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Reg. Proc. II

DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-189346 DATE: August 25, 1978

MATTER OF: Al Johnson Construction Company

DIGEST:

1. Contracting officer should have been on notice of possible mistake in proposal and requested verification when telegram was received which stated that offeror "inadvertently failed to include One Million Five Hundred Twenty Thousand ($1,520,000.00) Dollar contingency * * *."

2. Where offeror alleges it mistakenly included low quote for drilling in its proposal, no recovery is allowed because offeror sustained no loss as it used subcontractor supplying low quote to perform work.

3. Since evidence submitted by offeror in connection with two items in proposal containing mistakes do not prove intended prices, payment for items may be made on quantum meruit basis.

4. Where workpapers show mathematical error was made and amount of that error contractor does not have to show that no contingency has been included in price that might cover error before correction is allowed.

Al Johnson Construction Company (Johnson) seeks relief from alleged mistakes it made in its proposal which resulted in a contract with the Army Corps of Engineers (Corps) to complete a dam at R.D. Bailey Lake, Guyandot, West Virginia. Johnson contends that it informed the Corps that its proposal contained mistakes before it was awarded the contract and therefore is entitled to have its contract price adjusted upward to its intended price.

After terminating the original construction contract for default, the Corps determined that, because of the need for prompt completion of the project, the reprocurement would be negotiated rather than formally advertised. The request for proposals was prepared on Standard Form 20, "Invitation for Bids," with modifications to adapt it for use in a negotiated procurement.

The solicitation called for submission of proposals on May 19, 1977. Johnson's was at $13,303,659.50, the lowest of the five proposals received; the next low proposal was $15,931,715.50.

According to the affidavit of Johnson's Executive Vice President:

> "Following the submission of bids, I was having dinner in the Holiday Inn dining room when three of the other contractors entered the room. A discussion arose with regard to the proposals and we compared notes as to our bid totals as submitted. We were never instructed not to disclose the amount of such bids after submission. In general figures, it was discovered that our bid was approximately $13,000,000 as against two other bidders being approximately $16,000,000 and a third bidder at about $18,000,000."

This comparison caused Johnson to reexamine its bid. On May 20, 1977, at 10:20 a.m., Johnson sent the following telegram to the Corps:

> "We inadvertently failed to include One Million Five Hundred Twenty Thousand ($1,520,000.00) Dollar contingency when finalizing our bids prior to submittal."

The Corps opened the proposals at 9:00 a.m. on May 20, and that afternoon decided to award the contract, without discussions, to Johnson as the low offeror. After receiving Johnson's telegram, the Corps halted the sending of its award notification

and held a meeting on Saturday, May 21 to discuss the Johnson telegram. Notification of the award was sent to Johnson at 11:38 a.m. that day.

Johnson executed the contract under protest and reserved its right to appeal the award to the Comptroller General.

The Corps argues that Johnson's telegram was an untimely attempt at modification and therefore the Corps was justified in disregarding it and awarding the contract to Johnson. In essence, it is Johnson's position that the telegram constituted a notice that its proposal contained a mistake and therefore the Corps should have permitted it to either correct its proposal or withdraw it. Although Johnson also argues in the alternative that its telegram constituted a timely modification, we believe it is clear from the record that the telegram which was received after proposals were received is not a valid modification.

The significant issue is whether Johnson's telegram put the Corps on notice of a possible mistake in Johnson's proposal.

We have held that although the specific procedures contained in Defense Acquisition Regulation/ Armed Services Procurement Regulations (DAR/ASPR) 2-406 (1976 ed.) are applicable only to mistakes in formally advertised procurements, the principles therein have been applied to negotiated procurements to the extent they are not inconsistent with the required negotiation procedures. OMNI Research, Inc., B-186301, October 19, 1976, 76-2 CPD 341. It is significant to note that Defense Procurement Circular (DPC) 76-7, April 29, 1977, contains new DAR/ASPR 3-805.5 which sets forth procedures to be used where mistakes are alleged in negotiated procurements. Although this new provision is not applicable to the instant case because the DPC was not received at the procuring activity until after the contract was awarded, its terms, which largely track our decisions, would not alter the results of this case. Clearly, Johnson's telegram should have put the Corps on notice of a possible mistake

and imposed a duty to verify the proposal before making award. Autoclave Engineers, Inc., B-182895, May 29, 1975, 75-1 CPD 325.

The Corps contends that, regardless of whether it had constructive knowledge of a mistake, Johnson should be denied relief on equitable grounds. The essence of the Corps' argument is that Johnson had "unclean hands" because it violated the solicitation's Independent Price Determination Certification (Standard Form 19-B, Oct. 1969 ed., FPR 1-16.401) by comparing prices with other contractors prior to the award. The Corps argues that permitting Johnson to take advantage of this violation would threaten the integrity of the competitive bidding system.

Johnson's disclosure does constitute a violation of the certification, which, in pertinent part, provides that offerors must not disclose their prices prior to award. However, we do not find that the gravity of the offense is such as to warrant a denial of relief. The Corps' arguments are not persuasive for the following reasons:

First, the disclosure of prices does not justify the award of a contract at an erroneous price.

Second, although this was a negotiated procurement, it was conducted in most respects like an advertised procurement. There was, in fact, no negotiation, and award was made, as was contemplated by paragraph 1B-8 of the solicitation, to the lowest offeror. In the case of an advertised procurement, bids would have been publicly opened immediately after submission, and there would have been no impropriety in any discussion among contractors of their respective bids.

Acceptance of a proposal by the Government with constructive notice of the possibility of an error does not create a binding contract, but one which is subject to recission or reformation. Graybar Electric Company, Inc., B-186004, April 6, 1976, 76-1 CPD 228; 49 Comp. Gen. 446 (1970). Recission is impractical here since a significant portion of the contract work has been completed. Graybar Electric Company, Inc., supra. Contract reformation

requires a determination of the intended price, and thus a review of the evidence presented by Johnson is necessary.

The first mistake alleged by Johnson is an error of $620,560.00 in the portion of the proposal pertaining to drilling. Johnson asserts that it intended to use a price of $4,439,010.00 but that the figure $3,818,450.00 was inserted by mistake. Johnson's worksheet shows that the above figures were among the quotations received from five drilling subcontractors. There is no indication on the worksheet which quote Johnson intended to use. The mistake claim is supported only by the affidavits of Johnson officers.

Regardless of its intent, however, since Johnson ultimately elected to give the drilling subcontract to the firm submitting the low quote at the price included in Johnson's original proposal, it has incurred no loss and thus is entitled to no increase.

The second mistake claimed is $354,262.00 for the labor cost for the required reinforcing steel work. Johnson states that while its intent was to use a cost of $.12 per pound, the figure $.058 per pound was inadvertently substituted.

Johnson's argument seems to be that the $.058 per pound figure represented only the installation cost of face slab reinforcing steel, whereas the $.12 intended price includes other labor such as loading, hauling, unloading, rehandling and sorting as well as the installation cost of non-face slab reinforcing steel. However, the evidence submitted is inconclusive on both the derivation of the $.12 figure and the elements it included. We are unable to find the $.12 figure in any of Johnson's worksheets.

Since Johnson has not presented clear and convincing evidence of its intended price for reinforcing steel, contract reformation is not possible for this item. Dunbar and Sullivan Dredging Co., B-188584, December 23, 1977, 77-2 CPD 497; Graybar Electric Company, Inc., supra. However, since recission is not practicable, the appropriate remedy is payment on a quantum meruit basis for this item.

Murphy Brothers, Inc., B-189756, March 8, 1978, 78-1 CPD 182. The amount of the payment should be arrived at by negotiation between Johnson and the Corps, but it may not exceed the claimed intended price for this item. Murphy Brothers, Inc., supra, or the next acceptable proposal. Colonial Oil Industries, Inc., B-189514, December 7, 1977, 77-2 CPD 437.

The third mistake claimed by Johnson is the omission of $48,200.00 from its proposal to erect and move a two drum hoist to the top of the dam. Johnson's evidence to demonstrate that this cost should have been included consists of workpapers submitted with its original request for relief which show the labor cost of a hoist operator. The derivation of the $48,200 figure is shown in a later Johnson submission.

The hoist has now been mounted, but Johnson and the Corps dispute the actual cost of the operation. The Corps claims that the $48,200 figure overstates actual costs while Johnson asserts that actual costs have been higher.

The evidence submitted (which consists of an undated "worksheet" not presented with its original worksheets but submitted several months later after the Corps questioned the item) does not sufficiently establish that Johnson intended to include an item of $48,200 for hoist erection in its original bid. Thus for the same reasons pertaining to reinforcing steel, reformation in the amount of $48,200 is not appropriate. However, the Corps does not dispute the fact that the hoist has actually been erected. Thus the proper remedy is quantum meruit payment for the actual cost of hoist erection. Johnson and the Corps should negotiate to arrive at agreement on that figure. The payment may not, of course, be greater than the claimed intended price.

Johnson's fourth mistake was to calculate the West Virginia gross receipts tax and the performance bond on a proposal estimate of $11,000,000 rather than on the $13,303,659.50 actually proposed. Although the Corps does not dispute that the workpapers show the error and the amount thereof, it contends that no upward revision is warranted because these costs can be covered under the category "Mobilization and Preparatory Work." It is the Corps' view that

this category is set up to compensate for such minor errors. It is Johnson's position that this figure is "backed out" of each cost item and set forth separately, not as a general fund to cover possible errors, but to take advantage of early contract payments under the "Payments for Mobilization and Preparatory Work" clause. Although we are not convinced of the Corps' position, we recognize that offerors on Government contracts must in some manner include in their prices contingencies to cover possible unforeseen factors such as errors in calculations, etc. We do not believe that this fact is relevant to the question of whether Johnson made a mathematical error in computing its taxes and bonding costs. A contractor is not obligated to prove that it has nowhere in its price factored in a contingency that might cover the error in order to obtain correction. The workpapers submitted with the original request for relief substantiate the claim, and thus payment to Johnson should be increased by $59,815 to reflect the tax and bond costs calculated on the amount of the original proposal.

R.F. Keller

Deputy Comptroller General
of the United States