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B-162667, Dec. 19, 1967

Number: B-162667

Date: 1967-12-19

B-162667, DEC. 19, 1967

TO LEASE BY BOCH, INC.:

WE FURTHER REFER TO A LETTER DATED OCTOBER 9, 1967, REQUESTING UPWARD ADJUSTMENT OF THE PRICE UNDER CONTRACT N62464-67-C-0396 ON THE GROUND THAT YOUR FIRM ERRONEOUSLY FAILED TO INCLUDE THE APPLICABLE FEDERAL EXCISE TAXES IN YOUR BID UPON WHICH THE CONTRACT IS BASED.

ON MAY 15, 1967, THE NORTHEAST DIVISION, NAVAL FACILITIES ENGINEERING COMMAND, ISSUED INVITATION FOR BIDS NO. N62464-67-B-0396, FOR THE RENTAL OF MOTOR VEHICLES IN ACCORDANCE WITH NAVFAC SPECIFICATION NO. 87500/67. THE INVITATION ADVISED POTENTIAL BIDDERS, AS FOLLOWS: ,INFORMATION REGARDING BIDDING MATERIAL, BID GUARANTEE AND BONDS: "SPECIFICATION NO. 87500/67 AND OTHER BIDDING DATA AND INFORMATION MAY BE OBTAINED UPON APPLICATION TO THE NORTHEAST DIVISION, NAVAL FACILITIES ENGINEERING COMMAND AT 495 SUMMER STREET, BOSTON, MASSACHUSETTS.'

PARAGRAPH 1.4 OF THE REFERENCED NAVFAC SPECIFICATION STATED THAT: "THE CONTRACT WILL BE EXECUTED ON NAVFAC FORM 2415, CONTRACT FOR MOTOR VEHICLE RENTAL.' THE SPECIFICATION ALSO CONTAINED THE FOLLOWING:

"NOTICE

"THE GOVERNMENT FORMS MENTIONED AND OTHER INFORMATION NECESSARY MAY BE OBTAINED OR EXAMINED UPON APPLICATION TO THE NORTHEAST DIVISION, NAVAL FACILITIES ENGINEERING COMMAND, * * *"

PARAGRAPH 7, OF NAVFAC FORM 2415, WHICH BECAME A PART OF THE CONTRACT, CONTAINED THE CLAUSE ENTITLED "FEDERAL, STATE, AND LOCAL TAXES (AUG. 1961).' THIS CLAUSE IS THE STANDARD TAX CLAUSE CONTAINED IN ARMED SERVICES PROCUREMENT REGULATION (ASPR) 11-401.1 (C) AND PRESCRIBED FOR USE IN ,ALL FORMALLY ADVERTISED CONTRACTS EXCEPT CONSTRUCTION CONTRACTS.' ASPR 11-401.1 (A) (1). THE CLAUSE PROVIDES, IN PERTINENT PART, THAT: "EXCEPT AS MAY BE OTHERWISE PROVIDED IN THIS CONTRACT, THE CONTRACT PRICE INCLUDES ALL APPLICABLE FEDERAL, STATE, AND LOCAL TAXES AND DUTIES.' HOWEVER, NO TAXES WERE SPECIFICALLY EXCLUDED FROM THE CONTRACT PRICE BY THE CONTRACT TERMS.

BY THE CLOSING DATE FOR RECEIPT OF BIDS, ONLY YOUR FIRM RESPONDED AND THE SUBJECT CONTRACT WAS AWARDED TO YOU ON JULY 1, 1967. BY LETTER DATED JULY 14, 1967, YOU APPRISED THE CONTRACTING OFFICER OF THE FAILURE TO INCLUDE APPLICABLE FEDERAL EXCISE TAX, AND REQUESTED RELIEF ON THE GROUND THAT, IN RESPONSE TO YOUR TELEPHONE INQUIRY, SOMEONE AT THE PROCURING ACTIVITY ADVISED YOU TO EXCLUDE FEDERAL EXCISE TAXES. IN DENYING THE REQUESTED RELIEF, THE PROCURING ACTIVITY

EXPRESSED NO KNOWLEDGE OF SUCH ADVICE, BUT STATED THAT IN ACCORDANCE WITH STANDARD POLICY ALL BIDDERS ARE TOLD TO INCLUDE ALL APPLICABLE TAXES AND THAT IT IS THE BIDDER'S RESPONSIBILITY TO DETERMINE WHICH ARE APPLICABLE. THE COMMANDER, NAVAL FACILITIES ENGINEERING COMMAND, WASHINGTON, D.C. HAS CONCURRED IN THE DENIAL OF RELIEF.

CONSISTENT WITH THE RESPONSIBILITY PLACED ON BIDDERS FOR BID PREPARATION AND SUBMISSION, THE TAX CLAUSE PRESCRIBED BY ASPR AND CONTAINED IN THE SUBJECT CONTRACT "PLACES THE RISK OF THE EXISTENCE OF APPLICABLE TAXES UPON THE BIDDER.' 44 COMP. GEN. 715, 717. ALTHOUGH YOU ALLEGED THAT YOU WERE ADVISED TO EXCLUDE FEDERAL EXCISE TAXES, THE PROCURING ACTIVITY HAS AFFIRMATIVELY DENIED ANY KNOWLEDGE OF SUCH ADVICE. IN THIS RESPECT, OUR OFFICE MUST ACCORD A SIGNIFICANT DEGREE OF FINALITY TO THE ADMINISTRATIVE STATEMENT OF FACTS IN THE ABSENCE OF CLEAR AND CONVINCING EVIDENCE TO THE CONTRARY. WE ALSO NOTE THAT YOUR FIRM RECEIVED THE PRIOR CONTRACT FOR THE RENTAL OF VEHICLES. SUCH CONTRACT CONTAINED THE IDENTICAL TAX CLAUSE, AND THERE WAS NO QUESTION AS TO THE INCLUSION OF APPLICABLE FEDERAL EXCISE TAXES IN THE CONTRACT PRICE.

ON THE BASIS OF THE RECORD BEFORE US, WE MAY ONLY PROPERLY CONCLUDE THAT THE FAILURE TO INCLUDE THE APPLICABLE TAXES WAS A RESULT OF MISUNDERSTANDING ON YOUR PART AND NOT DUE TO ANY INDUCEMENT BY THE GOVERNMENT. THE SITUATION THUS PRESENTED IS ANALOGOUS TO ONE WHERE A CONTRACTOR MAKES AN ERROR IN ITS BID PRICE OF WHICH THE CONTRACTING OFFICER HAS NEITHER ACTUAL NOR CONSTRUCTIVE NOTICE. IN THIS REGARD, THE COURTS HAVE HELD THAT WHERE AN ERROR IS UNILATERAL, THE CONTRACTOR IS NOT ENTITLED TO ANY REDRESS. EDWIN DOUGHERTY AND M. H. OGDEN V. UNITED STATES, 102 CT. CL. 249, AND SALIGMAN ET AL. V. UNITED STATES, 56 F.SUPP. 505. ..END :