

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DML CORPORATION )  
 ) Docket No.  
Under DGS Project ) MSBCA 1552  
#AU-105-850-020 )

January 8, 1991

Mistake in Bid - Discovered After Award - A change in price is not an available remedy under Maryland's procurement law due to a unilateral error discovered after award under the provisions of COMAR 21.05.02.12D. Maryland Port Administration v. Brawner Contracting Co., 303 MD 44, 492 A2d 281 (1985).

Mistake in Bid - Discovered After Award - The only exception to the rule that changes in price are not permitted is where there is evidence of mutual mistake, fraud, duress or inequitable conduct practiced by the State against the bidder.

APPEARANCES FOR APPELLANT: Michael T. Wyatt, Esq.  
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APPEARANCES FOR RESPONDENT: Michael P. Kenney  
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APPEARANCE FOR INTERESTED PARTY: ARC Asbestos Removal Co. None

OPINION BY MR. PRESS

Appellant filed a timely appeal of a Department of General Services (DGS) Procurement Officer's final decision rejecting Appellant's post-award request for correction of a bid mistake.

Findings of Fact

1. This project entails asbestos removal and abatement in the penthouse at the main State Office Building in Baltimore City.
2. A pre-bid conference was held on May 21, 1990 and Appellant did not attend the conference, nor the public bid opening.
3. On June 28, 1990 at 10:00 a.m. six (6) bids were received and

Appellant was the low bidder at \$187,218. The next responsive bid was \$280,000. Before noon that day, a representative of Appellant made a bid result inquiry. Later in the afternoon, Mr. Bart Thomas, (DGS) Asbestos Data Base Manager and the Procurement Officer's representative for the procurement noticed the disparity between Appellant's bid and the other bids, and telephoned Mr. Robert C. Wyatt, Appellant's General Manager. Mr. Thomas requested Mr. Wyatt to examine his figures and confirm Appellant's bid in accordance with COMAR 21.05.02.12C.<sup>1</sup> Mr. Wyatt confirmed Appellant's bid to be correct, and commented the disparity in bids may have been because Appellant had done similar work for the State previously and perhaps other bidders had not.

4. DGS submitted Appellant's bid to the Board of Public Works on August 8, 1990. Remarks on this Board agenda item reveals the engineer's estimate for the project, obtained by DGS prior to bidding and unknown to bidders, was \$175,000.

5. On September 12, 1990 by letter to DGS, Appellant raised the

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<sup>1</sup>COMAR 21.05.02.12C. Confirmation of Bid

If the procurement officer knows or has reason to conclude that a mistake has been made, the bidder may be requested to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn upon the written approval of the Office of the Attorney General if any of the following conditions are met:

(1) If the mistake and the intended correction are clearly evident on the fact of the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn.

Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.

(2) A bidder may be permitted to withdraw a low bid if:

(a) A mistake is clearly evident on the fact of the bid document but the intended correct bid is not similarly evident; or

(b) The bidder submits proof of evidential value which clearly and convincingly demonstrates that a mistake was made.

issue of a "major error in our bid as it relates to labor" and requested an increase of \$85,950 for a total amount of \$273,168. On September 25, 1990 DGS acknowledged Appellant's letter, but demanded Appellant execute the contract. Appellant by letter dated September 28, 1990 protested, and the DGS Procurement Officer denied the protest by final decision dated October 25, 1990. Appellant appealed to this Board on November 7, 1990.

#### Decision

Appellant alternatively requests this Board to either authorize the cancellation of the contract or increase the price pursuant to COMAR 21.05.02.12.D which provides:

Mistakes Discovered After Award. Mistakes may not be corrected after award of the contract except when the procurement office and the head of a procurement agency make a determination that it would be unconscionable not to allow the mistake to be corrected. Changes in price are not permitted. Corrections shall be submitted to and approved in writing by the Office of the Attorney General. (Underscoring added).

a. Appellant contends the relief it requests is in accordance with this section of COMAR and that enforcement of the contract would be unconscionable, and that rescission of the contract is justified under present law.

b. Appellant alternatively avers it is entitled to rescission based on unilateral mistake.

c. Appellant, further asserts DGS has abused its discretion in finding Appellant should be held to performance without the requested increase in price.

The relief requested cannot be granted. The question of a change in price is not an available remedy under Maryland's

procurement law due to a unilateral error discovered after award. Maryland Port Administration v. Brawner Contracting Co., 303 MD 44, 492 A.2d 281 (1985). In Brawner, supra, the Court of Appeals held "Changes in price are not permitted." Under the facts of this appeal, it is clear that Appellant has made a unilateral error. The only exception to the rule that changes in price are not permitted is where there is evidence of fraud, duress or inequitable conduct practiced by the State or mutual mistake. No such activity or condition is alleged.

Appellant alternatively requests this Board to authorize a cancellation of the contract, per its interpretation of COMAR 21.05.02.12D. The evidence is convincing when DGS recognized the possibility of error in Appellant's bid, DGS expeditiously sought verification prior to award of the contract pursuant to COMAR 21.05.02.12C. In this regard, the telephone conversation between Mr. Thomas and Mr. Wyatt is not disputed. This Board finds Appellant affirmed its submitted bid, and was cognizant of the disparity between its bid and the next highest bid. Under the circumstances, the DGS Procurement Officer or his representative acted in good faith in evaluating the bids, and discharging his error detection responsibility.

The evidence in this appeal this Board concludes does not involve the exception as pronounced in COMAR 21.05.02.12C, to correct a unilateral mistake. We concur with DGS, that the proper exercise of discretion was used and it was not unconscionable not to allow rescission of the contract under COMAR 21.05.02.12D.

Therefore, this Board is unable to find the DGS decision not to rescind this contract was unreasonable, arbitrary or an abuse of discretion.

The cornerstone of the procurement process requires a bidder to stand by its bid and not be permitted to abrogate a contract based on a unilateral mistake, in the absence of fraud, duress, or inequitable conduct. Price is the essence of competitive bidding and a submitted bid is binding.

For the foregoing reasons, the appeal is denied.

