

Our solicitation requested special packaging to be included in the unit pricing.

The seller's proposal specified special packaging at an extra charge.

The contract specified special packaging included in the price

The seller shipped and then billed the extra charge for the special packaging.

This raised a red flag and we stopped releasing additional product shipments.

Obviously we have a contract since the contract clearly spelled out special packaging to be included and the seller shipped the product.

The seller accepted by performance and so is probably going to have to absorb the special packaging cost for the shipments already received

We did not have a clear agreement before award and both Buyer and Seller made mistakes in not noticing the difference and resolving it.

IF the seller does not want to continue the contract and absorb the special packaging cost, then:

We could try in court to force performance since the seller had already accepted the contract by shipping – but clearly both sides made mistakes and even if we were prevailed, it would ruin our relationship.

We could offer to renegotiate the contract and let the seller “get well” by adding an extra charge for the special packaging – but that would be unfair to the competition and/or ruin any pricing reduction we gained by apparent competition.

IF the proposed new pricing by the seller is higher than the next low offer, then we could consider letting the seller out of the contract by cancelling and re-awarding to the next low offeror.

We could cancel the contract, re-open the competition and let everyone submit new proposals. Caution: Protect yourself from unfair termination claims by making sure all aspects of the problem are documented, that seller clearly confesses the mistake and requests to be let out of the contract.

Buyer didn't notice difference in proposal prior to award

Seller didn't notice contract difference prior to making the first few shipments

No, we did not get a signed acknowledgement. ☹️

Seller's invoice did not match the contract, but he had accepted the contract by shipping

At the very least, Seller needs incentive not to make the same mistake again and/or try this scenario as a negotiation strategy on future awards.

I would also require seller to specifically address this failure as a past-performance concern in future proposals. Otherwise, how would you ever trust a proposal from this seller again?

Post-Award renegotiation of pricing to correct a seller's mistake in a proposal is very hard to justify when the correction would result in the seller getting more money. So much so, that the FAR has a whole section of requirements on the subject 14.407-4 [Worth reading even if just for the checklist of issues to address]

The most appropriate resolution will depend on the circumstances. A sole-source supplier, specially fabricated parts, highly competitive market, long lead time, complex and expensive proposal preparation process, etc. All could be issues that lead to different resolutions.

Both the buyer and seller's sales representative need some counseling about paying attention.

FYI – here is a copy of the FAR and I've highlighted some important concepts/issues

14.407-4 Mistakes after award.

If a contractor's discovery and request for correction of a mistake in bid is not made until after the award, it shall be processed under the procedures of [Subpart 33.2](#) and the following:

(a) When a mistake in a contractor's bid is not discovered until after award, the mistake may be corrected by contract modification if correcting the mistake would be favorable to the Government without changing the essential requirements of the specifications.

(b) In addition to the cases contemplated in paragraph (a) of this section or as otherwise authorized by law, agencies are authorized to make a determination—

(1) To rescind a contract;

(2) To reform a contract—

(i) To delete the items involved in the mistake; or

(ii) To increase the price if the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original invitation for bids; or

(3) That no change shall be made in the contract as awarded, if the evidence does not warrant a determination under subparagraph (b)(1) or (2) of this section.

(c) Determinations under paragraph (b)(1) and (2) of this section may be made only on the basis of clear and convincing evidence that a mistake in bid was made. In addition, it must be clear that the mistake was—

(1) Mutual; or

(2) If unilaterally made by the contractor, so apparent as to have charged the contracting officer with notice of the probability of the mistake.

(d) Each proposed determination shall be coordinated with legal counsel in accordance with agency procedures.

(e) Mistakes alleged or disclosed after award shall be processed as follows:

(1) The contracting officer shall request the contractor to support the alleged mistake by submission of written statements and pertinent evidence, such as—

(i) The contractor's file copy of the bid,

(ii) The contractor's original worksheets and other data used in preparing the bid,

(iii) Subcontractors' and suppliers' quotations, if any,

(iv) Published price lists, and

(v) Any other evidence that will serve to establish the mistake, the manner in which the mistake occurred, and the bid actually intended.

(2) The case file concerning an alleged mistake shall contain the following:

(i) All evidence furnished by the contractor in support of the alleged mistake.

(ii) A signed statement by the contracting officer—

(A) Describing the supplies or services involved;

(B) Specifying how and when the mistake was alleged or disclosed;

(C) Summarizing the evidence submitted by the contractor and any additional evidence considered pertinent;

(D) Quoting, in cases where only one bid was received, the most recent contract price for the supplies or services involved, or in the absence of a recent comparable contract, the contracting officer's estimate of a fair price for the supplies or services and the basis for the estimate;

(E) Setting forth the contracting officer's opinion whether a bona fide mistake was made and whether the contracting officer was, or should have been, on constructive notice of the mistake before the award, together with the reasons for, or data in support of, such opinion;

(F) Setting forth the course of action with respect to the alleged mistake that the contracting officer considers proper on the basis of the evidence, and if other than a change in contract price is recommended, the manner by which the supplies or services will otherwise be acquired; and

(G) Disclosing the status of performance and payments under the contract, including contemplated performance and payments.

(iii) A signed copy of the bid involved.

(iv) A copy of the invitation for bids and any specifications or drawings relevant to the alleged mistake.

(v) An abstract of written record of the bids received.

(vi) A written request by the contractor to reform or rescind the contract, and copies of all other relevant correspondence between the contracting officer and the contractor concerning the alleged mistake.

(vii) A copy of the contract and any related change orders or supplemental agreements.

(f) Each agency shall include in the contract file a record of—

(1) All determinations made in accordance with this [14.407-4](#);

(2) The facts involved; and

(3) The action taken in each case.