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N. Eaton
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DECISION

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

FILE: B-186359 DATE: January 12, 1977

MATTER OF: Peterman, Windham & Yaughn, Inc.

DIGEST:

1. Reaffirmation of extremely low bid following meeting called to discuss suspected mistake, at which prospective contractor had opportunity to review specifications and compare Government estimate with his own, satisfies ASPR § 2-406.3, and acceptance creates valid contract.

2. Where vice president, now president, of contracting firm attended but did not actively participate in meeting to discuss suspected mistake, he cannot later be heard to say contract is unconscionable.

On grounds of a mistake in bid discovered 13 months after award, Peterman, Windham & Yaughn, Inc. a small business, requests an increase of $51,717.29 in contract No. F09650-74-C-0335, covering repair of hangar doors in two buildings at Warner Robins Air Logistics Center, Georgia.

Invitation for bids (IFB) No. F9650-74-B-0678, issued on March 7, 1974, called for "repair" of an existing trolley busway system in Building 110 and "installation" of a trolley busway system and associated hardware on horizontal doors in Building 125. (Trolley busways are used in connection with pushbuttons and warning horns to operate hangar doors.)

On bid opening date, April 12, 1974, the two bids received were both below the Government estimate of $111,000, which on the basis of previous work to the hangar doors had been considered fairly accurate. The totals, reflecting a base price and each of two additive items, were as follows:

Peterman, Windham & Yaughn, Inc.	$40,978.35
R&D Constructors, Inc.	$89,175.00

W. J. Yaughn, then vice president and now president of Peterman, Windham & Yaughn, Inc., attended the bid opening and thus knew of the difference between the two bids as well as of the Government estimate. In addition, the contracting officer formally notified the firm of the discrepancy. The firm verified the bid on April 15, 1974, in a letter signed by H. Gordon Windham, president.

Since both procurement and civil engineering personnel at the air center still suspected a serious error in the low bid, a meeting was held on either April 19 or April 23, 1974, (both dates appear in the record) for the purpose of reviewing specifications and determining whether a mistake actually had been made. The record includes a sworn statement by Mr. Yaughn and memorandums prepared by Air Force personnel concerning that meeting. Attending were Mr. Windham, Mr. Yaughn, and representatives of the contracting officer and of the base Civil Engineering Division.

While there are some conflicts in the memorandums, it is agreed that Mr. Yaughn did not participate actively in the discussion. Mr. Windham briefly compared the 11-page Government estimate with his own 5-page estimate and asked for clarification of some specifications not relating to the trolley busway system. Unable to discover any error, he is reported to have stated that he was familiar with the hangar doors, had access to economical sources of material and efficient labor, and could complete the job on time and at a profit. The contract was awarded to Peterman, Windham & Yaughn, Inc., on May 2, 1974. Various amendments adding work and extending the completion date are not relevant to this request for modification of the contract price.

Work by the contractor proceeded on schedule until mid-December 1974, after which little progress apparently was made. On January 24, 1975, the contractor was informed that work was 11.55 percent delinquent, and on March 18, 1975, the firm was presented with a show cause notice stating that the Government was considering termination for default. On March 28, 1975, Mr. Yaughn informed the contracting officer that the firm had been reorganized and that he had become its president. The firm wished to proceed with the contract, Mr. Yaughn stated, but required further clarification of specifications and drawings and additional time to obtain material from suppliers. Work remaining to be done was discussed at a meeting between Mr. Yaughn and the contracting officer on April 8, 1975, but the required trolley busway system for Building 125 was not mentioned. The fact that it had not been installed was discovered during an inspection on June 9, 1975. Given a choice of performance or

termination for default, the contractor completed installation of the trolley busway system in December 1975.

A mistake in bid, based on omission of the trolley busway system for Building 125 from the contractor's estimate, first was alleged on June 17, 1975. The initial request for modification of the contract price was in the amount of $29,762.52, the estimated cost of materials and labor for installation of the trolley busway system. This request was denied by the Air Force Logistics Command in a decision dated November 7, 1975. It held that the mistake was a unilateral one for which there was no legal basis for relief under Public Law 85-804 [codified at 50 U.S.C. 1431 and implemented by Armed Services Procurement Regulation (ASPR) § 17-204.3, (1975 ed.)] which requires that such action facilitate the national defense. The April 13, 1976, request to this Office for modification in the amount of $51,717.29 represents the actual cost of installing the trolley busway system according to the contractor; the Air Force, however, questions the accuracy of this figure.

The first issue for consideration here is whether a valid and binding contract was consummated by the Air Force's acceptance of Peterman, Windham & Vaughn's low bid. Counsel for the contractor argues that modification of the contract should be approved because the contracting officer did not adequately fulfill his duty to verify the low bid.

The general rule as to a mistake in bid alleged after award is that the bidder must bear the consequences unless the mistake is mutual or the contracting officer had actual or constructive notice of the error prior to award. Forta-Kamp Manufacturing Company, Inc., 54 Comp. Gen. 545 (1974), 74-2 CPD 393, and cases cited therein; Boise Cascade Envelope Division, B-185340, February 10, 1976, 76-1 CPD 86. At the outset, we agree with the Air Force that the mistake was unilateral. The fact that the trolley busway system was not discussed at the time Mr. Vaughn became president of the contracting firm, or that an inspector was unaware of the requirement does not make the mistake mutual. Nor does the fact that progress payments had been made and work said to be 81 percent complete change our opinion. The specifications and drawings, incorporated in the IFB and in the contract, clearly called for installation of the trolley busway in Building 125, and the Government estimate made available to the contractor prior to award also included it. Thus, at the time the contract was executed, the mistake was unilateral.

When, as in this case, it is suspected that the low bidder has made a mistake, ASPR § 2-406.1 requires the contracting officer to seek verification. In addition to requesting a confirmation of the bid price, under ASPR § 2-406.3(a)(1) the contracting officer must advise the bidder, inter alia, of the fact that his bid is much lower than the other bids, of important or unusual characteristics of the specifications, and of such other data as will give notice of the suspected mistake. See Porta-Kamp Manufacturing Company, Inc., supra; Ames Color File Corporation, B-185873, March 26, 1976, 76-1 CPD 199; Boise Cascade Envelope Division, supra; Aerospace America, Inc., B-181439, July 16, 1974, 74-2 CPD 33, affirmed upon reconsideration, May 25, 1975, 75-1 CPD 313.

Counsel for the contractor argues that the contracting officer had a duty to "inquire in depth and dispel any suspicion of error on the part of the contractor," and that the meeting between Air Force personnel and Peterman, Windham & Yaughn, Inc., which was not documented at the time, was ineffective for this purpose. We are not persuaded. There is no requirement in ASPR § 2-406.3(a)(1) that verification be documented, although this was done later. See Porta-Kamp Manufacturing Company, Inc., supra.

In an analogous case in which the bidder alleged that it had erroneously estimated some costs and omitted others in computing its bid price, our Office held that a contracting officer need not determine before contract award whether every production cost element had been considered in connection with the bidder's price in order to discharge his duty to verify under ASPR § 2-406. Aerospace America, Inc., supra. Therein, we cited 47 Comp. Gen. 732, 742 (1968), in which we stated that:

> "Errors of omissions and inaccuracies in your bidding estimates may have occurred but it was your responsibility to estimate the price at which you could perform the proposed contract at a reasonable profit. If you made a mistake in your bid, but failed to discover a mistake and allege such mistake prior to contract award, notwithstanding the fact that you were afforded every reasonable opportunity to check the bid before acceptance thereof, the Government cannot be held responsible for the resulting loss. * * *"

In another case in which the bidder sought to impose a duty on the contracting officer to conduct a detailed technical review

of the proposed design, we held that a preaward survey during which technical data had been reviewed and the bidder had indicated his understanding of the invitation satisfied the verification requirements set forth by the court in United States v. Metro Novelty Manufacturing Co., 125 F. Supp. 713 (S.D.N.Y. 1954), and incorporated in ASPR § 2-406.3(a)(1). "Any higher standard of inquiry on the part of the survey team would have unduly involved the Government in a business judgment area reserved to bidders," we stated. B-169188, June 11, 1970.

Omission of the trolley busway system from Peterman, Windham & Vaughn's estimate was not apparent from the bid itself. The contracting officer had no knowledge of the specific nature of the error when verification initially was requested and obtained. We believe that by offering the prospective contractor an opportunity to review the specifications and to compare the Government's estimate with his own, the contracting officer adequately fulfilled any duty to assist the contractor in discovering a mistake. ASPR § 2-406.3(a)(2) permits the rejection of bids which are "far out of line" with the other bids received or the agency's estimate when "the bidder fails or refuses to furnish evidence in support of a suspected or alleged mistake." However, we do not believe that provision is applicable where, as here, the bidder insists that no mistake was made even after meeting with the contracting officer for the purpose of comparing the bidder's worksheets with the agency's detailed estimate. See Southern Rock, Inc., B-182069, January 30, 1975, 75-1 CPD 68.

After reaffirmation by Peterman, Windham & Vaughn, Inc., the contracting officer was not only justified in accepting the bid but would have failed in his duty had he done otherwise. 37 Comp. Gen. 786 (1958); 36 Comp. Gen. 27 (1956). Good faith acceptance of the bid therefore consummated a valid and binding contract. 47 Comp. Gen. 732, supra; Ames Color File Corporation, supra; Boise Cascade Envelope Division, supra.

The second issue for consideration here is whether the contract price was so low that "the Government was obviously getting something for nothing," entitling the contractor to relief under our decision in Yankee Engineering Company, Inc., B-180573, June 19, 1974, 74-1 CPD 333. In that case, notwithstanding verification of an extremely low bid by the bidder, who subsequent to award alleged an error due to misreading of specifications, and statements by the procurement activity that it had unsuccessfully attempted to review specifications with the bidder, this Office concluded that it would be overreaching and unconscionable to require performance at the mistaken bid price. Commenting for the record in the instant case, the Air Force states:

"* * * fundamental to the application of the ruling in Yankee Engineering is the requirement that a bona fide error caused the underpriced contract. It would be intolerable if just faulty judgments or careless cost estimates could enable bidders routinely to buy in on contracts, confident that price adjustments would be forthcoming on the basis of an alleged mistake. The burden should be on the contractor to establish convincingly the existence of a genuine error--a miscalculation of the sort that it would be patently unfair for the Government to benefit from.

"In the instant case we do not believe that the record reveals a mistake of the quality which would warrant relief under the rule of Yankee Engineering. Indeed, * * * the mistake is not so great that the Government can be said to be 'obviously getting something for nothing', the prime test of Yankee Engineering. Here we have a claimant, nominally a corporate entity, but really in the person of Mr. Yaughn, who blames the supposed error on Mr. Windham, his predecessor in office (and on the Government). In Yankee Engineering there was also a change in company personnel involved with the bid preparation. However, in that case there was documentary proof showing that the bid was based on supplying 6,025 feet of track instead of 10,180 feet required by the specifications. Here, the contemporaneous documents do not substantiate the allegation that the contractor was unaware of the requirement for installing the trolley busway on Building 125. Viewed as a whole, the facts in the record create a manifest uncertainty and substantial doubt as to whether a bona fide mistake was made.

"* * * Mr. Yaughn says that due to the price difference, he was 'stunned' and 'almost hysterical' * * * following the bid opening. He admits that he thought there was a mistake prior to the April 1974 meeting. Yet he contends that, though a vice president and part owner of the contracting firm, he sat passively through the meeting and paid little attention to what was being studied and discussed. * * *

> "Given Mr. Vaughn's admitted knowledge of the pricing discrepancies from the time of the bid opening and his personal involvement with the Government's efforts to have his firm ascertain a possible error, we see little basis for giving separate consideration to the corporation under its present ownership and management. * * *
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> "* * * Lastly, the size of the price differential itself does not warrant a bid modification. * * *"

We do not dispute the contracting officer's finding that the specific mistake cannot be ascertained from the evidence submitted by the contractor. Work sheets include an estimate for the trolley busway in Building 110 but none for Building 125; however, there is $16,278 in the base price for which there is no itemized listing. The contracting officer surmises that estimates for numerous items were too low and/or that delay in purchasing supplies resulted in inflated costs.

Considering his role as vice president of Peterman, Windham & Yaughn, Inc. at the time of verification, we believe that Mr. Yaughn cannot now be heard to complain that the verification was inadequate or that acceptance of the low bid was unconscionable. Counsel for the contractor points out that the Government estimate for electrical work on Building 125 alone was more than $38,000; this estimate should have confirmed Mr. Yaughn's fears that something had been omitted from his firm's bid of $40,978.35. The burden was on him to have participated actively in discovering what that omission was before contract award.

The price differential is only one factor to be considered in determining unconscionability. The quantum of error here may be expressed in a variety of ways. For example, the $99,175 bid of R&D Construction Company, Inc., the only other bidder, was 242 percent of that of Peterman, Windham & Yaughn, Inc. But expressed in terms of the difference between the two bids, $58,196.65, Peterman, Windham & Yaughn's bid was only 58 percent below that of R&D. Our Office has found contracts to be unconscionable where the second low bid was between 280 and 300 percent greater than the contract price; on the other hand, differences of 53 and 58 percent have been held insufficient to demonstrate unconscionability. Walter Motor Truck Company, B-185385, April 22, 1976, 76-1 CPD 272, and cases cited therein.

In the instant case, we believe that the additional facts and circumstances preclude a finding of unconscionability under the doctrine of Yankee Engineering. Since the Government's agents did all that could have been expected to protect the contractor from its own imprudence, the Government cannot be charged with having "snapped up an advantageous offer made by mistake." See 47 Comp. Gen. 616, 623 (1968), citing Alabama Shirt & Trouser Co. v. United States, 121 Ct. Cl. 313, 331 (1952).

Accordingly, we conclude that there is no legal basis for modification of the contract price, and do not reach the questions raised by the Air Force as to the proper amount of relief due Peterman, Windham & Yaughn, Inc.

R.F. Keller

Deputy Comptroller General
of the United States