

**DECISION**



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

**FILE:** B-216728 **DATE:** February 1, 1985  
**MATTER OF:** Sam Gonzales, Inc.

**DIGEST:**

Agency's refusal to permit upward correction of the protester's low bid is reasonable and will not be disturbed by GAO where: (1) the protester's worksheets show that a higher overhead rate was applied to roofing work allegedly omitted from the original bid price than was applied to roofing work included in the original bid price; (2) the correction requested would bring the protester's bid to within 2.5 percent and \$6,158 of the next low bid; and (3) the correction would increase the original bid by 50 percent.

Sam Gonzales, Inc. (Gonzales), protests the United States Army Corps of Engineers' refusal to allow an upward correction of its bid, and the subsequent award of a contract to Samuel C. Rosner, General Contractors (Rosner), under invitation for bids (IFB) No. DACA31-84-B-0106. We deny the protest.

The IFB called for "Alterations to Building 469, Alterations to Roof, Building 469," at Fort Meyer, Arlington, Virginia. Two amendments were issued, Amendment 0001 adding further roofing work. Of seven bids timely received and opened on September 12, 1984, Gonzales' was low at \$159,574, and Rosner's was second low at \$244,357. The government's estimate was \$268,546. The Army requested in a September 13 telegram that Gonzales verify its bid since it was significantly lower than the other bids and the estimate. Gonzales telephoned the Army on September 17 to advise that it had made a mistake in calculating its bid.

At a September 18 meeting, Gonzales presented the Army its original worksheets for the project, the worksheets its roofing estimator used to prepare the roofing bid items, and an affidavit from the estimator. The estimator explained (and stated in his affidavit) that the bid mistake arose in transmitting the roofing work to Gonzales over the

telephone. When Gonzales called for the roofing estimate, the estimator claims he quoted an amount of \$60,960, his estimate for the roofing work under the original IFB, and that he neglected to also quote an additional amount of \$78,625 for the roofing work added by amendment 0001. The estimator attributes this oversight to the similarity of the job component titles used in the IFB and the amendment, and additional confusion from the fact that he was working on a similar Department of the Navy job at the time he gave the quote. In a September 17 letter to the Army, Gonzales requested a \$78,625 upward correction of its bid for a total bid of \$238,199 or, alternatively, that it be permitted to withdraw.

In reviewing Gonzales' bidding materials, the Army noted that while the original worksheets showed a 5-percent overhead rate for the roofing work included in the bid (at a price of \$60,960), the worksheets for the allegedly omitted amendment 0001 roofing work indicated that a higher rate of 15-percent was used in calculating the \$78,625 amount. Seeking to understand why different overhead rates would be applied to similar work, the Army telephoned Gonzales on September 24. Mr. Gonzales explained that since he treats all roofing work as subcontract (5-percent overhead) rather than in-house (15-percent overhead) work, the estimate for the amendment 0001 roofing work should have included 5- rather than 15-percent overhead. By letter to the Army dated September 24, however, counsel for Gonzales confirmed that Gonzales' intended bid for the omitted work would have included 15-percent overhead as indicated in the worksheets.

The Army ultimately determined that while Gonzales had presented clear and convincing evidence that a mistake had occurred, the evidence presented did not also constitute clear and convincing evidence of the actual bid intended due to the uncertainty caused by Gonzales' inconsistent overhead rates. The Army thus decided Gonzales could withdraw its bid, but could not correct it and receive the award. Rosner was awarded the contract on September 28.

Although our Office has retained authority to review agency decisions regarding the correction of mistakes in bids, the actual authority to determine whether a bidder

should be permitted to correct a mistake alleged after bid opening, but prior to award, is vested in the procuring agency. National Heat and Power Corp., B-212923, Jan. 27, 1984, 84-1 C.P.D. ¶ 125. An agency may permit correction of a bid where clear and convincing evidence establishes both the existence of a mistake and the bid actually intended. Aleutian Constructors, B-215111, July 12, 1984, 84-2 C.P.D. ¶ 44. Whether the evidence of the mistake or the bid intended meets the clear and convincing standard is a question of fact, and we will not question an agency's decision based on this evidence absent a clear showing that its decision lacked a reasonable basis. PK Contractors, Inc., B-205482, Apr. 22, 1982, 82-1 C.P.D. ¶ 368.

Further, the closer an alleged intended bid comes to the next low bid, the greater the threat correction would pose to the integrity of the competitive bidding system and, thus, the stronger the evidence must be to establish such an intended bid. As a result of this increasing burden, correction often is disallowed on the basis that the corrected bid would be too close to the next low bid. See Aleutian Constructors, *supra*; Crimson Enterprises, Inc., B-213239, May 8, 1984, 84-1 C.P.D. ¶ 513.

Because Gonzales' requested correction would bring its bid to within approximately 2.5 percent (and only \$6,158) of Rosner's bid, the Army determined that a high evidentiary standard should be applied in deciding whether Gonzales should be permitted to correct.<sup>1/</sup> In doing so, the Army found that the inconsistency in the overhead rates shown on Gonzales' worksheets created some doubt as to precisely how Gonzales would have bid, but for the mistake. Specifically, the Army was concerned at the absence of any assurance that Gonzales had not (and the appearance that it might have) purposely increased the overhead for the omitted work after bids had been opened in order to raise its bid as close as reasonably possible to the next low bid. Further, given the magnitude of the requested correction (50 percent of Gonzales' original bid), it was the Army's view that correction could damage the public perception of the

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<sup>1/</sup> Gonzales claims its bid would be at least 5 percent below Rosner's, but our calculations indicate that \$6,158 in fact is approximately 2.5 percent of \$244,357.

competitive bidding system, and that the evidence of the bid intended thus did not meet the clear and convincing standard.

Gonzales believes it has clearly established its intended bid of \$238,199. Gonzales points out that, even if it is unclear whether it would have used a 15-percent or 5-percent overhead rate, its bid clearly would have been low under either interpretation (either \$238,199 or \$232,041 according to our calculations) and, thus, could be accepted. Gonzales argues that the 2.5 percent difference between its corrected bid and Rosner's bid should not be deemed too small to permit correction since our Office previously has approved correction when the percentage difference was even smaller.

We cannot conclude that the Army unreasonably determined that correction of Gonzales' bid was not warranted. Notwithstanding Gonzales' contrary position, we agree that there is an inconsistency on the face of Gonzales' worksheets which casts some doubt on the amount Gonzales would have bid but for the mistake. While Gonzales is correct that its bid would remain low if either a 5-percent or 15-percent overhead rate was applied, the doubt raised by this inconsistency extends beyond these two amounts. The Army's doubt is founded on the appearance that Gonzales could purposely have increased the overhead on the worksheets for the omitted work after bid opening, and, thus, that the firm might have applied an even higher rate had the second low bid been higher. While there is no evidence other than the overhead discrepancy itself indicating that Gonzales actually did so, neither is there evidence that Gonzales did not. Mr. Gonzales himself conceded to the Army that the 15-percent rate should not have been used. As noted above, later Gonzales' counsel confirmed that the 15-percent rate was intended. Even if the resulting doubt seems slight, we cannot say the Army was required to overlook it as insignificant, at least in light of the magnitude of the requested correction and the proximity of Gonzales' corrected bid to Rosner's bid.

Our Office has permitted correction where an intended bid is clearly and convincingly shown to fall within a range of uncertainty below the next low bid. See, e.g., Western States Construction Company, Inc., B-191209, Aug. 29, 1978, 78-2 C.P.D. ¶ 149. Under the facts of this line of cases, however, the alleged intended bid is at the low end of the range, and the top of the range is significantly below the

next low bid. In Western States, the alleged intended bid was more than \$700,000 below the next low bid and the agency conceded that the uncertainties in the intended bid would amount to no more than \$20,000. The facts here are quite different. Gonzales' alleged intended bid is at the top of its claimed range of uncertainty (\$232,041 to \$238,199) and the top of the range (i.e., the intended bid) is only 2.5 percent, or \$6,158, below the next low bid. Given these facts, the above line of cases is not applicable to permit correction here. See Fortec Constructors, B-203190.2, Sept. 29, 1981, 81-2 C.P.D. ¶ 264; Treweek Construction, B-183387, Apr. 15, 1975, 75-1 C.P.D. ¶ 227.

The fact that, as Gonzales argues, our Office previously has approved correction to within less than 2.5 percent of the next low bid does not preclude us from finding that 2.5 percent is too small a difference to permit correction here or in future cases. There is no specific percentage difference above which correction automatically must be permitted. Rather, the significance of a particular percentage difference in bids depends upon the facts of each case and the reasonableness of the agency's position. As a result, we may view the same percentage differently in different cases where we find the agency's position reasonable in light of the facts. Compare Crimson Enterprises, Inc., B-213239, supra (upholding agency denial of correction to within 1.5 percent of next low bid), with G.N. Construction, Inc., B-209641, June 2, 1983, 83-1 C.P.D. ¶ 598 (upholding agency decision to permit correction to within 1.5 percent).

The 2.5 percent difference in bids here represents only \$6,158; the requested \$78,625 correction would increase the original bid by 50 percent; and there was an inconsistency on the face of the worksheets which cast doubt on the amount that would have been bid but for the mistake. Under these circumstances, we believe the Army reasonably determined that the 2.5 percent difference in bids warranted applying a strict evidentiary standard and that the evidence presented by Gonzales was not sufficiently clear and convincing under this standard to warrant correction of its bid.

The protest is denied.

*for Seymour Efron*  
Comptroller General  
of the United States