Lyman Trump 75-92

DECISION

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

FILE: B-192106 DATE: September 11, 1978

MATTER OF: Chaney & Hope, Inc.

DIGEST:

1. An error in bid may be corrected after opening if bidder can show by clear and convincing evidence that a mistake was made, how the mistake occurred, and what the intended bid would have been.

2. Late bid modification may be evaluated in conjunction with other evidence to establish by clear and convincing evidence the intended bid.

3. The existence of late bid modification is not sufficient without independent substantiating evidence to establish by clear and convincing evidence the existence of error or the intended bid.

4. Although the GAO has retained the right of review, the authority to correct mistakes alleged after bid opening but prior to award is vested in procuring agency and weight to be given evidence in support of alleged mistake is question of fact to be considered by the administratively designated evaluator of evidence, whose decision will not be disturbed by us unless there is no reasonable basis for agency decision.

5. In reviewing agency decision on correction of alleged bid mistake, GAO concern is not whether GAO would necessarily have reached same result in first instance, but whether there was reasonable basis for agency's conclusion.

The Vicksburg District of the Army Corps of Engineers issued Invitation for Bids (IFB) DACW38-78-B-0021 for "constructing the recreation facilities at Enid Lake, Mississippi Dam and Outlet Channel." The eight bids submitted were opened at 11:00 a.m. on February 21, 1978. The apparent low bidder was Chaney & Hope, Inc. (Chaney), at $639,909.35. The second low bid was $673,631 by Wise Construction Company. The Government estimate was $587,193.20.

At 10:39 a.m. EST, which was 9:39 a.m. CST, or one hour and twenty minutes before bid opening, Chaney sent a TWX requesting an increase in items 6 and 7 of its bid by $9,000 and $10,000, respectively. Because the previous day had been a holiday, the teletype was in heavy use and the bid modification was not received until 2:36 p.m., 3 1/2

hours after bid opening. Vicksburg District notified Chaney by phone of the late receipt of its bid modification and that it was precluded from considering it by the provisions of section 2-303.1 of the Armed Services Procurement Regulations (ASPR).

Section 2-303.1 provides:

"Bids received in the office designated in the invitation for bids after the exact time set for opening are 'late bids'. A late bid, modification of bid, or withdrawal of bid shall be considered only if the circumstances and the provisions in 7-2002.2 are applicable."

Section 7-2002.2 permits late bids, modifications or withdrawals only if sent by registered or certified mail not less than 5 days prior to date specified for receipt of bids, or if sent by mail or telegram and late receipt was due solely to mishandling by the Government after receipt. None of the conditions of section 7-2002.2 are here involved.

By letter of February 21, 1978, Chaney requested modification of its bid by addition of $19,000 and submitted original working papers in support of the request. An adjustment sheet furnished with its letter shows the following revisions:

(Sub Items)	Estimate	Revised	
Renovate Toilets	$5,000	$2,250	
Landscape	50,000	53,982	
Misc. Iron	20,375	28,892	
Material Escalation	0	10,000	
	75,375	95,124	19,749 (Difference)

In a telephone conversation on February 28, 1978, Chaney was advised that ASPR required a bidder to furnish clear and convincing evidence establishing: (1) existence of error; (2) manner in which the error occurred; and (3) the amount intended. The evidence submitted with Chaney's letter of February 21 was not believed by Vicksburg District to address either existence of an error or the manner in which the error occurred.

By letters of March 1 and 7, 1978, Chaney elected to pursue the request for modification but to accept award at the erroneous bid.

To facilitate this procurement the Department of Labor was requested to extend its wage determination number 77-MS-477 because the applicable rates were to expire March 14, 1978, which would require

cancellation of this solicitation and readvertisement. Since no information was received concerning extension, a contract was awarded to Chaney on March 14. The contract provides for an increase of price up to $19,000 if the contractor's contentionsare sustained.

Under the cover of the March 1 letter Chaney furnished an affidavit enumerating and explaining the attached supporting evidence. The contracting officer recommended against correction of the bid because the erroneous bid was not so disparate as to constitute either constructive notice or unfairness, and because Chaney had failed to establish by clear and convincing evidence either that a mistake was made or the manner in which the alleged mistake occurred.

After a detailed analysis of the cost evidence submitted, the Office of the Chief of Engineers (OCE) concurred in the recommendation of the contracting officer. OCE states that while Chaney has established that a mistake was made, it has not established by clear and convincing evidence its actual intended bid price. The worksheets do not show the extent of inclusion of all direct or indirect costs, costs for miscellaneous iron cannot be recalculated due to omission of necessary information and inconsistent pricing patterns between the sample quotation and the actual bid offered, and, finally, there is no evidence, other than self serving information, to justify the omitted material escalations costs. In addition OCE noted that some of the worksheets bore the same date as bid opening, but would have had to be prepared several days prior to bid opening since the bid was mailed to the agency. Chaney filed a protest to this decision.

Chaney contends that it is a well established rule of law that a modification to a bid, forwarded to the procuring agency prior to bid opening, but received by the agency after bid opening, provides primary evidence of an intended bid price for bid correction purposes. It relies on our decisions in B-165434, December 2, 1968; B-170311, June 3, 1971; and B-176314, December 4, 1972. In addition Chaney alleges that the bidding papers do confirm an intended bid adjustment of $19,000, since the adjustment sheet "* * * reflects final bidding adjustments, which are not correlatable back into the detailed estimate sheet, but which are nontheless final bidding adjustments, in the amount of $19,749 * * *", rounded off to $19,000.

In response OCE states that in relying on the line of cases cited by the protester OCE finds that clear and convincing evidence of a mistake in bid exists but not what the intended bid price would have been. OCE further contends that our decision in B-176314 of December 4, 1972, is inconsistent with the other two decisions, which OCE contends hold that "* * * the submission of a late modification is some evidence in support of a mistake in bid which must be

supported by independent evidence of the intended bid in order to allow correction of the bid." Our decision in B-176314, however, is alleged by OCE to hold that the late bid modification without any additional substantiating evidence "* * * is adequate to establish both the existence of a mistake and the intended bid price." OCE requests that this decision be modified or overruled.

Our decision in B-165434, December 2, 1968, concerned an IFB for 40 gas generator molds. The protester submitted the low bid of $98,745 as compared to the next two bids of $119,132 and $120,132. Prior to bid opening the bidder's supplier of corsets corrected by telephone its previous oral bid of $400 per unit increasing the per unit price to $700. The protester immediately sent a telegraphic modification of its bid 17 minutes before bid opening. However, it was not received until two hours and 40 minutes after bid opening. The contracting agency found clear and convincing evidence of a mistake in the bid after reviewing the bidder's working papers, but did not allow corrections on the grounds that since the telegram was received too late to be considered as a modification, any correction on the basis of mistake in bid would be prejudicial to other bidders and inconsistent with the terms of the invitation. In effect the Navy concluded that since the attempted modification arrived late it could be given no consideration for any purpose whatever.

In the decision we said that:

"We do not agree that because a telegram was received too late to be considered as a bid modification it cannot be considered as evidence in establishing the existence of a mistake and the bid actually intended. The weight to be given evidence submitted in support of a requested correction of a bid primarily is a question of fact to be considered by the evaluator authorized by the regulations to make such determination, in this case the Deputy Commander, Purchasing, Naval Supply Systems Command. From the record, the late modification of price sent prior to bid opening should have been evaluated as the best available evidence to support the quantum of proof needed to show what the bidder stated, prior to award, was the intended bid.

"The general rule is that a bidder may not change his bid after the date of opening, to the prejudice of other bidders. Nevertheless, the statutes requiring advertising for bids and the award of contracts to the lowest responsible bidders are for the benefit of the United States in securing both

> free competition and the lowest competitive prices in its procurement activities. It has consistently been held, therefore, that where a mistake is alleged promptly after opening of bids and there is presented convincing evidence showing that a mistake was made, in what it consists, how it occurred, and what the bid would have been except for the mistake, the interests of the United States require that the bid be considered as corrected so that the Government may have the benefit of it, provided, of course, correction would not result in exceeding the next low correct bid."

We held that the evaluator had failed to apply the test enunciated in the general rule and required by the regulations, specifically, the determination and application of evidence submitted to establish an intended bid. However, because the contract was 65 percent complete we did not believe it to be in the Government's interest to cancel the contract due to the urgency of the procurement.

In B-170311, December 7, 1970, the Fort Worth District, Corps of Engineers, issued an IFB for construction of a medical laboratory. The bids were opened at 2:00 p.m. on May 12, 1970, and the bid of D.E.W., Inc. (D.E.W.) of $182,000 was the lowest of five bids. At 2:01 p.m. a telegraphic modification was received increasing D.E.W.'s bid by $10,000 for structural steel erroneously omitted. Because the modification was received after bid opening, it was rejected in accordance with ASPR 2-303 and 2-305, since late receipt was not due to any fault of the Government. D.E.W. protested rejection of the late modification submitting a sworn statement of how the error occurred, the reason for the delay in telegraphing, and the original worksheets. After reviewing the evidence, the General Counsel of the Office of the Chief of Engineers determined, pursuant to ASPR 2-406.3 (a)(4), that the evidence was not clear and convincing that the bid as submitted was not the bid intended, that correction could not be permitted, and that the bid should be considered for award in the amount submitted.

By decision of December 7, 1970, on protest by the bidder, our Office found that there was no legal basis upon which the protester might be afforded any relief from performance of the contract at the original bid figure. On review of the evidence submitted and the questions raised on that evidence by the General Counsel of the Office of the Chief of Engineers, we stated that we could not "disagree with the administrative determination that the evidence does not clearly and convincingly establish the fact that a mistake was made."

On request for reconsideration, D.E.W. submitted two affidavits and a "sheet metal take-off summary". The first affidavit was an

explanation by the president of D.E.W. of the lump sum of $54,368 for steel, which was for sheet steel and installation by a sheet metal contractor acting as an employee of D.E.W. rather than as a subcontractor. The "sheet metal take-off summary" originally prepared by Brown, the sheet metal contractor, listed 13 separate items totaling the $54,368.12 questioned by the agency, and structural steel was not included. Therefore, contrary to the assertion now made by Chaney, the bidder's worksheets did show the existence of an error and the amount of the error. By decision of June 3, 1971, on the basis of the additional evidence, our Office found clear and convincing evidence of the error, and of the original intended bid. Relying on our decision in B-165434, supra, we stated that:

> "* * * a telegram received too late to be considered as a bid modification may be considered as evidence in establishing the existence of a mistake and the bid actually intended * * *. In the present case we believe the late modification of price, which was sent prior to bid opening and was received only one minute late, when considered in conjunction with the other evidence of record, is adequate to establish both the existence of a mistake and the intended bid price." (Emphasis added).

In our decision of December 4, 1972, B-176314, the protester was low bidder on an IFB for landscape services. About a half hour after bid opening, the contracting agency received telegraphic modification increasing the protester's bid by $11,000. Also, because of the disparity in bid prices, the agency requested the protester to verify its bid. The bid had been prepared without an inspection of the premises. On verification, the protester determined that additional work would be needed, and, contrary to the present allegation of OCE, submitted computations upon which the $11,000 increase was based. The contracting agency found no "* * * basis under which this Office, through the mistake in bid procedure, could authorize any adjustment of the bid amount submitted * * *," and the contract was awarded to the protester at the uncorrected bid price. Although this was a close case our Office permitted an amendment of the contract. We stated:

> "It is true that we are precluded by the regulations pertaining to late bid modifications from considering the telegram of March 30, 1972, as a bid modification increasing Nelson's bid by $11,000. However, we have held that a telegram received too late to be considered as a bid modification may be considered as evidence in establishing the existence of a mistake and the bid actually intended. B-165434, December 2, 1968, and

> B-170311, June 3, 1971. The fact that a bidder's mistake is due to carelessness does not entitle the Government to take advantage of the mistake. 36 Comp. Gen. 441, 444 (1956); B-155268, October 22, 1964. In the present case, we believe the late modification of price, which was sent prior to bid opening and was received only 32 minutes late, when considered in conjunction with the other evidence of record [the submitted computations], is adequate to establish both the existence of a mistake and the intended bid price." (Emphasis added.)

We therefore see no reason to modify or overrule this decision as requested by OCE.

In Southern Rock, Inc., B-182069, January 30, 1975, 75-1 CPD 68, our Office considered and rejected the construction of this line of decisions now advanced by Chaney. We stated that these decisions did not hold that the mere existence of an attempted bid modification is sufficient to establish the existence of error. It is clear that in every one of these decisions there also existed independent substantiating evidence, which together with the bid modification was found sufficient to show by clear and convincing evidence the existence of the error and the bid intended.

We believe that the present case is similar to and governed by our decision in B-170311, December 7, 1970. Here, as in that case, the protester submitted worksheets supporting the figures and computations to which the agency raised several questions. We have held that although we have retained the right of review, the authority to correct mistakes alleged after bid opening but prior to award is vested in the procuring agency and the weight to be given the evidence in support of an alleged mistake is a question of fact to be considered by the administratively designated evaluator of evidence, whose decision will not be disturbed by us unless there is no reasonable basis for the decision. John Amentas Decorators, Inc., B-190691, April 17, 1978, 78-1 CPD 294; Michigan Electric, B-190446, March 23, 1978, 78-1 CPD 229; Gichner Mobile Systems, B-189996, January 30, 1978, 78-1 CPD 73. Our concern, therefore, is not whether we would necessarily have reached the same result as the agency in the adjudication of the claimed error in the first instance, but rather whether there was a reasonable basis for the agency's conclusion. See John Amentas Decorators, Inc., supra. And, on review of the evidence, we cannot say that there was not a reasonable basis for the conclusions of OCE.

Accordingly, the protest is denied.

R. F. Keller

Deputy Comptroller General
of the United States