

11377 Proc II
Roberts

DECISION



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

FILE: B-195003

DATE: September 12, 1979

MATTER OF: Arbor Development Corporation *DLG 02730*

DIGEST:

Request for Contract Reformation

1. Where evidence of intended price for omitted items consists of supplier quotations obtained after bid opening, resulting in a recalculation of the bid based on factors not originally considered, agency properly did not allow correction of erroneous bid.
2. Since it is clear that contractor was aware of all requirements when it elected to accept award at original bid price, resultant contract expressed final understanding of parties and no legal basis exists for subsequent reformation based on mistake in bid.
3. Where bidder is permitted to withdraw its bid but willingly and knowledgeably accepts award of contract at erroneous bid price which allows it to make a profit and keep its work force intact through winter months, contract is not unconscionable.

Arbor Development Corporation (Arbor) requests additional payment under U.S. Department of Agriculture Forest Service Contract No. 50-8428-9-16. The basis for the request concerns Arbor's error in bidding under the Forest Service's solicitation No. INT-79-01 for the construction of a Headhouse/Greenhouse at the Intermountain Forest and Range Equipment Station, Provo, Utah.

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The solicitation called for a base price on the major construction work, a price for an additive item which included furnishing and installation of laboratory plumbing fixtures, and a total price. Arbor's total price of \$199,060.00 was the apparent low bid;

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however, its bid on the additive item was considerably lower than the Government estimate for that item, and below the price range of other bids for the additive item. Because of this disparity, the Forest Service requested that Arbor verify its bid. Arbor replied that it had erred in its bidding of the additive item because it had omitted the cost of stainless steel sinks and counter tops in calculating the price.

In response to the contracting officer's request for information that would support this claim of error and establish both the mistake and the exact price intended, Arbor provided work sheets, including estimate details, which indicated that Arbor had overlooked the requirement for stainless steel sinks and tops in the preparation of its bid. Since Arbor overlooked these items while preparing its bid, the only evidence which it could provide of an intended bid price for these items consisted of quotations obtained from suppliers after bid opening when Arbor became aware of the requirement. Arbor stated that the additional cost of the sinks and tops would be \$5,712.00, thus raising its intended total bid price to \$204,772.00, which was still lower than the second low bidder.

After review of the Arbor submissions, the Forest Service determined that the evidence was clear and convincing as to the mistake itself but that Arbor could not establish its intended price because all evidence of the intended price was generated after bid opening. Based on these determinations, the Forest Service informed Arbor that no correction would be allowed and that withdrawal of the bid would be permitted.

In subsequent discussions with the Forest Service, Arbor stated its willingness to waive the error and accept award of the proposed contract at its original bid price because it would still be able to make a profit at that figure and because it wanted to maintain its work force through the remaining winter months. The Forest Service determined Arbor to be a responsible contractor and awarded to Arbor on the basis that award at the

original bid price would not be unfair to Arbor (which had indicated it would still make a profit), or other bidders (whose bids would still be higher than the corrected Arbor price), and would be in the Government's best interest.

After receiving award, Arbor appealed the Forest Service's decision not to allow upward correction of its bid, and requested that the Forest Service either issue a change order for the sinks and tops and increase the contract amount accordingly, or delete the disputed requirements with no reduction in contract price. Arbor claims that the Government is receiving value without providing compensation, thus resulting in an unconscionable contract. We believe the Forest Service acted properly in denying these requests.

With regard to correction of mistakes in bids, Federal Procurement Regulations § 1-2.406-3(a)(3) provides:

"A determination may be made permitting the bidder to correct his bid where * * * clear and convincing evidence establishes both the existence of a mistake and the bid actually intended * * *. If the evidence is clear and convincing only as to the mistake, but not as to the intended bid, a determination permitting the bidder to withdraw his bid may be made."

The rule which allows bid correction does not extend to situations where, as here, the bidder discovered after opening that its intended bid was incomplete. As we stated in 37 Comp. Gen. 650, 652 (1958):


" * * * bids may not be changed after they are opened, and the exception permitting a bid to be corrected upon sufficient facts establishing that a bidder actually intended to bid an amount other than that set down on the bid form * * * does not extend to permitting a bidder to recalculate and change

his bid to include factors which he did not have in mind when his bid was submitted * * *."

See also General Elevator Company, Inc., 57 Comp. Gen. 257 (1978), 78-1 CPD 81 and decisions cited therein. Consequently, the Forest Service properly determined not to allow correction of the Arbor bid.

Regarding the requested contract modifications, the record indicates that Arbor, in accepting the award at its original bid price, understood that the award included the additive item's requirement for sinks and tops. There was not, then, any lack of knowledge of the parties, either mutual or unilateral, concerning the terms of the contract. Consequently, we believe that the instant contract expressed the final understanding of the parties and we find no basis in law here which would allow for relief in the nature of contract reformation based on a mistake in bid. See, e.g., 31 Comp. Gen. 384 (1952) which cites The Massman Construction Company v. United States, 102 Ct. Cl. 699, cert. denied 325 U.S. 866 (1945). Furthermore, Arbor indicated it will still make a profit on this contract, and it wanted the contract to maintain its work force through the winter months. In these circumstances, it is not grossly unfair (the standard for unconscionability) to require Arbor's performance, as agreed. See B-178795, September 26, 1973.

For the foregoing reasons, the request for contract reformation is denied.


Deputy Comptroller General
of the United States