



**The Comptroller General  
of the United States**

Washington, D.C. 20548

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## Decision

**Matter of:** Alaska Mechanical, Inc.

**File:** B-235252

**Date:** August 14, 1989

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### DIGEST

Where low bidder alleges a mistake in bid but then waives the mistake and agency makes award at original bid price, award was improper as bidder's worksheets show mistaken bid would not have been low and therefore bidder was not eligible for waiver.

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### DECISION

Alaska Mechanical, Inc. (AMI), protests the award to Gaston & Associates, Inc., under invitation for bids No. 102-IFB-89-0008, issued by the Public Health Services, Department of Health & Human Services (HHS), to modify schools at military bases in Fairbanks, Alaska. AMI contends that Gaston should not have been allowed to withdraw a claim for mistake in its bid and receive the contract at its original bid price. We agree and sustain the protest.

The IFB contained three separate line items, 001a, 001b and 002, and an option item 003. Line items 001a and 001b were for work on schools at Eielson Air Force Base and Fort Wainwright Army Base, respectively. Item 002 was for a combined award at both bases. The IFB advised that split awards were possible.

Six bids were opened on March 14, 1989, with the following results for the items relevant to the protest:

	Govt. Est.	Gaston	Next low
001a	\$1,022,427	\$905,600	\$912,000 (Consolidated)
001b	936,533	667,651	819,000 (AMI)
002	1,958,960	1,565,251	1,785,000 (Consolidated)

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As noted above, item 002 represented a combined award. Some bidders simply added 001a and 001b to arrive at their price for 002. Other bidders, such as Gaston, made deductions for anticipated economies of scale.

On March 15, 1989, Gaston advised the contracting officer that a mistake had been made in its bid for item 001b. Gaston stated that its electrical subcontractor had raised its quote shortly before bid opening from \$325,000 to \$475,000, an increase of \$150,000, which Gaston had failed to include in its bid. The following day, Gaston, by letter, requested that its bid for item 001b be increased to \$817,651. Subsequently, on March 31, Gaston's attorney advised the contracting officer that Gaston was withdrawing its claim of mistake and would perform the contract at its original bid price. The contracting officer had not yet made a decision on whether to allow the correction.

In deciding to allow Gaston to withdraw the claim of mistake and receive the award, the contracting officer concluded that since Gaston's bid for item 002 was only 12 percent below the next low bid received its acceptance would not be unfair to Gaston or prejudicial to other bidders. Also, Gaston reported to the contracting officer that the \$150,000 increase did not represent a real increase in the cost of work, but was a contingency amount that the subcontractor had added at the last minute. Finally, the contracting officer found that Gaston's bid on item 001b was low both as submitted and with the alleged mistake corrected.

Award was made to Gaston on April 17, 1989, for item 002 and optional item 003 at its original bid price, and a determination made to proceed with performance based on urgency notwithstanding the protest at our Office was signed on April 27, 1989.

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. Duro Paper Bag Mfg. Co., 65 Comp. Gen. 186 (1986), 86-1 CPD ¶ 6.

While the contracting officer found that Gaston's bid was low as submitted and would remain low if corrected, we disagree. The contracting officer, in determining that Gaston's bid would remain low with the alleged mistake corrected, added \$150,000 plus \$1,580 for overhead and profit and bonds on the additional amount. The contracting officer justified the \$1,580 markup (slightly more than 1 percent) as follows:

"These worksheets showed that even though there were increases in prices, once the initial 'plug amount' or Gaston's in-house estimate was modified by the initial subcontractor quotes to obtain an 'adjusted amount,' the sub-bond, overhead and profit, and bond amounts were not changed. The Project Manager concluded that there was a very high degree of probability that the addition of the \$150,000 would not have also resulted in an increase in any of the mark-up figures. Thus it was possible to ascertain with a high degree of certainty what the intended bid would have been. The Project Manager also concluded that in the remote event a mark-up was to be added to the \$150,000 increase, the appropriate mark-up to be added that would still be consistent with the rest of the bid, would be \$1,580."

The contracting officer concluded that even adding the \$151,580 to Gaston's bid for item 001b, resulting in a price of \$819,231, or \$231 more than the AMI bid of \$819,000 for the item, Gaston's bid for item 002 corrected to \$1,717,101, still would be low when compared to Consolidated's bid of \$1,785,000.

However, our review of Gaston's worksheets shows that it did add in varying amounts after changes in subcontractor quotes. On item 001a, in response to an earlier electrical subcontractor quote change, it added an unlabeled amount of 18 percent of the increase to its bid price. On item 001b, also for an earlier electrical subcontractor change, it added an amount equal to 9.5 percent of the change. Therefore, we find it unreasonable for the contracting officer to have marked up the alleged mistake here by only 1 percent when prior changes averaged almost 14 percent.

If Gaston's subcontractor quote change of \$150,000 is marked up 9.5 percent, the lowest percentage mark up shown on Gaston's worksheets, to \$164,250, Gaston's bid for item 002 is no longer low. Gaston was awarded item 002 at \$1,565,251, but with the \$164,250 added, the price would be \$1,729,501. Separate awards to Gaston for item 001a (\$905,600) and to AMI for item 001b (\$819,000) results in the lowest cost to the government of \$1,724,600.

Therefore, since it was not certain that Gaston's bid for item 001b, with the alleged mistake corrected, would have been low, Gaston should not have been permitted to waive the mistake and accept the award at its original price.

While we sustain the protest, since performance has almost been completed, we are unable to recommend corrective action. However, under our Bid Protest Regulations, AMI is entitled to its bid preparation costs and the costs of pursuing the protest, including its attorneys' fees. 4 C.F.R. § 21.6(d)(1)-(2) (1988). The claimed amounts should be submitted directly to the agency.



Acting Comptroller General  
of the United States