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PRINCIPLES APPLICABLE TO MISTAKES IN BIDS ON FEDERAL CONSTRUCTION CONTRACTS*

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WITH the continued large scale operations of the Federal Government in the field of construction, contractors and their attorneys are becoming increasingly aware of the problems that may be encountered as a consequence of the submission of bids on invitations issued by departments and agencies of the Federal Government. One of the problems currently prevalent is the result of mistakes made by contractors in the preparation of their bids. A mistake by a bidder in preparing his bid on a Government contract—if it develops that his bid is the lowest received —can be, and often is, a serious matter because the Congress, the courts and the accounting officers of the Government have of necessity surrounded with legal safeguards the awarding of contracts by the Federal Government. This article will set forth and discuss some of these safeguards and illustrate their application.

REQUIREMENTS IN OFFERING AND AWARDING GOVERNMENT CONTRACTS

Today, two basic statutes govern the award of most contracts which are let by the Federal Government pursuant to invitations for bids. The Armed Services Procurement Act of 1947[1] controls all purchases and contracts for supplies or services made by the Departments of the Army, Navy and Air Force, the United States Coast Guard and the National Advisory Committee for Aeronautics. Contracts for supplies and services by the other executive agencies of the Federal Government are subject to the Federal Property and Administrative Services Act of 1949.[2] Both of these laws provide that, apart from certain specified exceptions, "all

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Subsequent issuues of the REVIEW will contain additional articles on the same subject.

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The views expressed herein are those of the author and do not necessarily express the views of any department of the Government.

1. 41 U.S.C.A. c. 3.
2. 41 U.S.C.A. c. 4.

purchases and contracts for supplies and services shall be made by advertising. . . ." They further provide that:

"Whenever advertising is required. . . . Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered."[3]

Prior to the enactment of the foregoing statutes, the procurement of supplies and services by the Federal Government was conducted generally under the provisions of section 3709, Revised Statutes, as amended.[4] Apart from specific exceptions, this law provides:

"Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals. . . ."[5]

In those agencies which are not subject to the Armed Services Procurement Act or the Federal Property and Administrative Services Act, such, for example, as the Office of the Architect of the Capitol, the provisions of the Revised Statutes as amended are applicable.

Thus, it is seen that the Congress clearly has provided in the foregoing series of laws that contracts, generally, shall be entered into only after advertising, with sufficient time to permit the submission of proposals, and that award shall be made to the lowest responsible bidder.[6] These statutes are mandatory in nature and procurement officers have no discretion to award a contract to other than the lowest responsible bidder.

In *Scott v. United States,* the Court of Claims enunciated the principle as follows:

"The agents of the Government stand upon a different footing from private individuals in the matter of advertising for the letting of contracts in behalf of the United States. They have no discretion. They must accept the lowest or the highest responsible bid, or reject all and readvertise."[7]

The principle was restated by a United States District Court some twenty-six years later in *O'Brien v. Carney,* where the court said:

"Rev. St. § 3709, 41 U.S.C. § 5 (41 U.S.C.A. § 5), requires that purchases

3. 41 U.S.C.A. § 152; 41 U.S.C.A. § 253.

4. 41 U.S.C.A. c. 1.

5. 41 U.S.C.A. § 5.

6. While the Armed Services Procurement Act and the Federal Property and Administrative Services Act use the phrase "price and other factors considered," the "other factors" have been construed as relating to the bidder's ability to perform. In 28 Comp. Gen. 662, 664 (1949), the Comptroller General stated:

"While the term 'other factors' as thus used is not expressly defined it seems clear that such term was not intended to be given other than its customary or usual meaning, i.e., it comprehends such factors as an evaluation of the bidder's experience, reputation, financial stability, and ability to perform the contract."

7. 44 Ct. Cl. 524, 527 (1909).

and contracts for supplies in any department of government shall be made by due advertising for proposals except when the public exigencies require immediate delivery. It must follow as a necessary corollary that this act imposes a duty upon the department to accept the proposal most advantageous to the government; otherwise the statute would be meaningless. It has been so held. Scott v. United States, 44 Ct. Cl. 524. It should be observed, however, that according to the Scott Case the duty is to accept the lowest responsible bid. This result is also both necessary and logical. It would not be to the advantage of the government to compel the acceptance of a low bid proposed by one who was unable to perform. Rev. St. § 3709 (41 U.S.C.A. § 5) was enacted for the benefit of the United States and not for the bidder."[8]

In a 1941 decision to the Secretary of Commerce, the Comptroller General of the United States commented on the requirements of section 3709, Revised Statutes, as follows:

"The quoted statute contemplates that all persons, insofar as their individual situations permit, shall be enabled to compete for Government business upon an equal basis, and that there shall be secured to the United States the benefits which may be expected to flow from free and open competition. . . .

". . . .

"Clearly, bidders would not be in free and open competition for Government business upon an equal basis if, after advertising for proposals, the Government should enter into negotiations with one or more bidders with a view towards the awarding of contracts on a basis differing either from the advertisement for proposals or from the submitted competitive bids. 17 Comp. Gen. 554, 558-559. It long has been recognized, therefore, that the purposes of the statute can be effectuated only by the awarding of a contract to the lowest responsible bidder; and that is what the statute requires. *O'Brien v. Carney et al.*, 6 F. Supp. 761, citing *Scott v. United States*, 44 Ct. Cls. 524; 17 Comp. Gen. 554, *supra*."[9]

Right to Withdraw or Modify Lost After Opening of Bids

In addition to the requirement that a contract made pursuant to an advertisement for bids must be awarded to the lowest responsible bidder, the courts have made a distinction between the right to withdraw or modify an offer made to a private person—which generally can be accomplished at any time before acceptance—and the right to withdraw or modify an offer in the form of a bid made to the Federal Government. In the latter instance, as a general rule, the offer may be withdrawn or modified as a matter of right only until the date and hour set for opening of bids. After opening, the Government has a right to consider the bids for a specified period or, in the absence of a specified period, for a reasonable time prior to award.

This question first came before the Court of Claims in the *Scott* case. There the plaintiff sued to recover $500 which had been deposited with the Commissioner of Indian Affairs as a guaranty for a bid made by him.

8. 6 F. Supp. 761, 762 (D. Mass. 1934).

9. 21 Comp. Gen. 56, 57-58 (1941).

The deposit was required pursuant to a regulation of the Secretary of the Interior which in substance provided that each bidder be required to deposit with his bid a certified check for at least five percent of the amount of the proposal. The check was to be forfeited to the United States in case any bidder or bidders receiving an award failed to properly execute the contract which had been awarded them. After bids had been opened and the amounts thereof known to the bidders, the low bidder in a communication addressed to the Commissioner of Indian Affairs withdrew his proposal and requested return of the check for $500, stating that a mistake had been made in telegraphing the bid in that he intended to bid 3¼ cents per acre instead of 5¼ cents per acre. The court held that the Secretary of the Interior was justified in declaring the draft for $500 forfeited to the United States, and in the course of its opinion stated:

"When a government official has proceeded in a regular and established way in the reception of bids and the awarding of contracts, defaulting bidders, within reasonable limits, should be held strictly liable for the forfeiture of penalties. If this is not required, the Government might be placed at the mercy of those who, by cooperating together, could render proposals for contracts a mere farce.

"It is not infrequent that mistakes are made in transcribing and transmitting bids preliminary to the letting of contracts by the Government, and the courts, when mistakes are *prima facie,* will protect bidders. But public policy demands that great care be taken by government officials, when mistakes are alleged, to prevent collusion and fraud by parties making proposals."[10]

The right of a bidder to withdraw his bid after opening was considered further by the Court of Claims in the case of *Refining Associates, Inc. v. United States.*[11] Here the bidder attempted to withdraw his bid after opening but prior to the expiration of the fifteen day period allowed to the Government by the invitation for consideration of the bids. The items involved were purchased by the Government from other sources at an excess cost of $20,111.70 which sum was withheld by the United States from sums due the contractor under other contracts. The plaintiff contended that since the offer was revoked before acceptance there was no valid contract. The Government contended that the general rule which permits the withdrawal of an offer before acceptance was not for application in the case because of regulations pursuant to which the plaintiff's bid was submitted or because government contracts constitute a well recognized exception to the general rule. The court affirmed the principle it had enunciated in the *Scott* case and held the bidder liable for the excess cost which had been incurred by the Government because of the contractor's failure to perform. The court stated its views as follows:

"In effect, there was in the *Scott* case a bid bond, one of the purposes of which

10. 44 Ct. Cl. at 531-32.

11. 124 Ct. Cl. 115, 109 F. Supp. 259 (1953).

was to insure government agents a reasonable time after the opening of bids within which to consider them, and to determine which bidder was the highest responsible bidder. In the instant case, no such bid bond was required, but as a condition to bidding, it was proided by U. S. Standard Form 22 . . . and the Armed Services Procurement Regulations . . . that after the opening of bids no bid might be withdrawn. Plaintiff submitted its bid subject to these provisions, and agreed that defendant should have 15 days from the date of opening to consider the bids. In so doing, plaintiff was accorded the right of having its bid considered on its merits, and this right was conditioned on the premise that the bid would remain open during the time specified.

"Where there is no mistake, unreasonable delay, or the like, there can be no injustice in holding the bidder to the conditions of the Invitation for Bids. 30 Op. A. G. 56, 64. If, on the other hand, the bidder has the right of withdrawal in all cases, innumerable frauds could be perpetrated against the United States by the parties engaged in the bidding. *Scott v. United States* . . . .

"There is no evidence that plaintiff's attempted revocation was due to any of the above factors. Accordingly, we hold that plaintiff's attempted revocation was ineffective, and that a valid contract was constituted upon timely acceptance by the government, under the facts and circumstances of this case.

". . . .

"A valid contract existed in this case, and defendant, in withholding sums due plaintiff to compensate it for excess costs incurred by reason of plaintiff's breach of contract, was within its rights under the contract."[12]

Relief Available to Bidder After Opening of Bids and Before Award

In General

Since a bid may not be withdrawn by a bidder as a matter of right after opening, what avenues of relief are available to a bidder who discovers after the opening of bids that a mistake has been made in his proposal? To whom should he apply for relief? What must be shown in support of his request and which agencies of the Government have authority to render a final decision in the matter?

It is seen from the foregoing discussion that in the absence of circumstances legally sufficient to excuse a bidder from performing in accordance with his offer, the contracting officer is obliged in the interests of the United States to accept a low bid in accordance with its terms. When a bidder alleges a mistake in his bid, one of these potential situations therefore arises: Either a claim by the bidder against the United States for additional compensation, or, if the bidder should default in performance, a claim by the United States against the bidder for any resultant damages. Under the provisions of the Budget and Accounting Act,[13] all claims and demands by or against the United States are required to be settled by the General Accounting Office and the decisions of the Comp-

12. Id. at 122-23, 109 F. Supp. at 262-63.

13. 31 U.S.C.A. c. 2.

troller General on questions of law arising out of such claims are final and binding on the executive branch of the Government. These provisions of law are as follows:

"All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."[14]

"Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller General of the United States, may, within a year, obtain a revision of the said account by the Comptroller General of the United States, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government."[15]

During the past four or five years, authority to permit bidders to withdraw, or possibly to correct their bids, upon the presentation of evidence substantiating a claimed mistake, has been granted by the Comptroller General to the military departments, the General Services Administration and a few other agencies. Except where these agencies have doubt as to the action to be taken because of the facts in the particular case, submission of the matter to the General Accounting Office for decision is not required. However, in the performance of its statutory functions to settle all accounts of the Government, the action by the administrative agencies in these cases is subject to review by the General Accounting Office. Therefore, as a practical matter, the agencies have continued to submit many cases to the Comptroller General for decision prior to taking any action as a matter of protection for themselves and for the contractors. If in a given situation a contractor is not satisfied with a decision of the contracting agency, as for example where the agency feels that the facts are not sufficient to permit him to withdraw his bid, he may ask for review by the Comptroller General prior to entering into performance.

Withdrawal Allowed Where Bona Fide Error is Shown

While a bidder may not withdraw his bid as a matter of right after bids have been opened, the courts have held on the other hand that where a bona fide error is shown by the contractor to have been made in his bid and the error is brought to the attention of the contracting officer before award, the bid cannot be accepted in good faith. In *Saligman v. United States*, the court stated the principle succinctly as follows:

"However, if the party receiving the offer or the bid, knows or has reason to know

14. 31 U.S.C.A. § 71.
15. 31 U.S.C.A. § 74.

because of the amount of the bid, or otherwise, that the bidder made a mistake, the contract is voidable by the bidder."[16]

Also, in *Nason Coal Co. v. United States*,[17] the Court of Claims held that a proposed acceptance by the Government was invalid where the record showed that the contractor had made a bona fide mistake in his bid and had notified the procurement officer of the mistake before award.

Likewise, the accounting officers have taken a similar view. In a 1938 decision, the Acting Comptroller General wrote:

"In my decision to you of December 31, 1937, A-91442, 17 Comp. Gen. 536, in the *Kerr Conserving Co.* case, it was said:

'There is, of course, no obligation on the part of the Government to have its contracting officers act as guardians for careless bidders, 8 Comp. Gen. 397, and this office agrees with the suggestion in your letter . . . as to the necessity of impressing upon all bidders the degree of care required in the preparation of all bids. However, when an error is alleged and clearly established before an award is made, the acceptance of the bid would not be in good faith, and, therefore, would not give rise to a binding contract.'

"In the present case, as in the *Kerr Conserving Co.* case, it appears that the error in the bid was alleged before the bid was accepted and is clearly established. The discrepancy between the prices bid by Joseph Spiotta & Co. and the other bids received was enough to cause the contracting officer to call on that company for verification of its bid, and it developed that the company had bid on the assumption that the Government was to furnish all materials, whereas the specifications required the contractor to furnish the thread, gimp, and certain other findings for the trousers, the thread being the principal item of difference, running to about 10 cents a pair in the cost of fabricating the garments, or a difference of some $10,000 for the 100,000 garments covered by the bid. An examination of the specifications indicates there may have been reason for some confusion as to whether the Government was to furnish the thread, although a careful reading shows that the thread was to be furnished by the contractor. However this may be, the evidence submitted sufficiently shows that a *bona fide* error was made and that it was alleged and the contracting officer was on notice thereof before the bid was accepted. It must be held accordingly that the acceptance did not give rise to a binding contract. *Nason Coal Company v. United States*, 64 Ct. Cls. 526."[18]

Sufficient Proof Required to Establish Bona Fide Error

While the foregoing principles are well settled, questions naturally arise in their application to the circumstances of individual cases. Perhaps the most difficult problem in this regard, both for the contracting agency and for the General Accounting Office, is to determine whether the bidder has in fact made a bona fide mistake in the preparation of his bid. Obviously no general rule may be laid down as to the type or quantum of evidence required. The proof must be sufficient to establish that an error was made. One of the facts which seems to be persuasive

16. 56 F. Supp. 505, 507 (E.D. Pa. 1944).
17. 64 Ct. Cl. 526 (1928).
18. 17 Comp. Gen. 575-76 (1938).

is awareness by the contracting officer of the probability of error before actual notice of mistake is received from the bidder. On the other hand, it is certain that a mere allegation of a mistake or the manner in which it occurred is not sufficient under the decisions of the accounting officers to support correction or withdrawal of a bid.

A good illustration of a case in which the supporting evidence was considered sufficient to permit the withdrawal of a bid is contained in a 1955 decision of the Assistant Comptroller General, the statement of the facts and conclusion being as follows:

"The probability of error in the low aggregate bid of $15,215.95 on items Nos. 1, 2 and 4 to 15, inclusive (excluding the alternate bid requested under Item No. 3), submitted by David E. Horne, Inc., properly was noted by the contracting officer since the bid was out of line with the two other aggregate bids of $26,340.30 and $33,900.91 on the same items and with the prior estimated cost of $34,368 for the contract work. Upon being requested to verify its bid, the corporation advised that it made an error in that it failed to include any amount in its bid to cover the costs of removing water which reasonably may be expected to accumulate upon making the numerous excavations required under several items. Its allegations of error is reasonably substantiated by its worksheets consisting of six pages, on the last of which are shown certain entries of additional amounts, per unit, for items Nos. 1, 5, 9 and 11, to cover the referred-to estimated cost of 'dewatering.' Hence, it appears that the bidder intended to include in its bid a charge for this item of cost but inadvertently failed to do so. While the intended bid has not been established, the facts and evidence of record warrant the conclusion that the corporation made a *bona fide* error in its bid, as alleged.

"Accordingly, since you had reason to believe that the bid of David E. Horne, Inc., might be erroneous and since such belief was confirmed and the error was explained satisfactorily by the corporation prior to award, the bid should be disregarded—the facts and circumstances in the case not being such as to warrant a departure from the basic rule that bids may not be changed after opening. See 17 Comp. Gen. 575."[19]

On the other hand, an illustration of a case in which withdrawal was not permitted because the allegation of mistake had not been established is contained in a 1951 decision of the Comptroller General to the Administrator of Veterans Affairs. There the Comptroller General stated as follows:

"It appears that upon the receipt of the letter of October 31, 1951, requesting that the two extra copies of the invitation form be executed, the Tesarski Manufacturing Company advised by telegrams of November 2 and 6, 1951, that an error had been made in its bid in that the price for items 1, 2 and 3 should have been $9.44, $9.42, and $9.44, each, respectively. In response to telegram of November 9 requesting to be advised how the error in the bid occurred, the company advised by telegram of November 12, 1951, that the mistake in its bid was the result of a stenographic error in transposing penciled figures.

"The basic rule is that bids may not be changed after the time fixed for opening. The exception to such rule, which permits correction of a bid, upon sufficient evidence

19. 34 Comp. Gen. 633-34 (1955).

to establish that the bidder actually intended to bid an amount other than that set forth in the bid, where the contracting officer is on notice of probable error prior to acceptance, does not extend to the recalculation or changing of the bid without conclusive proof as to the amount of the intended bid. See 17 Comp. Gen. 575, 577. In the present case Tesarski Manufacturing Company has not submitted such proof. Furthermore, the company has not established that an error actually was made in the bid. The prices quoted by the company are not out of line with the other bids received.

"Accordingly, there appears no legal basis for permitting the Tesarski Manufacturing Company to modify its bid and, the amount involved not being such as to render unconscionable a contract based on the bid as submitted, the said bid may not be corrected or disregarded."[20]

Correction of Bids—When Allowed

In a relatively few cases where the mistake has been alleged promptly after the opening of bids but before award, and there has been a timely presentation of convincing evidence that a mistake has been made, its nature, and what the bid price would have been except for the mistake, the Comptroller General has permitted the bid to be corrected and considered with other bids in order that the Government might have the benefit of the lowest price. For years the accounting officers of the Government have felt that such action is necessary under the statutes which provide for a system of competitive bidding and require the award of contracts to the lowest responsible bidder. The mistake in this type of case usually consists of a failure by the contractor to include some element of cost, such as labor or equipment, in his bid figure for some phase of construction. The mistake occurs in transferring cost figures from his preliminary work papers to a final bid summary sheet. In such instances the contractor's papers are required to be submitted to the Government *immediately* for examination and verification of the error. These cases are considered most carefully by the General Accounting Office and it is only in the clearest type of mistake, when the evidence shows convincingly the nature of the mistake and what the contractor's bid would have been, that correction is permitted. For example, in an unpublished decision dated April 13, 1953,[21] the Comptroller General allowed the correction and consideration of a bid where the original worksheets of a bidder disclosed that in transferring figures on an item of excavation from the estimate sheet to the final worksheet, the cost of selecting, hauling, loading and unloading was omitted. As a result, the bid on the item of excavation was submitted as $.50 per cubic yard instead of an intended bid of $1.50 per cubic yard.

20. 31 Comp. Gen. 183, 184 (1951).
21. Decision No. B-114438.

WITHDRAWAL OR CORRECTION NOT ALLOWED AFTER AWARD

Where unilateral error is alleged *after award* of a contract, the contract is presumed in law to express the understanding of the parties and the unilateral mistake is not considered to be a proper ground for reformation, revision or repudiation. In a decision of the Comptroller General dated February 12, 1952,[22] a contract for $29,000 for the construction of a storage building was awarded at 8 a.m. The second low bid was $33,000. At 8:25 a.m., the successful bidder was advised of the award by telephone and in the course of the conversation stated that he had failed to include the cost of the concrete floor amounting to $3,000 in his bid. He later supported his request for a $3,000 increase in the contract price with worksheets used in computing the bid price. It was held that the bid price was not so far out of line with other bids as to make enforcement unconscionable and, since the mistake was unilateral and notice was not given before award, no legal basis existed to justify a nullification of the contract.

CONCLUSION

It is my firm belief that the application of the foregoing principles completely discourages any attempts by bidders to purposely underestimate their bids or to prepare bids in a negligent manner, with the expectancy that a later claim of mistake may result in their receiving an award at the expense of a bidder who has carefully and conscientiously prepared his bid. It is estimated that in alleged mistakes in bids on construction contracts ninety-nine percent of the cases considered by the General Accounting Office result either in the bidder being required to perform in accordance with his submitted bid or in the withdrawal of the bid. In the remaining one percent, or perhaps less, a bidder who has made an innocent mistake, which is clearly established, is permitted to have his bid corrected and considered with the others.

The foregoing discussion of the principles should serve to emphasize to contractors the importance of exercising extreme care in the preparation of bids submitted on invitations for bids issued by the Federal Government. The effort which may be taken in this regard before the bid is submitted is far less than the worry or expense which a contractor may be required to undergo if a mistake is made and is not discovered until after bids are opened. However, if a mistake is discovered after bids are opened, the discussion makes plain the necessity of immediately notifying the contracting officer of the mistake and the presentation of evidence in support thereof. If such be done, the possibilities of obtaining relief are far greater than if the mistake is not alleged until after the contracting officer has made an award.

22. 31 Comp. Gen. 384 (1952).