

DECISION

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

32098

FILE: B-219437 **DATE:** August 28, 1985
MATTER OF: LABCO Construction, Inc.

DIGEST:

1. Agency properly did not permit correction of an error in a bid where the estimate of the cost of the work omitted from the bid price was prepared after bid opening and so that correction would have involved an impermissible recalculation of a bid to include factors not originally considered.
2. Where a bidder alleges mistake after bid opening, it is not then generally free to decide to waive its claim. Waiver will be permitted only if it is clear that the intended bid would have been the lowest even though the intended bid could not be clearly proven for the purpose of bid correction. Agency properly rejected bid without giving the bidder a chance to waive its mistake where it was doubtful that the intended bid would have been the lowest.

LABCO Construction, Inc. (LABCO), protests the award of a contract for the replacement of an existing grease trap to Robira & Managan Development Corporation (Robira) under invitation for bids (IFB) No. DAKF24-85-B-0025 issued by the Department of the Army (Army), Fort Polk, Louisiana. LABCO objects to the Army's unilateral rejection of its bid on the basis of mistake without giving LABCO the opportunity to either correct its bid or perform the contract at its original (mistaken) bid price.

We deny the protest.

Bids were opened on April 29, 1985, and the three bids received contained the following prices:

LABCO	\$ 524,185
Robira	\$ 665,888
H.V. Allen Co.	\$ 1,036,300

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All bids were considered by the contracting officer to be responsive to the IFB.

On May 8, 1985, LABCO contacted the contract specialist to notify the Army that its bid contained a mistake in that it failed to consider prices for blowers and grease removal equipment (skimmers and beaching mechanism). LABCO followed up the phone conversation with a letter stating that the estimated cost of the equipment not included in its bid is \$102,300 exclusive of "the costs of the labor, field overhead, general administrative overhead, or profits associated with these items." LABCO requested that the Army permit it to correct its bid because correction would allegedly not change its position relative to the second low bidder. By letter dated May 29, 1985, LABCO notified the Army that it received additional quotes on the equipment related to the mistake and therefore reduced the mistake amount by \$10,430. The May 29 letter did not refer to the associated costs listed in the earlier letter.

The contracting officer reviewed the documents submitted by LABCO as evidence of its mistake and intended bid. He determined that, since LABCO's worksheets evidenced that LABCO failed to consider the cost of the blowers, skimmers, and beaching mechanism and associated costs, there was clear and convincing evidence that an error of omission had occurred. He also determined, however, that there would be no way of knowing exactly what LABCO's "intended" bid would have been. Since LABCO submitted only equipment cost information for the missing items, and not the associated costs, the contracting officer estimated the amount of the associated costs based on the other associated costs found in LABCO's worksheets. The contracting officer calculated that LABCO's labor costs are 37 percent of its equipment costs, so he added 37 percent to the cost of the omitted equipment. He then applied LABCO's percentages for general administrative and field overhead and profit to the sum of labor and equipment costs. The estimated total cost for the omitted items was \$166,452. When combining LABCO's original bid of \$524,185 with the total estimated cost of the omitted items, \$166,452, LABCO's apparent "intended" bid price became \$690,637, approximately \$25,000 higher than the bid of Robira. Accordingly, the contracting officer refused to allow LABCO to either correct its mistake or waive its mistake and perform the contract at its original bid price. Instead, award was made to Robira on June 25, 1985.

A bidder seeking correction of an error in its 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. Amtech Elevator Services, B-216067, Jan. 11, 1985, 85-1 C.P.D. ¶ 31. However, a bidder may not recalculate and change its bid to include factors which the bidder did not have in mind when the bid was submitted. General Elevator Co., Inc., 57 Comp. Gen. 257 (1978), 78-1 C.P.D. ¶ 81; Amtech Elevator Services, B-216067, supra. LABCO, by its own admission, discovered the omitted items after its bid was submitted and opened. While LABCO contends, in its comments to the agency report, that its worksheets reference one of the omitted items (2 blowers) establishing its intent to include a bid for these, the worksheets do not reference the other omitted items (skimmers and beaching mechanism), and, in any case, no firm estimates were calculated in advance of bid opening for any of the omitted items. Therefore, since the evidence here does not establish an intended bid other than the one originally submitted, the Army properly decided not to allow correction of LABCO's bid.

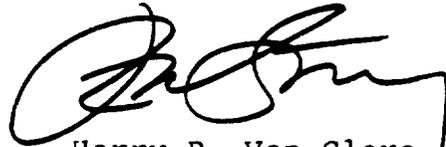
LABCO contends that the Army should not have unilaterally rejected its bid but should have given it the opportunity to waive its error and perform the contract work at its original bid price. We disagree. Where, as here, a bidder alleges a mistake after bid opening, the bidder is not then free to decide to waive its mistake claim. To permit the bidder to do so would be to allow it the impermissible option of either affirming its low bid or withdrawing it, depending on which appeared to be in its best interest. DSG Corp., B-210818.3, et al. Apr. 25, 1984, 84-1 C.P.D. ¶ 476. However, we have permitted an exception to the rule against waiver only if it is clear that the intended bid would have been the lowest even though the amount of the intended bid could not be clearly proven for the purpose of bid correction. Bruce-Anderson Co., Inc., 61 Comp. Gen. 30 (1981), 81-2 C.P.D. ¶ 310.

LABCO contends that the evidence is clear that, at most, its total bid would have been \$645,682, approximately \$20,000 below Robira's bid. LABCO produced this amount by adding to its original bid of \$524,185 its lowest (omitted) equipment cost estimate of \$91,870, 15 percent general and administrative costs, and another 15 percent for overhead

and profits. LABCO did not add the cost of labor (calculated by the Army to be \$33,992) because it contends that its original bid contained the cost of labor (\$5,285) which could be associated with installing all of the omitted equipment.

We do not agree with LABCO's assertion that it is clear that its corrected bid would have been low. Although LABCO's worksheets for section 12 work (which required 2 skimmers, 1 beaching mechanism, and 1 grease storage hopper) indicated a labor amount of \$5,285, it is not possible for us to conclude that this amount represented the total labor cost for all section 12 work versus being the labor cost for a part of the work. All that is listed under LABCO's section 12 worksheet is a storage hopper with a unit price of \$2,000. Other worksheets use the word "total" or otherwise clearly indicate the total costs on that sheet, but the section 12 worksheet does not indicate "total" next to \$5,285. In addition, although the word "blowers" appears on the section 11 worksheets, there clearly is no indication what the labor costs associated with the blowers would be. We believe that the Army acted reasonably in estimating LABCO's omitted labor costs to be \$33,992.

Here, when applying the labor costs amount of \$33,992 (versus \$5,285), not only is it unclear that LABCO's "intended" bid would have been lower than Robira's bid, but, on the contrary, it is reasonably certain that, after all related costs of the omitted items are considered, LABCO's "intended" bid would have substantially exceeded the price of Robira's bid. Moreover, it is unclear that LABCO's reduced estimated omitted equipment cost of \$91,870 should be applied (instead of its higher estimated cost of \$102,300) since there is no way of knowing that LABCO would have used that equipment cost when LABCO originally calculated its bid. Since there was uncertainty that LABCO's corrected bid would have remained low, the Army acted properly by rejecting LABCO's bid without giving LABCO a chance to waive its mistake. See DSG Corp., B-210818.3, et al., supra; Sta-Dri Co., Inc., B-190355, Mar. 8, 1978, 78-1 C.P.D. ¶ 184.


Harry R. Van Cleve
General Counsel