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**DECISION**



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

FILE: B-201200.2

DATE: May 29, 1981

MATTER OF: Lien-Ranger Construction Co., Inc.

**DIGEST:**

Bidder awarded contract by agency despite claim of mistake before award is entitled to relief even though evidence bidder furnished to substantiate claim was not sufficient to permit correction of bid since evidence was sufficient to allow bidder to withdraw bid.

Lien-Ranger Construction Co., Inc. (Lien-Ranger), low bidder and awardee under invitation for bids (IFB) No. SCS-1-WA-81 issued by the Soil Conservation Service (SCS), United States Department of Agriculture, complains of SCS's refusal to allow it to correct or withdraw its bid. According to Lien-Ranger, a mistake occurred in the preparation of its bid--that is, it inadvertently omitted mobilization costs. SCS, however, argues that correction or withdrawal was not permitted since Lien-Ranger did not present clear and convincing evidence that a mistake occurred.

We believe that Lien-Ranger presented sufficient evidence prior to award to allow withdrawal.

The IFB solicited bids for the construction of an emergency flood protection project in the Yakima, Washington, area. Six bids were received by bid opening, and Lien-Ranger was determined to be the low bidder at \$1,540,597. The second low bid was \$2,049,900. (The Government's estimate was \$1,151,000.)

Since Lien-Ranger's bid was approximately \$500,000 less than the next low bid, the contracting officer requested that Lien-Ranger verify its bid.

*[Complaint of Agency Refusal to Allow Correction or Withdrawal of Bid]*

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Lien-Ranger's representative assured the contracting officer that there was no error in the bid and explained the factors he believed made it possible for Lien-Ranger to offer the lower price. Early the next day, however, the Lien-Ranger representative telephoned the contracting officer to advise him that a bid error had been discovered. According to the Lien-Ranger representative, a review of the worksheets had revealed that mobilization costs had not been included in the bid. The contracting officer then advised the Lien-Ranger representative that he should submit his worksheets and any other information which would substantiate his claim of mistake. This was done and the contracting officer forwarded this information to the Office of General Counsel in Washington, D.C., for review.

After studying these documents, the General Counsel found that Lien-Ranger's submission did not provide the clear and convincing evidence required by Federal Procurement Regulations (FPR) § 1-2.406-3 (1964 ed., Circ. 1) to substantiate a claim of mistake in bid based on the fact that the documents submitted to show the error were undated and showed evidence of erasures. Moreover, it could not be determined who prepared the documents or who altered them. Finally, numerous entries were found scattered throughout the documents which indicated that mobilization costs had been considered during preparation of the bid.

Upon receipt of this finding, the contracting officer refused to allow either correction or withdrawal and awarded the contract to Lien-Ranger on the basis of its original bid.

The authority to correct mistakes alleged after bid opening but prior to award has been delegated to the procuring agencies pursuant to the terms of FPR § 1-2.406-3(a). Nevertheless, our Office retains the authority to review these determinations. See FPR § 1-2.406-3(e).

Correction of a mistake in bid alleged after bid opening but prior to award is only allowed if the bidder can show by clear and convincing evidence that an error has been made, the manner in which the

error occurred, and the intended bid price. FPR § 1-2.406-3(a)(3); F. Hodgson & Sons, B-193531, May 16, 1979, 79-1 CPD 357. Clear and convincing evidence of the actual bid intended is required because it would be unfair to the other bidders and detrimental to the integrity of the competitive bidding system to allow a bidder, after bid opening, to determine for the first time what bid price it should have submitted. U.S. Royal Maintenance, B-193470, January 15, 1979, 79-1 CPD 21.

According to FPR § 1-2.406-3(a), clear and convincing evidence of the existence of a mistake is also required to permit withdrawal. However, we have held that this standard applies only to administrative determinations by executive agencies. Thus, where the bidder submits some evidence to the agency which reasonably supports the allegation of error but the evidence is not "clear and convincing," the matter is to be submitted to this Office for determination. Murphy Brothers, Inc.--Reconsideration, 58 Comp. Gen. 185 (1978), 78-2 CPD 440.

When a doubtful case is referred to our Office, we have held that the degree of proof required to justify withdrawal of a bid before award is in no way comparable to that necessary to allow correction of an erroneous bid. Murphy Brothers, Inc.--Reconsideration, supra. Withdrawal may be allowed whenever it reasonably appears that an error was made. Thus, in view of the general rule that acceptance of a bid with knowledge of an error therein does not consummate a valid and binding contract, we have held that where the Government attempts to bind a bidder to its bid after notice of a claim of error, the Government "virtually undertakes the burden of proving that there was no error or that the bidder's claim was not made in good faith." 36 Comp. Gen. 441, 444 (1956). If that burden is not satisfied, the bidder cannot be held to the contract purportedly awarded. Murphy Brothers, Inc.--Reconsideration, supra.

Section 8 of the contract specifications indicates that "mobilization" consists of those undertakings of the contractor to marshal the forces and equipment necessary for performing the work required under the contract. Section 8 states that mobilization:

"shall include the purchase of contract bonds; transportation of personnel, equipment, and operating supplies to the site; establishment of offices, buildings, and other necessary facilities at the site; and other preparatory work at the site."

After reviewing Lien-Ranger's worksheets, SCS has cited numerous examples of cost items which it believes can be categorized as mobilization. Lien-Ranger denies that these items cover mobilization and argues that it should be permitted to correct its bid by \$228,878 to cover its mobilization costs or, in the alternative, be allowed to withdraw the bid.

Our Office will not disturb a contracting agency's determination regarding the weight to be given the evidence furnished in support of a claim of mistake unless that determination is without a reasonable basis. F. Hodgson & Sons, supra. Here, SCS has concluded that Lien-Ranger's evidence is not clear and convincing either as to the existence of a mistake or the actual bid intended. We believe that SCS's findings in regard to the sufficiency of this evidence must be given great deference in resolving the question whether correction of the bid may be allowed. Therefore, since SCS has decided that Lien-Ranger did in fact include some mobilization costs in its bid, and since we have no basis to conclude that this determination is unreasonable, we must defer to SCS's finding that the clear and convincing evidence required to permit correction is not present here.

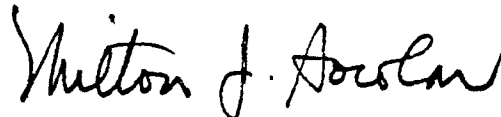
On the other hand, before SCS could refuse Lien-Ranger permission to withdraw the bid, it should have referred this doubtful case to our Office for an advance decision. Further, SCS has the burden in this case of proving that Lien-Ranger's bid was correct as submitted and that no mistake had in fact occurred. To satisfy this burden, SCS must essentially show that all mobilization costs had been included in the bid. However, SCS has only pointed out some items which it believes provide for mobilization and speculates

about the rest of the mobilization costs being hidden among the other cost items. We do not believe that these arguments satisfy SCS's heavy burden on this issue. Therefore, Lien-Ranger should have been permitted to withdraw its bid.

SCS has also criticized what it believes to be the haphazard way in which Lien-Ranger prepared its bid. In SCS's opinion, Lien-Ranger was negligent in attempting to prepare its bid in a rush shortly before the deadline for the submission of bids. SCS believes that this should influence Lien-Ranger's right to correct or withdraw its bid. However, we have held that where a mistake in bid is discovered after bid opening but before award, the bid may be withdrawn regardless of the bidder's negligence in making the mistake. See Department of the Navy--Advance Decision, B-196007, September 21, 1979, 79-2 CPD 215.

Based on the foregoing, we do not believe that a valid and binding contract was consummated. Therefore, since Lien-Ranger has already begun performance, we believe that it is entitled to payment on a quantum meruit or quantum valebant basis for the reasonable value of the services and materials actually furnished to the Government. The remaining requirements should be resolicited.

By separate letter of today, we are notifying the Secretary of Agriculture of our decision.



Acting Comptroller General  
of the United States