

S. Riback



Comptroller General
of the United States

535254

Washington, D.C. 20548

Decision

Matter of: Apache Enterprises, Inc.

File: B-255943; B-255943.2

Date: April 20, 1994

Merritt Lee Murry, Esq., Slocum, Boddie & Murry, for the protester.
William R. Medsger, Esq., and Harry W. Longbottom, Esq., Department of the Army, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly denied firm's request for correction of bid where bidder's worksheets, while providing evidence that a mistake had been made, did not provide clear and convincing evidence of the intended bid.
2. Bidder is not an interested party to maintain protest relating to qualification of awardee where appropriate course of action requires bidder to withdraw its bid and, consequently, the firm is ineligible for the award of a contract.

DECISION

Apache Enterprises, Inc. protests the actions of the Department of the Army in connection with invitation for bids (IFB) No. DAAB07-93-B-P605, issued for lighting modification kits for Army helicopters. Apache argues that the agency improperly refused to permit upward correction of mistakes in its bid. Apache also argues that the awardee, Rodelco Electronic Corporation, should have been found nonresponsible for failing to meet the solicitation's definitive responsibility criteria.

We deny the protest in part and dismiss it in part.

BACKGROUND

The IFB called for fixed prices for base and option quantities of five different lighting modification kits to be used to make the lighting systems in Army helicopters compatible with night vision eyewear. Four firms including the protester submitted timely bids; Apache's was low and

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Rodelco's second low. Apache's price was so low, however, that the contracting officer suspected that the firm had made a mistake. By letter dated June 8, 1993, the contracting officer requested that Apache review its bid and either confirm its offered prices or provide information relating to the existence of a mistake in its bid.

By letter dated June 17, Apache replied to the contracting officer, alleging that three mistakes had been made in its bid. For two of the conversion kits, the ARC-186 and the ARC-164, Apache claimed to have failed to include the cost of six purchased parts for each of the two kits. Apache maintained that its bid preparer had failed to carry the prices for these parts forward from its supplier's quotation sheet to its bid worksheet. According to Apache, this occurred because its bid preparer erroneously thought that the cost of these parts was included in the cost of a larger assembly for each of the two kits. Apache requested an upward adjustment in its bid of \$231,391.23 (\$128.39 per unit) for the ARC-186, and \$147,897.90 (\$144.15 per unit) for the ARC-164.

Apache also claimed that its pricing for another of the conversion kits, the RT-1285/APX-100 (the APX-100), was in error. Apache stated that it had inadvertently misplaced a decimal point during its calculation of one of the kit's purchased parts. According to Apache, it prepared its bid using a supplier's price for a push-button switch of \$197.52; after applying its standard 15-percent markup to this cost, its price was to have been \$227. Apache submitted a bid worksheet for this kit which it maintained showed that the individual preparing the bid had inadvertently misplaced the decimal point for this price, thus mistakenly including it at a cost of \$2.27. Apache therefore requested an upward adjustment in its price of \$231,391.23 (\$224.73 per unit) for the APX-100. The three corrections would increase Apache's bid by a total of \$599,007.30.

Apache included in its June 17 submission copies of its bid worksheets, as well as supporting statements from the personnel involved in preparing the bid. After reviewing Apache's submission, the contracting officer concluded that, although the firm had provided sufficient evidence to show that a mistake had occurred, the evidence did not clearly and convincingly show what the firm's intended bid was. After being informed of the Army's initial decision, Apache requested and was granted an opportunity to furnish additional material to support its claim which it submitted by letter dated October 4. The October 4 package included a more elaborate explanation of the claimed mistakes, affidavits from Apache personnel (as well as affidavits from one of Apache's suppliers, Sun Dial and Panel Corporation),

a statement from Apache's accountants representing that the nature of the mistakes were as explained by Apache, and a statement from Apache's attorneys relating to the legal basis for allowing correction. On November 30, the contracting officer wrote to Apache denying its request for upward correction on the basis that the evidence remained inadequate to establish the intended bid. Apache then filed this protest.

Apache argues that the upward corrections should have been permitted because its intended bid for each of the three kits is ascertainable from the materials furnished to the agency. As for the errors in its bid for the ARC-186 and ARC-164 kits, Apache claims to have failed to include the prices for six vendor-supplied parts for the ARC-186 and ARC-164 kits. Apache states that, in preparing its bid for these items, it used the worksheets submitted to it by its vendor, Sun Dial, deleted all pricing information from the sheets using typing correction fluid, and then used the sheets for its bid worksheets. Apache states that it failed to list the prices for the Sun Dial parts because its bid preparer erroneously concluded that the price for one of the Sun Dial parts in each kit was inclusive of the prices for the other Sun Dial parts. Apache maintains that its worksheets show clearly its intent to use Sun Dial parts for these kits, as well as the intended prices for these parts (plus the firm's 15-percent markup). As for the APX-100, Apache maintains that its bid worksheet shows clearly its intent to use its supplier's price of \$197.52 for the push-button switch plus its 15-percent markup, for a total price of \$227.

ANALYSIS

A bidder's request for upward correction of a bid before award may be granted only where the request is supported by clear and convincing evidence of both the mistake and the intended bid. Federal Acquisition Regulation § 14.406-3(a). Since the authority to correct mistakes is vested in the procuring agency, and because the weight to be given the evidence is a question of fact, we will not disturb an agency's determination unless there is no reasonable basis for it. H.A. Lewis, Inc., B-249368, Nov. 16, 1992, 92-2 CPD ¶ 351.

We find that the agency reasonably refused Apache's request for correction because the worksheets do not clearly and convincingly show the firm's intended prices. The essential problem is that there is no evidence showing that Apache intended to include prices for the ARC-186 and ARC-164 kits. We note in this regard that Apache's worksheets indicate it did not include prices for a total of 12 of the ARC-186 kit's parts, 10 of which are identified as supplied by Sun

Dial. Apache does not explain why it did not include prices for the four Sun Dial parts which have not been included in its correction request, or why it did not include prices for the additional two parts that are identified in the worksheet as Apache-furnished. Similarly, the ARC-164 worksheet shows some 20 other unpriced parts in addition to the 6 Sun Dial parts that Apache claims should have been included in its bid. All 26 of these parts are shown on the worksheet as being furnished by Sun Dial, and Apache has not explained why the cost of only 6 of these unpriced parts should have been included in its bid.

The firm's intent in this regard is further confused by an examination of its bid worksheets for other kits to be supplied under the solicitation. Apache's worksheet for the ASN-128 kit shows that Sun Dial was to have furnished 10 parts, but no prices are included for these parts on the Apache-prepared worksheet for this kit. Similarly, for the ARC-114A kit, the worksheet shows that Sun Dial was to have furnished 11 parts, but the Apache-prepared worksheet for this kit does not include pricing for any of these parts. Apache has not explained why prices for so many of the parts designated as furnished by Sun Dial were not included in its calculations or why it does not claim an upward adjustment in its bid for the other kits discussed above. These give rise to legitimate doubt as to whether Apache intended to include prices for the Sun Dial-furnished parts it now claims it omitted. Capitol Contractors, Inc. and Baker Roofing Co., B-248944; B-248944.2, Oct. 22, 1992, 92-2 CPD ¶ 267; L.F. Leiker Constr. Co., Inc., B-238496, May 4, 1990, 90-1 CPD ¶ 453.

Additionally, even assuming that Apache intended to include prices for the parts it now claims it omitted, there is no way to tell whether the firm intended to include Sun Dial prices in particular. In this regard, some 10 vendors other than Sun Dial are referenced in various places throughout Apache's worksheets, and there is no clear evidence that Apache intended to obtain the allegedly omitted items from any particular vendor. Apache claims that its use of the Sun Dial worksheets to prepare its bid shows that it intended to use Sun Dial prices for the allegedly omitted items. Using this logic, however--that is, assuming from one action that another action was intended--it is just as reasonable to conclude that the firm's failure to actually insert the Sun Dial prices on its final bid worksheet evidenced its intent not to include them in its bid. L.F. Leiker Constr. Co., Inc., *supra*; Capitol Contractors, Inc. and Baker Roofing Co., *supra*.

We conclude that the Army reasonably refused to allow Apache to correct its bid upward for the ARC-186 and ARC-164 kits.¹

Apache maintains that, even if correction properly was denied, it is entitled to award of the contract--and should not be required to withdraw its bid--because, even if its intended bid cannot be determined precisely, it clearly would be low under any circumstance. We disagree.

Where a bidder requests correction of a mistake, and the intended bid cannot be determined from the firm's workpapers, award may still be made to the firm, so long as the amount of its bid may be determined within a narrow range of uncertainty and would remain low under all circumstances. Vrooman Constructors, Inc., B-218610, Oct. 2, 1985, 85-2 CPD ¶ 369. If, on the other hand, there is no way to establish the upper end of this range of uncertainty, the mistake cannot be waived, and the bid must be withdrawn. William G. Tadlock Constr., B-251996, May 13, 1993, 93-1 CPD ¶ 382.

Here, there is no way to establish that Apache's bid would remain low under all circumstances. This is because the alleged mistakes for the ARC-186 and ARC-164 resulted from the omission of prices, and there is no way to establish that Apache intended to include any particular prices. While with use of the Sun Dial prices Apache's bid would remain low, as discussed above, there is no evidence to show that Apache intended to include Sun Dial prices rather than another vendor's prices (or, for that matter, no prices). The record shows that the pricing for the kits in question varied widely. Prices for the ARC-186 ranged from Apache's low price of \$425 to \$5,974 per unit; for the ARC-164, prices ranged from \$1,683.99 per unit to \$5,274 per unit. In light of the absence of clear evidence that Apache intended to use Sun Dial prices, there is no basis for concluding that Apache would not have included much higher prices for the omitted items. As Apache's use of much higher prices than Sun Dial's could result in its bid being other than low, there is no basis to conclude that Apache's

¹We need not address the firm's claim for upward adjustment of its price for the APX-100. Even if we agreed with Apache that its intended price for this kit may be determined from its worksheets, we still would find that the firm's only alternative is to withdraw its bid. As more fully explained below, Apache cannot be awarded a contract under these circumstances due to the uncertainty associated with its bid for the ARC-186 and ARC-164. Since there exists at least the possibility that its bid would not be low under all circumstances, withdrawal of the bid is appropriate.

bid would remain low under all circumstances. Accordingly, withdrawal of the bid (rather than waiver of the mistakes) is the appropriate course of action. Id.

Finally, Apache challenges the agency's determination that the awardee, Rodelco, meets the IFB's definitive responsibility criteria. We dismiss this aspect of the protest because Apache is not an interested party to raise the matter. In order to be an interested party, a firm must have a direct economic interest in the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a) (1993). Since we conclude above that Apache's bid cannot be accepted, the firm is not eligible for award of this contract. Because Apache is ineligible for award, it lacks the direct economic interest necessary to maintain this basis of protest.

The protest is denied in part and dismissed in part.


fr Robert P. Murphy
Acting General Counsel