

DOCUMENT RESUME

03249 - [A2173288]

[Protest against Refusal of Agency to Permit Bid Correction].
B-188477. August 2, 1977. 7 pp.

Decision re: Columbus Building and Supply Co.; by Robert F.
Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense -
Procurement & Contracts (058).

Organization Concerned: Collins and Co.; Department of the Army:
Corps of Engineers, Savannah, GA; Lynch Construction Co.,
Inc.

Authority: A.S.P.R. 2-407.8(b)(2-3). A.S.P.R. 2-406.3. 37 Comp.
Gen. 650. 37 Comp. Gen. 652. 17 Comp. Gen. 575. 17 Comp.
Gen. 577. 49 Comp. Gen. 211. 53 Comp. Gen. 584. 54 Comp.
Gen. 145. 4 C.F.R. 20.1(b-c). 4 C.F.R. 20.4. B-187384
(1977). B-187671 (1977). B-187495 (1977). B-187638 (1977).
B-184260 (1976). B-186655 (1977).

The protester objected to the refusal of the Army Corps
of Engineers to permit correction of its bid. The evidence
established that the bidder mistakenly omitted an item in
computing the bid, so the agency properly permitted the bidder
to withdraw but not to correct the bid since the evidence
established only that the mistake was made. The agency's
estimate was revised pursuant to agency procedures to include
omitted items and not to justify the award to the second low
bidder as contended by the low bidder. The defective Government
estimate which was used solely for intra-agency purposes did not
cause the bidders to submit unbalanced bids and did not provide
a compelling reason for resolicitation of bids. (Author/SC)

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Charles Roberts
Proc. XI II



DECISION

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

FILE: B-188477

DATE: August 2, 1977

MATTER OF: Columbus Building and Supply Co.

DIGEST:

1. Where evidence establishes that bidder mistakenly omitted item in computing its bid, agency properly permitted bidder to withdraw but not to correct its bid since evidence establishes only that mistake was made and not intended bid.
2. Record reveals that Government's estimate for construction of road was revised pursuant to agency procedures to include omitted items and not to justify award to second low bidder as contended by low bidder.
3. Defective Government estimate which was not included in IFB and was used solely for intra-agency purposes did not cause bidders to submit unbalanced bids and does not provide compelling reason for resolicitation of bids.

Columbus Building and Supply Co. (Columbus) protests the refusal of the Savannah District, Army Corps of Engineers to permit correction of its bid. While Columbus was permitted to withdraw its low bid after bid opening when it allegedly discovered it had omitted a \$65,849.00 item, it contends that the contracting officer improperly refused to modify its bid. Additionally, Columbus alleges that the contracting agency improperly revised its estimate on the project after bid opening and that the proper procedure under the circumstances was a revision of the invitation for bids and a resolicitation of the procurement rather than to make award to the next low bidder. Finally, the protester contends that the award was made notwithstanding its protest.

The Army issued invitation for bids (IFB) No. DACA 21-77-B-0039 for the construction of Water Pollution Control Facilities at Fort Stewart and Hunter Airfield, Georgia. On January 5, 1977, the Army opened the bids, and the three lowest bids, including the Government estimate, were as follows:

Government Estimate	\$ 919,490.00
Columbus Building and Supply Co.	\$ 940,123.95
Collins and Company	\$1,133,740.00
Lynch Constr. Co., Inc.	\$1,159,066.00

On January 10, 1977, Columbus notified the contracting agency of a mistake in its bid. By letter dated January 11, 1977, Columbus explained that an error of \$65,849.00 occurred when it accepted a subcontractor's cost quote for an item (Modifications and Additions to Sewage Treatment Plant) which did not include certain mechanical costs. The pertinent portion of Columbus' explanation is as follows:

"I commenced a detailed review of the preparation and computation of our bid with respect to the 53 items after the opening of the bid. This revealed to me late on the afternoon of Friday, January 7th, that our mechanical sub-bidders had not included the Aerated Grit Chamber, Air Supply and Diffusion Equipment. (B7)."

Columbus submitted its workpapers and prebid computations requesting permission to modify its bid. Essentially, Columbus argued that in preparing its bid, a total sum of \$134,000 was added to all of the estimated labor, material and sub-contract prices to cover special conditions and bond expenses and profit of \$50,000. According to Columbus the \$134,000 amount was a fixed figure for "our planning purposes and would not have necessitated any addition or profit factor charge being added to any additional equipment items received at the last minute to be added to the total bid." The protester insists that had the fact of the omitted item been brought to its "attention prior to bid opening only the exact cost of this equipment would have been added to our other bid totals" and that the sum of \$65,849 is the amount of the error because it is the amount furnished by "the only sub-bidder offering a price upon this equipment."

The Corps of Engineers on February 25, 1977, determined that Columbus should be permitted to withdraw but not to modify its bid. The Corps of Engineers found that Columbus had submitted "clear and convincing evidence" of a mistake in bid and the manner in which it occurred, but had failed to show the bid intended. Specifically, the Corps of Engineers concluded that "there was no way to determine from the original bid documents or the backup material what was the value of the omitted mechanical equipment, nor could the intended bid be reconstructed from the material." Further, in checking the protester's bid, the Corps of Engineers realized the its cost estimate also had been understated due to certain omitted items. Accordingly, the Government estimate was recalculated to \$1,016,753.00.

Columbus was informed of the adverse agency ruling on February 25, 1977. On Friday afternoon, February 25, 1977, Collins and

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Company was awarded the contract. By telegram dated February 25, 1977 and stamped as received by us on Monday, February 28, 1977, Columbus protested the agency's ruling and an award to any other bidder.

We agree with the agency's determination that Columbus has failed to produce clear and convincing evidence of its intended bid. The protester acknowledges that it omitted the cost of the machinery in computing its bid. By its own admission, Columbus has stated that it did not know whether the omitted item was included in the subcontractor's bid until after the opening of bids, and that it "erroneously assumed" it had been included.

The rule allowing a bidder to correct his bid under Armed Services Procurement Regulation (ASPR) § 2-406.3, does not extend to situations where the bidder discovered the omission of a factor after the bid was submitted and opened. The basic rule was stated by us in 37 Comp. Gen. 650, 652 (1958):

"* * * bids may not be changed after they are opened, and the exception permitting a bid to be corrected upon sufficient facts establishing that the bidder actually intended to bid an amount other than that set down on the bid form * * * does not extend to permitting a bidder to recalculate and change his bid to include factors which he did not have in mind when his bid was submitted. [T]o permit this would reduce to a mockery the procedure of competitive bidding required by law in the letting of public contracts. See 17 Comp. Gen. 575, 577."

In this regard we believe that allowance of a bid modification under these circumstances would constitute a post-opening modification of the bid which, as our cases reflect, is not permitted.

We have considered the cases which Columbus relies upon, North Star Electric Contracting Corp., B-187384, January 28, 1977, 77-1 CPD 73; Government Contractors, Inc., B-187671, January 31, 1977, 77-1 CPD 80; Chris Berg, Inc. v. United States, 426 F. 2d 314 (Ct. Cl. 1970), as authority to permit bid correction in this case. Each case involved mathematical or transpositional errors which resulted in erroneous bids. Correction in each case was allowed primarily because the bidder's worksheets demonstrated the bidder's intent. For example, in North Star, supra, the bidder submitted worksheets and back-up data which clearly showed that the error consisted of a misplaced decimal point when a figure was transferred from one document to another. In Government Contractors, supra, correction

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was allowed by this Office because the worksheet submitted as evidence of the intended bid explained the entirety of a \$100,000 mathematical error except \$1,000. However, the explanation for the \$1,000 error presented was satisfactorily congruent with the data on the bidder's worksheets. In Chris Berg, supra, the bidder was allowed to increase its price through reformation of the contract primarily because the agency refused to consider contractor's evidence of the intended bid after a mistake in bid was alleged. No such restriction has been placed upon the bidder here, as it has been permitted to submit all pertinent evidence it deemed relevant to proving its intended bid price. Only after such a review of the evidence presented did the contracting agency conclude that it was impossible to reconstruct the intended bid from the documents submitted. For these reasons, we do not feel that the Chris Berg case controls here.

Columbus cites Commercial Industrial Development Corp., B-187495, March 22, 1977, 77-1 CPD 199 as effectively establishing the principle that the Government should allow "the low bidder to correct its offer in the amount alleged (if it) would be in the best interests of the Government because the increased (bid) * * * would still be substantially lower than other offers."

We can not agree that Commercial, supra, has established such a rule. There the issue of clear and convincing evidence of an intended bid was not involved because the contract was awarded prior to discovery of the bidder's mistake. We allowed reformation of the contract on the basis that the contracting officer was on constructive notice of the mistake prior to the award and not because the "best interests" of the Government would be served by bid correction prior to award.

Finally, Columbus cites George C. Martin, Inc., B-187638, January 19, 1977, 77-1 CPD 39, as authority for a rule that "where the apparent low bidder can demonstrate the honesty, sincerity of its mistake and that it would be the low bidder even after correction, the correction should be allowed." However, as we stated in the Martin case:

"It is true that this Office has held that where a mistake in bid is not alleged in good faith, the mistake (correction) will not be allowed. S. J. Graves and Sons Co., B-184280, March 30, 1976, 76-1 CPD 205 at 6. However, this Office does not require that a bidder assert and prove his 'good reputation' in order to support a claim of mistake in bid." 77-1 CPD 39 at 4.

We upheld the agency's determination to allow bid correction in that case because the evidence showed the nature of the errors and the intended

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bid. Accordingly, bid correction may not be allowed merely because the bidder made an "honest" mistake.

The protester next contends that we should find the award improper because the contracting agency arbitrarily and capriciously revised the Government's estimated cost for the project in violation of the regulations and for the sole purpose of awarding the contract to the next low bidder.

The record does not sustain this allegation. In accordance with the Corps of Engineers procedures the contracting agency prepared its cost estimate for the project. The estimate (\$918,490.00) was intended to include all items required by the specifications in the IFB. However, after bids were opened on January 5, 1977, the Government discovered that the following items were omitted:

Grit Collector Mechanism	\$40,567
Bond Cost Allowance (3/4%)	\$ 6,896

Revision of the allowance for general conditions which had been approximated at 7% was itemized and modified upward to include the overhead allowance:

Revision of General Conditions	\$49,800
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The revised Government estimate, \$1,016,753, was approved by the Division Engineer on February 18, 1977. Further, the Division Engineer on February 18, 1977, approved the award to Collins and Company. Based on the record, we find that the revision was done pursuant to agency guidelines.

Columbus also argues that the revision of the Government estimate resulted in the "unbalancing" of bids. Protester cites Trataros Painting and Construction Co., B-186655, January 18, 1977, 77-1 CPD 37, and alleges that "there can be no distinction in the requirements of this case and that of the Trataros case, that having discovered the estimate to be inaccurate, unbalanced and insufficient, reprocurement is the only path available to the activity."

Columbus fails to distinguish a major difference between Trataros, supra, and the present case. In the prior case an erroneous estimate of work requirements had been set forth in the solicitation. In order to avoid misleading bidders, the agency decided to resolicit under revised specifications. We sustained that action. Here, the Government estimate was used for internal purposes and was not revealed to bidders

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until after the bid opening. The fact that this estimate was determined to be erroneous after bid opening did not cause bidders to be misled or otherwise affect the bidding. The Government's estimate was in error and not the requirements under the IFB. Therefore, we cannot find a "compelling reason" for cancellation since the actual needs of the Government have been met under the existing IFB. 49 Comp. Gen. 211 (1969); 53 id. 584 (1974); 54 id. 145 (1974).

Columbus also contends that the agency improperly proceeded with award and performance of the contract despite Columbus' "preaward" protest. Columbus states that on Friday, February 25, 1977, it became aware that the agency had decided not to permit correction of its bid. Columbus then filed a telegraphic protest with our Office. Our copy of the telegram indicates it was transmitted shortly after noon.

Our bid protest procedures advise protesters that "to expedite handling" within our Office, protests should be directed to the attention of our Bid Protest Control Unit. 4 C.F.R. § 20.1(b) (1976). Columbus did not do this, nor does it appear that Columbus filed a copy of its protest with the contracting officer concurrently with its filing here, as required by 4 C.F.R. § 20.1(c) (1976). Unaware of the protest, the agency proceeded with an award on Friday afternoon.

Although Western Union advised Columbus that its protest was delivered to our Office at 1:56 p.m. on Friday, our copy of the message indicates that it was not received until 3:05 that afternoon. In any event, the message was not received by our Index & Files section until 8:29 on Monday morning, February 28. After a member of that section had logged in the message, checked to make sure that it was not related to any existing file, and had assigned the protest a B-number, it was sent to our Bid Protest Control Unit. An employee in the Bid Protest Control Unit orally notified the agency of the protest that same day.

The objectionable circumstances to which our rules are directed is where the contracting officer proceeds with an award with full knowledge that a protest has been filed with our Office, in the absence of sufficient justification therefor. See 4 C.F.R. § 20.4 and ASPR § 2-407.8(b) (2) and (3) (1976 ed.). Here, the contracting officer was not aware of the protest when award was made because Columbus failed to inform him of its protest concurrently with its filing in our Office and because there was not enough time remaining on Friday afternoon for the administrative processing of the protest message prior to its receipt

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by the Bid Protest Control Unit. Therefore, we find no impropriety in the award. We are also aware of no regulatory provision requiring an agency to withhold a notice to proceed under an existing contract pending resolution of a protest, although an agency may choose to do so. Finally, we can see no prejudice to Columbus which resulted from the agency's proceeding with an award in view of our decision upon the merits of the protest.

Accordingly, the protest is denied.

Deputy


Comptroller General
of the United States