

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548**FILE:** B-217227**DATE:** January 3, 1986**MATTER OF:** Duro Paper Bag Manufacturing Co.**DIGEST:**

Where low bid for the supply of grocery bags is 13 to 23 percent less than the second low bid on various items for which the low bidder alleges its bid was mistaken, but the allegation of mistake is essentially unsupported by any evidence, it is within the contracting agency's discretion to make award on the basis of the bid as originally submitted since under the circumstances there is no adverse effect on the competitive bidding system.

Duro Paper Bag Manufacturing Co. (Duro) protests the award to Trinity Paper and Plastics Corporation (Trinity) of certain items of a solicitation issued by the General Services Administration (GSA) Office of Federal Supply and Services, Region 5, under invitation for bids (IFB) 5FCG-34A-84-070. The procurement was for paper grocery bags, to be provided under a 6-month term contract. Duro contends that GSA's award of the contract items to Trinity was improper because after bid opening Trinity claimed that it made a mistake in its bid on the subject items and subsequently, when market conditions allegedly were more favorable, revoked its claim of error with the knowledge that it was the low bidder. We deny the protest.

Background

At the time of bid opening on June 5, 1984, it was determined that of the nine bids received, Trinity was the apparent low bidder on items 6, 9, and 11 (among others not pertinent to this case), and that Duro was the next low bidder on these items. The agency's comparison of the two lowest bids on the three items, however, revealed price differentials between Trinity's bid and Duro's bid of 14.20 percent on item 6 (\$2.16 per unit ^{1/}), 13.18 percent on

^{1/} For these items, one unit is a bale consisting of 400 bags. The solicitation listed estimated 6-month requirement quantities for the three items, respectively, as 73,906 bales, 16,786 bales, and 14,375 bales.

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item 9 (\$1.95 per unit), and 22.54 percent on item 11 (\$4.00). A further comparison by the agency of Trinity's prices on these three items with the then-current contract prices showed that Trinity's prices were lower by 15.37 percent, 17.2 percent, and 22.54 percent, respectively. In accordance with the agency's procedure whenever price differentials exceed 10 percent, the contracting officer requested, by mailgram dated July 3, 1984, that Trinity verify its bid.

By letter dated July 9, 1984, Trinity responded to the contracting officer, stating:

"Reviewing your telegram request [for verification of the bid] . . . we are enclosing a copy of Stone Container Corporation price increase which was not taken into consideration with our costing department on the above offer.

"As paper going into the finished product of paper sack accounts for 75% of our total cost; this increase in paper which was not taken in consideration of our [May 24] quotation accounts for this tremendous difference we believe between our quotation and the next low bidder.

Therefore, we would like to withdraw our bid quotation for item numbers 6,9, . . . and 11."

Enclosed with Trinity's letter was a single sheet of paper bearing Stone Container Corporation's letterhead and containing a price list, dated March 23, 1984, entitled "New Prices Effective 5/1/84", and consisting of a list of prices, on a per ton basis, of various kinds of kraft paper.

On July 13, the contracting officer acknowledged Trinity's "allegation of a mistake" and advised Trinity that it must provide additional evidence of its claimed mistake since "the Federal Acquisition Regulation precludes any correction or withdrawal of a bid unless the alleged mistake is supported by clear and convincing evidence." This letter was followed by another letter to Trinity, dated July 18, in which the contracting officer requested that Trinity verify its prices on other items in the solicitation that required the same bag, but differing only in quantities and

destinations. In explanation of this request, the contracting officer stated that if Trinity's prices on the subject items were in error due to its failure to consider a recent increase in the price of paper, it would appear that its other prices for the same item were also mistaken. ^{2/}

On July 19, Trinity's Vice President for Sales replied to the contracting officer's July 13 letter, stating:

"Our cost sheets are done manually, and basically these are scratched out and handed to me, and therefore, [we] do not have any additional substantiation [as] you requested . . . other than what we [previously] supplied"

Then by letter dated July 23, Trinity wrote to the contracting officer:

"Reviewing your July 18, 1984 letter on [Solicitation 5FCG-34A-84-070], our quotation offer date of May 24, 1984 pricing will remain as originally quoted."

When contacted by GSA concerning this letter, Trinity stated that it wished to honor its bid prices on all items it had bid and reiterated that no bid preparation documentation was available. Counsel in GSA's regional office then contacted Trinity and asked that it submit evidence which would substantiate that its prices were mistaken as to those items for which it had asked that its bid be withdrawn. According to GSA, Trinity at first agreed to submit the old price list that it initially claimed to have used in error and to restructure its bid with and without the mistake it earlier claimed, but later indicated to the agency that it would not provide documentation to support its previous allegations of mistake in its bid.

Upon being advised that Trinity was awarded items 6, 9 and 11, Duro protested to GSA, contending that after

^{2/} These items had not been included in the contracting Officer's initial request that Trinity verify its bid because they were within GSA's 10 percent price differential guideline.

initially claiming an error in its bid, Trinity was permitted to take advantage of the time extensions for award requested by GSA to observe the price decline in the paper market as a result of which Trinity decided to waive its claim of error. Duro requested that it be awarded the contract for the contested items or, alternatively, that those items be resolicited to correct the procedural improprieties which had occurred.

The agency denied Duro's protest, stating that Trinity did not submit clear and convincing evidence to prove its initial allegations of mistake in bid and that since there was no evidence of mistake, there was no basis to permit withdrawal of its bid. As a basis for its determination, GSA cited section 14.406-3(g)(5) of the Federal Acquisition Regulation (FAR), which provides:

"Where the bidder fails or refuses to furnish evidence in support of a suspected or alleged mistake, the contracting officer shall consider the bid as submitted unless (i) the amount of the bid is so far out of line with the amounts of other bids received, or with the amounts estimated by the agency or determined by the contracting officer to be reasonable, or (ii) there are other indications of error so clear, as to reasonably justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide bidders."

GSA maintains that Trinity's bid prices were not so low as to have been obviously in error and that since there were no other indications of error in Trinity's bid, the contracting officials were required by the regulation to consider Trinity's original bid as submitted.

Essentially, the protester argues two general points as the bases of its protest. First, it contends that the GSA afforded Trinity an unfair advantage by improperly allowing Trinity to waive its post-bid opening claim of mistake after it had been apprised of the percentage difference between its bid and the next low bid and had the opportunity to review changed market conditions. Secondly, Duro contends that GSA misinterpreted and misapplied the FAR. More specifically, the protester contends that after Trinity claimed a mistake in bid and was then allowed to waive its claim of error, it was in a position to elect either to stand by or to withdraw its bid, depending upon which action was to its

advantage, and that for GSA to consider Trinity's bid under these conditions was contrary to the principles of the competitive bidding system.

Duro maintains that the provisions of FAR, 48 C.F.R. § 14.406-3(g)(5), do not apply to the circumstances of this case where the bidder first claims a mistake in bid and then attempts to recant or waive its claim of mistake. The protester further contends that the regulation applies only in cases where a bidder fails or refuses to furnish any evidence in support of a suspected or alleged mistake. Duro expresses the view that since Trinity provided as evidence of its mistake a copy of the price list which, it said, represented a price increase not taken into consideration by its costing department, the FAR provision does not apply here. The protester also contends that even if the regulation is applicable in this case, it would preclude consideration of Trinity's original (erroneous) bid because the substantial difference between Trinity's bid, the next low bid, and the then current prices on the items in question clearly indicate that Trinity's bid prices were in error so that it was unfair to other bidders for GSA to consider the contested items of that bid.

Discussion

The mistake in bid rules, permitting relief for certain mistakes made in the calculation and submission of bids, are premised on the basis of two principles: that it would be unfair for the government to take advantage of what it knows or should know is an error by the bidder, and that the government should not automatically be deprived of an advantageous offer solely because the bidder made a mistake. See Shnitzer, *Government Contract Bidding* 449 (1976). Because mistake in bid situations arise in the period after bid opening, however, when bid prices have been exposed and market conditions may have changed, the rules also reflect a paramount concern with protecting the integrity of the competitive bidding system. Panoramic Studios, B-200664, Aug. 17, 1981, 81-2 C.P.D. ¶ 144. These rules, for example, require a bidder alleging mistake in its bid to meet a high standard of proof before correction of the bid will be allowed. FAR, 48 C.F.R. § 14.406-3(a). Similarly, where it is reasonably clear that a mistake has been made, the bid cannot be accepted, even if the bidder verifies the bid price, denies the existence of a mistake, or seeks to waive an admitted mistake, unless it is clear that the bid both as

submitted and intended would remain low. Panoramic Studios, supra, and cases cited therein. On the other hand, a bidder is not permitted to avoid the consequences of the firm bid rule (requiring a bid to be available for acceptance for a specified period) merely by alleging that there is an error in its bid; rather, there must be some evidence of the mistake. Murphy Brothers, Inc.--Reconsideration, 58 Comp. Gen. 185 (1978), 78-2 C.P.D. ¶ 440; B-164388, July 29, 1968.

Under the rules applicable to this procurement, the agency could permit withdrawal if the evidence "reasonably support[ed]" the existence of a mistake; if the evidence did not, the agency could decide not to permit withdrawal. FAR, 48 C.F.R. § 14.406-3(c), (d).

Here, the only documentation furnished by Trinity in support of its allegation of mistake was a one-page price list for kraft paper which it states it overlooked in arriving at its price for grocery bags. Not furnished was the price list it actually used or any worksheets which would show how the cost of kraft paper was factored into Trinity's bid price. Under these circumstances, as GSA points out, there is nothing to show which price list actually was used by Trinity in the preparation of its bid; nothing which explains the relationship of the price list to the calculation of the price submitted; and nothing which explains why the failure to use the price list would result in a mistake in some, but not all, of the items solicited. GSA states that "in the absence of any evidence showing the relation of [the price list furnished by Trinity] to the bid preparation process, there is, in effect, no proof of mistake at all."

We have long recognized that agencies must in the first instance evaluate the adequacy of evidence supporting the possibility of mistake, and that the determinations made by the agencies are not subject to objection unless there is no reasonable basis for the decision. See, e.g., 53 Comp. Gen. 232 (1973). Here, the only evidence in support of the possibility of mistake consists of the price list submitted by Trinity and the bids of Trinity and Duro which reflect that Trinity's bids on the three items involved are 13, 14, and 23 percent below Duro's. We agree with GSA that the price list, by itself, does not reasonably establish that Trinity made a mistake, and we do not think that Trinity's bid prices, while below Duro's, are so out of line as to by themselves indicate that Trinity's bid prices are mistaken. Compare 37 Comp. Gen. 579 (1958), where the amount of the bid and other factors strongly indicated that the low

bidder, who refused to provide documentary evidence of mistake, had made a mistake and likely would not be the low bidder if the mistake were corrected.

Since we agree with the agency that there is no credible evidence of a mistake here, we further agree that Trinity could not have withdrawn its bid under the FAR, 48 C.F.R. §§ 14.406-3(c) and 14.406-3(g)(5).

Duro argues, of course, that notwithstanding those FAR provisions the protection of the competitive bidding system requires the rejection of Trinity's bid because Trinity first alleged mistake and then, instead of supporting the allegation, stood by its original bid. As Duro points out, we have required the rejection of a bid where the bidder first claimed a mistake and then sought to take the contract at the bid price. See, e.g., 52 Comp. Gen. 706 (1973). In those cases, however, it generally was clear, either from discrepancies between bids or from information provided by the bidder, that a mistake indeed had been made; those cases usually involved the bidder's seeking to remain in contention for award when bid correction was denied. Here, however, there is no meaningful evidence that a mistake has been made and in the absence of such evidence Trinity was bound by the submission of its bid and the agency could not properly reject the bid. That being so, Trinity in fact did not have the opportunity to get mistake in bid relief considered by the agency (since there was no evidence of mistake) and then to have the bid as submitted remain in contention when that relief was not provided. Since it is that opportunity that must be guarded against, we fail to see how acceptance of Trinity's bid under the circumstances here would be detrimental to the bidding system.

The protest is denied.

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Harry R. Van Cleve
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General Counsel