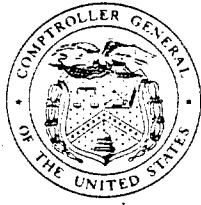


Proc II

DECISION



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

9627

FILE: B-193692 DATE: March 23, 1979

MATTER OF: Lilly Distributing Company
of San Antonio *DLG 01374*

DIGEST:

1. [Agency rejection of low bid] on basis of suspected mistake was reasonable despite bidder's assertion that no error was made, where unit price of item in question was substantially below both other bids received and bidder's previous bids for that item, and bid as corrected would not be low.
2. Agency refusal to permit bidder to waive error and accept award at original price bid is proper where bid as corrected would no longer be low since acceptance would be unfair to other bidders.

DLG 01373

Lilly Distributing Company of San Antonio (Lilly) *DLG 01374* has protested the award of a contract to Dairy Rich, Inc. (Dairy Rich) under Invitation for Bids (IFB) No. DLAL3H-79-B-0158 issued by the Defense Logistics Agency, Defense Personnel Support Center, Philadelphia, Pennsylvania (DLA). Lilly maintains that it, rather than Dairy Rich, was entitled to the award as the low bidder. For the reasons given below, we think that the award to Dairy Rich was proper.

Bids were solicited on various groups of dairy products, including a group of ice cream products, and were required to be made on an "all or none" basis for each group. Bid opening took place as scheduled on November 8, 1978, and Lilly was the apparent low bidder on the group of ice cream products with a bid of \$183,650. Dairy Rich was the next low bidder at \$201,810.50.

Upon reviewing the two low bids, the DLA procurement agent noted a significant difference between the unit prices of Lilly and Dairy Rich for items 38, 40, 41, 43 and 53. (Items 38 and 41 were for quantities of ice cream in two and one-half or three gallon containers and items 40 and 43 were for quantities of ice cream

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in four-ounce cups. Item 53 was for a quantity of sherbert in four-ounce cups.) The bids of Lilly and Dairy Rich on these items were as follows:

Lilly

<u>Item No.</u>	<u>Quantity</u>	<u>Unit</u>	<u>Unit Price</u>	<u>Total Price</u>
38	100	GL	7.60	760
40	3,000	GL	1.56	4,680
41	100	GL	7.60	760
43	4,000	GL	1.56	6,240
53	1,000	GL	1.49	1,490

Dairy Rich

<u>Item No.</u>	<u>Quantity</u>	<u>Unit</u>	<u>Unit Price</u>	<u>Total Price</u>
38	100	GL	2.64	264
40	3,000	GL	3.68	11,040
41	100	GL	2.64	264
43	4,000	GL	3.68	14,720
53	1,000	GL	3.12	3,120

DLA states that on November 9, 1978, Lilly was requested by telephone to verify its prices for items 38, 40, 41, 43 and 53 pursuant to Defense Acquisition Regulation (DAR) § 2-406.1 (1976 ed.). DLA maintains that during this conversation and a later conversation on November 14, 1978, Lilly's vice-president stated that Lilly's prices for items 38 and 41 had mistakenly been made on a three gallon unit basis and its prices for items 40, 43 and 53 had been mistakenly made on a per dozen four-ounce cup unit basis rather than a one gallon unit basis required by the IFB. DLA further maintains that Lilly's vice-president stated that Lilly

would send DLA its correct prices for the items in question and also that Lilly would stand by its mistaken prices in the event its bid as corrected would no longer be the low bid.

DLA states that on November 14, 1978, it received a letter from Lilly stating that its prices as submitted were firm but that the letter did not contain corrected prices for items 38, 40, 41, 43 and 53. DLA further states that the procurement agent and the contracting officer again talked to Lilly's vice-president by telephone on November 14, 1978, and that Lilly's vice-president stated that its prices for the items in question were mistaken but that its bid for those items was firm.

DLA indicates that since Lilly admitted its bid was mistaken and that Lilly did not send DLA its corrected prices, DLA was unsure whether Lilly in fact was the low bidder. DLA, in an effort to assure that award went to the low bidder, converted Lilly's three gallon unit prices and Lilly's per dozen four-ounce cup unit prices to the one gallon unit prices required by the IFB.

First, DLA determined that since Lilly entered a three gallon unit price of \$7.60 for items 38 and 41, Lilly's one gallon unit price would equal \$2.53. DLA then multiplied \$2.53 times one hundred to reach a total price for items 38 and 41 of \$253 each rather than the \$760 price submitted by Lilly. Next, DLA determined that since Lilly entered a per dozen four-ounce cup unit price of \$1.56 for items 40 and 43, its one gallon unit price for those items would equal \$4.16. (One dozen four-ounce cups at \$1.56 equals \$.0325 per ounce; there are 128 ounces in a gallon.) DLA then multiplied \$4.16 times 3,000 to reach a total unit price of \$12,480 for item 40 and multiplied \$4.16 times 4,000 to reach a total unit price of \$16,640 for item 43 rather than the prices of \$4,680 and \$6,240, respectively, submitted by Lilly.

Finally, DLA determined that since Lilly entered a per dozen four-ounce cup unit price of \$1.49 for item 53, its per gallon price would equal \$3.97. (One

dozen four-ounce cups at \$1.49 equals \$.0310 per ounce; there are 128 ounces in a gallon.) DLA then multiplied \$3.97 times 1,000 to reach a total unit price of \$3,970 for item 53 rather than the \$1,490 submitted by Lilly. After converting Lilly's prices to a per one gallon unit basis, DLA determined that as corrected Lilly's bid totaled \$203,318 and therefore no longer was the low bid. Accordingly, DLA awarded the contract to Dairy Rich.

Lilly admits telling DLA that its prices for items 38, 40, 41 and 43 were mistaken but denies telling DLA that its price for item 53 was mistaken. Lilly further states that while it does not object to DLA's conversion analysis for items 38, 40, 41 and 43 and the resultant increase in its bid, it does object to DLA's increasing its price for item 53 since its price for that item was as intended. In Lilly's view its bid as corrected equals \$200,838 or \$972.50 below Dairy Rich's bid of \$201,810.50, and therefore it was entitled to the award. In support of this position, Lilly has submitted a letter from its supplier stating that Lilly purchased sherbert on a per one gallon basis.


As noted above, DLA maintains that Lilly's vice-president twice advised DLA that its price for item 53 was mistaken. In response to Lilly's denial of a mistake in its price for item 53, DLA states that it is clear that Lilly's price is mistaken regardless of what Lilly now says. DLA first points to the significant difference between Lilly's unit price of \$1.49 and those of the other bidders: Hygia Dairy Company (\$3.65); Dairy Rich (\$3.10, 1/4 percent-20 day prompt payment discount); and Knowlton (\$2.40, 1/8 percent-20 day prompt payment discount). DLA also notes that in four recent solicitations for ice cream products, Lilly's lowest bid on sherbert in four-ounce cups was \$2.02 and its highest was \$2.80. Finally, DLA observes that Lilly submitted a letter from its supplier merely stating that Lilly purchased sherbert on a one gallon unit basis, but which did not state the price at which Lilly purchases sherbert. DLA argues that Lilly's failure to produce more convincing evidence of the correctness of its price for item 53 indicates that no such evidence exists. DLA

further states that since Lilly's bid as corrected was higher than Dairy Rich it could not under our precedents allow Lilly to waive its mistake and make an award to Lilly at the mistaken bid prices. Therefore, DLA concludes, it had no other choice than to make an award to Dairy Rich.

We believe that DLA acted properly in rejecting Lilly's bid on the basis of a suspected mistake and awarding the contract to Dairy Rich. Under DAR § 2-406.3(e)(2), a contracting officer is required to reject a bid which is clearly mistaken even though the bidder denies a mistake, if the bid as corrected would no longer be low. See 51 Comp. Gen. 498 (1972) where we held that a bid which offered two-color printing at a substantially lower price than for what it offered one-color printing was so clearly mistaken that the bid should have been rejected, notwithstanding the fact that the bidder denied a mistake had been made. See also Verne Corporation, B-190448, April 6, 1978, 78-1 CPD 275. In view of the large difference between Lilly's unit prices for item 53 and those of the other three bidders, as well as Lilly's own submission of higher prices for the same item in recent procurements, we believe that DLA reasonably concluded that Lilly's bid was mistaken and as corrected was no longer low.

Furthermore, we believe that DLA properly refused to permit Lilly to waive its mistake and accept an award on the basis of its original bid since it is clear that when corrected, Lilly's bid would not be low and acceptance of Lilly's original bid would have been unfair to other bidders. Regis Milk Company, B-180930, June 17, 1974, 74-1 CPD 328. Under these circumstances DLA had no other choice than to reject Lilly's bid.

The protest is denied.


Deputy Comptroller General
of the United States