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D. Hanford
Proc I

DECISION



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

FILE: B-190845

DATE: June 7, 1978

MATTER OF: Deco-Grand Inc.

DIGEST:

1. Where past procurement history was approximately 2-3/4 years prior to contested contracts and on whole involved purchases of greatly larger amounts of items, such history cannot negate fact that where second low bids were approximately 2-1/2 times greater than low bids on two procurements, contracting officer was on constructive notice of possibility of error in bids and should have requested verification. Since error and amount of error (failure to include F.E.T.) are ascertainable, claim is allowed.
2. Where third contract was awarded on basis of only one solicited bid, contracting officer was not on notice of possibility of mistake and claim is denied.
3. Claim for interest and penalties accrued on account of failure to pay F.E.T. under three contracts may not be paid as payment is not provided for under terms of contracts or laws of United States.

Deco-Grand Inc. appeals the Certificate of Settlement, dated November 7, 1977, issued by our Claims Division, wherein the claim of Deco-Grand for \$2,798.75 (for its payment of Federal Excise Taxes (F.E.T.)) plus interest and for \$559.60 (for the penalty paid for not timely paying the F.E.T.) was denied.

The claim arose under United States Army Tank-Automotive Command contract Nos. DAAE07-73-C-2352,

awarded December 19, 1972, -2493, awarded January 3, 1973, and -4900, awarded June 25, 1973, which involved the purchases of 1,534, 1,698, and 2,930 elbow exhaust components, respectively. On the first of these procurements Deco-Grand submitted a unit price of \$6.18. The other two bidders submitted unit prices of \$16 and \$19.72, respectively. On the second procurement, Deco-Grand, the sole source solicited, submitted a unit price of \$5.88. On the third procurement, Deco-Grand submitted a \$6.18 unit price; the next low unit price offered was \$15.15, with two additional bidders submitting even higher unit prices.

Our Claims Division found that the alleged failure of Deco-Grand to include the F.E.T. in its prices resulted from a unilateral mistake by Deco-Grand and not from a mutual mistake. Such a conclusion was made because the fact that the F.E.T. were to be included in the bid price was set forth in each solicitation and because the contracting activity was not on notice of any possible mistake by the unit prices submitted by Deco-Grand. The latter conclusion was reached on the basis of the procurement history for the item in question which showed purchases of 6,420 units at \$6.02 each in December 1966, 3,680 units at \$7.65 each in April 1969, and 3,006 units at \$4.60 each in March 1970. These prices included all applicable taxes.

While prior procurements may constitute sound bases from which to draw inferences as to the existence of mistakes in bids, this information is not necessarily controlling, and the particular procurement in question must also be scrutinized. Miller's Sawmill, Inc., B-188946, December 23, 1977, 77-2 CPD 499. First, the prior procurements were at the minimum 2-3/4 years prior to the first contract award of which Deco-Grand complains. Second, each prior procurement was for a quantity which was, with the partial exception of the third Deco-Grand contract, substantially greater than the amounts awarded under the Deco-Grand contracts. In view of these factors, and, in particular, in view of the facts that on the procurements leading to the award of contract Nos. -2352 and -4900 the next low bids were approximately 2-1/2 times greater than the Deco-Grand bids, we believe that the contracting officer was on constructive notice as to the possibility of mistakes in the Deco-Grand bids due to the extremely large differences between these bid prices and the others

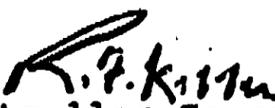
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submitted and should have, consequently, requested Deco-Grand to verify its prices. As regards the procurement leading to the award of contract No. -2493, however, we believe that the contracting officer was not on constructive notice of a possible mistake in the Deco-Grand unit price, since that contract was based on a quote solicited from Deco-Grand only and since Deco-Grand advised that the lowness of the quoted price was made possible by the fact that a production run for the same item was being made at that time. E. I. DuPont DeNemours and Company, Inc., B-188620, June 2, 1977, 77-1 CPD 388.

In view of the above, and since the worksheets of Deco-Grand show that it did not include the 8-percent F.E.T. in contract Nos. -2352 and -4900, the claim for the amount of the F.E.T. paid on these contracts is allowed. Contract No. -2493 was valid and binding as awarded.

As regards reimbursement for interest and for penalty charges levied against Deco-Grand, these items would not have been part of any corrected bid price had Deco-Grand corrected its prices prior to award. Further, the general rule is that payments for such items may not be made unless so stipulated in the contract or provided for in the laws of the United States. Western Mass. Electric Company, B-184962, November 14, 1975, 75-2 CPD 310. Such is not the case here.

Therefore, the determinations made in the November 7 Certificate of Settlement, with the exception regarding the F.E.T. paid by Deco-Grand under the two above-cited contracts, are affirmed.


Acting Comptroller General
of the United States