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

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B-178378

November 27, 1973

The Honorable Earl L. Butz
The Secretary of Agriculture

Dear Mr. Secretary:

By letter dated April 3, 1973, the Director, Office of Plant and Operations, United States Department of Agriculture forwarded to us a claim relative to a bid mistake by the Frischhertz Electric Company.

Invitation for bids ARS-118-B-72 was issued by the Agricultural Research Service (ARS), United States Department of Agriculture, for furnishing and installing an electrical distribution system in New Orleans, Louisiana. The solicitation invited bids for Basic Bid Item 1 and Alternate Item 1A. Alternate Item 1A required bidders to state the amount to be added to the Basic Bid for furnishing circuit-breaker type main switchgear in lieu of the switch-and-fuse type required under Basic Bid Item 1.

Bids were opened on June 26, 1972; six bids were received as follows:

	Basic Bid Item 1	Alternate Item 1A
1. Frischhertz Electric Co., Inc.	$172,022	$ 4,000
2. Webb Electric Company	173,286	34,349
3. Walter J. Barnes Electric Co.	190,000	38,000
4. Lambert Electric	207,555	35,167
5. R. E. Neuman, Inc.	224,485	35,580
6. Pratt Farnsworth, Inc.	228,755	46,930

Due to the great difference between Frischhertz's bid on Alternate Item 1A and the next low bid on that item, Frischhertz was contacted concerning possible error in its price for Alternate Item 1A. Frischhertz informed ARS, however, that it had sent a telegram revising prices for both items. Frischhertz was advised that ARS had not received this telegram. Just prior to this discussion, the requisitioning office had directed the contracting officer to disregard Alternate Item 1A and make award for Basic Bid Item 1 only.

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ARS received Frischhertz's telegram the next day on June 27, 1972, at 3:46 p.m. The telegram would have increased Frischhertz's bids for Basic Bid Item 1 and Alternate Item 1A by $37,370 and $24,720, respectively. Western Union acknowledged in a letter dated July 5, 1972, that it failed to deliver the telegram properly.

The contracting officer determined that the late telegraphic modifications could not be considered, and he awarded Contract No. 12-14-100-11468(72) to Frischhertz for Basic Bid Item 1 in the original bid amount of $172,022. Notice of award, requesting that the contract and surety documents be executed and returned within 10 days, was sent to Frischhertz on June 29, 1972.

Frischhertz failed to return the necessary documents. On July 10, 1972, the contracting officer again requested that the executed contract documents be returned immediately and he advised Frischhertz that "* * * if he wanted to file a claim, he should submit to me a statement of fact along with other supporting evidence for legal determination." Frischhertz did not reply; however, the contracting officer on July 12, 1972, did receive a telephone call in Frischhertz's behalf from Mr. Ray E. Putfark, Executive Director of the Construction Industry Association of New Orleans, Incorporated. Subsequently, on July 17 the contracting officer received a letter from Mr. Putfark requesting that Frischhertz be relieved of any obligation to perform the contract. On August 8, 1972, the contracting officer sent a cure letter to Frischhertz giving it 10 days to return the executed documents; a copy of this letter was sent to Frischhertz's surety. On August 10, Mr. Putfark called to advise that the executed contract would be mailed. Thereafter, the executed documents were received, and a notice to proceed was sent to the contractor on August 14, 1972.

By letter of February 21, 1973, Frischhertz requested a "final decision relative to granting relief due to failure of timely delivery of telegraphic revisions to original bid prices and for negotiating a reasonable price adjustment." Frischhertz contends that its original bid prices were computed incorrectly "* * * due to a mathematical error in figures supplied by a potential subcontractor and which were incorporated in the contractor's original bid prices." It contends that the contracting officer acted improperly in sending a Notice of Award to Frischhertz since the contracting officer "* * * had full and complete knowledge that there were obvious errors in the contractor's original bid submission." The contracting officer, on the other hand, states that no claim of error was made prior to the letter of February 21 and that the contractor, by accepting the contract and proceeding with the work, waived any claim it might have against the Government.

Under ordinary circumstances we would not expect the contracting officer to anticipate the possibility that the bidder would subsequently claim a mistake in bid after the award was made. However, in this case the contracting officer was on notice of the possibility of a bid error in regard to Item 1A and the attempted bid modification included Items 1 and 1A. While we recognize that the contracting officer was not on constructive notice of the possibility of an error on Item 1 on the basis of the bid price itself, he should have been alerted to the possibility of an error on Item 1 as well as Item 1A once he became aware of the bidder's attempted price increases on both items. We believe that the prudent course of action for the contracting officer prior to any award would have been to ask the bidder whether the attempted price increases reflected mistakes in bid on both items. Moreover, the record indicates that Frischhertz did not acquiesce in the award. After the award was made, the contracting officer advised the contractor that it could file a claim.

We think this case fits within the rule set forth in 38 Comp. Gen. 504 (1959). In that case a bidder alleged a mistake in bid but was incorrectly told that the bid could not be withdrawn instead of being advised that it could submit evidence substantiating its alleged error. We held that the bidder should not be foreclosed from relief simply because it went ahead and executed a contract in reliance upon the incorrect advice. Similarly, we think that Frischhertz should have been given the opportunity to establish error prior to the award.

Accordingly, we think that if Frischhertz presents evidence to establish the existence of a mistake, it would be evident that no contract was ever effected at the award price. Chris Kerr Inc. v. United States, 426 F. 2d 314 (1970) and 37 Comp. Gen. 705, 707 (1958). The contracting officer has reported that a substantial portion of the contract work has been completed. Since rescission is no longer feasible we would interpose no objection to payment on a quantum valebant or quantum meruit basis, that is, the reasonable value of the services and materials actually furnished. B-157280, October 11, 1965 and C. H. Monroe Manufacturing Company v. United States, 143 F. Supp. 449 (1956).

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States