



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

B-177482

April 16, 1973

30804

Hudson, Creyke, Koehler, Brown & Tacke 2606389
1744 R Street, NW.
Washington, DC. 20009

Attention: John J. Reed, Esq.

Gentlemen:

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Reference is made to your letter of February 16, 1973, and previous correspondence, protesting, on behalf of Woerfel Corporation and Towne Realty Company (a joint venture) (hereinafter Woerfel), award to any other bidder under invitation for bids (IFB) 10-024-3, issued by the John F. Kennedy Space Center (KSC), National Aeronautics and Space Administration (NASA).

The IFB was issued September 22, 1972, for the construction of spacecraft assembly and encapsulation facilities (SAEF) Nos. 1 and 2. Bids were opened October 24, 1972, with the following results:

Woerfel	\$4,169,651
Morrison-Knudsen Company (M-K)	4,761,000
Heyl and Patterson, Inc.	5,101,000

The Government estimate for the work was \$5,134,320. Because Woerfel's bid was significantly lower than the other bids and the estimate, the contracting officer suspected a mistake and requested Woerfel on October 24, 1972, to review the bid. By letter of the same date, Woerfel advised that a gross clerical error in the amount of \$476,000 had occurred and requested that its bid be corrected to \$4,645,651. On October 25, 1972, the contracting officer requested Woerfel to submit documents substantiating the mistake and the bid intended. By letter dated October 26, 1972, Woerfel submitted worksheets and other data and stated that the mistake arose from failure to add the price of electrical work to the mechanical work price, \$1,648,800, to obtain a correct subtotal of \$2,173,800 for the two items. Had the correct subtotal been added to the other items, it was alleged that the correct bid would have been \$4,640,383. Woerfel stated that it believed the documentation would allow NASA " * * * to make a favorable award of this contract to us * * *."

After consideration of the documentary evidence submitted in support of the alleged error, NASA's Director of Procurement made the following determination (quoted in pertinent part) dated November 10, 1972:

[Contract Award Protest]

PUBLISHED DECISION
52 Comp. Gen.

7-583 / 012238

BEST DOCUMENT AVAILABLE

A review of the supporting documentation confirms the bidder's allegation that the quotation for the electrical work, as required by Section 16 of the specifications, was omitted from recapitulation sheet and was not elsewhere included in the bid. However, such review fails to confirm, in a clear and convincing manner, the amount of the intended bid. The amount of the Holloway quotation, \$525,000, which is specified on Page 8 of 9, was not included in the Woerfel/Towne bid; however, it is not clear whether the bidder actually intended to use this quotation or that of a competitor, Famco, for the electrical effort.

The exact amount of Famco's quote prior to bid opening is subject to conjecture; the bid confirmation letter is dated October 26, 1972 and the Woerfel/Towne stamp indicates receipt on October 30th. In this letter, Famco reduces its original quotation (apparently given telephonically prior to bid opening) of \$528,000 by \$58,000 (\$28,000 for vendor material reductions and \$30,000 for its own labor and material cuts). Woerfel/Towne may have intended to use the latter quote because recapitulation sheet 1 of 9 shows "Electrical Famco -29,000 (apparently a recording error) -30,000," but there is no indication that these amounts were subtracted from the total of the bid submitted. Regardless, based on the contention of a \$525,000 omission (Holloway sheet 8 of 9) the corrected price per this computation would have been \$4,699,383. Also, the contractor in correcting his bid by incorporating the \$525,000 electrical subcontractor quote failed to adjust the \$300,000 overhead and profit figure in his original bid.

In cases such as this where the evidence is clear and convincing as to the existence of a mistake but not as to the bid intended, the Comptroller General has consistently ruled that the mistaken bid may be disregarded. See 17 Comp. Gen. 492,493 and 17 id. 536,537. Accordingly, it is hereby determined that the bid of Woerfel Corporation/Towne Realty may be disregarded under this procurement and award made to the next low responsive and responsible bidder.

By letter of November 14, 1972, NASA communicated this determination to Woerfel and stated that the bid was being disregarded. The contract was awarded to M-K the same day. On November 15, 1972, Woerfel sent a telegram to NASA which read in part:

* * * THE WOERFEL CORP HEREBY PROTESTS THE PROPOSED AWARD OF THE ABOVE CAPTIONED CONTRACT TO MORRISON AND KNUDSON [sic] CO OF BOISE IDAHO BECAUSE IT IS IN THE BEST INTEREST OF THE GOVERNMENT TO AWARD THE CONTRACT TO WOERFEL CORP AT THE REVISED AMOUNT OF FOUR MILLION SIX HUNDRED FORTY THOUSAND THREE HUNDRED EIGHTY THREE DOLLARS WHICH IS \$120,617 LOWER THAN THE BID SUBMITTED BY MORRISON KNUDSON [sic] CO. WE REQUEST THAT OUR MISTAKE IN BID STATEMENT DATED 26 OCTOBER 1972 BE FORWARDED TO THE CONTROLLER GENERAL FOR DETERMINATION

By telegram dated November 17 and letter of November 27, counsel for Woerfel protested to our Office. It was alleged that NASA erred in refusing to permit correction of Woerfel's bid and in disregarding Woerfel's bid. Woerfel requested that award be made to it at its original bid price, pending a determination of the merits of the mistake in bid request and that, if correction was proper, the contract price could be adjusted accordingly.

Counsel for Woerfel subsequently filed Civil Action No. 72-311 (Woerfel Corporation and Towne Realty Company (A Joint Venture) v. Dr. James C. Fletcher, Administrator, National Aeronautics and Space Administration and Morrison-Knudsen Company, a corporation) in the United States District Court for the Middle District of Florida, Orlando Division, on December 26, 1972. Plaintiff demanded judgment as follows: declaring that defendant, NASA, acted unlawfully, arbitrarily, and capriciously in awarding the contract in question to the defendant M-K; vacating and setting aside the unlawful contracts awarded to M-K; temporarily restraining the defendants from performing under the contract; temporarily and permanently enjoining the defendants from performing under the contract; directing NASA to reconsider the offers submitted, including plaintiff's, or alternatively issuing a new IFB; and providing other relief as might be just and proper. By order of January 15, 1973, the court denied the application for a temporary restraining order, stating in part that:

Should the Comptroller General determine that NASA acted erroneously and that the contract should be withdrawn from Morrison-Knudsen, permitting the contract to be withdrawn after more than one-twelfth (1/12) had been completed would still not have as serious complications as holding the contract in abeyance as plaintiff requests * * *

As to the other matters alleged in the complaint, a pretrial conference has been scheduled for April 24, 1973, and a trial date of April 30, 1973, has been set. In this regard, it is the policy of our Office not to issue a decision on the merits of a protest where the material issues involved are likely to be disposed of in litigation before a court of competent

jurisdiction. B-174052, August 29, 1972. However, since the District Court order reasonably contemplates that our Office will render a decision, we will consider the protest on the merits at this time. 52 Comp. Gen. ____ (B-176223, September 25, 1972).

For the reasons which follow, we find no basis to sustain the protest.

The initial question for determination is your contention that NASA's decision denying correction of the Woerfel bid was erroneous. To permit correction of an alleged error in bid prior to award, the bidder must submit clear and convincing evidence that an error has been made, the manner in which the error occurred and the intended bid price. 49 Comp. Gen. 480, 482 (1970) and NASA FR 2.406-3(d)(2). The weight to be given such evidence is a question of fact to be considered by the administratively designated evaluator of the evidence. 51 Comp. Gen. 1 (1971). After a review of the record, we conclude that NASA's determination was reasonable, since it is not possible to ascertain the intended bid price from the bidder's workpapers. If the intended price for the electrical work was \$525,000, as indicated on page 8 of 9 of the workpapers, addition of this amount, plus an adjustment in the insurance and bond costs based on a percentage of the cost, would yield a corrected bid price of \$4,699,383. On the other hand, if the \$59,000 deduction on Famco's electrical price (noted on page 1 of 9 but not otherwise included in the calculations) was meant to be deducted from the total bid price of \$4,699,383, the corrected bid price would be \$4,640,383, as contended by Woerfel in its October 26, 1972, letter. Another possibility is that the \$59,000 amount was meant to be deducted from the \$525,000 electrical quote before the application of insurance and bond factors, which would produce a third bid price. It cannot be determined from the workpapers which of these possibilities, if any, represents the intended bid price. In any event, since in one place in the worksheets the bidder is using one electrical subcontractor's quotation and in another place indicates a \$59,000 deduction from another electrical subcontractor, it is not clear which subcontractor's quotation the bidder intended to rely upon in preparing the bid.

However, notwithstanding the decision denying correction, you further contend that NASA officials erred in disregarding Woerfel's bid and proceeding to award the contract to M-K. You allege that NASA acted arbitrarily and in violation of NASA FR 2.406-3(e), which provides, inter alia, that a bidder, as a matter of right, may have his claim of mistake determined by the Comptroller General and that all doubtful cases will be forwarded to the Comptroller General for advance decision. Section 2.406-3(d)(5) of the regulations provides further:

Where the bidder fails or refuses to furnish evidence in support of a suspected or alleged mistake, the contracting

officer shall consider the bid as submitted unless the amount of the bid is so far out of line with the amounts of other bids received or with the amount estimated by the Government or determined by the contracting officer to be reasonable, or there are other indications of error so clear, as reasonably to justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide bidders, in which case it may be rejected. The attempts made to obtain the information required and the action taken with respect to the bid shall be fully documented.

Several decisions of our Office are cited which you contend support "* * * the right of a bidder who claims mistake to be entitled to award at the original bid price, if the corrected price would still be lowest * * *." B-176111, November 7, 1972; B-174957, May 30, 1972; B-173031, September 17, 1971; and 42 Comp. Gen. 723 (1963). Particular reliance is placed upon B-165405, October 24, 1968, which permitted the original erroneous bid to be considered for award since acceptance of such a bid would not be prejudicial to other bidders where the evidence clearly indicated that the bid would have been lowest even if corrected. The decision quoted section 1-2.406-3(d)(5) of the Federal Procurement Regulations, which is similar to NASA PR 2.406-3(d)(5). In summary, your contention is that, in light of the NASA regulations and decisions of our Office, after NASA officials refused to correct Woerfel's bid, they were not only permitted but obligated to consider Woerfel's original bid as submitted, or, at the very least, obligated to query Woerfel as to its desire in the matter before disregarding the bid. It is also contended that NASA should have withheld award to M-K pending a decision on the merits of Woerfel's mistake in bid claim by our Office. You point out that not only did NASA fail to ask Woerfel if it would accept the contract at the original bid price, but also that Woerfel was allowed no time to express its intent since the notice that its bid was being disregarded was sent on the same day the contract was awarded to M-K.

Normally, where a bidder alleges a mistake after bid opening, he is not then free to waive his right to have the bid rejected because of mistake. To permit a bidder to do so would be tantamount to allowing the ostensible low bidder to elect, after bid opening, whether to stand on the bid, or withdraw it, depending upon which course of action appeared to be in his best interests. 37 Comp. Gen. 579, 582 (1958). However, as the decisions you have cited point out, our Office has permitted acceptance of an original bid where the bidder established that an error had been made in the bid, but has not established the intended bid price. The rationale of those decisions has been that where it is clear that the corrected bid would still have been lowest, even though the amount of the intended bid could not be clearly proved for the purpose of bid correction, no prejudice to the other bidders would result by acceptance of the original bid.

Before considering the propriety of NASA's decision to disregard Woerfel's bid, it must be determined whether the evidence clearly shows that the bid would have remained low if corrected. In Woerfel's October 26, 1972, letter, after adding the omitted \$525,000 electrical price, appropriate upward adjustments were made for insurance and bond costs; however, the \$300,000 overhead and profit figure was unchanged. The \$300,000 amount represents approximately 7.7 percent of the original, uncorrected subtotal for the nine items of work involved (\$3,852,235). Therefore, it is conceivable that if the \$525,000 electrical price had been included in the total estimate for the work, the bid price could have been \$4,756,763, allowing for the overhead and profit and insurance and bond costs. Further, we note that while Woerfel has alleged an omission of \$525,000 for the electrical work, the Government estimate for that work was approximately \$700,000.

In 48 Comp. Gen. 748 (1969), our Office considered a request for correction where the Government estimate for the omitted work item was \$31,000, the low bidder claimed omission of a \$21,000 quote, and correction on the basis claimed would have made the bid only about \$500 lower than the next low bid of \$272,464. We held that, under the circumstances, the facts were not sufficiently clear to warrant correction, stating:

The correction of mistakes in bid has always been a vexing problem. It has been argued that bid correction after bid opening and disclosure of prices quoted compromises the integrity of the competitive bidding system, and, to some extent at least, this is true. For this reason, it has been advocated that the Government should adopt a policy which would permit contractors to withdraw, but not to correct, erroneous bids. We do not agree completely with this position, since we believe there are cases in which bid correction should be permitted. We do agree that, regardless of the good faith of the party or parties involved, correction should be denied in any case in which there exists any reasonable basis for argument that public confidence in the integrity of the competitive bidding system would be adversely affected thereby. The present case, it seems to us, falls in this category.

In our view, the instant case falls within this rule and on this basis alone a claim for correction or withdrawal of the claim of error must be denied.

Moreover, even if it is assumed that Woerfel's corrected bid is clearly lowest, we find no basis in the regulations or the decisions of this Office to conclude that NASA erred in disregarding the bid. NASA PR 2.406-3(d)(5) is, on its face, inapplicable to the circumstances here,

since it deals with the situation where a bidder fails or refuses to furnish any evidence in support of a suspected or alleged mistake. In B-165405, supra, and B-160673, April 7, 1970, similar regulatory language was cited for the purpose of providing guidance in the consideration of the original bid in situations where the low bidder had indicated his willingness and desire, prior to the decision on correction, to accept award at the original bid price if correction were denied. See, in this regard, 42 Comp. Gen., supra, at 725. In the instant case, we do not regard the language in Woerfel's October 26, 1972, letter concerning a "favorable" contract award as indicating that Woerfel desired award at the original bid price if correction were denied. Moreover, even after denial of correction, the only request in Woerfel's November 15, 1972, telegram to NASA was that award be made at the corrected price. The first indication of a desire to be awarded the contract at the original price is Woerfel's November 17, 1972, telegram to our Office. This was 3 days after award to M-K.

Our decision B-173031, supra, likewise is distinguishable from the facts of the present case in that the low bidder specifically requested award at the original bid price if correction were not permitted. As for decisions B-174957 and B-176111, supra, the former involved a situation where the bidder failed to furnish evidence as to its intended bid price, and in the latter we held that since the Government erred in failing to determine that a mistake had been made, award at the original price was not legally enforceable and the bidder should be given the option of withdrawing its bid or waiving the mistake, the alternative following on the statement of the bidder to our Office that withdrawal was not an acceptable solution. Further, in this respect, see B-164910, October 25, 1966, where it was held:

It is true that in certain cases where a bidder has established that an error had been made in its bid but not its intended bid price, our Office as authorized acceptance of its original bid on the basis that it was the lowest bid and, therefore, not prejudicial to other bidders. It should be noted that in those cases, the bidder had advised the contracting officer that if he could not permit correction of the bid that the bid be considered for award as originally submitted. * * *

Under the circumstances presented, we conclude that NASA was not obligated to consider Woerfel's original bid or to query Woerfel as to its willingness to accept award at the original bid price. Nor did NASA PR 2.406-3(e) impose an obligation to withhold award to M-K pending our decision on the merits of the mistake in bid claim. Finally, it would have been improper for NASA to have followed the course of action suggested in your November 27, 1972, letter to us, that is, award to Woerfel at the original bid price followed by determination of the mistake in bid claim. B-164910, supra.

B-177482

From the foregoing, it must be concluded that the administrative actions taken in regard to Woerfel's bid were proper. Accordingly, the protest is denied.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States

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