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GAO

United States General Accounting Office  
Washington, DC 20548

Office of  
General Counsel

In Reply  
Refer to: 7-196742

JAN 3 1980

The Honorable Bill Alexander <sup>Do not make available to public reading</sup>  
House of Representatives

Dear Mr. Alexander:

We refer to your letter dated October 26, 1979, requesting a determination whether FMC Corporation is entitled to an increase in contract price to cover the cost of Federal Excise Taxes (FET).

In its letter to you, FMC requested that GAO issue a "Certificate of Relief" from FET. We point out that GAO does not have such authority. However, we reviewed this matter to determine whether the contract may be reformed to provide for reimbursement or whether the contract price may be corrected due to a mistake. We have determined that such relief is not warranted.

In May 1978, the Air Force awarded a contract to FMC for 24 hydraulic sewer cleaners. Based on the erroneous belief that FET was inapplicable to this procurement, FMC did not include an amount for FET in its offer. In so doing, FMC relied on its interpretation of provisions of the Defense Acquisition Regulation (DAR) and on its past experience with other Government contracts. FMC alleged after contract award a mistake of \$27,891.41 in its offer price, the amount of FET. Robins Air Force Base, Georgia denied FMC's request for an increase in its contract price and, subsequently, FMC requested that you submit the matter to GAO.

The request for proposals (RFP) advised all offerors that the solicitation and any resultant contract were subject to the terms of the Warner Robins Master Solicitation. Reference number 15 of the master solicitation designates DAR 7-103.10(a) as a General Provision of the solicitation. This provision provides that the price bid shall include all applicable Federal, state, and local taxes and duties. In previous



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decisions of this Office, we have held that where DAR 7-103.10(a) is incorporated into the contract, a contractor is on notice that FET may apply to the procurement. D-171668, February 17, 1971. In this connection, offerors also were expressly advised in a February 9, 1973 letter that "the price proposed must include any and all applicable taxes. With regard to Federal Excise Tax, the offeror should consult with his own tax counselor \* \* \*." Thus, as previously stated in our decisions, it was incumbent upon the offeror to ascertain the applicability of and to assume the responsibility for taxes and to submit its offer accordingly. Based on these facts it appears that the Government did not mislead FMC regarding the applicability of FET to this procurement and, therefore, we cannot grant reformation of the contract on this basis. Consolidated Diesel Electric Company, 56 Comp. Gen. 340 (1977), 77-1 CPD 93; E-159064, May 11, 1966.

Where a mistake in bid or proposal is alleged after award, relief can be granted only if the mistake was mutual or the contracting officer was on actual or constructive notice of the error prior to award. In the latter situation, no valid and binding contract is consummated when a contracting officer knew or should have known of the probability of error in an offer but failed to take proper steps to verify the offer. However, if the Government does not have actual or constructive notice of an error, the contract is binding on the parties. E-171668, supra.

In this case, nothing on the face of FMC's proposal indicated that an error in price had been made. Moreover, while FMC's offered unit price (excluding those vehicles destined for California) was \$27,420, the other offerors submitted unit prices of \$23,923.54 and \$29,035. The Government estimate was approximately \$24,000. FMC's total price, not including first article or transportation cost was \$660,650, with other offers of \$631,675.75 and \$722,250.15. We believe that the difference between FMC's and the other offered prices was not so great to warrant a conclusion that the contracting officer should have been aware of an error in FMC's offer price.

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Therefore, we believe that the contract may not be corrected on the basis of a mistake alleged after award.

We note, however, that DAR 7-103.10(a), which was incorporated into this solicitation, provides that if a contractor warrants that it did not include an amount for FET in its contract price and a "written [IRS] ruling" takes effect after the contract date which results in the contractor paying FET, the contract price can be increased by the amount of the tax. FMC may wish to pursue the matter under this contract and DAR provision.

Sincerely yours,

MILTON SOCOLAR

Milton J. Socolar  
General Counsel