

DECISION



094755
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

[Request for Contract Reformation] 40995

FILE: B-178336

DATE: August 1, 1974

MATTER OF: Reconsideration of F. R. Stanfield Company

- DIGEST:**
1. Contracting officer is not on constructive notice of error in bid where bids are not in narrow range and low bid is not conspicuously outside that range.
 2. Contracting officer does not have constructive notice of error in bid where difference between low and next low bid is not significantly more than average difference between any two of other bids.
 3. Condition of economy and particular industry and customary degree of competition among suppliers do not impute to contracting officer constructive notice of error in bid.
 4. Government estimate 3.6 percent more than low bid is not sufficient to place contracting officer on constructive notice of error in bid.

This decision is a reconsideration of B-178336, May 10, 1973, requested by the F. R. Stanfield Company (Stanfield). In that decision, our Office denied the request to reform the contract to include \$28,800 to compensate for a mistake in bid alleged after Stanfield received the contract award.

In our decision of May 10, 1973, we stated that the difference between the bid of Stanfield (\$323,333), the second low bid (\$357,650) and the Government estimate (\$335,000) was not great enough to have placed the contracting officer on constructive notice of the possibility of error.

In its letter of May 3, 1974, Stanfield has underlined certain portions of pages 20 through 24 of an article entitled,

"Mistakes in Government Contracts--Error Detection Duty of Contracting Officers," by Marshall J. Doke, Jr., 18 SW. L. J. 1 (1964). Stanfield argues that the indicated portions of this article require a reversal of our prior decision.

The first underlining on page 20 relates to the significance that may be accorded to the range of bids received. Thus, the article notes that when all three bids except the low bid, \$1,024, are in a narrow range, \$1,383 to \$1,440, the contracting officer may be on constructive notice of the probability or error. B-147647, December 27, 1961. However, unlike the cited decision, there were seven bids received in this case in a substantially more varied range, \$323,333 to \$484,327. Nor was Stanfield's bid conspicuously outside that range.

At pages 20-21 of the article, our decision B-148481, April 3, 1962, is cited for the proposition that the contracting officer is on constructive notice of possible error when the difference between the amounts of the low and the next low bid, \$2,137, is significantly more than the average difference between any two of the other 16 bids, approximately \$412. However, it should be noted that the second low bid in that case, \$5,730, was 59 percent greater than the low bid of \$3,595, whereas the average disparity between any two of the other bids was approximately 6 percent. In the instant case, the second low bid was only approximately 10.6 percent greater than Stanfield's low bid and the average disparity between any two of the other bids was approximately 6 percent. Consequently, we affirm our decision that the facts of the instant case could not be said to have charged the contracting officer with constructive notice of the possibility of an error under this theory.

The third point indicated by Stanfield in the article, at pages 21-22, is that the contracting officer may be on constructive notice of error even though the second low bid exceeded the low bid by less than 8 percent. B-148412, August 13, 1962. However, in addition to the above, it should be noted that the narrow range of the other four bids received (\$.775 per pound to \$.844 per pound) was a significant consideration, particularly since the low bid of \$.7189 per pound was conspicuously out of line with the other bids. The article goes on to indicate

that the disparity in bids alone may not be sufficient to place the contracting officer on constructive notice of error, even where it is as high as 40 percent. 17 Comp. Gen. 373 (1937). We do not believe what a disparity of approximately 10.6 percent between the low bid and next low bid is sufficient to put the contracting officer on notice of possible error, especially when the Government estimate intervenes at about 3.6 percent higher than Stanfield's low bid.

In conjunction with the preceding argument, Duke suggests that the conditions of the national economy, of the particular industry, and of the customary degree of competition among suppliers should be factors for consideration which, when coupled with the disparity in bids, may charge the contracting officer with constructive notice of error. The following statement in B-178402, October 1, 1973, is pertinent:

"* * * The 'responsibility for the preparation of bids is on the bidder who is presumed to be qualified to estimate the price which can be charged in order for a bidder to realize a reasonable profit. See Frazier-Davis Construction Company v. United States, 100 Ct. Cl. 120, 163, B-165297, December 6, 1968."

Moreover, the condition of the economy applies equally to all competitors and consequently would not serve as useful indices of the amount of disparity in bids necessary to indicate the possibility of error. While the article does not specify whether the state of the particular industry should be measured nationally or locally, it too is a constant factor. We do not believe a consideration of the customary degree of competition would be of probative value when adequate competition is achieved, as in this case.

The test of constructive notice of errors in bids is not intended to place an undue administrative burden upon the contracting officer.

"Mistake-making contractors will naturally seek to impose upon contracting officers a rather high level of brilliance for the purpose of

detecting the error. See Wender Presses, Inc. v. United States, 170 Ct. Cl. 483, 486. However, the test is whether under the facts and circumstances of 'the particular case there were any factors which reasonably should have raised the presumption of error in the mind of the contracting officer.' (Welch, Mistakes in Bids, 18 Fed. B. J. 75,83) without making it necessary for the contracting officer to assume the burden of examining every bid for possible error by the bidder. See Saligman v. United States, 56 F. Supp. 505, 508 * * *." B-175760, July 12, 1973.

The next argument raised by Stanfield appears at page 22 of the Duke article: a large disparity between the amount of the low bid and the Government estimate may be the determining factor in charging the contracting officer with constructive notice of error, particularly when only two or three bids are received. B-149846, October 30, 1962; B-146124, September 1, 1961; B-144018, September 29, 1960; and B-148120, February 27, 1962.

In B-178731, August 3, 1973, the bids were \$8,250; \$9,100; \$10,780; \$13,288; and \$15,880. The Government estimate was \$9,645. We stated:

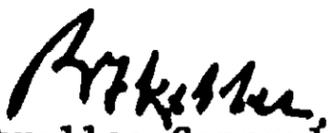
"* * * [T] here is no evidence of record to indicate that the Government had either actual or constructive notice of the mistake prior to award. The fact that the Government's estimate was \$1,395 more than the low bid and the second low bid was only 14 percent higher than the low bid, is not of sufficient difference as to have placed the contracting officer on notice of the likelihood of an error. B-177926, April 19, 1973; B-178336, May 10, 1973. Consequently, any error that was made in the bid was unilateral, not mutual."

Although Stanfield's was the only bid below the Government estimate, the difference was only about 3.6 percent and the next low bid approximately 6.3 percent higher than the Government estimate. We note that the average disparity between any two of the other bids was also approximately 6 percent.

In our opinion, this affirms our determination that the contracting officer was not on constructive notice of an error in Stanfield's bid.

The final underlined passage from the article concerns the inferences that may be drawn from a bid comparison with prior procurements. The record does not indicate that such a comparison was made in Stanfield's case. However, since Stanfield's bid was so close in line with the Government's estimate and other bids received, we do not believe that such a comparison was necessary.

We, therefore, affirm our decision of May 10, 1973.


Deputy Comptroller General
of the United States