DECISION

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

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FILE: B-179040 DATE: January 29, 1974

MATTER OF: Fink Sanitary Service, Inc.

DIGEST: Offer to change 10-day discount to 20-day discount after bid opening is late bid modification consideration of which is precluded by ASPR 2-305 and paragraph 8(a) of solicitation instructions and conditions.

Offer of a 10-day discount was not an apparent mistake which required contracting officer to verify bid when such an offer is not precluded by solicitation nor does such an offer preclude Government's taking advantage of discount should non-discounted bid be low. See ASPR 2-407.3(d).

If protestor contends either that it intended 20-day discount but indicated 10-day discount or that it mistakenly believed 10-day discount could have been evaluated under IFB, 20-day discount cannot be considered since it would cause displacement of another bidder while protestor's actual intent is not evident on the face of the bid.

Government estopped to deny existence of contract where, acting under its own mistake and believing that protestor would commence work in following week, it told protestor, apparent but not actual low bidder, contract number 6 days before contract was to have commenced and protestor without knowledge of true facts acted to his detriment. See Emeco v. U.S., Ct. Cl. No. 547-71, October 17, 1973. U.S. v. Georgia-Pacific Co., 421 F. 2d 92 (9th Cir. 1970).

Where Government is estopped to deny existence of a contract with other than low bidder, although entering into such a contract is outside scope of contracting officer's authority, contract is not illegal, as contractor neither directly contributed to underlying mistake nor was on direct notice of mistake. See 52 Comp. Gen. 215 (1972). Award should, however, be terminated for convenience of Government.

PUBLISHED DECISION
53 Comp. Gen.....

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The Department of the Air Force issued invitation for bids (IFB) F11602-73-B-0671 on May 4, 1973. The solicitation (Standard Form 33, Solicitation, Offer and Award) requested bids for refuse collection and disposal services at Chanute Air Force Base, Illinois, on a requirements basis. The solicitation instructions and conditions provide at paragraph 9(a), Discounts:

> "Notwithstanding the fact that a blank is provided for a ten (10) day discount, prompt payment discounts offered for payment within less than twenty (20) calendar days will not be considered in evaluating offers for award, unless otherwise specified in the solicitation. However, offered discounts of less than 20 days will be taken if payment is made within the discount period, even though not considered in the evaluation of offers."

Of the two bids received on June 14, 1973, the bid of C & S Sanitary Co. (C&S) was lower ($53,019 compared to Fink's bid of $53,760). However, Fink's bid offered a discount of 2 percent for payment within 10 days which the contracting officer initially considered in determining that Fink's bid was lower than that of C&S. Fink was thereafter advised on June 18, 1973, that it was the apparent low bidder.

The Air Force relates the subsequent events of June 25, 1973, as follows:

> "On 25 Jun 73, Mr Fink came to the Procurement Office with a letter verifying his bid price, giving references, equipment listing, and a financial statement. He was advised by Mr Mannchen (Procurement Supervisor) that all factors pertaining to the pending contract must now be reviewed prior to awarding of the contract. Mr Fink was told, for information purposes, that when the contract was awarded either by formal execution of the contract, or by written Notice of Award, it would carry contract number F11602-73-C-0183."

(The review here referenced was to have been a referral of the bidding documents to the Procurement Review Committee. We have been informally advised that this committee exists merely as a local management tool, serving as a quality control check. Its existence and utilization in no way limit the authority of the contracting officer.)

On the other hand, Mr. W. Raymond Fink, the owner of Fink Sanitary Service, Inc., by affidavit of October 10, 1973, stated:

> "4. * * * Procurement Officer Mannchen examined the documents requested by Lt. Telowicz and there was some discussion of the items thereon. Mr. Mannchen then went into the hallway of the building and spoke with some other member of the Procurement Office. Mr. Mannchen then returned and said 'Yes things seem to be in order': he then left the

office saying that he would go down and get a contract number, returned with the number, wrote it on a card and gave it to me. He told me to refer to that number in any correspondence with regard to performance of the contract that would be typed for my signature.

"During the course of conversation I indicated to him that I would be purchasing a truck with which to perform the contract and he gave to me his name and telephone number so that if there was any difficulty I could get in touch with him because the contract was for me to commence work the following week.

"5. At no time in the conversation did Mr. Mannchen advise me that any further formal action was necessary to complete formal award of the contract. He indicated only that a written contract would be prepared for my signature."

Fink advises that based upon the foregoing and because performance was to commence on July 1, 1973, the bidder purchased an additional refuse truck on June 26, 1973, to fulfill the contract requirements.

Upon further review of Fink's bid by a Procurement Review Committee on June 27, 1973, it was found that the 2-percent discount for payment within 10 days offered by Fink could not be considered in evaluating its bid since consideration of a 10-day discount was prohibited by paragraph 9(a), quoted above. See, also, paragraph 2-407.3(c) of the Armed Services Procurement Regulation (ASPR). As a consequence, the Fink bid was evaluated at its offered price, or $741 more than the C&S Sanitary Co. bid.

When this result was communicated to Fink, it offered to change the discount terms to 2-percent, 20 days.

Fink contends that the modification should have been accepted under ASPR 2-305 since the modification of an otherwise successful bid can be considered if it makes the terms of the bid more favorable to the Government. Fink's request was denied because it constituted a late bid modification consideration of which is barred by paragraph 8(a) of the solicitation instructions and conditions. Moreover, it is contended that the 10-day discount was such an obvious mistake on the face of Fink's bid, that the contracting officer had a duty under ASPR 2-406.1 to verify the bid, calling attention to the mistake. Lastly, it is contended that since Fink justifiably relied, to its detriment, on the contracting officer's representations, the Government is estopped to deny the existence of the contract.

Concerning the effect of ASPR 2-305, we observe that since the 10-day prompt payment discount could not be considered for evaluation purposes, Fink was never in fact the low bidder. Consequently, we agree that the late bid modification could not be relied upon to make Fink the lowest evaluated bidder.

Fink implies that it was prejudiced by the contracting officer's failure to verify promptly what was an apparent mistake on the face of the bid in offering a 10-day prompt payment discount. Specifically, Fink contends that after the June 14 opening, the contracting officer should have noted Fink's mistake and called it to its attention, citing ASPR 2-406.1. This action, it is alleged, would have made it improbable that Fink would have purchased an additional truck after receipt of the contract number.

In our opinion, the offer of a 10-day discount was not an apparent mistake which required the contracting officer to verify the bid under the provisions of ASPR 2-406.2. The offer of a 10-day discount period is not precluded by the invitation for bids nor does such an offer preclude the Government from taking advantage of the discount should the nondiscounted bid be low (see ASPR 2-407.3(d)).

If it is Fink's contention that either it intended a 20-day discount or that it was mistaken in believing a 10-day discount could be evaluated and would therefore have offered a 20-day discount had it properly read the IFB, we feel that no relief can be granted on either theory. ASPR 2-406.3(a)(3) states:

> "(3) Where the bidder requests permission to correct a mistake in his bid and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended, a determination permitting the bidder to correct the mistake may be made; provided that, in the event such correction would result in displacing one or more lower bids, the determination shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself. 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.
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> "(4) Where the evidence is not clear and convincing that the bid as submitted was not the bid intended, a determination may be made requiring that the bid be considered for award in the form submitted."

In the present case, even if we assume that a mistake has been proven, we can find no evidence on the face of the bid as to the actual intention of the bidder. Such evidence is required to displace a lower bidder. See 52 Comp. Gen. 604 (1973); B-174460, April 27, 1972; and B-164584, October 4, 1968. Thus, Fink cannot now substitute an acceptable discount term to make lower its evaluated bid price.

Regarding the issue of estoppel, we note that the Court of Claims in Emeco Industries, Inc. v. United States, No. 547-71, October 17, 1973, has recently reasserted the four elements propounded in United States v. Georgia-Pacific Company, 421 F. 2d 92 (9th Cir. 1970), that must be present in order to establish an estoppel:

1) the party to be estopped must know the facts;

2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;

3) the latter must be ignorant of the true facts;

4) he must rely on the former's conduct to his injury.

The present situation, however, differs from that set out in Emeco. There the Government was aware of all of the true facts when it acted so as to induce Emeco into acting to its detriment. In the instant case, as of June 25, the date of the Government's allegedly inducing actions, the procuring activity, by its own misfeasance, was not aware of the true facts. We believe that this mistake should not, however, be a basis for relieving the Government of liability. See 52 Comp. Gen. 215, 218 (1972).

In reasonably reconstructing the events of June 25, 1973, we feel that both parties left the meeting held on that day believing that Fink Sanitary Service would be the party performing refuse collection and disposal services commencing July 1, 1973. Indeed, we believe that the Government also was aware of Fink's plans to purchase an additional truck to accomplish this contract.

The agency's actions in giving the contract number to the apparent low bidder (whose status, known to the other bidder, had not been protested although known for a week) just 6 days prior to the commencement of the contract period is, we believe, an action which a reasonable bidder has a right to believe was intended for it to act upon--here to prepare for commencement of the contract.

We further believe that at the time Fink acted to its detriment in reliance upon the actions of the Government, the bidder was ignorant of

the true facts--that actual award to Fink Sanitary Service was impossible since it was not in fact the lowest responsive bidder to the IFB.

In sum, we find that Fink has met the criteria set forth in Emeco and that the Government should be estopped to deny the existence of a contract between itself and Fink. However, the nature of the agreement so reached must be examined to determine the Government's liability, if any, for its failure to comply with the agreement.

In Emeco, the Court of Claims did not address itself to the important problem inherent in holding the Government liable on a contract which its agent (the contracting officer), as in the instant case, had no authority to enter. Emeco was not the lowest responsive, responsible offeror on the portion of the solicitation to which estoppel was applied. Neither, in fact, was Fink low bidder on this procurement. The general rule is that the contracting officer has no authority to award a contract to other than the lowest responsive, responsible offeror and that an award to another party is illegal. B-162535, October 13, 1967; B-149466, July 27, 1962; 38 Comp. Gen. 368 (1958). In such circumstances, the injured party is entitled only to the value of the goods and services provided to the Government on a theory of quantum meruit. B-162535, B-149466, 38 Comp. Gen., supra.

However, in 52 Comp. Gen., supra, at page 218, we stated that:

> "* * * We are in agreement with the position of the Court of Claims that 'the binding stamp of nullity' should be imposed only when the illegality of an award is 'plain.' John Reiner & Co. v. United States, 325 F. 2d 438,440 (163 Ct. Cl. 381) or 'palpable,' Warren Brothers Roads Co. v. United States, 355 F. 2d 612,615 (173 Ct. Cl. 714). In determining whether an award is plainly or palpably illegal, we believe that if the award was made contrary to statutory or regulatory requirements because of some action or statement by the contractor (Prestex, Inc. v. United States, 320 F. 2d 367 (162 Ct. Cl. 620), or if the contractor was on direct notice that the procedures being followed were violative of such requirements (Schoenbrod v. United States, 410 F. 2d 400 (187 Ct. Cl. 627), then the award may be canceled without liability to the Government except to the extent recovery may be had on the basis of quantum meruit. On the other hand, if the contractor did not contribute to the mistake resulting in the award and was not on direct notice before award that the procedures being followed were wrong, the award should not be considered plainly or palpably illegal, and the contract may only be terminated for the convenience of the Government. John Reiner & Co. v. United States, supra; Brown & Son Electric Co. v. United States, 325 F. 2d 446 (163 Ct. Cl. 465)."

Therefore, since in the instant case Fink neither directly contributed to the mistake upon which its bid was evaluated nor was it on direct notice prior to the "award" that a mistake had been made (also a requirement for estoppel), we are unable to say that such an "award," while improper, was plainly or palpably illegal. The agreement entered into between the Government and Fink is merely terminable for the convenience of the Government and not void ab initio.

Accordingly, we conclude that the contract, improperly "awarded" to Fink on June 25, 1973, although not illegal, should be terminated for the convenience of the Government since "award" was made to other than the lowest responsive bidder.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510.

Deputy Comptroller General
of the United States