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K. H. ...

DECISION



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

FILE: B-205482

DATE: April 22, 1982

MATTER OF: PK Contractors, Inc.

DIGEST:

1. GAO will not disturb a contracting agency's determination to allow the low bidder to correct its bid to an amount still below the next low bid where the agency reasonably concluded that the bidder presented clear and convincing evidence of the mistake and of the bid actually intended.
2. Where a low bidder claims a mistake in its bid before award, and requests upward correction to the bid price allegedly intended, which is below the second low bid, the closer the intended bid is to the next low bid the more difficult it will be to establish clearly and convincingly that the amount claimed was the bid actually intended.

PK Contractors, Inc. protests the Department of the Interior's decision to permit A&H Underground Construction Co. to correct a mistake in bid that was alleged after bid opening under invitation for bids (IFB) No. 8400-81A. PK contends that there is a strong possibility that A&H fabricated new estimating worksheets to prove its mistake and thereby increase its low bid to an amount just below that of PK, the second low bidder.

We deny the protest.

Bids in response to the IFB, which was for sewerage and power systems improvements at Lassen Volcanic National Park in California, were opened on August 6, 1981. A&H submitted the low bid of \$1,697,400, followed by PK's bid of \$2,130,541. On August 10, A&H called the contracting officer claiming a mistake in

its bid, specifically in solicitation line items 11, 12 and 13 (there were 50 line items) involving trench excavation, bedding, and backfill work. A&H informed Interior that its mistake was due to an error in the pagination of its 28 worksheets in that it incorrectly numbered two pages as "sheet 8." According to A&H, one of the sheet 8 worksheets, which concerned line items 11, 12 and 13, was overlooked in computing the final bid amount. In support of its mistake claim, A&H furnished to Interior its certified original worksheets, written quotations from suppliers and subcontractors, original estimate sheets, and a revised estimate sheet.

Upon studying A&H's submissions, Interior found that A&H's elements of cost for items 11, 12 and 13 began on sheet 7 and continued through sheet 9 of the firm's worksheets. The elements of cost for these items appearing on sheet 7, the first sheet 8, and sheet 9 were totaled on sheet 9, and that total figure was transferred to A&H's estimate summary sheet which was used in the final preparation of the bid. The estimates of other costs for items 11, 12 and 13 that appeared on the second sheet 8, however, erroneously were not included in the sheet 9 total or, therefore, on the estimate summary sheet. Interior determined that as a result of this failure to consider the cost figures on the second sheet 8 A&H mistakenly omitted from its bid \$355,134 in direct costs, overhead and profit. Interior concluded:

"[A] review of A and H's working papers, discussions with the contracting officer and with A and H's estimator, yields clear and convincing evidence of both a mistake in the bid submitted, and of what the intended bid amount was. In addition, the bid as corrected and uncorrected is the lowest bid received * * *. Therefore, * * * A and H * * * may be allowed to correct its original bid from * * * \$1,697,400 to \$2,052,534 * * *."

A firm that requests correction of its bid based on an error alleged after bid opening but prior to award must submit clear and convincing evidence that an error has been made, the manner in which the error occurred, and the intended bid price. Federal Procurement Regulations § 1-2.406-3(a)(2) (1964 ed.); see Ace-Federal Reporters, Inc., 54 Comp. Gen. 340, 344 (1974), 74-2 CPD 239. Since the authority to correct such mistakes has

been delegated to the procuring agency, and because the weight to be given to the evidence in support of an alleged mistake is a question of fact, our Office will not disturb the decision of the agency's evaluator of the evidence unless the decision has no reasonable basis. J.W. Creech Inc., B-191177, March 8, 1978, 78-1 CPD 186. Upon inspection of A&H's work papers and review of Interior's analysis of the mistake claim, we believe Interior's determination to permit upward modification of A&H's bid is reasonable.

The thrust of PK's objection to the upward correction of A&H's bid is directed at the evidence upon which Interior's mistake-in-bid determination was based; PK suggests that A&H may have fabricated the evidence necessary to support its mistake claim. Although PK concedes that this is conjecture, its suspicion is based primarily on its belief that (1) A&H had the time to "manufacture" fraudulent worksheets because it allegedly was dilatory in claiming the mistake and in providing Interior with documentation to support its claim, and (2) the second sheet 8 worksheet was "conveniently loaded" with excessively high costs for items 11, 12, and 13 that raised A&H's bid to just under PK's second low bid. In this respect, PK suggests that permitting correction of a low bid to just below the next low bid encourages an unethical bidder to bid extremely low and, upon learning its competitors' prices, declare a mistake in its bid and secure an award in any amount up to the second low bid.

We recognize that the correction of bid mistakes presents a vexing problem with regard to the possibility of fraud. It has been argued that bid correction after bid opening and the disclosure of prices compromises the integrity of the competitive bidding system, which to some extent, at least, is true. Nonetheless, there are cases in which bid correction should be permitted; where the evidentiary requirements and regulatory procedures for bid correction are strictly followed, the United States should have the cost benefit of a corrected bid if it is still low. See 48 Comp. Gen. 748 (1969). The potential for abuse flowing from a decision allowing correction is protected against by the high standard of proof necessary before correction is permitted. See John Amentas Decorators, Inc., B-190591, April 17, 1978, 78-1 CPD 294.

We do not believe PK's specific reasons to suspect fraud are well-founded here. First, we find nothing unreasonable or dilatory in the amount of time it took A&H to allege a mistake after bid opening. A&H notified Interior of its mistake less than two business days after bid opening. Furthermore, A&H submitted the evidence supporting the mistake claim less than two days after Interior requested it.

Second, with regard to PK's concern that the increase of \$355,134 for the three line items in question was excessive and unreasonable, we have held that the pertinent inquiry for an agency reviewing a mistake claim is whether the claimant actually intended to bid the additional amount, and not whether the amount appears high. Brendle Sprinkler Company, Inc., B-202971, July 15, 1981, 81-2 CPD 39. A&H has presented clear and convincing evidence of its intended bid price. Also, A&H has provided a plausible explanation for the apparently high costs indicated on the second sheet 8 by pointing out that the costs represent such high dollar expenses as the rental of a rock crusher, the excavation of 15,300 feet of trench and the operation of a rock processing plant, items which other bidders may not have included, or which are reflected elsewhere in their bids.

Finally, concerning PK's complaint that allowing correction of a low bid to an amount close to the next low bid encourages unethical conduct by low bidders, the requirement that corrections be limited to those cases where the evidence clearly and convincingly establishes the existence of a mistake and the bid actually intended serves as a safeguard against this type of abuse. In effect, the closer an asserted intended bid is to the next low bid, the more difficult it is to establish that the amount claimed clearly was the bid actually intended. See R. H. Whelan Co., B-203248, August 11, 1981, 81-2 CPD 123. For that reason, correction indeed often is disallowed where a corrected bid would come too close to the next low bid. See, e.g., Asphalt Construction, Inc., 55 Comp. Gen. 742 (1976), 76-1 CPD 82, where we denied correction that would have brought the total corrected bid to within one percent of the next low bid.

In this case, however, A&H's corrected bid of \$2,052,534 remains \$78,007, or nearly 4 percent, less than PK's second low bid of \$2,130,541. Moreover, we believe that Interior reasonably has determined that the evidence discussed above

is clear and convincing as to A'H's intended bid, and we have no basis to conclude that the evidence was fabricated. Since the standard for bid correction thus has been met, we cannot object to Interior's decision to allow A&H to correct its bid.

The protest is denied.

Milton J. Fowler
for Comptroller General
of the United States