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

B-178207 September 11, 1973

31369

Hudson, Creyke, Koehler, Brown
and Tacke
1744 R Street, NW.
Washington, D.C. 20009

Attention: Jean J. Provost, Jr., Esquire

Gentlemen:

We refer to your letter dated March 16, 1973, and subsequent correspondence, protesting on behalf of Urban Systems Development Corporation (USDC) against the award of a contract to it under Invitation for Bids (IFB) F25600-73-B-0020, issued at Offutt Air Force Base, Nebraska (hereafter "Offutt.")

The principal contention in this protest is that no contract came into existence because the Air Force failed to effectively accept USDC's bid before the applicable Davis-Bacon Wage Rate Determination expired on February 2, 1973, and before its bid expired on February 6, 1973. Alternatively, USDC argues that its bid was not responsive to the invitation and that a mistake occurred in the formulation of its bid price.

IFB -0020 constituted the second step of a two-step formally advertised procurement for the design and construction of 300 family housing units. USDC's bid was the lowest of the four received, and as a result of a favorable preaward survey, award to USDC was recommended.

Several communications were exchanged between Offutt and USDC between the time of bid opening and mid-February 1973, when USDC attempted to withdraw its bid. USDC contends that the communications from Offutt did not constitute an acceptance of its bid, while the Air Force maintains that USDC's bid was accepted. Since the Air Force was of the opinion that a contract had come into existence, it did not consent to the withdrawal of USDC's bid. USDC then protested to our Office.

[Protest of Air Force Contract Award]

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After the protest was filed, the Air Force issued to USDC a Notice to Proceed with performance, which the latter refused to do on the basis that it had no contract. On April 11, 1973, the contracting officer notified USDC that its contract was terminated for default pursuant to the clause "Termination for Default-Damages for Delay-Time Extensions" incorporated by reference into the solicitation and purported contract. USDC appealed from this decision to the Armed Services Board of Contract Appeals (ASBCA), before which it submitted a motion to dismiss on the grounds that no contract came into being and that therefore the ASBCA lacks jurisdiction.

As a result of these events, two forums have been presented with the issue of whether a contract came into existence. The ASBCA has taken the position that the determination of whether a contract was formed is within its jurisdiction because such a determination is necessary to ascertain whether there was an effective Disputes Article which provided for appeal to the ASBCA. See, e.g., Blackstone Mfg. Co., Inc., ASBCA No. 11763, March 29, 1968, 68-1 BCA para. 6951

Our decision B-169147, April 10, 1972, concerned a contract which had been terminated for default after commencement of performance. The default termination was appealed to the Interior Board of Contract Appeals, which dismissed the appeal without prejudice to its reinstatement following our decision (requested by the contractor) as to whether a contract had come into existence. After observing that the resolution of certain factual disputes was "essential to a determination of the existence of a contract and the terms thereof," we stated:

> "Since Linegear [the contractor] undertook performance of the subject contract and was defaulted, we do not believe our Office is the proper forum to resolve the factual disputes. Whether the default termination was valid will necessarily involve consideration of the same facts that have been referred to in connection with the question of validity of the contract. Under the disputes clause of the purported contract any dispute concerning a question of fact arising under the contract is to be determined by the Interior Board of Contract Appeals and such determination is final and conclusive if it meets the standards of review of the Wunderlich Act, 41 U.S.C. 321-322. Also, in this connection see Vitro Corp. of America, ASBCA No. 14448, January 21, 1972.

> "Since the same facts are determinative of both the validity of the default termination and the validity of the contract, and in view of the finality which attaches to Board determinations of factual issues, we believe that any decision by our Office at this time would be premature and unwarranted. Accordingly, we must decline to rule on your request for relief."

The instant case is distinguishable from the decision quoted immediately above in that here, the facts "essential to the determination of the existence of a contract and the terms thereof" are not in dispute. In our view, there exists only a question of law, i.e., whether a contract came into existence, to be resolved on the basis of the facts of record. Therefore, we deem it appropriate for our Office to consider the issue presented.

The Invitation for Bids was issued upon Standard Form 21, Bid Form (Construction Contract) which provides in part:

> "The undersigned agrees that, upon written acceptance of this bid, mailed or otherwise furnished within _____ calendar days (60 calendar days unless a different period be inserted by the bidder) after the date of opening of bids, he will within 10 calendar days (unless a longer period is allowed) after receipt of the prescribed forms, execute Standard Form 23, Construction Contract, and give performance and payment bonds on Government standard forms with good and sufficient surety."

Additionally, paragraph 4 of Standard Form 22, Instructions to Bidders (Construction Contract), advised all bidders:

> "If the successful bidder, upon acceptance of his bid by the Government within the period specified therein for acceptance (sixty days if no period is specified) fails to execute such further contractual documents, if any, and give such bond(s) as may be required by the terms of the bid as accepted within the time specified (ten days if no period is specified) after receipt of the forms by him, his contract may be terminated for default. In such event he shall be liable for any cost of procuring the work which exceeds the amount of his bid, and the bid guarantee shall be available toward offsetting such difference."

Paragraph 23 of the Information to Bidders contained in IFB -0020 further provided:

> "BID ACCEPTANCE PERIOD (1960 AFR): Bids offering less than sixty (60) days for acceptance by the Government from the date set for the opening of bids will be considered nonresponsive and will be rejected."

USDC did not specify in its bid a longer period for acceptance, and therefore, you contend that the bid would expire on February 6, 1973, which was 60 days after the bid opening held on December 8, 1972.

USDC was determined to be the low, responsible bidder. On January 12, 1973, the contracting officer mailed to USDC a Standard Form 23 Construction Contract and appropriate bond forms under cover of a letter dated January 10, 1973, which read in its entirety:

> "1. Subject form is attached for your signature.
>
> "2. This contract is subject to the written approval of The Secretary or his duly authorized representatives and is not binding until approved; therefore, release of any information regarding this contract shall not be made until an approved award is communicated."

USDC executed the Standard Form 23 and returned it on January 17, 1973. The contract was then signed by the contracting officer who submitted it to the Strategic Air Command Assistant Deputy Chief of Staff (Logistics) for his approval, which was obtained on January 26, 1973.

In the meantime, USDC's payment and performance bonds had not been received at Offutt, whose representative inquired of USDC about them on January 22, 1973. The Offutt representative was told the bonds would be promptly provided. On January 30, 1973, Offutt advised the unsuccessful bidders by letter that the contract had been awarded to USDC. On January 31, 1973, a member of the contracting officer's staff called USDC to advise that it had been awarded the contract and that the payment and performance bonds still had not been received. Additional calls were made on February 7 and 9, 1973, in an effort to obtain the bonds.

The bonds (which had been executed on January 23) were received by Offutt on the morning of February 13, 1973, whereupon the procuring activity mailed to USDC its fully executed copy of the contract. Early in the evening of the same day, USDC transmitted a telegram to the procuring activity in which USDC advised that it considered

its bid to have expired without acceptance, requested that its bid be considered withdrawn, and further alleged that its bid was nonresponsive and reflected a mathematical error. USDC's telegram was telephonically received by Offutt the following day, February 14. On February 15, USDC received the executed contract documents and on February 16, Offutt received the written copy of USDC's telegram.

Your primary contention is that the governing provisions of statute, regulation, and IFB -0020, required a written acceptance of USDC's bid; that USDC's bid was not accepted in writing while the bid was available for acceptance; and that, therefore, no contract came into existence between USDC and the Government.

The conduct of the instant two-step formally advertised procurement was governed by 10 U.S.C. 2305(c), which provides in pertinent part that:

> "Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered."

Similarly, Armed Services Procurement Regulation (ASPR) 2-407 states:

> "2-407 Award.
> 2-407.1 General. Unless all bids are rejected, award shall be made by the contracting officer, within the time for acceptance specified in the bid or extension thereof, to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered. If a proposed award requires approval of higher authority such award shall not be made until approval has been obtained. Awards shall be made by mailing or otherwise furnishing to the bidder a properly executed award document (see Section XVI, Parts 1 and 4) or notice of award on such form as may be prescribed by the procuring activity. When a notice of award is issued, it shall be followed as soon as possible by the formal award. * * * All provisions of the invitation for bids, including any acceptable additions or changes made by the bidder in the

> bid, shall be clearly and accurately set forth (either expressly or by reference) in the award document, since the award is an acceptance of the bid, and the bid and the award constitute the contract."

We also observe that Standard Form 21, Bid Form (Construction Contract) imposes upon the bidder the obligation to execute a contract and give performance and payment bonds "upon written acceptance of this bid * * *."

The contracting officer's letter dated January 10, 1973, forwarded contract and bond forms for signature, and advised USDC that "This contract" was subject to approval by higher authority and was "not binding until approved." Written approval by higher authority was obtained on January 26, 1973, and approval of the award was communicated by telephone to USDC on January 31, 1973 -- all during the period in which USDC's bid was open for acceptance and before expiration of the applicable Davis-Bacon Wage Rate Determination.

USDC maintains that the contracting officer's January 10 letter did not effectively accept the bid because "the letter did not express a present intent on the part of the Government to be bound", and that the oral notification of award approval given on January 31 also was ineffective in view of the requirement that bid acceptances be in writing.

However, the contracting officer's letter of January 10 clearly placed USDC on notice that an award to it was being processed subject to the administrative step of obtaining approval from higher authority. USDC then executed the contract and returned it to Offutt. From the time of the subsequent oral notification that approval of the award had been obtained until the attempted bid withdrawal on February 13, the actions of both parties were consistent with an understanding that USDC had been awarded a contract.

We note, for example, that on February 7 and 9 -- after the scheduled expiration date of its bid -- USDC responded positively to inquiries by Offutt concerning the missing payment and performance bonds. Under the terms of the solicitation, quoted on page 3, supra, USDC was obligated to give the bonds only upon the acceptance of its bid. USDC's assurances, made after February 6, that it would provide the bonds is therefore consistent with an understanding that its bid had been accepted.

We believe it would be a distortion of the facts to conclude that the Government did not effectively communicate its acceptance of USDC's bid within the time allowed. Therefore, upon consideration of

all the facts and circumstances, we are of the opinion that USDC's bid was effectively accepted, thereby creating a contract between USDC and the Government.

With regard to the responsiveness of USDC's bid, you observe that as required by ASPR 7-603.15 and 18-104, IFB -0020 provided:

"ADDITIONAL GENERAL PROVISIONS (CONSTRUCTION CONTRACT)

* * * * *

"90. PERFORMANCE OF WORK BY THE CONTRACTOR (1965 JAN)

"The contractor shall perform on the site, and with his own organizations, work equivalent to at least fifteen percent (15%) of the total amount of work to be performed under the contract. * * *."

The invitation for bids did not require bidders to describe the actual amount of the work which they proposed to perform with their own organizations. However, you have furnished USDC's work sheets in support of your allegation that USDC intended to perform only approximately 7.5 percent of the work with its own organization. You maintain USDC's bid should be rejected as nonresponsive since the bid was based upon a method of operation inconsistent with the requirement of paragraph 90 of the Additional General Provisions, quoted above.

In support of your contention, you cite our decision which is reported at 45 Comp. Gen. 177 (1965), in which we upheld the rejection of a bid as nonresponsive where the bidder did not offer to perform the required minimum amount of work with its own forces. Our 1965 decision, however, dealt with a bidder who inserted on the face of its bid a figure inconsistent with the solicitation requirements. In contrast, IFB -0020 did not require any entry by bidders in this regard, and there was nothing upon the face of USDC's bid which deviated from the IFB's requirements. Regardless of the basis upon which USDC calculated its bid, or whether that basis was mistaken, the bid submitted by USDC was entirely responsive to the IFB. Therefore, USDC's alleged error with respect to the amount of work to be performed with its own forces affords no basis for the rejection of its bid as nonresponsive.

Finally, you request that USDC be permitted to correct an error in its bid price, first alleged on February 13, 1973, which in our view was after award of the contract. As we observed in our decision, B-17[illegible], July 10, 1973:

> "Our Office has consistently stated that where a mistake in bid is alleged after award of a contract, in the absence of any mutual mistake, as here, we will grant relief only when the contracting officer was on actual or constructive notice of the error or probability of error prior to award. 52 Comp. Gen. _____(B-177482, April 16, 1973); 45 id. 700 (1966)."

IFB -0020 included certain additive items and a deductive alternate item to be taken into consideration in the evaluation of bids. USDC alleges that in arriving at its base bid price, it excluded the amounts for these items (approximately $255,000) even though the figure from which the deduction was made included nothing for those items. Therefore, USDC states, its base bid of $5,889,000 was about $255,000 below what it should have been, which was approximately $6,144,000.

We do not believe it is necessary for us to determine whether this mistake actually occurred for even if the existence of the error is conceded, the circumstances are not such as to have placed the contracting officer on constructive notice of error. USDC's base bid compared as follows to the Government's estimate and the other base bids received:

USDC	$5,889,000
Government Estimate	6,098,000
National Homes Construction	6,429,000
Selden Devel. Management	6,864,000
Lueder Constr. Co.	7,143,000

USDC's base bid, therefore, was approximately 3.5 percent below the Government estimate and 8.5, 14 and 17.5 percent below the base bids of National, Selden and Lueder, respectively. USDC's allegedly intended base bid of $6,144,000 would have compared similarly, since it would have been less than one percent above the Government estimate, and 4.4, 10.5 and 14 percent below the National, Selden and Lueder bids, respectively.

Under these circumstances, especially the small variance between USDC's base bid and the Government estimate, we are unable to conclude that the contracting officer was placed upon constructive notice of the alleged error. See B-178731, August 3, 1973; B-178613, July 13, 1973, copies enclosed. Therefore, no relief may be granted from the alleged mistake in contract.

In view of the foregoing, your protest is denied. The original worksheets enclosed with your letter of March 28, 1973, are returned.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States