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DECISION

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

FILE: B-197847 DATE: August 4, 1981

MATTER OF: HLI Lordship Industries, Inc.

DIGEST:

1. Where Government contract contains express stipulation as to amount of compensation to be paid, and no provision is made for any increase in event performance becomes more expensive or difficult, fact that cost of performance is increased by factors which do not constitute undue interference by Government provides no basis for equitable price relief.

2. Provision excusing contractor for excess costs if failure to perform contract arises out of causes beyond control and without fault or negligence of contractor is applicable to situations involving one-time, extraordinary emergency types of contingencies and generally not to increased costs of raw material due to sharp fluctuations in volatile market. Changing gold market conditions could not be reasonably characterized as unforeseen, or necessarily beyond control of contractor to protect against.

3. Where mistake is unilateral and contracting officer is not on actual or constructive notice of mistake, Government will not relieve contractor from effect of bad business judgment because contractor has duty to ascertain costs of supplies prior to submission of bid.

4. Enforcement of contract is not unconscionable since at time of bid opening and award, contract price was not unreasonable and Government was not receiving something for nothing.

The Veterans Administration (VA) requests a determination by our Office of the propriety of granting

[Request for Relief of Default Costs]

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HLI Lordship Industries, Inc. (HLI), relief from a termination for default order issued by the VA. HLI failed to deliver 2,450 gold emblems under contract V797P-325d. The VA terminated HLI for default. The VA then reprocured the contract items from another firm at a cost of $30,131.50 above the price contained in HLI's contract. HLI requests relief from assessment of the reprocurement costs and in conjunction with the VA seeks our decision on the matter.

HLI's reasons for failing to meet its contractual obligations were: (1) the unexpected and unprecedented increase in the price of gold; (2) the apparent unwillingness of HLI's gold supplier to ship the necessary gold on time due to the increase in gold prices; and (3) the request by the VA that the silver and copper emblems be shipped first, leaving the gold emblems for shipment in November 1979.

At the time of contract award in June 1979, the price of gold was $275 per ounce, or $8.25 per emblem. In October 1979, the price of gold had increased to $415 per ounce. By January 1980, the price of gold was $850 per ounce, or $17.10 per emblem. The contract price was $9.75 per emblem.

HLI contends that its nonperformance of this contract is excusable on the basis of commercial impracticability as defined in the Uniform Commercial Code (UCC), § 2-615, and also on the basis of an exculpatory contract provision which it believes controls in this situation. It further argues that relief may be granted on the theory that HLI's contract was unconscionable.

The contract between HLI and the VA was a firm fixed-price contract and contained no specific provision for escalation of the contract price in the event of an increase in raw material costs.

This Office has consistently stated that where a Government contract contains an express stipulation as to the amount of compensation to be paid, and no provision is made for any increase in the event performance becomes more expensive or difficult, the fact that the cost of performance is increased by factors which do not constitute undue interference by the Government as a contractor provides no basis for equitable price relief. 53 Comp. Gen. 157 (1973); Genuine Motor Parts of Pennsylvania, Inc., B-182204, December 16, 1974, 74-2 CPD 347; Ferry Creek Rock & Concrete, Inc., B-172531, October 24, 1974, 74-2 CPD 226;

AMCA International Corporation, B-182233, October 3, 1974, 74-2 CPD 188. The fact that performance of the contract becomes burdensome, or even results in a pecuniary loss, does not entitle the contractor to relief. Ferry Creek, supra.

Furthermore, we do not agree with HLI that the UCC is applicable to this contract. While our Office has looked to the UCC principles as a source of Federal common law in the absence of any statute, regulations or contract provision, here, the contract contained clauses (changes and default) sufficient to establish the rights and duties of the parties. R.H. Pines Corporation, 54 Comp. Gen. 527 (1974), 74-2 CPD 385.

The VA states that the gold market had not been stable for several months preceding the bidding. Thus, HLI appears to have had warning of the rise in prices when submitting its bid in June 1979 and prior to award. The price was $275 per ounce in June of 1979, and it took until October 1979 for the price to rise to $415 per ounce. It rose to $850 per ounce in January 1980, but the contract had required delivery by November 16, 1979. HLI had an opportunity to protect itself from gold price increases by arranging to purchase the gold beginning in June when HLI received the contract. HLI does not offer any explanation for its failure to begin contracting for the gold as soon as it received the VA contract or why it delayed entry into the gold market. This was a business judgment made by HLI, not the Government, for which the Government had no responsibility.

We also point out that HLI, for its own reasons, apparently dealt exclusively with one gold supplier. HLI continued to negotiate with this one supplier, even after it appeared that the supplier would not or could not meet HLI's needs.

Thus, HLI has not shown that the needed gold was actually unavailable. At best, the record indicates errors in business judgment. Under these circumstances, we cannot conclude that the rise in gold prices was an unforeseen occurrence, and that the contract should not have been enforced. See Iowa Electric Light and Power Co. v. Atlas Corp., 467 F. Supp. 129 (N.D. Iowa 1978); Eastern Airlines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975); Transatlantic Financing Co. v. United States, 363 F. 2d 312 (D.C. Cir. 1966).

HLI also argues that the contract termination for convenience clause of the contract contained in standard form 32, section 11(c), controls here and places the risk of unforeseen contingencies, such as a severe rise in gold prices, with the Government. Section 11(c) reads, in part, as follows:

> "* * * the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the contractor. Such clauses may include, but are not restricted to, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the contractor." (Emphasis added.)

The clause provides a number of examples of causes which could permit price adjustment. However, while these examples are not all-inclusive, they all involve one-time, extraordinary, emergency types of contingencies. Increased cost of raw material due to sharp fluctuations in a volatile market is not similar in nature to the enumerated examples. Thus, we do not believe that market fluctuation was contemplated as a basis for affording relief under this clause.

In any event, as indicated above, we do not believe that changing market conditions for gold could reasonably be characterized as unforeseen, or necessarily beyond the control of HLI to protect against. Therefore, we do not believe that this provision can be used to justify relief in these circumstances.

Furthermore, the contention that a mistake was made does not provide a basis for relief. In effect, HLI's "mistake" was not taking into account in its bid the possibility of a rise in cost of materials. The fact that the company did not obtain a firm price from its supplier on which to compute its bid and the supplier increased its price subsequent to the date on which the company submitted its bid does not afford any basis for authorizing an increase in the prices bid by the company. Bill Bouska Construction, Inc., B-196786, December 2, 1980, 80-2 CPD 411; 31 Comp. Gen., supra.

Here, the "mistake," if any, was unilateral, not mutual. The contracting officer clearly was not on actual or constructive notice of any mistake and, thus, there is no basis for relief on the theory of a mistake in bid where the firm's business judgment was wrong. See 48 Comp. Gen. 672 (1969); Security Systems, Inc., Reconsideration, B-190865, July 19, 1978, 78-2 CPD 48; Walter Motor Truck Company, B-185385, April 22, 1976, 76-1 CPD 272.

Similarly, we do not believe relief can be granted on the theory of unconscionability. In order to show that a contract is unconscionable, it must be demonstrated that the mistake is so great that the Government, by enforcement of the existing contract, would receive something for nothing. 53 Comp. Gen. 187 (1973). The issue is whether the contract was unreasonable at the time of bid opening or award. Here, there is no evidence the contract price was unreasonable at time of bid opening or award. Furthermore, the subsequent increase in the cost of gold would not bear on the unconscionability of the contract at the time of award, especially since the gold could have been purchased immediately after award. See Walter Motor Truck Company, supra. On the basis of this record, we cannot say that it was grossly unfair for the Government to expect performance of the contract, or that the Government was receiving something for nothing.

HLI's claim for relief is denied.

Milton J. Socolar

Acting Comptroller General
of the United States