

DECISION



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

*Mr. Weiskopf
PLI*

14279

FILE: B-195207

DATE: July 14, 1980

MATTER OF: WestAm Builders & Engineers, Inc.

DIGEST:

*[Protest Against Award of
Construction Contract]*

1. Where there appears to be no applicable state law involving correction of bid, grantee's actions will be reviewed according to basic principles of competitive bidding which apply to Federal procurements.
2. Correction of mistake in bid, alleged after bid opening and prior to award, is proper where grantee could reasonably conclude that bidder showed by clear and convincing evidence existence of error, how it occurred, and intended price. However, because amount of correction does not accurately reflect actual intended bid, GAO recommends that grantee be advised that readjustment of contract price to reflect proper calculations would be appropriate.

WestAm Builders & Engineers, Inc. (WestAm) has requested that we review a construction contract awarded to Martin J. Jaska, Inc. (Jaska) by the Economic Resources Corporation (ERC), Lynwood, California, a private non-profit corporation which was awarded a grant by the Economic Development Administration (EDA) pursuant to the Public Works and Economic Development Act of 1965, as amended, 42 U.S.C. §§ 3121-3246 (1976).

Jaska submitted the low bid at \$809,000, but after bid opening informed ERC that it had omitted costs totaling \$36,787 from its bid. Jaska requested a \$39,384 increase to include these costs plus \$2,597 for profit, overhead, and the increased bond premium. Individual amounts for these three latter items are not indicated in the record.

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Jaska's worksheets contain 13 consecutive items totaling \$35,287 which were not included in the bid. Jaska explained that these items represented supervisory services directly provided by Jaska, and that Jaska solicited subcontract bids for the remaining items. Jaska's bid estimator had to adjust the worksheets as he received bids from potential subcontractors; to avoid repeated addition of the unchanging supervisory costs, he drew a line underneath them and entered the subtotal (which he erroneously calculated as \$36,787) to the left of the column for these items. When the worksheets were turned over to Jaska's controller for the final computation of the bid, the controller only added the subcontractor costs in the base bid column and mistook the first item under the line as being the sum of the 13 supervisory items above.

After reviewing Jaska's worksheets and hearing Jaska's explanation of how the alleged mistake occurred, ERC concluded that the evidence sufficiently established the existence of a mistake and permitted the requested correction. Consequently, with EDA's concurrence, award was made to Jaska at \$848,384. This is \$46,197 less than WestAm's second-low bid.

Jaska acknowledges that the supervisory items only total \$35,287 as opposed to \$36,787 (a difference of \$1,500), but claims that in adding the base bid line items the controller made another error which more than offsets the amount claimed. Jaska alleges that the controller mistakenly added \$500 for an item that was entered as \$5,000 on the worksheets.

WestAm complains that any price increase after bid opening is inconsistent with competitive bidding requirements, and also questions whether Jaska sufficiently established that it in fact made a mistake. WestAm also suggests that EDA's grant rules and regulations preclude an upward correction of a low bid. We are aware of no such prohibition.

The grant agreement here stipulates, among other things, that the grantee must comply with Attachment O

of Office of Management and Budget (OMB) Circular A-110, which states:

"All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition."

We have construed such language as requiring that certain basic Federal principles of competitive bidding, the "Federal norm," must be followed. Copeland Systems, Inc., 55 Comp. Gen. 390, 393 (1975), 75-2 CPD 237. Although Attachment O permits grantees to use their own procurement procedures which must be consistent with state and local law, it is apparent from the record that ERC has no established procedures dealing with mistakes in bids. Moreover, we are not aware of any California law which would be applicable to the correction of bids in a procurement conducted by a non-governmental, i.e., private, organization such as ERC. We therefore will rely upon the "Federal norm" for the resolution of this case. RAJ Construction, Inc., B-191708, March 1, 1979, 79-1 CPD 140.

It is not improper, under the principles inherent in the "Federal norm," to allow a bidder to adjust its bid upward after bid opening but before award. To protect the integrity of the competitive bid system, however, such an adjustment is permitted only where the bidder can show by clear and convincing evidence that an error was made, the manner in which it occurred, and the intended price. F. Hodgson & Sons, B-193531, May 16, 1979, 79-1 CPD 357; Defense Acquisition Regulation (DAR) § 2-406.3(a)(2)(1976 ed.); Federal Procurement Regulations (FPR) § 1-2.406-3(a)(2)(1964 ed.). The bidder must establish the actual bid intended because it would obviously be unfair to other bidders and detrimental to the integrity of the competitive system to allow the bidder, after opening, to first determine what price it should have submitted. Western States Construction Company, Inc., B-191209, August 29, 1978, 78-2 CPD 149.

since the adjustment did not reflect the actual intended direct costs.

As indicated by the worksheets, Jaska intended to include in its bid costs of \$35,287, and not the mistaken subtotal of \$36,787. In this regard, Jaska may not setoff the difference against the alleged mistake of \$4,500 made by its controller because Jaska did not raise this mistake until after award. It is a fundamental principle of competitive bidding that relief may be granted for a unilateral mistake alleged after award only if the contracting officer had either actual or constructive knowledge of the mistake prior to award, see John W. Logan, B-196494, December 26, 1979, 79-2 CPD 434; DAR § 2.406.4(b); FPR § 2.406-4(c), or if the contractor accepted the award reserving the right to obtain correction for the alleged mistake. Contra Costa Electric, Inc.--Reconsideration; Carl W. Olson and Sons Co., B-192752, August 6, 1979, 79-2 CPD 79. Since there is no evidence that ERC had such knowledge of this error, or that Jaska reserved the right to raise the mistake after award, the mistake alleged after award cannot be considered.

[As the correct figure for omitted costs is \$35,287, any correction must be based on that figure. See AAA Engineering & Drafting, Inc., B-191658, June 23, 1978, 78-1 CPD 460. The worksheets show that Jaska added \$50,000 for profit and overhead to its total direct costs of \$759,000 in the original bid. Applying the same rate of markup to the \$35,287 of omitted costs, the increased profit and overhead should be \$2,325, for a total of \$37,612. The \$50,000 worksheet figure for markup might be a rounded figure based on a percentage markup or an amount Jaska intuitively regarded as being competitive. This uncertainty raises some question as to what extent the bidder would have relied upon the omitted costs to modify its markup. However in Chris Berg, Inc., supra, the court held that such

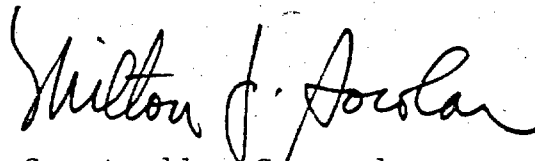
uncertainty does not preclude the reformation of a contract to correct a mistake in bid (including markup), and explained:

"One must be willing to believe the evidence is 'clear and convincing' on the basis of a reasonable probability that the markup on the higher costs would be computed in the same way it was on the mistaken lower ones."

Although Jaska requested correction to reflect increased bonding expenses, the worksheets do not show whether or not fixed percentages were used in calculating the amount of bond premium, and there is no other evidence of record concerning what the bond premium should have been. Consequently, we cannot determine with certainty what this aspect of the intended bid would have been absent the mistake. See 51 Comp. Gen. 503, 506 (1972).

We are recommending that grantor agency advise the grantee that adjustment of the Jaska contract to reflect the correct calculations would be appropriate.

The complaint is denied.



For The Comptroller General
of the United States



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

B-195207

July 14, 1980

The Honorable Philip Klutznick
The Secretary of Commerce

Dear Mr. Klutznick:

We are enclosing a copy of our decision of today concerning WestAm Builders & Engineers, Inc.'s complaint that an Economic Development Administration grantee -- the Economic Resources Corporation, Lynwood, California -- improperly allowed Martin J. Jaska, Inc. (Jaska), the low bidder, to correct a mistake alleged after bid opening. The correction increased Jaska's bid by \$39,384.

We find that while the grantee properly permitted bid correction, the amount of the correction was inappropriate. We recommend that you advise the grantee that adjustment of the contract price to reflect the contract calculations, as indicated in our decision, would be appropriate.

Sincerely yours,

A handwritten signature in cursive script, reading "Milton J. Fowler", is written over the typed name.

For The Comptroller General
of the United States

Enclosure