

**DECISION**

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

10/19/84  
PK-II  
29890

**FILE:** B-215973

**DATE:** November 30, 1984

**MATTER OF:** PNM Construction, Inc.

**DIGEST:**

1. Where bidder claimed that it had incorrectly totaled the estimated costs of performance on its worksheets and had then discounted the resulting totals in order to obtain the bid price, the inability to ascertain what the discount would have been had the bidder known the correct totals would not, by itself, have justified the agency's refusal to permit correction, since the probable upper range of uncertainty--that is, no discount at all--would still have left the bid substantially below the next low bid.
2. Agency did not lack a reasonable basis for finding that evidence of the asserted mistake, of the manner in which the mistake occurred and of the intended bid price was not the clear and convincing evidence required for correction. Bidder's explanation that the estimated costs of performance had been incorrectly added on the worksheets used to prepare the bid was questionable because the worksheets and the affidavits submitted by the bidder suggest that the bidder in fact knew the correct totals.
3. Bidder was not denied an adequate opportunity to present its mistake-in-bid claim where the request for verification revealed the substantial disparities between the bids and between the government estimate and the mistaken bid and where the bidder did not submit its claim and supporting documents until 12 days after discovering the nature of the alleged mistake and being notified of the verification request.

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4. Despite the immediate cost savings available under the bid if corrected, it would have been contrary to the maintenance of the integrity of the competitive bidding system to have permitted correction since the agency reasonably concluded that the evidence submitted or otherwise available did not constitute the clear and convincing evidence required for correction of the mistake in bid.
5. Agency did not act improperly in accepting a late modification of the otherwise successful bid since reduction in price benefited the government and acceptance of the reduction did not affect the relative standing of the bidders.
6. Alleged agency failure to follow regulations concerning the making of an award notwithstanding the pendency of a protest does not affect the validity of the otherwise proper award.

PNM Construction, Inc., protests the award of a contract to Titan Construction Co., Inc., under invitation for bids No. F28609-84-B-0009, issued by the Department of the Air Force for alterations and repairs to the learning center at McGuire Air Force Base in New Jersey. PNM alleges that the Air Force improperly refused to permit correction of a mistake in PNM's low bid and instead made award to the next low bidder, Titan. We deny the protest.

The Air Force received 18 bids in response to the solicitation. Although the work to be performed under the specifications had been divided into two bid items for each of which the bidder was requested to indicate a price, the solicitation provided that the government would make only one aggregate award. PNM submitted the apparent low aggregate bid of \$221,900, or \$68,000 for item No. 1 and \$153,900 for item No. 2. Titan submitted the apparent second low bid of \$272,222, or \$69,700 for item No. 1 and \$202,522 for item No. 2. The remaining bids ranged from \$282,000 to \$392,000.

Since PNM's aggregate bid was 18.49 percent less than the bid submitted by Titan and 14.39 percent less than the government's estimate of \$259,200, the contracting officer considered PNM's bid to be unreasonably low and, accordingly, requested PNM to verify the bid. PNM subsequently submitted a mistake-in-bid claim, alleging that it had incorrectly added its estimated costs on the worksheets used to prepare its bid. It requested that its bid price be corrected upward to \$251,900, an increase of \$30,000.

After considering the evidence submitted by PNM in support of its claim, including worksheets, affidavits and quotations from potential suppliers and subcontractors, the contracting officer found the evidence concerning the mistake to be sufficient to permit withdrawal, but not to be the clear and convincing evidence of the intended bid price required for correction. The Air Force therefore made award to Titan and PNM filed this protest with our Office.

PNM protests the refusal of the Air Force to permit correction of its bid, contending that it demonstrated by clear and convincing evidence the intended bid price.

In support of its mistake-in-bid claim, PNM submitted to the Air Force the worksheets allegedly used to prepare its bid. The worksheet for item No. 1 contains entries for 10 estimated costs of performance, including seven enumerated lump-sum cost entries totaling \$60,690 followed by three percentage-based cost entries--a 15-percent "Labor Comp." cost of \$5,250, a 20-percent office and profit cost of \$16,800, and a 1.5-percent performance bond cost of \$1,260--totaling an additional \$23,310. Although, in fact, these 10 entries totaled \$84,000, the worksheet indicates a total of only \$74,000. Likewise, the worksheet for item No. 2 contains 15 entries, including 12 enumerated lump-sum cost entries totaling \$127,795 followed by three percentage-based cost entries--a 15-percent labor compensation cost of \$10,500, a 20-percent office and profit cost of \$34,980 and a 1.5-percent performance bond cost of \$1,625--totaling an additional \$47,105. Although, in fact, these 15 entries total \$174,900, the worksheet indicates a total of only \$154,900. The worksheets further appear to indicate that PNM then calculated its total bid of \$221,900, incorrectly

written as \$121,900 on one of the worksheets, by first discounting the estimated costs for item No. 1 by \$6,000 and those for item No. 2 by \$1,000, and then adding the resulting totals.

PNM also submitted to the Air Force affidavits from its estimator and from its president. PNM's estimator stated that although he had prepared the worksheets, he "never totaled the bid line items individually or both of them together nor did I know what the final bid submitted . . . was until . . . after the bid opening . . ." PNM's president indicated that he had agreed to handle preparation of the bid on his own and confirmed that "[e]ach individual bid item on the Estimate Sheets had not been totaled" when he received the worksheets. Instead, said the president, he had totaled the "sums for the individual items" shortly before bid opening, arriving at the incorrect totals of \$74,000 in estimated costs for item No. 1 and \$154,900 in estimated costs for item No. 2. He explained that he discounted the estimated costs for item No. 1 by \$6,000 and the costs for item No. 2 by \$1,000 and then added the estimated cost totals for both items in order to arrive at the bid price of \$221,900.

The Air Force, however, found sufficient discrepancies and uncertainties in PNM's worksheets and explanation of the mistake to render the bid intended uncertain. In particular, the Air Force noted that the amount of the 20-percent office and profit entries for both items was based upon 20 percent of the correct total of the estimated cost entries on the worksheets. Since PNM, therefore, apparently must have known the correct total for each item in order to arrive at the office and profit entries, the Air Force considered these entries inconsistent with PNM's claim that the totals were incorrectly added. Moreover, contracting officials believed that PNM's version of events, i.e., the claim by its estimator in the affidavit submitted to the Air Force that he had "never totaled the bid line items individually," to be further impeached by what appeared to them to be the still visible traces of partially erased subtotals in the amounts of \$60,690 and \$127,795, the correct subtotals for the seven enumerated lump-sum entries for item No. 1 and the 12 such entries for item No. 2, on the worksheets. We note that PNM's president now admits that "[t]here may have been some subtotaling accomplished and erased" by the estimator and the

estimator now admits that "[i]n my work-up of this bid I did use subtotals," although both maintain that to the "best of my recollection" the worksheets used by the president did not have subtotals written on them.

The Air Force also concluded that the intended bid price was further rendered uncertain by the failure of the worksheets and the affidavits submitted to the Air Force to indicate the means by which the discounts were calculated, since it was, therefore, impossible to ascertain whether and by how much the discounts would have differed had the correct totals of the estimated cost entries been known. We note in this regard that although PNM has subsequently explained in affidavits submitted to our Office that the estimate for item No. 2 was more heavily discounted because it required more extensive subcontracting for types of work in which PNM had little experience, this explanation was neither apparent when the Air Force was considering PNM's mistake-in-bid claim nor, in any case, of much value in determining the discount that would have been taken if PNM had known that the estimated costs were \$30,000 higher than indicated.

An asserted mistake in bid alleged prior to award may be corrected where there exists clear and convincing evidence that a mistake was made, of the manner in which the mistake occurred, and of the intended bid price. See Franco, B-214124, May 1, 1984, 84-1 CPD ¶ 488; D. L. Draper Associates, B-213177, Dec. 9, 1983, 83-2 CPD ¶ 662; see also Defense Acquisition Regulation (DAR) § 2-406.3(a), reprinted in 32 C.F.R. pts. 1-39 (1983). 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 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 was no reasonable basis for the decision. See Franco, B-214124, supra, 84-1 CPD ¶ 488 at 6; D. L. Draper Associates, B-213177, supra, 83-2 CPD ¶ 662 at 3. Generally, worksheets may constitute clear and convincing evidence if they are in good order and indicate the intended bid price and there is no contravening evidence. See Franco, B-214124, supra, 84-1 CPD 488 at 6.

The uncertainty as to whether PNM would have discounted its cost estimates by the same amount had the employees responsible for preparing its bid known that the correct total of the estimated cost entries was \$30,000 more than that indicated would not, by itself, have been sufficient to prevent correction. The likely range of uncertainty is narrow because the probable upper range of uncertainty, that is, no discount at all, would still have left PNM's bid substantially below the next low bid. We do not believe that the presence of such a narrow range of uncertainty is inconsistent with the clear and convincing evidence required for correction. See Dadson Corp., B-210413, June 7, 1983, 83-1 CPD ¶ 618.

However, we agree that basing the estimate of the office costs and profit upon the correct total of all the estimated costs, for each bid item, when considered in conjunction with the purported traces of the correct subtotals, raised significant, unanswered questions in regards to PNM's explanation as to how the alleged mistake occurred and as to the bid price actually intended.

Moreover, these apparent discrepancies or uncertainties were not eliminated by reference to worksheets prepared in response to other solicitations and quotations from potential suppliers and subcontractors, both of which were provided by PNM in support of its request for correction. Although the worksheets for other projects indicated that PNM had calculated profit as a percentage of the total estimated costs, including profit and other percentage-based cost estimates, for those projects as well as here, this in no way diminishes the possibility that the PNM personnel who prepared the bid here were in fact aware of the correct total of the estimated cost entries. As for the quotations submitted by PNM, it is unclear which of them were relied upon for some cost entries and for other entries no quotation appears relevant. At best, the quotations seem to substantiate some of the estimated costs. They in no way resolve whether PNM intentionally bid \$30,000 less than its estimated costs (plus profit) in order to become the low bidder.

As we indicated above, the question presented to our Office is solely whether the agency had a reasonable basis for finding the evidence of PNM's mistake, the manner in which it occurred and the intended bid price to be less than clear and convincing. It is not whether our Office would have reached the same conclusion had we reviewed the evidence de novo. Nor is it whether the evidence is also reasonably susceptible to an interpretation generally consistent with PNM's explanation of the mistake and the intended bid.

Given the significant and substantially unexplained discrepancies and uncertainties in the evidence available to the Air Force when it denied correction of PNM's bid, we are unable to conclude that the Air Force lacked a reasonable basis for finding that the evidence required for bid correction was not present. Since the disparity in prices and the statements and worksheets submitted by PNM reasonably indicated, however, that a mistake had been made in PNM's bid, we believe that the Air Force acted properly in permitting PNM to withdraw the bid. See Franco, B-214124, supra, 84-1 CPD ¶ 488 at 9; Pneumatic Construction Co., B-207871, Aug. 31, 1982, 82-2 CPD ¶ 193.

We note that PNM considers the opportunity afforded it to present its mistake-in-bid claim to have been inadequate. It alleges that the Air Force in the request for verification failed to notify PNM that it considered its bid to be unreasonably low. It further contends that it was unable to provide all the evidence relevant to the claim because PNM was allowed little time in which to prepare the affidavits submitted to the Air Force and was not given the opportunity to clarify them.

The request for verification, however, reasonably indicated that PNM's bid was substantially less than the next low bid and the government estimate. Moreover, it is clear from the record that PNM understood the nature of its alleged mistake at least as early as March 23, 1984, the day on which the president of PNM reportedly discovered the mistake and the day on which the Air Force notified PNM of the request to verify its bid. See DAR § 2-406.3(e)(1); cf. Y. T. Huang and Associates, Inc., B-192169, Dec. 22, 1978, 78-2 CPD ¶ 430 (verification request inadequate where

disparity in bid prices was the basis for the request but the agency did not inform the bidder of the amount of the other bids, the large disparity between the low bid and the next low bid, or the amount of the government's estimate). Since PNM did not submit its claim with the supporting documents until April 4, 12 days later, and since the alleged mistake was of a relatively simple character, we are not convinced that PNM lacked a reasonable time in which to submit its claim. Cf. Porta-Kamp Manufacturing Co., Inc., 54 Comp. Gen. 546 (1974), 74-2 CPD ¶ 393 (8 days sufficient time in which to review bid for possible mistakes). As for an opportunity to clarify the affidavits, PNM had this when it initially prepared its mistake-in-bid claim, and we are unaware of any requirement that the agency afford PNM a subsequent, additional opportunity.

PNM observes that the refusal of the Air Force to permit it to correct its bid denied the government the cost savings available under the bid. However, since we conclude that the Air Force reasonably found that the evidence submitted by PNM or otherwise available failed to meet the standard required for bid correction, we believe that it would have been contrary to the maintenance of the integrity of the competitive bidding system, nevertheless, to have permitted PNM to correct its bid. See Ecological Water Products, Inc., B-199154, Sept. 30, 1980, 80-2 CPD ¶ 232.

PNM further observes that award was made to Titan at a price other than Titan's bid price. In its original bid, Titan offered to perform the required work for a total price of \$272,222. By a telegraphic modification sent by Titan prior to bid opening but received by the Air Force after bid opening, Titan reduced its bid price by \$4,000. The Air Force subsequently made award to Titan at a price of \$268,222.

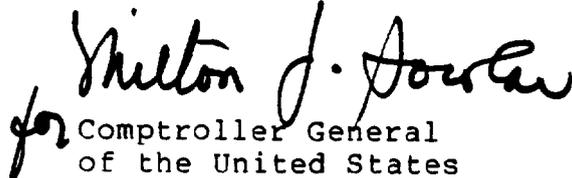
This was not improper. The solicitation provided that a late modification of the otherwise successful bid which makes its terms more favorable to the government may be accepted. Given the agency's refusal to permit correction of PNM's bid, Titan was the apparent low bidder prior to the price reduction. Accordingly, acceptance of the reduction did not affect the relative standing of the bidders

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and thus was not improper. See JEM Development Corp., B-209707, Apr. 22, 1983, 83-1 CPD ¶ 444.

Finally, PNM complains that the Air Force improperly made award to Titan after receiving notice of PNM's protest and in the absence of any emergency. However, an agency's failure to follow the regulations concerning the making of an award notwithstanding the pendency of a protest does not affect the validity of an otherwise proper award. See E.S. Edwards & Son, Inc.; Koch Corp., B-212304, B-212304.3, June 18, 1984, 84-1 CPD ¶ 631.

The protest is denied.

  
for Comptroller General  
of the United States