

Proc II

DECISION



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

10,659

FILE: B-193828

DATE: July 3, 1979

MATTER OF: Climax Molybdenum Company

DLG 02066

[Request for Contract Modification]

DIGEST:

1. Where agency's acceptance varies from express terms of bidder's offer, no valid contract is consummated for sale item.
2. Agency may not reject high and reasonably priced bid for sale item in absence of some defect or impropriety in competitive bidding process or other justifiable cause.
3. Agency may not rely on unauthorized award for sale item as basis for obtaining money from bidder in excess of amount to which agency would have been entitled had proper award been made.

Climax Molybdenum Company (CMC) requests modification of its contract awarded under invitation for bids (IFB) No. ORES-255, issued by the General Services Administration (GSA) for the sale of various lots of tungsten ores and concentrates from the national stockpile. AGC 00017

The solicitation, among other things, required bidders to specify the items desired, including any alternates, by item number and lot number, and to specify the quantity and price bid per unit. Two bids were received and opened on November 28, 1978. CMC's bid, as amended, per short ton unit (STU) of tungsten trioxide (WO3), was, in pertinent part, as follows:

	<u>Item No.</u>	<u>Lot No.</u>	<u>Unit of Measure (STU-WO3)</u>	<u>Price Bid Per Unit</u>
Group I	989	12	3985.300	\$126.11
Group II	992	15	3910.492	126.36
Group III	987	8	3918.750	127.11

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Group IV	988	9	3914.350	128.36
Group V	993	16	3902.370	129.61

In descending order of preference, bidder is willing to purchase up to a total of 4,000 STU's from the above groups.

The other bidder, Li Tungsten, offered a unit price of \$125.47 per STU.

In accordance with its usual practice, GSA compared the bids received with the prices published in both the London Metal Bulletin (LMB) and Metals Week (MW). The former publishes current market prices for tungsten twice a week; the latter does so on a weekly basis. Because LMB prices are considered by GSA to reflect more fairly the current world market price of tungsten, greater weight is attached to the LMB prices. Further, since MW is issued on a weekly basis, its prices are not considered as timely.

LMB quoted a price range of \$126.10 to \$134.26 per STU of WO3 on November 27, 1978, the day before bid opening. MW's published domestic spot prices ranged from \$125.00 to \$132.00 for the week ending November 27, 1978. In view of the current LMB market prices, GSA rejected Li Tungsten's bid on the ground that its offered price of \$125.47 was unreasonably low.

CMC's principal bid on item No. 989 and its alternate bids, in descending order of preference, on item Nos. 992, 987, 988 and 993 were the only bids received for those items. Further, CMC's bids were all within the range of the current LMB market prices and were considered reasonable by GSA. However, notwithstanding CMC's bid for the items in descending order of preference, GSA established a minimum acceptable price ("cut-off price") of \$129.61 for the tungsten and made award on December 8, 1978 to CMC at the highest alternate price of its last preference, i.e., item No. 993 at \$129.61.

On December 12, 1978, CMC representatives attended a meeting with GSA officials to dispute the award made for that item at that price. Subsequently, on December 15, 1978, GSA issued a shipment order for the tungsten, which was "outloaded" by CMC on December 19, in "mitigation of its damages." CMC was billed by invoice dated January 19, 1979, for the total balance of its high bid price on item No. 993.

The basis of CMC's protest is that GSA made an unauthorized and improper award at its highest alternate bid price in contravention of the express terms of its bid, which specified that the items were bid in descending order of preference. For the reasons stated below, we agree with the protester.

The solicitation's general terms and conditions provide:

"[U]nless otherwise specified * * * by the bidder, [the Government reserves the right] to accept any one item or group of items in the bid, as may be in the best interest of the Government." [Emphasis added.]

CMC, by the clear terms of its bid, expressly limited the Government's power of acceptance of the bid items in descending order of preference. Therefore GSA could not award item No. 993 to CMC unless it awarded the preceding four items to another bidder or reasonably determined that it could not accept CMC's bids on these items because they were unreasonably low. However, CMC's offer on its principal bid item, No. 989, was the only bid received on that item and, we understand from GSA, was viewed as reasonably priced. Although we are not aware of any regulations governing this issue in sales, we do not believe that GSA could reject such a bid without justifiable cause such as some defect in the bid, solicitation or competitive bidding process. See generally Federal Procurement Regulations (FPR) § 1-2.404-2 (1954 ed. amend. 121). It is apparent, therefore, that GSA's acceptance of CMC's highest alternate price varied from the terms of the bidder's express offer and thus did not operate as a valid acceptance. Consequently, no contract came into existence.

Under the common law, an acceptance varying from an offer operates as a rejection and counter-offer. Restatement of Contracts, §§ 38 and 60 (1932). However, Government sales invitations do not contemplate the rejection of a reasonably priced high offer or the making of a counter-offer by the selling agency. Further, even if we were to consider GSA's acceptance as a valid counter-offer, it is well established that the acceptance of an offer must be clear and unequivocal. Laurence Hall d/b/a Halcyon Days, B-189697, February 1, 1978, 78-1 CPD 91. CMC, in fact, disputed the award at that price and, in effect, took delivery of the tungsten "under protest" and in "mitigation of its damages." As a result, it cannot be said that CMC, by its conduct, accepted GSA's counter-offer by taking possession of the tungsten under GSA's shipment order.

Since delivery of the tungsten has been completed, rescission is no longer feasible. In similar circumstances, where no valid contract is consummated, our Office has recognized that payment may be made for goods furnished to the Government on a quantum valebant basis (the reasonable value of goods sold and delivered). International Harvester Company, B-183424, April 30, 1975, 75-1 CPD 272. However, we are not aided in this instance by the application of the doctrine of quantum valebant since the entire range of bids submitted by CMC was reasonable and therefore the question of what price CMC should pay for the tungsten would still remain unresolved.

GSA's only claim to the money in excess of CMC's principal high bid item is its purported acceptance of the highest alternate bid of the last preference item, an action which we have found to be unauthorized and improper. Further, GSA was required to make award on the highest bid which it was legally entitled to accept. We do not believe that GSA should be allowed to rely on an improper and unauthorized act as the basis for obtaining money from a bidder in excess of the amount to which it would have been legally entitled had a proper award been made.

We therefore conclude that this contract should be modified to reflect a contract price of \$126.11 per STU, CMC's bid on item No. 989, which should have been accepted by GSA.

R. F. Keller
Deputy Comptroller General
of the United States