13782 TRANS

DECISION

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

[Request for Contract Reformation]

FILE: B-196924 DATE: May 20, 1980

MATTER OF: Dorman Electric Supply Co., Inc.

DLG 04468

DIGEST:

1. No legal basis exists to reform contract on basis of alleged mistake in bid, discovered after award, where error was unilateral, there was no actual notice, and next low lump-sum bid was less than 11 percent higher than awardee's bid, which by itself is insufficient to warrant placing contracting officer on notice of possibility of error.

2. Administrative Procedure Act excludes contract matters from rule making provisions; moreover, GAO is not subject to act since it does not engage in rule making or adjudication as contemplated by act.

3. Under procedure where GAO settles claims pursuant to 31 U.S.C. § 71 on basis of written record without formal hearings, there is no denial of due process.

4. GAO intended to give tacit approval to Architect of Capitol's proposed error in bid regulations when comments were furnished without objection to delegation proposed.

5. Although error in bid regulations of Architect of Capitol are not published to public at large, they are incorporated by reference into invitations for bids and are available to bidders and contractors upon request so that contractor by bidding under invitation for bids was made aware of regulations that would apply in event of error in bid.

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Dorman Electric Supply Co., Inc. (Dorman), requests reformation of contract No. ACho-499-B for certain electrical supplies awarded by the Office of the Architect of the Capitol (Architect). WTH00013

Dorman submitted a lump-sum bid of $40,104.61 for items listed under group "B" of invitation for bids (IFB) No. 7926. Eight other responsive bids on this group ranged from $44,338.09 to $59,270. A previously prepared Government estimate was deemed unsuitable for comparison purposes since it had been calculated prior to a requirement change which increased the items being purchased.

Approximately 1 week after award of group "B" was made, the Government advised Dorman that the material which Dorman had shipped under the contract was not in conformity with stated requirements with respect to four items. In each instance, Dorman had sent conduit lengths totaling one-tenth the footage specified. On reviewing the IFB, Dorman allegedly realized for the first time that the specifications called for numbers of ("unusual") 10-foot conduit lengths, while its bid preparation and shipment were based on ("common trade usage") 1-foot conduit lengths.

Dorman advised the agency of its error and requested reformation in the form of an $11,545.04 increase in contract price. This request was denied by the agency and Dorman appealed to the General Accounting Office (GAO). Dorman now indicates that it would be willing to accept a $4,000 price increase since this would keep its total contract price below the second low bid.

We have decided that the claim provides no basis for relief.

The general rule applicable to an error in bid alleged after award is that the bidder must bear the consequences of its mistake unless it was mutual or the contracting officer had either actual or constructive notice of the mistake prior to award.

Wolverine Power Diesel Company, 57 Comp. Gen. 468 (1978), 78-1 CPD 375; Paul Holm Company, Inc., B-193911, May 2, 1979, 79-1 CPD 306.

In this case, the claimant suggests that a mutual error was made because the agency failed to compare its bid with the Government estimate. It alleges that this constituted a mistake by the Government, since such a comparison was not impossible. This suggestion is misplaced since the essence of mutual mistake is that the contract as reduced to writing does not reflect the actual agreement of the parties. R.B.S., Inc., B-194941, August 27, 1979, 79-2 CPD 156. Here the contract contains the agreement of the parties.

There is no allegation or indication that the contracting officer had actual knowledge of the unilateral mistake. In the case of unilateral mistakes, a valid and binding contract is consummated upon the Government's acceptance of a responsive bid unless the contracting officer knew or should have known of the probability of an error in the bid but failed to take steps to verify it. Courier-Journal Lithographing Company, B-195811, September 20, 1979, 79-2 CPD 208.

The test for constructive notice is one of reasonableness--whether under the facts and circumstances of the particular case there are factors which should raise the presumption of error in the mind of the contracting officer. 53 Comp. Gen. 30 (1973); United Sound, Inc., B-187273, January 19, 1978, 78-1 CPD 50. Generally, a contracting officer has no reason to suspect error where a low bid is in line with the other bids received. B-179725, October 30, 1973; American Railroad Industries, Inc., B-187488, October 22, 1976, 76-2 CPD 361.

Bid disparities ranging from 5 to 38 percent have been held by our Office to be insufficient, standing by themselves, to charge a contracting officer with constructive notice of a mistake in bid. Veterans Administration Request for Decision Concerning a Mistake in Bid Alleged by L.E.B., Inc., B-186797, July 23, 1976, 76-2 CPD 77. In this instance, the difference between Dorman's bid price

and that of the second low bidder was approximately 10.5 percent; the other bids ranged from 11.8 to 47.8 percent higher than Dorman's. Under these circumstances, we do not believe the 10.5-percent disparity was sufficient to place the contracting officer on constructive notice of mistake such that bid verification should have been obtained prior to award.

However, the claimant contends that this line of decisions should not be controlling. Dorman, citing N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759, (1969), argues that the decisions of the Comptroller General are not binding because they were not reduced to rules pursuant to the Administrative Procedure Act, 5 U.S.C. § 551, et seq. (1976). In that regard, Dorman contends that reliance upon the decisions substitutes rules made in the course of adjudicatory hearings for rules which should have been formulated under the Administrative Procedure Act.

This argument fails because the Administrative Procedure Act specifically excludes contract matters from the rule making provisions. 5 U.S.C. § 553(a)(2) (1976). See Starline, Incorporated, 55 Comp. Gen. 1160 (1976), 76-1 CPD 365; B-178862, October 10, 1973. Moreover, our Office is not subject to the act, since it is not engaging in rule making or adjudication as contemplated by the act.

Dorman further contends that its claim should be resolved only after full due process is afforded. The authority of GAO to settle and adjust all claims and demands by or against the United States is contained in 31 U.S.C. § 71 (1976). Claims presented to GAO are settled on the basis of the facts as established by the Government agency concerned and by evidence submitted by the claimant. The settlement is made on the basis of the written record without resort to formal hearings. See 4 C.F.R. part 31 (1980). We have decided that under this procedure there is no denial of due process. 21 Comp. Gen. 244 (1941).

Dorman has asserted also that this case should be governed by the holding in Kemp v. United States, 38 F. Supp. 568 (D. Md. 1941). Kemp concerned the reformation of a contract in a situation where the awardee's bid was $2,953.65 and the only other bids were $10,112 and $12,133. In Kemp the discrepancy was so great that the Government was "obviously getting something for nothing." That situation does not exist in the present case. To the extent that Kemp discusses the general principles concerning constructive notice, it is in accord with the above-stated principles currently followed by our Office.

Dorman also contends that the Architect is acting beyond its authority in considering mistakes in bid alleged after award because of the absence of a delegation of authority by our Office and the failure to formally publish the mistake in bid regulations under which it operates.

The regulations proposing the settlement authority were presented to our Office for comment before they were adopted by the Architect. We intended to give tacit approval to those regulations when in furnishing comments we voiced no objection to the delegation proposed. Further, although the Architect's regulations are not published to the public at large, they are incorporated by reference into the invitations for bids and are available to bidders and contractors upon their request. Thus, by bidding under the invitation, Dorman was made aware of the Architect's regulations that would apply in the event an error in bid was contended. Therefore, the absence of the publication of the regulations in some more formal manner is not considered to be relevant.

Accordingly, the claim for relief is denied.

Milton J. Socolar

For the Comptroller General
of the United States