could not perform the contracts in the reduced quantities awarded because the firm's bids were based on the total quantities solicited and asked to be relieved of the contracts. In a letter to DLA on the following day, confirming the telegram, Wolverine related the preaward survey inquiry concerning the acceptability of a reduced-quantity award and the firm's response that such an award would be unacceptable because pricing on purchased parts would be increased on reduced quantities. Wolverine returned the contracts to DLA on May 28, 1974.

DLA telegraphically acknowledged receipt of Wolverine's telegram and letter on May 31, 1974; DLA further advised that in order to consider the request for relief from the contracts Wolverine must furnish clear and convincing evidence of the alleged mistake, enumerated acceptable types of evidence, and required that the evidence be submitted by June 7, 1974. Wolverine timely furnished DLA an affidavit of the industrial specialist who conducted the preaward survey, together with a letter stating that the firm interpreted Clause No. D4 of the solicitations as indicating that awards would be made for total quantities and that no indication to the contrary was given in DLA's numerous requests for extensions of the acceptance dates of the firm's bids.

By telegram dated June 11, 1974, however, DLA informed Wolverine that the evidence supplied appeared insufficient to substantiate the alleged mistake, referred to the examples of evidence listed in the Agency's May 31 telegram, allowed Wolverine to provide additional evidence by June 18, 1974, and admonished that failure to do so would raise the assumption that no further evidence existed and such failure would be considered in determining the request for relief.

Wolverine responded on June 17, 1974, with cost comparisons of tooling, production start up, and fire extinguisher and bracket costs for producing the total and partial quantities. Four days later DLA's contracting

officer telephonically informed Wolverine that the information furnished in the June 17 letter did not appear to substantiate the alleged mistakes and asked whether the firm had worksheets or other information which would show that Wolverine intended to indicate that the bids should be on an "all-or-none" basis or that an award for less than the total quantity would not be accepted. According to the record, Wolverine replied that it had furnished to DLA the only information the firm had and that nothing in the worksheets indicated that the bids should be "all or none." Wolverine reiterated its request for relief in a letter to DLA of August 19, 1974, asserting that the statements made during the preaward survey, together with the affidavits furnished concerning costing, constituted sufficient legal evidence of mistake in bid within the meaning of ASPR § 2-406 (1973 ed.).

DLA notified Wolverine by letter dated October 17, 1974, that its request for relief from the contracts had been denied because the evidence which the firm submitted was not clear and convincing, to which Wolverine responded on October 22, 1974, again requesting that DLA recognize its reasons for not accepting the contracts and relieve the company of performance responsibility.

DISCUSSION

Formation of Contract

Initially, paragraph 10(d) of standard form (SF) 33A of the IFB's in question provided that award of the contracts would be made in the following manner:

"10. Award of Contract.

* * * * *

"(d) A written award (or Acceptance of Offer) mailed (or otherwise furnished) to the successful offeror within the time for acceptance specified in the offer shall be deemed to result in a binding contract without further action by either party." (Emphasis added.)

As mentioned above, DLA sent telegraphic notices of the award of Contracts 8790 and 8827 to Wolverine on May 9 and May 10, 1974, respectively. We believe that those telegrams constitute written acceptance of Wolverine's bids which were timely "otherwise furnished" to the firm within the meaning of the above-quoted provision of the solicitations. We have long held that where such language is included in the solicitation and the bidder takes no exception to it, a binding contract comes into existence at the time the notice of award is mailed or otherwise furnished, regardless of when or whether it is received by the bidder. 45 Comp. Gen. 700, 708 (1966). Because Wolverine did not take exception to the terms of the IFB concerning consummation of the contract upon notice of the award, the contracts were effective on May 9 and 10, 1974, and Wolverine's May 13, 1974, telegram to DLA was an allegation of mistake in bid made after award.

Mistake in Bid

We have consistently held that the responsibility for preparing a bid rests with the bidder. The general rule applicable to a mistake in bid alleged after award is that the bidder must bear the consequences unless the mistake was mutual or the contracting officer had either actual or constructive notice of the mistake prior to award. See, e.g., 17 Comp. Gen. 373,374-75 (1937); 48 Comp. Gen. 672, 675 (1969); Porta-Kamp Manufacturing Company, Inc., 54 Comp. Gen. 545, 547(1974), 74-2 CPD 393; Peterman, Windham & Yaughn, Inc., B-186359, January 12, 1977, 77-1 CPD 20.

Wolverine takes the somewhat anomalous position that (1) neither the terms of the solicitations nor DLA's requests for extensions of the acceptance dates of the firm's bids indicated the possibility that multiple awards might be made under the solicitations, and (2) the firm intended to bid on an "all-or-none" basis and its failure to do so constituted mistakes in the bids for which relief from performance of the contracts should have been granted.

Paragraph 10(c) of SF 33A of the solicitations provided, in pertinent part, for the making of multiple awards under the following circumstance:

> "(c) The Government may accept any item or group of items of any offer, unless the offeror qualifies his offer by specific limitations. * * **"

We have held that in the absence of qualifying language to the contrary in the bids under consideration, this provision allows the procuring activity to split the items for award. Engineering Research, Inc., B-188731, June 15, 1977, 77-1 CPD 431; Federal Contracting Corporation, B-189655, November 8, 1977, 77-2 CPD 353. While we feel that the above-quoted provision constitutes sufficient advice of the possibility of multiple awards, we note that the Master Solicitation, section"D," Evaluation And Award Factors, paragraph D3, of the IFB's expressly provided that:

> "[B]ids will be evaluated on the basis of advantages or disadvantages to the Government that might result from making more than one award (multiple awards). [I]ndividual awards will be for the items and combination of items which result in the lowest aggregate price to the Government, * * * ." See ASPR § 2-201(a)(D)(iii)(1973 ed.)

Consequently, we find nothing which precluded DLA from splitting the awards for items included in the solicitations. Federal Contracting Corporation, supra.

With regard to Wolverine's exception to DLA's requests for extension of the firm's bids, we find nothing in the procuring activity's actions inconsistent with the Agency's prior reservation of the right to make multiple awards under the solicitations. Wolverine's bids as initially offered and extended contained the above-quoted provisions, did not include any qualifying language to the contrary, and were therefore extended with the Government's right to so award intact.

As to Wolverine's allegation that the firm intended its bids to be considered only in the aggregate and that its failure to qualify the bids to that effect constituted a mistake, we cannot agree that such an error should be characterized as a mutual mistake requisite to the relief

sought. It is our opinion that the only mistake which may have been involved was in Wolverine's judgment concerning the meaning of the IFB award provision, due solely to the firm's own misinterpretation of the solicitations and, thus, a unilateral error. See Federal Contracting Corporation, supra; 49 Comp. Gen. 782, 787 (1970); 47 id. 378, 382-83 (1968); 45 id. 700, 709 (1966); 17 id. 373, 374 (1937). Furthermore, a mistake by one party coupled with the ignorance of that mistake by the other party does not constitute a mistake as to which a legal basis exists for reformation or relief of a contract. B-143438, September 9, 1960; 47 Comp. Gen. 365, 369 (1968).

Because notice of award was issued to Wolverine prior to the firm's allegation of mistake, and DLA was not aware of Wolverine's interpretation of the solicitation's award provisions prior to issuing the notices, we are unable to conclude that DLA's contracting officer had actual notice of the alleged errors before the awards were made. 45 Comp. Gen. 700, 708 (1966); Federal Contracting Corporation, supra.

Similarly, we cannot agree with Wolverine's contention that the preaward survey inquiry concerning the acceptability of a partial award constituted notice of mistake to the contracting officer. According to the record, that interchange was neither included in the survey report, nor was the information otherwise communicated to the contracting officer prior to the time the notices of award were issued. See Cross Aero Corporation, ASBCA No. 15092, 71-2 BCA ¶ 9076 (September 14, 1971); Cross Aero Corporation, ASBCA No. 14801, 71-2 BCA ¶ 9075 (September 4, 1971); 38 Comp. Gen. 218 (1958).

There remains for consideration the question of whether the contracting officer had constructive notice of the alleged mistake. Such notice is said to exist when the contracting officer, considering all the facts and circumstances, should have known of the possibility of an error in the bid. 44 Comp. Gen. 383, 386 (1965); Smith Decalcomania Co., Inc., B-182414, January 27, 1975, 75-1 CPD 54. However, we find nothing in the record from which to conclude that DLA contributed to, was responsible for, or had specific or constructive knowledge of Wolverine's misinterpretation of the solicitations' award provisions. 47 Comp. Gen. 378, 386 (1968).

Accordingly, Wolverine's request for relief is denied.

R. F. Keller

Deputy Comptroller General
of the United States