



The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

Matter of: Southwind Construction Corporation

File: B-228013

Date: October 8, 1987

## DIGEST

1. Generally, 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. Where the bidder supports its request for correction of its bid with conflicting affidavits as to what bid price it actually intended, the contracting agency's decision to deny correction was reasonable.

2. The failure of a bidder alleging a mistake in regard to construction work to make provisions in its worksheets for profit and overhead calls into question whether the alleged intended bid price of the bidder is indeed the bid price actually intended.

3. By contrast with the clear and convincing evidence required for bid correction, withdrawal of a bid for reason of mistake requires a lesser degree of proof and may be permitted if it reasonably appears that an error was made.

## DECISION

Southwind Construction Corporation protests the determination of the Army Corps of Engineers to deny Southwind's request to correct a mistake in its low bid under invitation for bids (IFB) No. DACAW03-87-B-0037. The IFB is for the excavation of an existing spillway and the construction of an earth and rockfill seepage berm along the Clearwater Dam in Black River, Missouri, using material excavated from the spillway.

We deny the protest.

Five bids were received and opened as scheduled on April 21, 1987. Southwind's bid of \$7,582,950 was low. Hill Brothers Construction Company's bid of \$9,938,390 was next low. The government estimate was \$10,664,863. Because Southwind's bid was so low, the Corps asked the firm to verify its bid on April 21. Southwind confirmed its bid in writing on the same day. On April 23, however, the Corps, still suspecting a mistake, telephoned Southwind and discovered that Southwind had based its bid on an interpretation of the specifications that would permit the use of fill material containing boulders with a volume of approximately 10 cubic yards. However, according to the Corps, the specifications prohibit the use of stones measuring more than 18 inches in any dimension in uncompacted fill material. The Corps then advised Southwind that it could either confirm its original bid, with knowledge of the agency's actual requirement, or allege a mistake and withdraw its bid.

By telegram dated April 27, Southwind insisted that its interpretation of the specification (as permitting boulders for fill material) was correct, but stated that if the Corps would not accept performance consistent with this interpretation, it desired bid correction by increasing the bid amount by \$1,704,750.

By letter dated May 8, 1987, Southwind again requested correction of its bid, contending that both its mistake and its intended bid price could be shown by clear and convincing evidence. Specifically, Southwind stated that had it not misread the specifications (as alleged by the Corps), its bid "would have been" increased by \$735,837.<sup>1/</sup> This figure was principally based on a subcontractor quote that Southwind explained as follows:

"Southwind obtained an oral bid from a subcontractor prior to the bid opening, which subcontract bid was confirmed in writing after the opening, for the total costs of blasting all boulders greater than one cubic yard in any dimension . . . . The performance of this work by the subcontractor, Twehous Excavating Company, would have permitted Southwind to meet the specifications as read by the government."

This explanation was supported by an affidavit from Southwind. A written proposal from Twehous dated May 1 (after bid opening) was also submitted by Southwind to the Corps, along with Southwind's workpapers.

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<sup>1/</sup> The difference from its initial claim that it was entitled to an increase of \$1,704,750 was not explained.

On May 18, Southwind submitted another request to correct its bid, this time requesting an increase of \$734,450. The supporting affidavit by the firm's president was similar to its previous affidavit except that instead of relying on the subcontractor costs, it was alleged that the basis for the requested increase was the calculations originally made on Southwind's worksheets, apparently for work that Southwind itself would perform without a subcontractor. In its protest to our Office, Southwind explains that it changed the basis of its bid correction request because the Corps [Little Rock Office] indicated that the latter figure, \$734,450, was suggested by Southwind's bid sheets and that Southwind's correction request was supportable by certain figures and calculations on its worksheets without resort to the subcontractor quote.

The May 18 correction request was submitted to the Corps' Little Rock District Office, which determined that Southwind had demonstrated clear and convincing evidence both of its mistake and what its bid would have been in the absence of this mistake. The Corps' regional office disagreed with this finding, however, and recommended that the Corps' Office of Chief Engineer deny the correction request. On July 21, the Chief Engineer determined that a mistake was made in Southwind's bid, but that there was no clear and convincing evidence of the bid price actually intended; therefore, the bidder could only be permitted to withdraw the bid, not correct it. On July 31, in accordance with this decision, the Corps awarded the contract to Hill Brothers.

Southwind protests the award to Hill Brothers and again seeks to increase its bid by \$734,450.

Generally, 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 Montgomery Construction Co., Inc., B-221317, Feb. 28, 1986, 86-1 CPD ¶ 210. 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. Fortec Constructors, B-203190.2, Sept. 29, 1981, 81-2 CPD ¶ 264. Here, the Corps based its denial of Southwind's bid correction request, in part, on its determination that "taken in its best light, it was a request to recalculate and change its bid to include factors that it did not have in mind when the bid was prepared and submitted."

The Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.406 (1986), requires a high standard of proof--clear and convincing evidence of the mistake and the bid actually intended--before correction is authorized, in order to protect the competitive bid system from abuse. Thus, where this high standard of proof has not been met, correction should not be permitted, notwithstanding the good faith of the parties. See John Amentas Decorators, Inc., B-190691, Apr. 17, 1978, 78-1 CPD ¶ 294. We think that this protest must fail because there is no clear and convincing evidence of the intended bid price. As stated above, the bidder, supported by conflicting affidavits, gave two different explanations of its intended bid price, with and without a subcontractor quote that itself was not reflected in the bidder's worksheets.

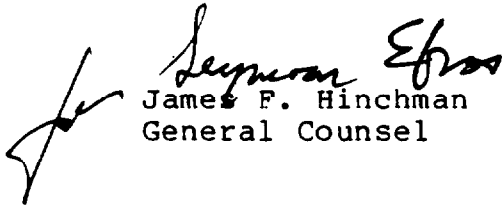
Southwind nevertheless requests correction based on its worksheets. In this regard, Southwind states that it interpreted the IFB as permitting boulders up to 10 cubic yards to be used in the fill for the embankment. Southwind states that it had included the cost of blasting 860,000 cubic yards of common excavation into pieces smaller than 18 inches on page 7 of its worksheets (at 59 cents per cubic yard, which was later revised to 82 cents on another page of its worksheets). While these figures (crossed-out), standing alone, do appear in the worksheets, there is no evidence in the worksheets that these calculations were associated with its misinterpretation of the IFB specifications and could be explained with reference to other work required by the IFB. Further, Southwind's initial insistence that it would have relied on a subcontractor to perform the work militates strongly against a finding that the figures in the worksheets reflect the omitted blasting work.

Moreover, our review of Southwind's worksheets clearly indicates that they include no entry for overhead or profit. We believe it is significant in determining the bid intended that the worksheets submitted by Southwind do not reveal what provisions the bidder intended for profit and overhead costs since the apparent failure to provide for these items in the calculations used to arrive at the allegedly intended bid price calls into further question whether that was indeed the bid price actually intended. See Montgomery Construction Co., Inc., B-221317, supra. For example, the addition of a 15 percent overhead factor to Southwind's bid would alone add almost \$1.2 million dollars after correction of direct costs. Accordingly, because it is not clear what Southwind had in mind when it prepared its bid, we uphold the agency's denial of its correction request since there is no clear and convincing evidence of the intended bid price.

In contrast with the clear and convincing evidence required for bid correction, withdrawal of a bid requires a lesser degree of proof and may be allowed if it reasonably appears that an error was made. See Southwest Marine, Inc., B-225686, May 14, 1987, 87-1 CPD ¶ 510. We think this remedy is applicable where the mistake is due to misinterpretation of the solicitation specifications. See The Gerstenslager Co., B-192705, Nov. 29, 1978, 78-2 CPD ¶ 375.

We agree with the Corps that Southwind cannot be awarded this contract and therefore that withdrawal of Southwind's bid is appropriate based on the disparity in bid prices received, Southwind's assertion that it made a mistake, and the Corps' evident view that the record supports the firm's claim.

The protest is denied.

  
James F. Hinchman  
General Counsel