1974 WL 27227 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
October 31, 1974

***1 Re: Withdrawal of bid on public contract where a unilateral error was discovered and transmitted to the State prior to acceptance of the bid.**

Mr. L. P. Hamilton
State Engineer
Post Office Box 11333
Columbia, SC 29211

Dear Mr. Hamilton:
You have requested an opinion of this Office as to whether or not a contractor should be allowed to withdraw his bid, submitted pursuant to Section 1-466, Code of Laws of South Carolina (1962), in the following circumstances.

At 3 P. M., Tuesday, October 22, 1974, bids were opened in the Jenkins Hall Auditorium at The Citadel, Charleston, South Carolina. These bids were received pursuant to invitations for bid published in the News and Courier on September 18, 26, and October 3, 1974. The invitation to bid included a requirement that
each bidder must deposit with hid bid, security equal to five percent of the gross base bid by certified check or a five percent bid bond form and subject to the conditions provided in the Instructions to Bidders.

Six general contractors submitted bids on The Citadel Physical Education project. Upon opening bids, it was discovered that the apparent low bidder had submitted a base bid of $3,247,700.00. This bid was some $77,000.00 lower than the second low base bid. After the bids were opened, the contractors were informed that the bids would be reviewed and studied and that they would hear from the Citadel as to which bid had been accepted at a later date.

According to the facts furnished this Office by you and Mr. John Breit, Colonel R. D. McCarty, Director of Physical Plant at the Citadel, and you stayed in Jenkins Hall some thirty minutes to an hour after the bid opening. Colonel McCarty then went straight back to his office and upon arriving there, found that the Executive Vice-President of the apparent low bidder had been trying to get in contact with him. Shortly thereafter, Colonel McCarty talked with the representative of the general contractor and learned that their bid on the Citadel project contained a mechanical error of $120,000.00, and that as a result of this error, the general contracting firm requested that they be allowed to withdraw their bid without penalty. Pursuant to Colonel McCarty's instructions, the general contractor sent details and substantiation of this error to the project architect. The contractor also confirmed the telephone conversation of October 22, 1974, with a telegram to Colonel McCarty dated that same date. At 10 P. M., Monday, October 28, 1974, a meeting was held in your office in order for the general contractor to present details and to substantiate the error on the part of his contracting firm.

The question arises as to whether or not the general contractor should be allowed to withdraw its bid. The situation in this case is that a unilateral mistake was made by the general contractor in the bid submitted to the Citadel. The mistake was not discovered nor was it reported to the Citadel until after all sealed bids were opened. However, the error, admittedly one arising from an improper transcription of costs figures, was made known to the Citadel prior to acceptance of the bid.
***2** Statutes for the letting of public contracts are enacted for the benefit of the public and should be carried out with sole reference to the public interest, and accordingly the rights of bidders must always be held subordinate to that interest. So

also, requirements of the law that contracts for public work or for public supplies shall be awarded to the lowest bidders are intended for the protection of the public from collusive contracts, favoritism, fraud, and extravagance rather than for the benefit of the bidders for such contracts. 64 Am Jur 2d Public Works and Contracts Section 82 at 942 (1972).

Furthermore,
As a general rule, at law a bidder for a public contract cannot, in the absence of special circumstances, either withdraw his bid or proposal, or recover the deposit made pursuant to the requirements of the advertisement for bids at the time of the submission of his bid, although in equity the bidder will be protected where it would be inequitable to compel him to perform the contract or forfeit the deposit in the case of his refusal or failure to perform, and there are numerous exceptions and qualifications to the rule at law. 64 Am Jur 2d Public Works and Contracts Section 83 at 942-943 (1972) (Emphasis supplied.)

There are, however, special circumstances in the present case. The general rule in situations such as this, where bids are submitted on a public contract, and unilateral error is discovered by the bidder and this error is brought to the attention of the State prior to the time the bid is accepted, is that the bidder will be allowed to withdraw the bid without penalty. See 52 ALR 2d § 5 at 797 (1957).
It is a general rule that although a bidder for a public contract makes a unilateral mistake in the preparation of his bid, yet if the mistake is one which is remedial in equity, notice thereof to the offeree previous to acceptance of the bid makes equitable relief or its equivalent available, absent other circumstances which it would make it inequitable to grant it. See 52 ALR 2d 779, § 5A at 797 (1957).

There are four essential conditions which must be met before a mistake is remedial in equity. These conditions are that (1) a mistake is of such consequence that its enforcement would be unconscionable; (2) the mistake is related to a material feature of the contract; (3) the mistake occurred regardless of the exercise of ordinary care [1]; and (4) it is possible to place the other party, that is the State, in status quo. 52 ALR 2d 779, § 3 at 793 (1957). There is no question that the conditions of 2, 3, and 4 are met with the Citadel bids. Furthermore, it is the opinion of this Office that condition 1 is met in that for the State to accept a bid knowing that there was an error in the bid of $120,000.00, and that bid only contained a profit of $167,000.00, it is an attempt to take advantage of the contractor's mistake, and any attempt to enforce this contract would be unconscionable. For the above reasons, therefore, it is the opinion of this Office that the general contractor with the low bid in this instance, should be allowed to withdraw his bid, and the bid should be awarded to the second low bidder.

***3** The only remaining question is the disposition of the general contractor's 'bid bond.' In the majority of the cases, '. . . it has been held that a surety on a bid bond was not liable where the failure of its principal to execute a contract was due to the discovery of an error or mistake leading to the making of the bid for a lesser amount than would have been the case but for the error or mistake.' 70 ALR 2d 1361 § 3 at 1375 (1960). (Footnote omitted) In most instances equity will not require the forfeiture of a 'bid bond' if the bidder (1) acted in good faith, (2) without gross negligence, (3) was reasonably prompt in giving notice of the error in the bid, (4) would suffer substantial detriment by forfeiture, and (5) the other party's position had not changed greatly and relief from forfeiture would work no substantial hardship. Donaldson v. Abraham 122 P. 1003, 68 Wash. 208 (1912). See also: 70 ALR 2d 1361 (1960). All five of the above conditions are met by the general contractor in this case.

For the above reasons, this Office is of the opinion that the general contractor should be allowed to withdraw its bid without penalty. The contract for The Citadel project should be awarded to the second law bidder.
Yours very truly,

M. Elizabeth Crum

Assistant Attorney General

Footnotes

1 The term 'negligence,' of its equivalent, in this connection generally means ordinary negligence, which will not necessarily bar granting equitable relief. Otherwise, qualified, it generally means carelessness or lack of good faith in calculation which violates a positive duty in making up a bid so as to amount to gross negligence, or wilful negligence, when it takes on a sinister meaning and will furnish cause, if established, for holding a mistake of the offending bidder to be one not remediable in equity. It is thus distinguished from a clerical or inadvertent error in handling items of a bid, either through setting them down or transcription. 52 ALR 2d 779, § 3 at 794 ftn. 4 (1957).

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