



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Three O Construction, S.E.
File: B-255749
Date: March 28, 1994

Manuel A. Ortiz for the protester,
Paul M. Fisher, Esq., Department of the Navy, for the
agency.
Robert C. Arsenoff, Esq., and John Van Schaik, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

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 and of the intended bid price. Where the bidder supports its request for correction with conflicting explanations as to what price it actually intended, the contracting agency's decision to deny correction was reasonable.
2. 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

Three O Construction, S.E. protests the determination of the Department of the Navy to deny Three O's request to correct a mistake in its bid under invitation for bids (IFB) No. N62470-93-B-3140. The IFB is for the replacement of potable water lines at a Naval facility in Sabana Seca, Puerto Rico.

We deny the protest.

Five bids were received and opened as scheduled on September 13, 1993. Sotgom Construction Corporation submitted the low bid of \$324,000, but alleged a mistake and was permitted to withdraw its bid. Three O submitted the second-low bid of \$539,538. On September 14, the protester was requested to verify its bid price in light of the fact that it was substantially below the government estimate of

\$825,000. By letter dated September 16, Three O confirmed its price as bid.

By letter dated September 27, however, Three O alleged a mistake in bid based on an error in failing to convert man-days to man-hours for four of its employees which were to be engaged in concrete work. As a result, Three O contended that its direct labor cost was understated by \$23,562. After adding a 40-percent markup for payroll taxes and fringe benefits, 4 percent for home office overhead, and 8 percent for profit, the protester calculated that its bid price should have been \$576,589 and therefore was understated by a total of \$37,051. In support of its request for correction, the protester submitted its original worksheets on September 28 certifying their accuracy as well as the amount of the requested correction.

The contracting officer reviewed the worksheets and concluded that an error had been made in the computation of direct labor costs in the amount of \$23,562 as alleged; however, the contracting officer found no evidence in the worksheets of an application of a 40-percent labor markup rate to cover fringe benefits and payroll taxes.

On September 29, the contracting officer asked Three O's representative to explain the basis for the firm's computation of hourly labor rates. During that conversation, the protester's representative admitted that the 40-percent labor-rate markup for payroll taxes and fringe benefits was inaccurate. Instead, the representative stated that the hourly labor rates listed in Three O's worksheets already included a 27-percent markup for fringe benefits and payroll taxes. He then explained that a 15-percent markup should be applied to the understated direct labor costs to cover workmen's compensation; in a letter confirming the conversation dated September 29, Three O revised its request for correction and applied a 15-percent factor for workmen's compensation, a 4-percent rate for overhead, and an 8-percent rate for profit to arrive at a "corrected" bid price of \$569,972.¹

¹Three O further explained that the \$20,625 workmen's compensation figure contained in its worksheets was derived by assuming that 25 percent of its estimated total project cost of \$550,000 would be labor costs and applying a 3.75-percent rate to cover workmen's compensation. Applying this formula accurately, however, would result in a total workmen's compensation figure of \$5,156 for the entire project, not \$20,625 as entered on the worksheet. The protester does not explain the discrepancy, how the 15-percent figure for workmen's compensation contained in

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The agency found that Three O had not established its intended bid price and denied the requested correction but decided to permit the firm to withdraw its bid. Award was made to the next low bidder at \$635,000. Three O protests the award.

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. Southwind Constr. Corp., B-228013, Oct. 8, 1987, 87-2 CPD ¶ 346. Here, the Navy based its denial of Three O's requested correction on its determination that the "inconsistencies [in the protester's explanations of how its labor costs were calculated] and the possible duplication of costs make any determination of the intended bid questionable."

Federal Acquisition Regulation (FAR) § 14.406 requires a high standard of proof--clear and convincing evidence of the mistake and of the bid actually intended--before correction is authorized, in order to protect the competitive system from abuse. Southwind Constr. Corp., supra. Thus, where this high standard of proof has not been met, correction should not be permitted, notwithstanding the good faith of the parties. Id.

We think the agency reasonably determined that Three O had not established its intended bid price by clear and convincing evidence. As indicated above, Three O gave differing explanations of its intended price. First, the protester explained that the salary rates which were the subject of the original correction request had to be burdened with a 40-percent markup for payroll taxes and fringe benefits. Subsequently, the protester stated that the 40-percent markup was erroneous and asserted that the salary rates in its worksheets had already been burdened with a 27-percent rate for payroll taxes and fringe benefits, but that a 15-percent markup for workmen's compensation had to be added. None of these rates is reflected in Three O's worksheets or any other documentary evidence. Moreover, as discussed above, the 15-percent rate

¹(...continued)

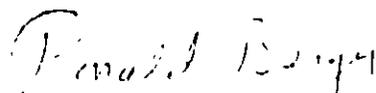
its second request for correction relates to the 3.75 rate used to prepare its bid, or why the 15 percent for workmen's compensation should be applied to its understated direct-labor rates when it had evidently already calculated a total project amount for workmen's compensation in formulating its bid.

for workmen's compensation used in the second request for correction is at variance with the 3.75-percent rate used in the protester's worksheets. Three O has not presented any explanation reconciling its differing calculations. We also note that Three O, in its comments on the agency report in this matter, states: "[a]fter looking at all the details presented by the contracting agency in their report on our protest, we may agree that our estimating form could have created some confusion." In light of the protester's conflicting explanations of its intended bid, none which is reflected in Three O's worksheets, there is no basis on this record for our disagreeing with the agency's conclusion that it could not permit correction.

Three O argues that it should be permitted to receive the award at its original bid price if correction is not permitted. After requesting correction of a mistake, a bidder ordinarily may not be permitted to waive a claim of error to remain the low bidder; it is only in very limited circumstances, where the evidence clearly indicates that the "correct" or "intended" bid would have been the lowest, that the bidder may be awarded the contract at its uncorrected bid price. Bruce-Andersen Co., Inc., B-203777, Oct. 14, 1981, 81-2 CPD ¶ 310.

The protester recognizes that, if the 40-percent burdening rate applied to the omitted salaries which were the subject of its first correction request were also applied to all of the salary rates in its worksheets, its "correct" bid would not remain low. When questioned about the application of this burdening rate, Three O modified its position to assert that the salary rates contained in its worksheets were already burdened for fringe benefits and payroll taxes at a 27-percent rate. Under this explanation, it appears that a "correct" bid would remain low. However, none of the supporting documentation submitted by the protester establishes whether, and at what rate, Three O's salaries were or should have been burdened. Thus, since the evidence does not clearly indicate that Three O's "intended" bid would have been the lowest, award to Three O at its original bid price is not permitted. Bruce-Andersen Co., Inc., supra.

The protest is denied.



for Robert P. Murphy
Acting General Counsel