Feldman

DECISION

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

04728

FILE: B-186359 DATE: January 9, 1978

MATTER OF: Peterman, Windham & Yaughn, Inc.--Reconsideration

DIGEST:

1. Contractor's contention that it should be afforded relief because of mistake in extremely low bid, notwithstanding its verification of bid prior to award, is denied. Prior decision affirmed.

2. In seeking verification of extremely low bid, contracting officer was not required to question competence of bidder's president to verify the bid or to conduct in-depth review of bidder's worksheets where full disclosure of Government estimate was made and bidder was afforded opportunity to conduct its own in-depth review.

3. While contracting officer might not have been fully aware of specification requirements at time contract was signed, contractor is not entitled to relief on basis of mutual mistake. So far as record shows, written contract expresses Government's intention and therefore mistake as to requirements of contract was unilateral and not mutual.

4. Prior decision that contractor should not be afforded relief on theory of unconscionability is affirmed.

Peterman, Windham & Yaughn, Inc. (Peterman), a small business, requests reconsideration of our decision Peterman, Windham & Yaughn, Inc., 56 Comp. Gen. 239 (1977), 77-1 CPD 20 wherein we denied that firm's request for an increase in the contract price because of an alleged mistake in bid asserted after award. In view of additional information submitted on reconsideration by Counsel for Peterman and our reexamination of the record, we believe that an increase in contract price is not justified.

On grounds of mistake in bid, Peterman requested an increase in price under contract No. F09650-74-C-0335, covering repair of hangar doors and installation of equipment 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 push-buttons 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, Winghan & Vaughn, Inc.	$40,978.35
R&D Construction, Inc.	$99,175.00

The Government estimate was $26,651 for Building 110, and $51,449 for Building 125. The contracting officer formally notified the firm of the discrepancy in bids. Peterman verified the bid on April 15, 1974, in a letter signed by the firm's president at that time.

Nevertheless, procurement and civil engineering personnel at the air center were convinced that the firm had made a serious error in its bid and a meeting was held for the purpose of reviewing the specifications and determining whether a mistake actually had been made. Peterman's representative briefly compared the 11-page Government estimate with the firm's 5-page estimate and asked for clarification of some specifications not relating to the trolley busway system. Unable to discover any error, Peterman's representative 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 on May 2, 1974.

Thereafter, as stated in our prior decision:

"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 of 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 $39,762.52, 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."

We concluded 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."

In requesting reconsideration Peterman indicates that the individual who represented Peterman at the bid verification meeting had a drinking problem. It is stated that this individual had been drinking on the day of the aforementioned meeting with Government personnel but that nevertheless, he was in charge of the firm's operations. It is further stated that the vice president of the firm was a journeyman electrician of limited technical background, and that for this reason the vice president did not actively participate in the bid verification meeting.

Moreover, Peterman states that while the contract specifications required installation of a trolley busway, neither the contractor nor the contracting officials concerned were aware of this requirement until final inspection was requested. Therefore, Peterman believes that both parties were mistaken, not only Peterman.

In addition, Peterman cites Yankee Engineering Company, Inc., B-180573, June 19, 1974, 74-1 CPD 333, as supporting recovery in this case on the theory "that the Government received something for nothing."

These contentions were considered in our prior decision. Both Peterman's president and vice president (and now president) were present at the bid verification session and were afforded the opportunity to verify their firm's bid figures, including the opportunity to examine a copy of the Government's detailed estimate for the work which listed the

trolley busway installation as a part of the work estimate. The contracting officer was assured by the company's president that he had expertise with respect to this type of work and access to economical material and efficient labor sources. While Peterman suggests that its former president may not have been fully competent at the meeting to conduct its business affairs, we cannot say that the contracting officer should have been aware of any such infirmity, especially since the company's vice president was also present.

Peterman also has suggested that it should have been required to justify its extremely low bid to the contracting officer before any award was made based on that bid. Apparently Peterman believes that the Government's bid verification duty in this case should have consisted of an in-depth review of the bidder's worksheets. However, we also considered this argument in our prior decision and concluded that:

> "Omission of the trolley busway system from Peterman, Windham & Yaughn'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 (e)(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 & Yaughn, 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."

We see no reason to alter our position in this regard.

Next Peterman contends that the mistake was mutual, not unilateral as stated in our prior decision, because the contracting officer was unaware of the busway requirement in the specification until the rest of the contract work was completed.

We believe the contractor misapplies the term mutual mistake. A party cannot set up his own negligence and call it a mutual mistake. Ellicott Machine Company v. United States, 44 Ct. Cl. 127 (1909). A mutual mistake arises when a contract as reduced to writing does not express the actual intent of the parties to the contract. Williston on Contracts, Third Edition, Section 1543. So far as the record shows, the contract as written expresses the intention of the Government. It may be that the contracting officer was not aware that the specification called for a trolley busway in Building 125 at the time the contract was signed, but there is no indication that the Government did not intend to include this work in the specification. Therefore we find no basis to conclude that the contract as written did not govern the rights and obligations of the parties. 39 Comp. Gen. 380 (1959).

Finally, Peterman again cites Yankee Engineering, supra, as allowing relief for mistake notwithstanding verification of an extremely low bid. We discussed the differences between this case and Yankee, and see no reason to reiterate that discussion at this time. We concluded that:

> "In the instant case, we believe that the additional facts and circumstances preclude a finding of unconsionability 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)."

We remain of the same view and accordingly affirm our prior decision.

Paul G. Dembling
For the Comptroller General
of the United States