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Transp.
Mr. Cohen

DECISION



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

FILE: B-195719

DATE: January 14, 1980

MATTER OF: Ziegler Steel Service Corp.

DIGEST:

1. Where contract was awarded prior to effective date of Contract Disputes Act of 1978 (Act), contractor properly could elect to request relief for mistake in bid from contracting agency under Pub. L. No. 85-804 rather than under Act.
2. Denial of relief for mistake in bid under Pub. L. No. 85-804 does not preclude GAO from considering whether contractor otherwise is entitled to relief independent of that statute.
3. Proper request for verification of bid requires that contracting officer apprise bidder of mistake suspected and basis for suspicion.
4. Binding contract was not consummated by Government's acceptance of bid after bidder verified price in response to inadequate request for verification. If intended bid price cannot be established and rescission is impractical, contractor may be paid on quantum valebant basis for materials delivered not to exceed alleged intended bid.

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Ziegler Steel Service Corp. (Ziegler) requests reformation of contract No. 700-78-C-1532 with the Defense Logistics Agency (DLA) on the basis of a

Request for Contract

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mistake in bid discovered after award. We believe that notwithstanding that Ziegler verified its bid at the request of the contracting officer before being awarded the contract, the request was inadequate, and acceptance of the bid therefore did not result in a valid and binding contract.

Background

The invitation for bids that resulted in the contract was issued in December 1977 and solicited bids on six items of Class A tubes (930 lengths total) and three items of more expensive Class E tubes (660 lengths total). Ziegler was the low bidder for all items. Of the two bids received for the Class E tubes, only Ziegler's bid of \$35.23 per length for each item was responsive. The nonresponsive bid was \$74.26 per length, and the Government estimate was \$34.11 per length. In view of the difference in the two Class E tube bids, the contracting officer telephoned Ziegler to request that it verify the bid. After verification, a contract for all items was awarded to Ziegler on March 13, 1978.

The Class E tubes delivered by Ziegler were rejected as nonconforming, and Ziegler was directed to supply conforming replacements. Ziegler did so, but also requested relief from supplying them at the contract price under Pub. L. No. 85-804, 50 U.S.C. §§ 1431-1435 (1976), on the basis that it mistakenly predicated the bid price on cheaper Class A material. That statute authorizes amending or modifying contracts to facilitate the national defense. DLA denied the request essentially because the firm had not proven that a mistake was made or the extent thereof; had in any case verified its bid prior to award; and had not shown the contract price to be unconscionable. Ziegler thereafter submitted its request for contract reformation to our Office.

Jurisdiction

As a threshold issue, DLA suggests that we should decline to review the matter for three reasons.

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First, DLA points out that the Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (1978) (the Act), provides in section 6 that "All claims by a contractor against the government relating to a contract * * * shall be submitted to the contracting officer for a decision." DLA asserts that the Act brings within the contracting officer's authority certain kinds of relief formerly available within the contracting agency only under Pub. L. No. 85-804, such as rescission and reformation. On that basis, DLA in effect suggests that we should require Ziegler to pursue relief in accordance with the Act's provisions rather than at our Office.

Second, DLA contends that the matter should be considered a factual dispute with respect to whether Ziegler's performance under the contract has been defective, and thus is for resolution under the contract's Disputes clause.

Third, DLA argues that Ziegler in any case should not be allowed to "collaterally attack" that agency's denial of the firm's request under Pub. L. No. 85-804 in another forum.

We find no legal merit to DLA's arguments. First, Ziegler's contract was awarded prior to the Act's effective date (March 7, 1979), and thus pursuant to section 16 of the Act it would apply to the claim only if Ziegler had elected to proceed thereunder. However, Ziegler's request to DLA was specifically for relief under Pub. L. No. 85-804, to which the Act clearly does not apply. See "Uniform Rules of Procedure for Boards of Contract Appeals and Related Regulations," 44 Fed. Reg. 12519, 12524, March 7, 1979. The fact that Ziegler may have been able to request the same relief under the Act is not relevant since it simply chose not to exercise that option.

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Regarding DLA's second point, there are no facts in dispute; rather, the matter is one of law, i.e.,

whether a binding contract came into existence, and thus is appropriate for our review. Wolverine Diesel Power Company, 57 Comp. Gen. 468 (1978), 78-1 CPD 375; 53 Comp. Gen. 167 (1973).

Finally, DLA's denial of Ziegler's request under Pub. L. No. 85-804 does not preclude our Office from considering whether the contractor is entitled to relief independent of that statute because of the alleged error. Aydin Energy Systems, B-192965, September 6, 1979, 79-2 CPD 180. We point out here that factual findings made by DLA in the course of considering Ziegler's request thus are not binding in connection with this review. 48 Comp. Gen. 672 (1969).

Merits of the request

Generally, when a bidder is requested to and does verify its bid, the Government's acceptance of the bid results in a valid and binding contract which will not be disturbed by a later allegation of error. R.B.S., Inc., B-194941, August 27, 1979, 79-2 CPD 156. However, the contracting officer's verification duty is not discharged merely by requesting confirmation of the bid--proper verification requires that the bidder be apprised of the mistake suspected and the basis for such suspicion. Defense Acquisition Regulation § 2-406.3(e)(1976); Electro Research, Inc., B-194231, March 29, 1979, 79-1 CPD 219. Thus, we have found a request for verification to have been inadequate where the bidder was advised of the reasons for the request only in part, e.g., the bidder was told of the disparity between the bid and the Government estimate but not of the disparity between the bid and the next low bid. Department of Agriculture--Francisco Ojeda, B-190704, January 9, 1978, 78-1 CPD 16. See also Frankel Co., Inc., B-187693, November 23, 1976, 76-2 CPD 446. Similarly, a statement by the contracting officer that the bid was "a little out of line with the other bids received" was found to be inadequate where the basis for the request was the

fact that the bid was 37 percent below the next low bid and 56 percent below the Government estimate. Electro Research, Inc., supra.

Here, the contracting officer's memorandum of the telephone call to Ziegler for verification states that Ziegler was only advised "to check prices on bid." Thus, Ziegler was not directed to the items in which a mistake was suspected nor was the firm advised of the basis for the request, i.e., the fact that the bid price for the Class E tubes was less than half of the only other bid. In fact, the contracting officer admits that the request for verification was "vague."

We note here that we do not consider it relevant that Ziegler's bid for the Class E tubes was close to the Government estimate (the accuracy of which Ziegler disputes), or that the other bid was not responsive, since despite those factors the contracting officer suspected a mistake on Ziegler's part based on the other bid. Also, it is not relevant that Ziegler nevertheless might have discovered the error had it used better procedures in reviewing the bid after the contracting officer's request since, as stated above, once a mistake is suspected the burden is on the contracting officer to properly request verification; the burden to properly verify cannot shift to the bidder unless the request is sufficient. See John P. Ingram, Jr., B-191867, November 8, 1978, 78-2 CPD 332.

In view of the above considerations, it is our opinion that the contracting officer's failure to draw Ziegler's attention to the suspected mistake and the basis for the suspicion resulted in an inadequate verification request, and therefore the award did not result in a binding contract for the Class E tubes at the bid price.

Relief

In this type of situation, a contract ordinarily is reformed upon presentation of evidence establishing the error and the intended bid. Charles E. Weber &

Associates, B-186267, May 12, 1976, 76-1 CPD 319. Ziegler contends that the price it ultimately paid to its supplier for the Class E tubes as increased by delivery costs, profit, etc., reflects the bid it would have submitted on the items in question. However, no price was calculated by Ziegler for the Class E material prior to the submission of the bid. The above-stated rule permitting reformation does not extend to the situation where a bid must be recalculated to include a factor that the bidder did not have in mind when the bid was prepared and submitted. International Harvester Company, B-183424, April 30, 1975, 75-1 CPD 272.

Nevertheless, the material has been delivered and contract rescission is not practicable. Accordingly, Ziegler may be paid on a quantum valebant basis, i.e., the reasonable value of those materials at the time of bid opening not to exceed the alleged intended bid. Al Johnson Construction Company, B-189346, August 25, 1978, 78-2 CPD 144.

We note here that Ziegler has also requested reimbursement for the \$6,270 difference in price between its cost for the nonconforming tubes and their resale value. We find no basis to allow that additional amount.



For The Comptroller General
of the United States