

## DECISION



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

FILE: B-213894

June 14, 1984

MATTER OF: Mid-South Electric Co., Inc.

## DIGEST:

1. Where a protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening is not filed until after opening, the protest is untimely under GAO Bid Protest Procedures, 4 C.F.R. § 21.2(b) (1), and will not be considered on the merits.
2. Where IFB for three construction projects provided that three contracts, one for each project, would be awarded, agency properly refused correction of alleged mistake of bidder whose combined prices for all three projects was low but who had failed to comply with IFB instructions for allocating certain costs among the projects, because correction of the error would displace another bidder otherwise in line for award of two of the projects and the mistake and intended bid were not ascertainable from the bid documents but only from the protester's post-bid opening explanation and worksheets.

Mid-South Electric Co., Inc., protests any award to Sippial Electric Co. for project Nos. 80-1070, 80-1210 and 680-073 under an invitation for bids issued by the Veterans Administration Medical Center, Tuskegee, Alabama, for general rewiring and the installation of nurse call and radio distribution systems. Mid-South appeals the VA's refusal to permit correction of its bid and contends that as the apparent overall low bidder it is entitled to an aggregate award for all three projects. We dismiss the protest in part and deny it in part.

As originally issued, the IFB requested bids on a base item which included the general rewiring of buildings No. 44, 50, 68 and 69 at the medical center and the installation of nurse call and radio distribution systems in building Nos. 3, 3A, 4, 4A, 44, 50, 68 and 69, as well as on six alternate deductive items. By amendment No. 2, the

VA re-divided the work into three "projects": project No. 80-1070 for rewiring building Nos. 68 and 69; project No. 80-1210 for rewiring building Nos. 44 and 50; and project No. 680-073 for nurse call and radio distribution systems in building Nos. 3, 3A, 4, 4A, 44, 50, 68 and 69 and radio systems in buildings 5 and 90. For each of the three projects, the bid schedule included an "Item 1" or "base bid" which included all the work for that project, plus three deductive alternate items. The VA neither asked for, nor did Mid-South submit, a single, overall total bid price for all three projects. The award statement for the amended solicitation provided that:

"A single award will be made on ITEM 1 of each project. Should the offer exceed the funds available, award will be made on any combination of Alternates for each project as selected by the V.A. Medical Center. The V.A. reserves the right to award three contracts based on any combination of base bids and/or any alternates to the best advantage of the V.A. OFFERORS MUST QUOTE A PRICE ON EACH ITEM LISTED."

By amendment No. 3, the VA further instructed bidders to include within the third project certain work shown on the drawings for the other two. Under this amendment, adjacent to project Nos. 80-1210 and 80-1070 were asterisks which referenced the following "Note" pertaining to the solicitation's drawings:

"All work on these drawings pertaining to furring, ceiling, partitions, doors, frames, hardware, painting, miscellaneous demolition, moving and relocation of patients, and cutting and patching shall be included in bid and bid alternates for Project No. 680-073."

Similarly, a double asterisk beside project No. 680-073 referenced a "Note" which stated:

"This project shall include all cost for all work pertaining to furring, ceiling, partitions, doors, frames, hardware, painting,

miscellaneous demolition, moving and relocation of patients, and cutting and patching for all buildings included in all projects."

The VA has advised us that the work was divided into three projects in order to allocate among different appropriation accounts the cost of the work properly chargeable to each. That is also the rationale for the IFB's award statement, quoted above, which contemplates the award of three separate contracts. We also are advised by the VA that the reason it issued amendment No. 3, transferring certain demolition and reconstruction-type work from two of the projects to the third one, is that project Nos. 80-1070 and 80-1210 use existing conduit and therefore do not require as much of that type of work as does project No. 680-73, which requires the installation of new conduit. By concentrating such work in project No. 680-73, the VA states, all or most of the demolition and similarly disruptive work will be performed at the same time.

As we explain more fully below, Mid-South's alleged mistake is that it failed to follow the instructions contained in the amendment No. 3 notes for placing certain work within the third project.

In response to the IFB, the VA received three bids with the following prices for "Item 1" or the "base bid":

<u>Bidder</u>	<u>Project 80-1210</u>	<u>Project 80-1070</u>	<u>Project 680-073</u>
Sippial	\$388,258	\$467,457	\$550,000
Mid-South	499,999	518,966	345,228
Montgomery Const.	566,140	627,979	892,608

As indicated above, the VA intends to award three contracts, each for "Item 1" or the "base bid" for each project. Although the solicitation did not request of bidders a total price for all three projects, the sum of the above figures for each bidder is:

Mid-South	\$1,364,193
Sippial	1,405,715
Montgomery Const.	2,076,727

Noticing the disparity in bid prices for project No. 680-073, the contracting officer suspected a mistake in Mid-South's bid and accordingly requested verification. Mid-South responded that it indeed had made a mistake in its bid, not only for project No. 680-073, but also for the other two projects. Although Mid-South had acknowledged receipt of amendment No. 3, it claimed that it had failed to take into account the re-allocation of work imposed by the amendment, and that accordingly, instead of pricing the work described in amendment No. 3 and which appeared to relate to project Nos. 80-1070 and 80-1210 in the bid for project No. 680-073 as required by the amendment, it priced that work in the bid for each project to which it appeared to relate.

On the basis of worksheets submitted by Mid-South in support of its claim, the VA determined that Mid-South's bid for project No. 80-1070 included work costing \$110,534, exclusive of overhead and profit, which should have been allocated to project No. 680-073. Similarly, Mid-South's worksheets for project No. 80-1210 reflected work costing \$118,446, exclusive of overhead and profit, which by the terms of amendment No. 3 should have been associated with project No. 680-073. In other words, Mid-South had failed to transfer almost \$229,000 worth of work from the first two projects to the third project, as directed by amendment No. 3. Since a correction of Mid-South's bid price for these two projects by subtracting the above sums would displace Sippial as the apparent low bidder, the VA determined that it could consider neither the worksheets nor Mid-South's post-bid opening statements in deciding whether to permit correction of Mid-South's bid for the projects. Since it found that the intended bid for the two projects could not be ascertained from the remaining evidence, the VA decided to permit the withdrawal, but not the correction, of Mid-South's bid for project Nos. 80-1070 and 80-1210. As for project No. 680-073, the VA found that the

correction of Mid-South's bid for this project by the addition of the \$228,980 in costs mistakenly allocated to project Nos. 80-1070 and 80-1210 resulted in a bid totaling \$574,208, or \$24,208 in excess of Sippial's bid for that project, and thus Mid-South's bid would no longer be low. The VA therefore intends to award three separate contracts to Sippial, one for each project.

In addition to asserting a mistake-in-bid claim, Mid-South protested to the VA the re-allocation of the work directed by amendment No. 3, claiming that the coordination of, and the division of responsibility among, different contractors would be impracticable. Mid-South contended that the work described in amendment No. 3 could only be performed under the contract for the "new electrical work" and concluded that therefore one contractor should be awarded the contracts for all three projects. When the VA denied its protest, Mid-South protested the denial and the VA's decision regarding its mistake-in-bid claim to our Office.

We will not consider the merits of Mid-South's contention that it is impracticable to make separate awards for each project. Under our Bid Protest Procedures, a protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening in order to be considered on the merits. 4 C.F.R. § 21.2(b)(1) (1984). Since amendment No. 2 clearly warned bidders that the VA reserved the right to make a separate award for each project and since the allocation of work on furring, ceilings, partitions, etc. was clearly set forth in amendment No. 3, Mid-South's failure to protest before opening renders its protest in this regard untimely. See Lazos Construction Company, Inc., R-211966, Aug. 11, 1983, 83-2 CPD ¶ 201.

As for Mid-South's alleged mistake-in-bid, we note that a bidder who seeks correction of an error in his bid alleged prior to award must submit clear and convincing evidence showing that a mistake was made, the manner in which the mistake occurred, and the intended bid price. Since the authority to correct mistakes alleged after bid opening but prior to award is vested in the procuring agency, and because the weight to be given the evidence in support of an asserted mistake is a question of fact, we

will not disturb an agency's determination concerning bid correction unless there is no reasonable basis for the decision. See D. L. Draper Associates, B-213177, Dec. 9, 1983, 83-2 CPD ¶ 662; G.N. Construction, Inc., B-209641, June 2, 1983, 83-1 CPD ¶ 598.

We have found worksheets in themselves to be clear and convincing evidence if they are in good order and indicate the intended bid price, and there is no contravening evidence. See G.N. Construction, Inc., *supra*. Nevertheless, where correction would displace the low bidder, we have held that a contracting agency may not determine a bidder's intended bid using worksheets and statements provided by the bidder. Instead, we generally have examined the degree to which it is clear from the invitation or from the bid itself, the range of the other bids, or from logic or experience, that the asserted bid is the only reasonable interpretation. See Marine Ways Corporation, B-211788, August 29, 1983, 83-2 CPD ¶ 271; Custom Metal Fabrication, Inc., B-209692, April 7, 1983, 83-1 CPD ¶ 372.

If these principles are applied to the bids for each project, the analysis leads to the rejection of Mid-South's bid as the VA has proposed. Mid-South's worksheets show that its bids for project Nos. 80-1070 and 80-1210 include costs of \$110,534 and \$118,446, respectively, which by the terms of amendment No. 3 should have been transferred to project No. 680-073. Were these amounts to be deducted from Mid-South's bids on the first two projects, its bids would be lower than Sippial's as to each of them. The nature of the mistake and the correct<sup>1</sup> bid prices, however,

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<sup>1</sup> One must give Mid-South some benefit of the doubt to say its "correct" bid prices for each project are ascertainable from its worksheets. This is because the "overhead and profit" factor Mid-South applied to its costs under project Nos. 80-1070 and 80-1210 is almost 30 percent higher than the factor it applied to project No. 680-073. Had Mid-South followed the instructions in amendment No. 3 and transferred almost \$229,000 worth of work from the first two projects to the third we do not know how its calculation of overhead and profit for each project may have been affected.

can be ascertained only with the aid of Mid-South's worksheets and the explanation it provided after bid opening which, as we stated above, is not permissible when correction of a mistake would displace a lower bidder. As for Mid-South's bid on project No. 680-073, given the clear evidence of mistake, the bid on the project was required to be rejected as mistaken. See Hughes & Smith, Inc., B-209870, March 22, 1983, 83-1 CPD ¶ 289.

Mid-South has not refuted the facts as presented by the VA (although the protester states there are "discrepancies" between the VA's report and statements made by its representatives at the time of bidding, it has not explained what those discrepancies are) nor has the protester shown that the VA is incorrect in its explanation of the rules governing the correction of mistakes in bids. The protester's position simply is that if the VA intends to have performed all the work covered by the solicitation it would save \$41,522 by making a single, aggregate award to the protester instead of awarding three contracts, one for each project, to Sippial. "No mistakes [would be] involved" in an aggregate award to it, the protester states: we assume by this the protester means that its mistake was not one of calculation but of allocating work among the three projects as directed by amendment No. 3, and therefore its total cost for performing all the work encompassed by the three projects was unaffected by the error.<sup>2</sup>

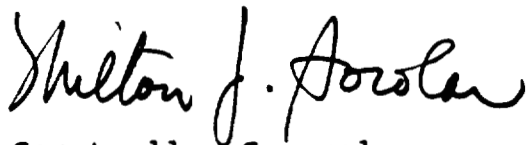
We note, however, that the solicitation advised bidders that three awards, one for each project, would be made and that an aggregate price for all three projects was not even solicited. It is well established that the award of a contract pursuant to advertising statutes must be made on the same terms as offered to all bidders. See Northeast Construction Company, 61 Comp. Gen. 317 (1982), 82-1 CPD 293.

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<sup>2</sup> This argument does not take into account the fact that the percentage for "overhead and profit" which Mid-South added to its costs was not the same for all three projects.

Absent Mid-South's claim of mistake, when bids are evaluated consistent with the solicitation, Sippial would receive award of project Nos. 80-1070 and 80-1210 and Mid-South of project No. 680-073. As a result of Mid-South's alleged mistake, the VA is now faced with the choice of awarding all the work to Sippial or all the work to Mid-South at a lower price. In the latter event, of course, Sippial no longer would receive the award of contracts for two projects for which it had been the low bidder: it would be displaced, in a very real sense, despite Mid-South's argument that the total cost of contracting with Mid-South for all of the work is unchanged by Mid-South's error. The displacement of Sippial as the low bidder would be legally permissible if the error and Mid-South's intended bid could be ascertained from the bid documents themselves; they cannot, and it is necessary to accept Mid-South's post-bid opening explanation and its worksheets to do so. Since this cannot be done under the law governing the correction of mistakes in bids, we do not find unreasonable the VA's determination to award all three projects to Sippial.

The protest is denied.

*for*   
Comptroller General  
of the United States