BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

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| Appeal of JOHN W. BRAWNER CONTRACTING COMPANY, INC. | ) | |
| | ) | Docket No. MSBCA 1085 |
| Under MPA Contract No. 282012 | ) | |

July 25, 1983

Mistake in Bid - Discovered After Award - COMAR 21.05.02.12D permits correction of a mistake discovered after award only where the procurement officer and agency head make a determination that it would be unconscionable not to allow the correction. In requesting correction of a bid mistake, a contractor must establish its intended bid price through strong, clear and convincing evidence. Where the contractor committed an error in judgment and seeks to change its contract price to an amount not intended at the time of bid, correction may not be obtained.

Mistake in Bid - Discovered After Award - COMAR 21.05.02.12D is broadly worded and does not require a finding of mutual mistake or inequitable conduct on behalf of the State before correction of a mistake may be permitted. Accordingly, a unilateral mistake may be corrected where the procurement officer and his agency head determine that it would be unconscionable not to permit relief.

Interpretation of Regulations - Although great deference is given to the interpretation of a regulation by the agency charged with its administration, the Board declined to give controlling weight to an agency's interpretation of COMAR 21.05.02.12D where said interpretation was concluded to be erroneous.

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OPINION BY CHAIRMAN BAKER

This timely appeal has been taken from a Maryland Port Administration (MPA) procurement officer's final decision rejecting Appellant's post-award

request for correction of a bid mistake. The bid mistake was made by a plumbing subcontractor who allegedly erred in computing its price to Appellant. Appellant claims that it relied upon this price in bidding the captioned contract and neither it nor its subcontractor purportedly were aware of the error until after award of the contract.

## Findings of Fact

1. In December 1981, the MPA issued a notice to contractors that it was seeking competitive sealed bids for the construction of a one story masonry building ("Marine Service Building") at its Dundalk Marine Terminal. Bidders were apprised as to how copies of the invitation for bids (IFB), including the specifications and contract documents, could be obtained. The notice also stated that bid opening was scheduled for January 14, 1982 at 11:00 a.m.

2. The IFB contained a "Proposal Form" which was to be utilized by contractors in submitting their bids. This form contained only eight bid items. The first seven of these bid items requested unit prices for such work as excavation, backfill, and the hauling of contaminated materials. The final bid item requested a lump sum price for the construction of the Marine Service Building.

3. Section 26 of the contract Special General Provisions described the plumbing work which was a necessary part of the construction of the Marine Service Building. Paragraph 3(b) of this section required this work to be performed ". . . by the Contractors licensed to perform these trades." Appellant, a general contractor without plumbing expertise, thus solicited subcontractor bids from licensed plumbers for this work.

4. The low bid received by Appellant for the performance of plumbing work was submitted by Burgemeister-Bell. This bid was communicated by telephone on the morning of the scheduled MPA bid opening and was in the amount of $45,605. The amount quoted by Burgemeister-Bell included $10,025 for interior plumbing and $35,580 for exterior plumbing. The exterior plumbing included the placement of a concrete manhole pit for a sewage ejector pump.

5. Appellant also received a plumbing quote from Bracken Plumbing in the total amount of $48,815. This quote did not include the placement of concrete for the sewage ejector pump. When the estimated cost of this concrete work was added to the Bracken Plumbing quote, it resulted in a total plumbing cost to Appellant of approximately $54,000, or $8,400 more than Burgemeister-Bell bid.

6. The subcontract quote submitted by Burgemeister-Bell was prepared, in large part, by Mr. Ronald Lang. Mr. Lang's estimate for interior plumbing was as follows:

| | |
|---|---|
| Material | $12,341.75 |
| Labor | 2,403.80 |
| Burden | 3,173.02 |
| Subtotal | $17,918.57 |
| Profit | 537.56 |
| Total | $18,456.13 |

This estimate was reviewed and adjusted by Mr. Carroll Bauerlien to include certain items omitted by Mr. Lang. Mr. Bauerlien's adjustments appear as follows:

| | |
|---|---|
| Lang Estimate | $18,456.13 |
| W/C Carrier[1] | 1,200.00 |
| | 19,656.13 |
| | - 147.40 [2] |
| | $9,508.73 |
| | 508.00 [3] |
| Total bid | $10,016.73 |

As is apparent, Mr. Bauerlien made a subtraction error resulting in a total estimate which was $10,000 less than intended. (Tr. 17-18). This erroneous estimate verbally was conveyed to Burgemeister-Bell's estimating supervisor who telephoned Appellant's President and apprised him of the subcontract bid.

7. Appellant incorporated the Burgemeister-Bell quote in its lump sum bid for the construction of the Marine Service Building.

8. On January 14, 1982, the following bids were received by the MPA:

| Bidder | Marine Service Building | Other Bid Items | Total |
|---|---|---|---|
| Appellant | $214,400.00 | $4,000.00 | $218,400.00 |
| The Metropolitan Cont. Co., Inc. | 236,636.00 | 9,764.50 | 246,400.50 |
| Urfanos Contractors, Inc. | 241,710.00 | 8,625.00 | 250,335.00 |
| American Building Cont., Inc. | 249,964.00 | 8,600.00 | 258,564.00 |
| Tech Contracting Co., Inc. | 249,700.00 | 9,550.00 | 259,250.00 |
| Madigan Construction Co., Inc. | 264,320.00 | 13,680.00 | 278,000.00 |
| Henry Brothers Const., Inc. | 285,000.00 | 36,937.50 | 321,937.50 |
| Cast Construction Co. Inc. | 329,798.00 | 9,675.00 | 339,473.00 |
| Athens General Contractors, Inc. | 356,304.00 | 32,825.00 | 389,129.00 |

9. The MPA estimate for the contract work was $318,232. This is broken down as $306,332 for the Marine Service Building and $11,900 for remainder of the work.

10. After reviewing the bids received and noting the price disparity between the two lowest bids, the MPA became concerned that Appellant may have erred. Accordingly, a meeting was arranged for January 20, 1983 to discuss Appellant's bid. What occured at this meeting is disputed. From the record before us, we find that the MPA representatives did express general

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[1] W/C Carrier stands for the term water closet carrier. It refers to the bracket necessary to mount toilet fixtures to a wall.
[2] The $147.40 correction is for the material cost of piping insulation.
[3] The $508 correction is the labor and material involved in insulating pipes. (Tr. 17).

concern about the price disparity between Appellant's bid and the others received. The MPA also pointed out the possibility of encountering contaminated chromium ore during excavation which would require special handling. In this regard, it was noted that Appellant had bid an exceptionally low price for the hauling of such material. Although we further find that Appellant's President was asked to check his bid and confirm it, he apparently saw no reason to do so. Appellant's President testified that he left the meeting thinking that everything was settled and that he had assured MPA officials that his company would do the job for the price bid. (Tr. 107). In view of the lump sum nature of Appellant's bid for construction of the Marine Service Building, it was not possible for the MPA to have particularized its concerns as to where any error was made in estimating the construction of this work.

11. Appellant was awarded a contract on February 12, 1982. This award was approved by the Board of Public Works on March 17, 1982.

12. Shortly after contract award, Burgemeister-Bell was notified by Appellant that it would be awarded a subcontract. Burgemeister-Bell representatives thus promptly prepared a materials list and set out to requisition all needed supplies. In so doing, it was recognized that the material costs alone would exceed the subcontract bid to Appellant. The subcontract bid estimate prepared by Messrs. Lang and Bauerlien thereafter was reviewed and the error previously described was identified.

13. Appellant was notified of the subcontract bid mistake on April 8, 1982. (Rule 4, Tab IV(4); Tr. 49). Notice of the mistake also was forwarded to the MPA on this same date. (Rule 4, Tabs IV (2 and 3)).

14. On April 23, 1982, a meeting was arranged between representatives of the MPA, Appellant, and Burgemeister-Bell to discuss the mistake made in the interior plumbing bid. During this meeting, Burgemeister-Bell produced its worksheets and explained the nature and extent of its error.

15. Despite its error, Burgemeister-Bell decided to proceed with contract work while pursuing administrative relief through the prime contract. Burgemeister-Bell began work on the project in mid-April, 1982 and ultimately entered into a written subcontract agreement on May 5, 1982 for the amount bid.

16. The MPA procurement officer denied Appellant's claim, submitted on behalf of Burgemeister-Bell, by final decision dated June 1, 1982.

17. A timely appeal was mailed on June 23, 1982.

## Decision

There is no dispute here that an arithmetical error was made by Appellant's subcontractor in submitting a bid on the interior plumbing required under the captioned contract. Likewise, the intended bid price has been established by credible evidence of record. The issue before us is whether these facts permit Appellant to obtain reformation or price correction on behalf of its mistaken subcontractor.[4]

[4]Although the mistake here was made by a subcontractor and not by the

The MPA contends that mistakes discovered after award of a State contract are correctable only in accordance with COMAR 21.05.02.12D as follows:

> Mistakes Discovered After Award. Mistakes may not be corrected after award of the contract except when the procurement officer and the head of a procurement agency makes 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 by the State Law Department. (Underscoring added).

Pursuant to this provision, the MPA further maintains that contract price may not be reformed or corrected.

When interpreting an administrative regulation, great deference is given to the interpretation of that regulation by the agency charged with its administration. Mountain States Telephone and Telegraph Co. v. United States, 204 Ct.Cl. 521, 499 F.2d 611 (1974); Suburban Uniform Company, MSBCA 1053 (March 19, 1982), at p. 9. Where the administrative interpretation is not plainly erroneous or inconsistent with the language of the regulation, it is entitled to controlling weight. Udall v. Tallman, 380 U.S. 1, 16-17 (1965). For the following reasons, however, we conclude that MPA's interpretation of COMAR 21.05.02.12D is erroneous and should not be followed.

COMAR 21.05.02.12D is contained under the chapter heading "Procurement by Competitive Sealed Bidding." Under the competitive sealed bid method of procurement described in that chapter, the State is required to issue an invitation for bids (IFB) specifying what it wants, the quantity, the delivery schedule, and the general provisions of the proposed contract. See COMAR 21.05.02.01; also compare COMAR 21.04.01.03. The bidder submits its price for the performance of the specified work and any additional information and forms necessary to establish its responsiveness. However, because responsiveness must be determined prior to award, it is apparent that the only substantive mistake whose detection could survive the award of the contract is one involving the formulation or tabulation of the bid amount. If all post-award corrections to bid price were precluded by COMAR 21.05.02.12D, the regulation thus would serve no purpose.[5]

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prime, this will not preclude correction where the facts otherwise require the application of equitable principles. Compare Kemp v. United States, 38 F. Supp. 568 (D. Md. 1941).

[5]The MPA in its posthearing brief stated as follows:

> A valid question exists as to what corrections can be made under this regulation, if price cannot be corrected. One example is where a State agency requires that a certain item be used in the construction of a building as part of a State construction contract, and it is described as "Name Brand" or equivalent. Bidder determines that "Brand X" is equivalent and costs half as much. However, in preparing his bid an error is made in that he offers to use "Name Brand" but bids the unit price of "Brand X." (This is also the type of mistake that might not give notice to the procurement officer that the bidder should be asked to confirm his

COMAR 21.05.02.12D was promulgated pursuant to Md. Ann. Code, Art. 21, §2-101(c) and was to be consistent with the general requirements, purpose, and policies of Code Article 21. The underlying purpose and policies of Code Article 21 are set forth, in pertinent part, as follows:

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bid.) It is only after award that Bidder discovers that he agreed to provide "Name Brand" but that he will only be paid by the State for "Brand X." The use of the item in question is so substantial as to create a severe financial hardship for Bidder if he is required to perform according to his bid. Since "Brand X" is equivalent and the mistake made was in offering to provide "Name Brand" in the bid at "Brand X" price, under this regulation, COMAR 21.05.02.12D, the procurement officer could determine that "Brand X" could be substituted even though the executed contract calls for "Name Brand." Price is not affected by the correction, but the mistake is corrected and the contractor is not forced to accept an unconscionable result."

We assume from this example that the contract required "equals" to be approved prior to bid and that Bidder neglected to have "Brand X" certified. In any event, the contract terms are not being reformed in the above example to correct an error. The procurement officer is waiving a contract requirement and agreeing to accept less than the State bargained for. The effect of the error is being mitigated but the error is not corrected. We doubt that this is what was envisioned by the drafters of the regulation. The intent of the regulation, in our view, is to provide a means of obtaining the performance bargained for while concomitantly permitting correction of a provable error to avoid an unconscionable result.

§1-201 (b) Purposes and policies — The underlying purpose and policies of this article are, among others to:

(1) Provide for increased public confidence in the procedures followed in public procurement;

(2) Insure the fair and equitable treatment of all persons who deal with procurement system of this State;

* * *

(6) Provide safeguards for the maintenance of a procurement system of quality and integrity; . . .

Prior to the enactment of Code Article 21, reformation was the sole remedy available to a contractual party, under appropriate circumstances, for correction of mistakes, including those involving price. Housing Equity Corporation v. Joyce, 265 Md. 570, 580 (1972); Painter v. Delea, 229 Md. 558, 564 (1962); Flester v. The Ohio Casualty Insurance Company, 269 Md. 544, 556 (1973). The MPA's interpretation of COMAR 21.05.02.12D thus represents a restriction on the application of equity as it traditionally has been practiced by the courts of this State. In view of the underlying purpose and policies of Maryland's procurement law, such an interpretation and result would not be consistent with the intent of the Legislature in enacting Code Article 21.

COMAR 21.05.02.12D, in our view, was intended by its drafters to substitute an informal and relatively fast administrative process for more cumbersome judicial procedure. The regulation was derived from a body of recommended regulations prepared by the American Bar Association to implement its Model Procurement Code. Because the Model Procurement Code and its regulations incorporate Federal contracting principles, we look to the Federal common law for guidance in interpreting the regulation in question here.

Correction of a mistake determined after award (i.e. reformation) is permitted administratively in Federal contracting where either (1) a mutual mistake has been made, (2) a contracting (procurement) officer has actual or constructive notice of the mistake, or (3) where the contract otherwise is unconscionable. Hagberg, Mistake in Bid, Including New Procedures Under Contract Disputes Act of 1978, 13:2 Public Contract Law Journal 257, 298 (1983). Reformation of bids or publicly bid contracts has been limited in Federal forums, however, by considerations involving the integrity of the competitive bid system. For example, in Comp. Gen. Dec. A-91103, 17 Comp. Gen. 575 (1938), a contractor sought post-award correction of a mistake in price. Although the mistake was established together with inequitable government conduct, relief was denied as follows:

> In the present case the bidder does not seek to have its bid corrected so as to have included therein a previously calculated item which it actually intended to include in, but which was inadvertently omitted from, the amount of its original bid . . . . Rather it proposes to change and increase its bid by the amount which it now considers necessary to cover the cost of required items which it overlooked in making the bid. The distinction is material. The basic rule is, of course, that the bids may not be changed after they are opened, and the exception permitting a bid to be corrected upon sufficient facts establishing that a bidder actually intended to bid an amount other

than set down on the bid form, where the contracting officer is on notice of the error prior to acceptance, does not extend to permitting a bidder to recalculate and change his bid to include factors which he did not have in mind when his bid was submitted, or as to which he has since changed his mind. To permit this would reduce to a mockery the procedure of competitive bidding required by law in the letting of public contracts. (Underscoring added).

See also, Comp. Gen. Dec. B-135815, 37 Comp. Gen. 706 (1958); Ruggerio v. United States, 190 Ct.Cl. 327, 335 (1970); National Line Co., Inc. v. United States, 221 Ct.Cl. 673, 607 F.2d 978 (1979).

In light of the foregoing, we now examine COMAR 21.05.02.12D. This regulation expressly permits correction of a mistake but not a change in price. This language is consistent with the Federal common law. Where a contractor seeks to conform a contract price to the amount which he intended at the time of bid, he is asking to correct an error. If the intended bid is proven with clear, strong and convincing evidence, the procurement officer may permit such a correction under COMAR 21.05.02.12D where it would be unconscionable not to do so. On the other hand, if a contractor seeks to alter a contract price based on factors which he either failed to consider or improperly evaluated at the time of bid, he is seeking to change his bid price. This would be impermissible under both existing equitable principles and Maryland's procurement regulations. This interpretation, we conclude, gives meaning to COMAR 21.05.02.12D and is consistent with the Legislature's intent in enacting Code Article 21.

The MPA, however, contends that it is essential to read COMAR 21.05.02.12 as an entity in determining the intent of its drafters. Under COMAR 21.05.02.12C., a bidder may correct a mistake discovered after bid opening but before award only where ". . . the mistake and the intended correction are clearly evident on the face of the bid document . . . ." Where the intended bid is not evident on the face of the bid document, the bidder is entitled only to withdraw its mistaken bid. The MPA argues that the regulation as a whole thus precludes the use of bid worksheets and estimates to establish the intended bid both prior to award and thereafter in view of a concern for the integrity of the competitive bid system. Further, where a bidder would not have been permitted to correct its mistake if discovered prior to award, it is said to be unreasonable to interpret the regulation as permitting correction of a similar mistake discovered after award.

Although a bidder indeed may be better off if it discovers or acknowledges an error after it has been awarded a contract, there are no guarantees. The correction of a mistake, in the absence either of inequitable conduct on behalf of the State or a mutual mistake, is dependent upon the exercise of collective discretion by the appropriate procurement officer and his agency

head. It also may be dependent upon existing appropriations.[6] Thus, a bidder who deliberately seeks to conceal a unilateral mistake until award has been made and performance has proceeded to the point where rescission is impractical assumes a potentially devastating financial risk. This risk operates as a disincentive for any contractor to consciously attempt to take advantage of the regulation permitting post-award correction of bid mistakes.

COMAR 21.05.02.12D is intended to provide a remedy where honest errors are discovered after it is too late to rescind the contract and either award to the second low bidder or readvertise. While the existence of a regulation permitting the correction of mistakes under such circumstances may tempt unscrupulous bidders to falsify worksheets or conceal mistakes until after award, a more restrictive rule would punish bidders for honest and clearly provable mistakes. We conclude that the broad discretion given the State's procurement officers and agency heads to deal with these matters, together with their collective experience, is sufficient to preserve the integrity of the procurement system and assure that post-award corrections are made only where equity warrants such action.

Finally, we note that COMAR 21.05.02.12D is broadly worded and does not require a finding of mutual mistake or inequitable conduct on behalf of the State before correction of a mistake may be permitted. Compare Dillon v. United States, 140 Ct.Cl. 508, 512-13, 156 F. Supp 719, 722 (1957); White

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[6]Although the parties have not raised this issue, the effect, if any, of Article 3, §35 of the Maryland Constitution would have to be considered where post-award correction otherwise is warranted. This provision reads, in pertinent part, as follows:

> Extra Compensation may not be granted or allowed by the General Assembly to any public Officer, Agent, Servant or Contractor, after the service has been rendered, or the contract entered into . . .

While the Maryland Court of Appeals has ruled that the term "extra compensation" does not embrace damages for breach of contract, we are unaware of any decisions which consider the constitutionality of appropriations for purposes of contract reformation. See State v. Dashiell, 195 Md. 677 (1949).

Abstract Company, Comp. Gen. Dec. B-183643, 75-2 CPD ¶98 (1975). In this regard, the discretionary equitable powers of a procurement officer and his agency head are greater than those of the Maryland courts.[7] This again is consistent with the underlying purpose and policies of Code Article 21.

Turning to the facts at hand, COMAR 21.05.02.12D places the correction of mistakes discovered after award of a State contract within the sound discretion of the appropriate procurement officer and his agency head. Review of such a discretionary decision is limited to a determination as to whether said decision was fraudulent or so arbitrary as to constitute a breach of trust. University of Maryland Baltimore County v. Solon Automated Services, Inc., Misc. Law No. 82-M-38 and 82-M-42 (Balto. Co. Cir. Ct. Oct. 13, 1982); Hanna v. Board of Education of Wicomico County, 200 Md. 49, 87 A.2d 846 (1952). Unfortunately, it is impossible to review the MPA procurement officer's decision made here pursuant to the foregoing standard.

By final decision dated June 1, 1982, the MPA procurement officer stated only as follows:

> This is in response to your [Appellant's] letter of May 2, 1982 in which you request relief, on behalf of your subcontractor, Burgemeister-Bell, from an arithmetic mistake in the amount of $10,000.
>
> After careful consideration of the issues and upon advice of counsel, your request is regrettably denied. (Rule 4, Tab II).

This final decision was not in accord with the requirements of COMAR 21.10.04.01B which mandates inclusion of the following data:

> (1) A description of the controversy;
> (2) A reference to pertinent contract provisions;
> (3) A statement of the factual areas of agreement or disagreement;
> (4) A statement of the procurement officer's decision, with supporting rationale . . .

Accordingly, we do not know the basis for the MPA procurement officer's decision, nor are we satisfied that he exercised the discretion expressly given him by COMAR 21.05.02.12D.[8]

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[7] The Maryland Court of Appeals repeatedly has stated that " . . . [e]quity will reform a written document when and only when there is a mutual mistake of fact or a mistake is made by one of the parties accompanied by fraud, duress or other inequitable conduct practiced on the person making the mistake by another party." Housing Equity Corporation v. Joyce, supra; Painter v. Delea, supra; Flester v. The Ohio Casualty Insurance Company, supra. Reformation is not available judicially to one who makes a unilateral mistake unaccompanied by inequitable conduct on the other side. Baltimore v. DeLuca-Davis Co., 210 Md. 518 (1955).

[8] It appears from the exchange of correspondence contained in the appeal file that the procurement officer's actions were governed by his understanding that COMAR 21.05.02.12D did not permit corrections to contract price.

The record before us indicates that the mistake made by Appellant and its subcontractor was unilateral. Although there is evidence that the MPA had constructive notice of the possibility of error in Appellant's bid[9], we find that it adequately sought verification prior to award of the contract. In this regard, the MPA invited Mr. Brawner to a meeting, six days after bid opening, to discuss its concerns about a bid mistake. Given the structure of Appellant's bid, the MPA specifically was able to call to Appellant's attention only the overall disparity in bid prices and Appellant's low price for disposal of contaminated materials as factors indicating the possibility of an error. Mr. Brawner, anxious to receive award of the contract and establish himself with the State, quickly assured the MPA's representatives that while he recognized the disparity between his bid and the next lowest, he was happy with his bid price. (Tr. 47). This disparity, we find, was not so large as to further require the MPA to demand additional verification. See generally, Schnitzer, Government Contract Bidding, p. 478 (1976). Mr. Brawner likewise denied the existence of a mistake as to his pricing for the hauling of contaminated material. (Tr. 46). Under these circumstances, we find that the MPA procurement officer acted in good faith, both in evaluating the bids and discharging his error detection duty, and did not overreach the contractor.

Nevertheless, as we previously concluded, COMAR 21.05.02.12D does permit correction of unilateral mistakes even in the absence of inequitable conduct by the State. The appeal, therefore, is remanded to the MPA procurement officer and his agency head for the required discretionary determination as to whether it would be unconscionable, under the facts present, not to permit the correction asked for.

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[9]The MPA procurement officer was concerned that a mistake had been made based on the disparity between the low bid and the next several bids. This concern was sufficient to charge him with constructive notice of an error and require him to obtain verification of the bid prior to award. COMAR 21.05.02.12C; Doke, Mistakes In Government Contracts - Error Detection Duty of Contracting Officers, 18:1 Southwestern Law Journal 1 (1964).