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Paul Sherry
Proc II.

DECISION



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

FILE: B-189544

DATE: October 25, 1977

MATTER OF: S. J. Groves & Sons Company

DIGEST:

1. Worksheets and other information submitted by bidder to agency in support of bid correction will be considered by GAO notwithstanding that same information has not been furnished protester.
2. Where mistake in bid was alleged prior to award and bidder presented clear and convincing evidence of mistake and of bid actually intended, and bid as corrected remains low by substantial amount, GAO will not disturb administrative determination to allow correction.
3. Fact that portions of bid may be unbalanced does not disturb contracting officer's determination that clear and convincing evidence of mistake and intended bid exists as to other portions of bid.

S. J. Groves & Sons Company (Groves) protests the correction of the low bid of B⁴ Constructors (B⁴) under Invitation for Bids (IFB) No. DC-7270 issued by the Bureau of Reclamation, United States Department of the Interior (Interior), for the construction of a section of the Tehama-Cclusa Canal at its Central Valley Project, California.

On April 19, 1977, Interior opened the six bids which had been submitted in response to the subject IFB. B⁴ submitted the low bid of \$18,970,693. Groves submitted the next low bid of \$22,922,322. The Government estimate for the work was \$25,149,730. Owing to the disparity between the low bid and the next low bid and Government estimate, B⁴ was contacted by the contracting officer on April 29, 1977, and requested to verify its bid price. By mailgram dated May 4, 1977, B⁴ advised that it erred in its lump-sum subtotal bid of \$1,740,000 for Items 60 through 83 of the IFB. On May 6, 1977, B⁴ furnished detailed information which indicated that in entering its lump-sum bid for Items 60-83 (furnishing and laying pipe) it had failed to enter the direct costs for the siphons (Items 79-83)

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on the bid summary sheet, thereby underestimating its bid by \$1,826,690. By telegram dated July 3, 1977, Groves protested to this Office against correction on the grounds that B⁴ did not make any mistake in its bid and that in the event of a mistake by B⁴, it has not been shown by clear and convincing evidence what the intended bid would have been. On July 15, 1977, award was made to B⁴ in order to assure timely completion of the project.

The protester raises a number of objections to Interior's action in this case. Initially it objects to the award being made while its protest was pending. It contends that although bids were due to expire on July 18, Interior should have asked for bid extensions rather than proceed with an award to B⁴. Groves also objects to the fact that Interior has refused it access to the worksheets and related documents furnished by B⁴ in support of its claim of bid mistake. It urges that our Office should either rule in favor of permitting access or, alternatively, draw an adverse inference as to the integrity and evidentiary weight of these worksheets and documents.

With regard to Interior's decision to make award immediately to B⁴, our Bid Protest Procedures, 4 CFR Part 20 (1977) provide in pertinent part:

"§ 20.4 Withholding of Award. When a protest has been filed before award the agency will not make an award prior to resolution of the protest except as provided in applicable procurement regulations."

The record contains the findings and determinations by the agency as required by Federal Procurement Regulations (FPR) 1-2.407-8(b)(4) (amend 68). In the instant case the record indicates that award on July 15 was necessary to prevent the B⁴ bid from expiring and to assure timely completion of the instant project. Groves, however, questions whether it was necessary to have made award in the face of its pending protest. It suggests that the award was made solely to prevent B⁴'s low bid from expiring and not because of any urgency. Moreover, it questions whether telephonic notice of the award to our Associate General Counsel (followed 10 days thereafter by written notice) complies with the notice requirement of our Bid Protest Procedures.

In this regard we have held that award of a contract while a protest is pending is not improper, so long as it is determined that prompt award will be advantageous to the Government and

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GAO is notified by the agency of its intent to make the award. Price Waterhouse & Co., B-186779, November 15, 1976, 76-2 CPD 412. Further, we have held that the notification requirement is met if our Office is notified. See Price Waterhouse, supra. Therefore, we see nothing improper with the agency's providing our Associate General Counsel with telephonic notice of the award followed by formal written notification. Nor do we find any improprieties in the agency's determination that prompt award was necessary for the reasons cited in its findings and determination.

In order to permit correction of an error in bid prior to award a bidder must submit "clear and convincing evidence" (1) that a mistake was made (2) the nature of the mistake, and (3) the bid price actually intended. 53 Comp. Gen. 232 (1973). These requirements for the correction of a bid are found in FPR § 1-2.406-3(2) (amend 165), which states that:

"A determination may be made permitting the bidder to correct his bid where the bidder requests permission to do so and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended * * *. If the evidence is clear and convincing only as to the mistake, but not as to the intended bid, a determination permitting the bidder to withdraw his bid may be made."

At the outset we note that by letter of July 20, 1977 Groves sought access from our Office under the Freedom of Information Act, 5 U.S.C. § 552, to worksheets and related documents furnished by B⁴ to Interior in support of its mistake in bid claim, which in turn were furnished to us in connection with this protest. By letter dated July 28, 1977, we advised the protester that release of these documents should be sought from Interior, as that agency and not GAO has the primary interest in such documents. Thereafter, we were advised by the protester that pending its Freedom of Information Act request to Interior our Office should nevertheless decide the merits of its protest. However, Groves argues that our Office should not give full weight to those portions of the record and the worksheets which it has not been permitted to inspect.

We have often taken the position that documents which are not furnished to the protester because they contain information considered by the agency to be proprietary will be considered

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and accorded full weight by our Office in deciding a bid protest. Techplan Corporation, B-180795, September 16, 1974, 74-2 CPD 189, Unicare Health Services, Inc., B-180262, B-180305, April 5, 1974, 74-1 CPD 175. In fact, we have in the past considered worksheets not provided the protester in a case concerning a bid correction. See B-174608, May 9, 1972. In accordance with our policy in such matters we will consider and accord full weight to all materials contained in the record notwithstanding the fact that some of these materials may not have been released to Groves.

Interior allowed correction in this case on the following basis:

"On page 11 of 8 pages of the original Bid Summary Sheet, there are no prices entered for the siphons, schedule items 79 through 83, for labor, equipment, and materials. There is a note that the siphon costs were to be added by RB (Robert Brosamer). On the xerox copy of this page, the labor, rental equipment, material, and total direct costs have been entered in red. The total direct cost of the siphons is shown as being \$1,826,690. B⁴ Constructors planned on constructing the siphons using its own crews. On the Bid Estimate Worksheet for the siphons, schedule items 79 through 83 it shows the total labor costs based on \$46.64 per cubic yard at \$589,781; equipment rent at \$16.89 per cubic yard for a total of \$213,660; and permanent materials at \$25.60 per cubic yard for a total of \$323,714. B⁴ Constructors then converted these unit per cubic yard prices to unit per linear foot prices. These unit prices were computed to be \$172 per linear foot for labor costs; \$62 per linear foot for equipment rent; and \$95 per linear foot for permanent materials. The costs of these three items based on the number of linear feet stated for the schedule items are \$686,520; 211,420, and 323,950 for a total cost of \$1,221,890. To this amount, B⁴ Constructors added the cost of rebar under the column heading 'Subcontract'. It estimated the total cost of rebar to be \$704,800 and added this amount to the \$1,221,890 and obtained its total lump sum price of \$1,926,690 for the siphons. There is no evidence that shows the prices for the siphons, schedule items 79 through 83 were entered into the Bid Summary Sheet. Also, there is no evidence to show that the prices for the siphons had been entered on any other worksheets or into the bid.

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"As further evidence to support B⁴ Constructors' contention that it thought the price of the siphons was in the base numbers entered opposite the word 'START' at the top of the Bid Summary: Plus & Minus Sheet, there are two instances where the price for rebar used to construct the siphons is adjusted. The first instance occurs on the second page of the Bid Summary: Plus & Minus Sheet, second line down from the 'START' line. On this line there is a plus \$43,400 after 'Rebar Klinger'. This plus is a result of a bid furnished by Klinger for rebar in the amount of \$1,181,010 which is \$43,400 higher than the \$1,137,600 estimated by B⁴ Constructors. Thus, B⁴ Constructors entered the \$43,400 as a plus on the Bid Summary: Plus & Minus Sheet to make up the difference between its original estimated price for rebar and the bid price submitted by Klinger. After receiving the rebar bid from Klinger, B⁴ Constructors received another bid for rebar from Judson in the amount of \$1,127,551. This bid was \$53,459 lower than the bid from Klinger. Therefore, the second instance that a change occurs is on page 3 of the Bid Summary: Plus & Minus Sheet, 7th line below the 'START' line. On this line there is entered a minus \$53,450 for 'Rebar-Judson'. In view of these two instances where the rebar prices are adjusted, it is rather evident that B⁴ Constructors thought that the price for constructing the siphons was included in the 'START' price entered at the top of page 1 of the Bid Summary: Plus & Minus Sheet. The rebar bids are shown on the 'Subcontract & Material Quotes' sheet marked 'Reinforcing'."

A corrected bid of \$20,797,383 (\$18,970,693 plus \$1,826,690) was thus derived. In addition, it should be noted that the IFB contained a provision requiring a bidder to waive \$37,000 plus 2 percent of the original bid over \$1 million of an amount requested for bid correction. In accordance with this provision, Interior has computed B⁴'s waiver to be \$396,913.85, which amount is to be deducted from the contract payments.

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Groves questions why B⁴ did not instantly or within a few days of bid opening assert its claim of mistake. The protester points out that the error was not alleged until B⁴ responded to the contracting officer's April 29 request for bid verification some time after the April 19 bid opening.

When it is suspected that the low bidder has made a mistake, FPR 1-2.406-1 (FPR Circ. 1) requires the contracting officer to seek verification. We do not find that either the contracting officer or B⁴ acted improperly or in such a manner that veracity of B⁴'s claim may be questioned. They both followed the applicable regulations, the contracting officer in seeking verification and B⁴ by responding in a timely manner. Moreover, FPR 1-2.406-1 (FPR Circ. 1) permits bid correction anytime prior to award.

Next the protester takes issue with Interior's determination that the evidence clearly and convincingly establishes a mistake in bid. It contends that the B⁴ bid is unbalanced in several areas and hence there is no reason to believe that a mistake was made in the siphon portion of the bid. Moreover, based on information made available to Groves, it suspects that the B⁴ bid was signed in blank by its president with the bid figures to be filled in later by another official of the company. If so, Groves argues that the bid originally submitted by B⁴ is its intended bid. In short, Groves argues that bid correction was contrary to the integrity of the bid system under the circumstances of this case.

In our view, however, the fact that B⁴'s bid on some of the 145 items may have been lower than Interior's estimate for such items does not prevent a determination that B⁴ made a mistake in other portions of its bid. Even if, as Groves suggests, the president of B⁴ signed its bid in blank, intending that it be filled in by an employee, it is clear from the workpapers which contain an estimate for the direct cost of constructing the siphons that the intended bid was not submitted.

Although our Office has retained the right of review in bid mistake cases, the authority to correct bid mistakes 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 our Office unless there is no reasonable basis for the decision. 53 Comp. Gen. 232, *supra*, at 235. Here, we have carefully reviewed the complete record, and it is our conclusion that the record reasonably supports the agency's determination to permit the B⁴ bid to be corrected.

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In view of the foregoing, the protest is denied.

Paul G. Leubling
For The Comptroller General
of the United States