

DECISION



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

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FILE: B-194141

DATE: March 22, 1979

MATTER OF: Jaybil Industries, Inc.

DIGEST:

[Allegation That Late Bid Modification Was Mistake]

1. Bidder that alleges after bid opening but before award that late telegraphic bid modification that further lowered its already low bid was sent to procuring activity by mistake is entitled to submit evidence of alleged mistake for consideration under applicable regulations to determine if bid can be corrected or withdrawn.
2. Where low bidder alleges after bid opening but prior to award that late telegraphic bid modification was sent to agency by mistake, agency cannot accept such modification unless bidder is given opportunity under applicable regulations to prove existence of mistake and obtain appropriate relief.

CNG00818

Jaybil Industries, Inc. (Jaybil), low bidder on invitation for bids (IFB) N62477-77-B-0269 issued by the Chesapeake Division, Naval Facilities Engineering Command (Navy), protests the Navy's acceptance of its late telegraphic bid modification on the basis that the telegram was sent by mistake.

AGC 1491

The IFB solicited bids for storm windows to be installed at the United States Naval Academy and Naval Station, Annapolis, Maryland. Bid opening was scheduled for 3 p.m., January 18, 1979. Seven bids were received, and when opened, Jaybil's bid of \$509,572.40 was low.

At 8 p.m. that evening, the procuring agency received over its telex machine a message from Jaybil which reduced that company's bid by \$20,000. Although

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this modification was received some 5 hours after the time scheduled for bid opening, the Navy determined that under the provisions of paragraph 7(d) of the IFB's "Instructions to Bidders" and Armed Services Procurement Regulation/Defense Acquisition Regulation (ASPR/DAR) § 7-2002.2 (1976 ed.) it was authorized to accept a late modification of an otherwise successful bid which makes the terms of that bid more favorable to the Government.

Yet, when informed that its bid was low at the reduced price of \$489,572.40, Jaybil notified the Navy that the bid modification had been a mistake and that the original price of \$509,572.40 was the one actually being offered.

According to Jaybil, on the afternoon of January 18, 1979, it had intended to reduce by \$20,000 a bid being submitted on a project at Fort Bragg, North Carolina, under which bid opening was scheduled for January 19, 1979. However, a secretary inadvertently picked up the file for the Annapolis project and as a result sent the telegram to the wrong base. The telegram was filed with Western Union at 2:06 p.m., less than an hour before bid opening. Jaybil claims that at approximately 4 p.m. the error was discovered and Western Union was immediately telephoned in order to cancel the telegram. The Western Union office in Washington, D.C., the destination point, assured Jaybil that it had not yet received the telegram and when it did that it would take steps to stop delivery. Yet, as noted above, the Navy received Jaybil's message directly over its telex line at 8 p.m. and later accepted the late bid modification under paragraph 7(d) of the IFB's "Instructions to Bidders" and ASPR/DAR § 7-2002.2.

Jaybil argues that this bid modification was a mistake due entirely to human error and as a result that it should not be bound by such an erroneous modification but awarded the contract at the price originally bid. The Navy, on the other hand, maintains that not only is it authorized under the IFB and the applicable regulation to accept Jaybil's late bid modification, but that it would also be detrimental to the integrity of the competitive bidding system to allow a low bidder to decide after bid opening whether its bid reduction should be applied or not. However, Jaybil has indicated that it will not accept the contract award unless it is made at the original bid price.

It is well established that the Government may consider and accept a late telegraphic bid modification from an otherwise successful bidder if the modification is favorable to the Government and will not prejudice the other bidders. See 38 Comp. Gen. 674 (1959); 40 Comp. Gen. 466 (1961); ASPR/DAR §§ 2-303.1, 7-2002.2; Federal Procurement Regulations § 1-2.305 (1964 ed. amend. 118). However, the regulations also contemplate the possible correction or withdrawal of a bid where a mistake in bid is alleged after opening but prior to award. See ASPR/DAR § 2-406.3.

In this regard, ASPR/DAR § 2-406.3(a) provides in pertinent part:

"(a) The Departments are authorized to make the following administrative determinations in connection with mistakes in bids, other than apparent clerical mistakes, alleged after opening of bids and prior to award.

* * * * *

"(3) When the bidder requests permission to correct a mistake in his bid and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended, a determination permitting the bidder to correct the mistake may be made; provided that, in the event such correction would result in displacing one or more lower bids, the determination shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself. If the evidence is clear and convincing only as to the mistake, but not as to the intended bid, a determination permitting the bidder to withdraw his bid may be made.

"(4) When the evidence is not clear and convincing that the bid as submitted was not the bid intended, a determination may be made requiring that the bid be considered for award in the form submitted."

Likewise, our Office has also permitted the correction of an error in bid prior to award if the bidder submits "clear and convincing evidence" (1) that a mistake was made, (2) the nature of the mistake, and (3) the bid price actually intended. 53 Comp. Gen. 232 (1973); Michigan Electric, B-190446, March 23, 1978, 78-1 CPD 229.

In addition, our Office has held that where the Government undertakes to bind a bidder to its bid, after notice of a claim of error by the bidder, the Government virtually undertakes the burden of proving that there was no error or that the bidder's claim was not made in good faith. 36 Comp. Gen. 441 (1956); Murphy Brothers, Inc.--Reconsideration, B-189756, December 28, 1978, 78-2 CPD 440. If, therefore, the Government fails to meet this burden, we will find that acceptance of the bid does not consummate a valid and binding contract.

The authority to correct mistakes alleged after bid opening but prior to award has been delegated to the procuring agency and the weight to be given to the evidence in support of an alleged mistake is a question of fact to be considered by the administratively designated evaluator of evidence, whose decision will not be disturbed by this Office unless there is no reasonable basis for the decision. John Amentas Decorators, Inc., B-190691, April 17, 1978, 78-1 CPD 294.

In the present case, the Navy has not processed the alleged mistake in accordance with the applicable regulations. We note that ASPR/DAR § 2-406.3(e)(1) provides that where a mistake in bid is alleged prior to award, the contracting officer is to advise the bidder to make a written request, supported by pertinent documents, indicating its desire to either modify or withdraw the bid. In this connection, the above regulation provides:

" * * * The request must be supported by statements (sworn statements if possible) concerning the alleged mistake and shall include all pertinent evidence such as bidder's file copy of the bid, the original worksheets and other data

used in preparing the bid, subcontractor's quotations, if any, published price lists, and any other evidence which conclusively establishes the existence of the error, the manner in which it occurred, and the bid actually intended." ASPR/DAR § 2-406.3(e)(1).

The Navy, therefore, should first notify Jaybil that it must not only submit a written request indicating whether it wants to correct or withdraw its bid, but that it must also support such request with documents that show that the telegraphic modification was in fact sent by mistake. Upon receipt of Jaybil's documented request, the Navy should then process it in accordance with the appropriate regulations to determine whether the evidence supports correction or withdrawal.

By letter of today, we are informing the Secretary of the Navy of our recommendation.

Accordingly, the protest is sustained.


Deputy Comptroller General
of the United States