



The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

Matter of: Northwest Builders  
File: B-228555  
Date: February 26, 1988

## DIGEST

1. A protester has shown clear and convincing evidence that its low bid was mistaken because of a malfunction in its bid preparation computer software where there was a considerable disparity between the low bid and the other bids and the software manufacturer has confirmed that there was a "bug" in the software that could cause this problem.
2. An agency reasonably found that a low bidder did not show by clear and convincing evidence its intended bid price, so as to permit correction of its alleged mistake in bid, where there is an unexplained and untraceable discrepancy in the labor, material and equipment costs that causes a relatively wide range of uncertainty in the possible intended bid price, ranging from less than one percent to 5.7 percent below the next low bid price.

## DECISION

Northwest Builders protests the Veterans Administration's denial of its request to correct an alleged mistake in its low bid submitted in response to invitation for bids (IFB) No. 648-128-87.

We deny the protest.

The IFB, issued on August 14, 1987, sought bids for the construction of two committal shelters at the Willamette National Cemetery. On bid opening, September 14, 1987, at 2 p.m., four bids were received as follows:

|                              |           |
|------------------------------|-----------|
| Northwest                    | \$267,500 |
| Michael Watt, Inc.           | \$394,556 |
| Lorentz Brown Co.            | \$407,000 |
| Gene Matney Construction Co. | \$421,901 |

On the same day, Northwest notified the contracting officer by telegram that there was a mistake in its bid and that due to a computer malfunction, approximately \$105,000 was

041392

inadvertently omitted from the bid price. The contracting officer asked for an explanation of the mistaken bid as well as substantiating original documentation for verification of the claim. Northwest promptly provided VA with evidence to support its mistake claim.

On September 30, 1987, VA determined that while there was some evidence of a mistake, the protester's intended bid could not be ascertained. Although Northwest was not allowed to correct its bid, it was allowed to withdraw. Northwest was orally notified of the decision and advised that a formal decision was forthcoming, which Northwest received on October 6. Also, on September 30, VA awarded the contract to the second low bidder. After receiving the written final decision, Northwest filed a protest on October 19, 1987, with our Office alleging that it submitted clear and convincing evidence of its mistake and its intended bid.

VA first argues that Northwest's protest is untimely. VA asserts that since Northwest was orally advised of VA's decision on September 30, 1987, but did not file a protest until October 19, more than 10 working days later, the protest is untimely under our Bid Protest Regulations.

We have held that oral notification of the basis of a protest is sufficient to start the 10-day period for filing a protest and a protester may not delay filing its protest until receipt of formal written notification of the protest basis. The George Washington University, B-222313.4, Oct. 2, 1986, 86-2 CPD ¶ 375. However, we generally resolve disputes over timeliness or doubts surrounding the date that a protester first became aware of the basis of the protest, in favor of the protester. See Menasco, Inc., B-223970, Dec. 22, 1986, 86-2 CPD ¶ 696.

Here, Northwest claims that when it called the contracting officer on September 30, it was never informed of the award to the second low bidder, the contracting officer never indicated that a final decision had been reached, and there was insufficient information on that date to file a protest. In fact, Northwest alleges that it was told to await a full review of VA's position in a forthcoming letter. This account is supported by a memorandum of the September 30 conversation written by the contracting officer, in which he explains he gave Northwest only the "gist" of a decision and that a letter was forthcoming. There is no mention in this memorandum of an award or a final decision.

Thus, since there is a legitimate dispute as to the date the protester became aware of the basis for protest and what the protester was told on September 30, we shall resolve all

doubts in favor of Northwest. Menasco Inc., B-223970, supra. Since Northwest did not receive the final decision until October 6, 1987, its protest filed on October 19 is considered timely.

Northwest explains that the mistake arose from its use of new computer software, which provides bid estimating, bid analysis and spreadsheet capabilities, to prepare its bid. According to the protester, on Sunday, September 13, 1987, the day before bid opening, Northwest printed out its detailed estimates in order to prepare its bid due the next day. These estimates were for costs, such as labor, materials, insurance and taxes, but did not include subcontractor costs because subcontractor bids were not to be received until bid opening day. This summary estimate data was then manually entered into a program called "Bid Analysis" which is designed to allow the separate entry of the subcontractor quotes as they are received while incorporating all other estimates to arrive at a total bid for a particular job.

On bid opening day, September 14, 1987, Northwest printed out a bid analysis spreadsheet at 9:23 a.m. This spreadsheet reflected an estimated total bid of \$131,074 for the contract, including \$14,945 of subcontractor bids already received. Northwest explains that as the day progressed towards the 2 p.m. bid opening time, subcontractor quotations were received via telephone or in person and were immediately entered into the computer.

According to Northwest, all subcontractor bids were not received until 1:55 p.m., because there was difficulty in obtaining competitive quotes from a roofing subcontractor. The spreadsheet on the computer screen at that time, which contained subcontractor bids and estimates, indicated a total bid between \$268,000 and \$269,000. Since there was no indication of any problem, Northwest states that it lowered this to \$267,500 for competitive purposes and called its representative at the place where bids were submitted. This was the bid price submitted to VA by Northwest's representative at 1:58 p.m.

After being apprised of the bid opening results, Northwest printed out a hard copy of the bid analysis spreadsheet at 2:17 p.m. The total bid figure on the 2:17 printout was \$372,980, approximately \$105,000 over the bid originally submitted to VA.

To support its claim of a mistake of approximately \$105,000 due to computer error, Northwest provided VA with computer estimate and spreadsheet printouts. Upon VA's request, on September 23, the protester also submitted five sworn

affidavits, which explained the events of the bid opening day.

Northwest alleges that it also provided VA the subcontractor quote sheets that were used in preparing this bid on September 22 as requested by VA. Northwest's correspondence at that time indicates that it submitted copies of this data to the appropriate VA office. VA denies having received the subcontractor quotes sheets until the protest was filed; however, VA did not follow up to ascertain what happened to the requested quotes.

As of September 30, Northwest had been unable to explain exactly why the computer screen data was not consistent with the hard copy, although it asserted an apparent computer error. In its September 15 and 22 letters to VA, Northwest advised VA that the software manufacturer stated that the scenario where the bid totals on the computer screen and the hard copy did not match up could only occur in conditions that did not exist, to Northwest's knowledge, when it submitted its bid on September 14. In these letters, Northwest offered to recreate the computer file. In this regard, the data on the original computer disc used to prepare the bid had been destroyed in Northwest's attempts to ascertain what went wrong with the computer software.

Northwest states that it recreated a file identical to the bid file using the malfunctioning software, and on September 22 offered VA a computer disc copy of the bid file and the facilities to recreate the malfunction. Northwest states that the recreation of the software error showed a bid total on the computer screen significantly less than the total on the hard copy. VA did not respond to Northwest's offer.

After discussions with and analysis by the software manufacturer, Northwest confirmed that the bid analysis software malfunctioned and failed to recalculate portions of the spreadsheet on the computer screen. The software manufacturer explains the software was such that under certain circumstances when copying a bid file and then viewing the spreadsheet, as was done here, the price figure that is supposed to be the total bid that appears on the computer screen is erroneous. On the other hand, the bid total on the printed hard copy accurately reflected the data input. Northwest states that it was unaware of this aspect of the software and relied upon the erroneous total appearing on the computer screen when it submitted its bid. As a result of this situation, the software manufacturer has issued a warning notice dated October 7, 1987, to the users of the bid analysis software and has modified the software to correct this problem.

The Federal Acquisition Regulation (FAR) authorizes an agency to correct a mistake if clear and convincing evidence establishes both the existence of the mistake and the bid actually intended. FAR § 14.406-3(a) (FAC 84-12). Additionally, the FAR provides that if evidence of a mistake is clear and convincing only as to the mistake, but not as to the intended bid, or the evidence reasonably supports the existence of a mistake but is not clear and convincing, the agency may permit a withdrawal of the bid. FAR § 14.406-3(c) (FAC 84-12).

We have consistently held that a bidder who seeks upward correction of an error in his bid alleged prior to award must submit not only clear and convincing evidence showing that a mistake was made, but also the manner in which the mistake occurred and the intended bid price. The closer an intended bid is to the next low bid, the more difficult it is to establish that it is the bid actually intended and the higher the standard of proof used in scrutinizing the evidence submitted; for these reasons, correction is often disallowed when a corrected bid would come too close to the next low bid. See Schoutten Construction Co., B-215663, Sept. 18, 1984, 84-2 CPD ¶ 318; D. L. Draper Associates, B-213177, Dec. 9, 1983, 83-2 CPD ¶ 662.

Correction, however, may be allowed even though the intended bid price cannot be determined exactly, provided there is clear and convincing evidence that the amount of the intended bid would fall within a narrow edge of uncertainty and remain low after correction. Conner Brothers Construction Co., Inc., B-228232.2, Feb. 3, 1988, 88-1 CPD ¶ \_\_\_\_; Vrooman Constructors, Inc.--Request for Reconsideration, B-218610.2, Mar. 17, 1986, 86-1 CPD ¶ 257. The sufficiency of the evidence to establish the intended bid depends on the extent of the range of uncertainty and the closeness of the corrected bid to the next low bid. The closer the top of the range of uncertainty is to the next low bid, the more difficult it is to establish an intended bid. Id.; Sam Gonzales Inc., B-216728, Feb. 1, 1985, 85-1 CPD ¶ 125. When the requested correction would bring the low bid within 1 percent of the next low bid, there can be almost no uncertainty in proving the amount of the intended bid. Conner Brothers Construction Co., Inc., B-228232.2, Feb. 3, 1988, 88-1 CPD ¶ \_\_\_\_; Aleutian Constructors, B-215111, July 12, 1984, 84-2 CPD ¶ 44.

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 to the evidence in support of an asserted mistake is a question of fact, we will not disturb an agency's determination unless there is

no reasonable basis for the decision. Swank Enterprises, B-228340, Nov. 18, 1987, 87-2 CPD ¶ 493.

VA found that it is "reasonably clear" that a bid mistake was made by Northwest because (1) the protester's corrected bid of \$372,980 is very close to the government estimate of \$375,000 and the prices of other bidders, and (2) the original bid was 29 percent below the government estimate and 32 percent below the next lowest bidder.

Moreover, the manufacturer of the bid analysis software has persuasively confirmed that the problems encountered with its computer software by Northwest were legitimate and that the discovery of the software "bug" was attributable to Northwest. Indeed, the manufacturer has corrected this software and recalled the malfunctioning software. This evidence, together with the disparity in bid prices, clearly and convincingly establishes that Northwest made a mistake in bid and that the computer software "bug" may have caused the mistake.

VA contends, however, that the only computer printout or other evidence that purports to show the intended bid price was printed after bid opening. VA states that the computer spreadsheets printed prior to bid opening are incomplete because they do not reflect total project cost. VA states:

"Comparing the spreadsheet printed prior to bid opening and the report printed after bid opening reveals additional subcontractor quotes in the latter report. It is not possible to determine, however, exactly when these additional line-item figures were obtained or whether these numbers actually correspond with those obtained prior to the submission of its bid."

VA therefore declined Northwest's request for correction.

Computer generated printouts can support a bidder's claim for correction of a mistake in bid. See, e.g., D.L. Draper Associates, B-213177, supra. Moreover, it is true, as contended by Northwest, that each of the subcontractor quotation sheets which Northwest has provided is dated and timed-in; that each sheet clearly reflects subcontractor price quotes; that a review of these quote sheets shows that every quote was received before the 2 p.m., bid opening deadline; that a comparison of the subcontractor quote sheets and the 2:17 p.m. printout, which reflects Northwest's intended bid price, reveals that there are no inconsistencies between these documents; and that the sheets corroborate each and every subcontractor quote appearing in the 2:17 printout.

However, our review also shows some unexplained discrepancies in Northwest's computer generated estimates and printouts. As discussed above, Northwest claims that it prepared its estimates for its own labor, material and equipment on the day prior to bid opening. According to Northwest, the 9:23 a.m. printout on bid opening day, the last printout made by Northwest prior to bid opening, reflects this data and a few subcontract quotes. However, our review shows that Northwest made significant downward adjustments in its total price figures for labor, materials and equipment from the 9:23 a.m. printout to the post-bid-opening 2:17 p.m. printout, the document which Northwest alleges shows its intended bid price. Nowhere in the record does Northwest explain why, much less even mention, that it lowered its estimates for labor, materials and equipment during bid opening day; Northwest only states that it entered subcontract quotes into the system after the 9:23 a.m. printout and that these other figures had been entered on August 13.

We calculate that if Northwest had not lowered the estimates contained on the 9:23 a.m. printout for labor, materials and equipment, its intended bid price would be more than \$20,000 greater than the \$372,980 total bid figure shown on the 2:17 p.m. printout.<sup>1/</sup> That is, although Northwest's price may still be low, it would be within one half of one percent of the next low bid.

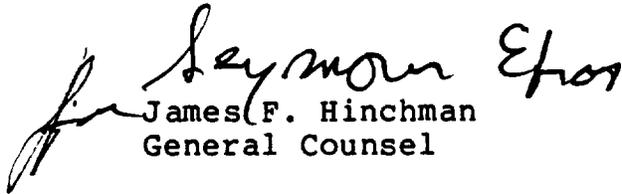
This unexplained and untraceable differential between the pre-bid opening and post-bid opening estimates for labor, materials and equipment casts doubt on whether Northwest's intended bid price was \$372,980 or as much as \$20,000 more. This creates a relatively wide range of uncertainty in Northwest's intended price ranging from less than one percent to 5.7 percent below the next low bid. Since the top of this range would be well within one percent of the next low bid, correction can only be allowed where there is almost no uncertainty in proving the amount of the intended bid. Conner Brothers Construction Co., Inc., B-228232.2, supra.

---

<sup>1/</sup> In making this calculation, we have considered the total decreases in labor, materials and equipment and the applicable percentages used in the bid analysis software program to account for the costs of insurance, employee benefits, workmens compensation, contingency, fee, bond and the other factors used in this program to determine the total bid price.

Given the unexplained and undocumented nature of the changes in Northwest's labor, materials and equipment costs and the extreme closeness of the upper range of Northwest's possible bid to the next low bid, we cannot conclude that the VA acted unreasonably in finding that Northwest did not establish clear and convincing evidence of its intended price. The fact that VA did not note this particular discrepancy does not preclude our Office, in its review of the record, from determining that VA otherwise had a reasonable basis to reject Northwest's claim for correction.

The protest is denied.

 James F. Hinchman  
General Counsel