

the further
PLI

DECISION



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

~~14562~~
14552

FILE: B-198711

DATE: August 12, 1980

MATTER OF: Servidone Construction Corp.; Midwest
Construction Company

DIGEST:

[Protest Alleging Mistake in Bid]

1. Bidder, who alleges mistake in bid and requests bid correction and award, and next low bidder, who protests correction and award, have standing to protest, since both are affected by agency determination regarding correction of mistake.
2. Bidder has fulfilled requirements that need to be met in order to permit correction of bid where it is clear from bidder's worksheet that bidder used incorrect number of weeks on job in computing bid and intended bid price can be ascertained from information in worksheet.
3. Percentage differential between intended bid price and next low bid price is only one factor to consider in deciding whether to permit correction where mistake in bid is alleged and is not controlling where intended bid price has been established by clear and convincing evidence.
4. Issue whether it would be in best interest of Government to make award to bidder who agrees to absorb mistake in bid is irrelevant, since determination has been made to permit correction. In any event, issue relates to bidder responsibility and GAO does not ordinarily review affirmative determinations of responsibility.
5. Question of whether bidder will provide proper payment/performance bonds after award of contract is matter of contract administration not cognizable under Bid Protest Procedures.

011617
113001

United States Army Corps of Engineers (Galveston District) invitation for bids No. DACW64-80-B-0030, a 100-percent small business set-aside for the construction of the Southwest Leg Levee and Structures (hurricane flood protection for Texas City, Texas), resulted in the receipt of bid prices ranging from \$4,333,330 to \$9,678,342. The low bid was rejected because the bidder was found to be other than a small business. The next low bidder (\$4,515,917.60), Midwest Construction Company (Midwest), protests any award to other than itself and also requests that its bid price be corrected upward due to a mistake in bid. The Servidone Construction Corp. (Servidone), the third low bidder (\$5,248,700), protests any award to Midwest in view of the mistake in bid.

The Midwest mistake in bid is based solely upon an error made in the arithmetical computation of the Midwest indirect cost estimate. The Midwest estimator (as indicated by affidavit) inadvertently misapplied the informational notation--"112 WEEKS TO COMPLETE PROJECT OR 26 MONTHS"--set forth at the top of the "Indirect Cost Estimate" page of the Midwest worksheets and multiplied the total weekly costs set forth for certain enumerated items by 26 rather than 112. As a result of the error, the estimated indirect costs were computed at \$398,808 instead of \$947,606. Accordingly, Midwest asserts that its bid price should be increased by \$548,798 (\$947,606 less \$398,808) plus an amount representing the 15-percent markup which it applied to both indirect and direct costs in figuring the bid--a total increase of \$631,117.70.

In considering the request for correction, the Galveston District noted that the figure of 112 weeks exceeded the project completion period (90 weeks) by 22 weeks, but concluded that this discrepancy might be explained by the contractor's expectations of incurring overhead costs prior to its receipt of the notice to proceed and after the project had been substantially completed. The District further noted that estimators normally use percentages of 12 to 15 for overhead, 10 for profit, and 1 for bond expenses (resulting in a total percentage of approximately 24.4 to 27.8), figures compatible with the original Midwest percentages of 11.6 (indirect/direct costs as computed on the Midwest "Indirect Cost Estimate" page) and 15 (markup).

It did not, however, believe these figures to be compatible with the corrected Midwest percentage of 27.7 for indirect/direct costs as this combined with the 15-percent markup resulted in an allegedly very high total percentage of approximately 46.9. The District believed that the high 27.7 percentage would have been considered noncompetitive by the estimator had that percentage been correctly computed in the original bid calculations and might not have been used. However, it was also noted that even with the 27.7 percentage Midwest would have been the low bidder. Because it was concluded that Midwest had proven its mistake and its intended bid price by clear and convincing evidence, award was recommended to Midwest on its corrected bid price pursuant to Defense Acquisition Regulation § 2-406.3 (1976 ed.)

The Acting Chief Counsel of the Office of the Chief of Engineers, Washington, D. C., reviewed the recommendation and concluded that correction should not be allowed because the corrected percentage for indirect/direct costs is excessive and it is speculative that the bidder would have relied upon it in preparing a bid. Midwest has agreed to accept an award at its original bid price subject to our ruling on the issue of bid correction. If the contracting officer does not find it to be unconscionable, the Office of the Chief of Engineers has concurred in award to Midwest on the basis of its original/uncorrected price.

Further, the Office of the Chief of Engineers points out that in Kings Point Mfg. Co., Inc., B-193952, September 14, 1979, 79-2 CPD 196, we held that:

"* * * The weight to be given to the evidence in support of an alleged mistake is a question of fact to be decided by the procuring agency whose decision will not be disturbed * * * unless there is no reasonable basis for the decision. * * *"

Therefore, it is stated that the decision not to permit correction of the Midwest bid moots the respective Midwest and Servidone protests for and against correction. Also, it is contended that, since the

Midwest bid price will not be corrected and since the original and corrected Midwest bid prices are lower than the Servidone bid, Servidone has no standing and is not an interested party to protest the award to Midwest at its original bid price.

Since both parties are affected by the agency determination regarding the correction of the mistake in bid, they both have standing to protest.

Servidone presents four bases of protest. First, it contends that no clear and convincing evidence exists as to the intended Midwest bid price and that it is possible that the intended bid would have exceeded the Servidone bid. Accordingly, it concludes that no award may be made to Midwest. Noting that it was not given access to the Midwest worksheets (Midwest asked that these not be disclosed to its competitors) except for information regarding the general money sums involved and the general manner in which Midwest computed its indirect costs, Servidone states that if the original amount of indirect costs (\$398,808) is divided by 26, the result is \$15,338.88; that if this is then multiplied by 112, the result is \$1,717,942.24; and that if \$398,808 is then deducted from this product, an error of \$1,319,134.24 is indicated. This amount is greater than the difference between the original Midwest bid and the Servidone bid. Also, if only the \$7,200 figure for "Office Help" is multiplied by 86 (112 minus 26) the result is \$619,200, and to combine this amount with the other errors in the Midwest calculations again indicates that the intended Midwest bid price is greater than the Servidone bid price. Finally, Servidone believes that the manner in which Midwest computed its indirect costs, for example, using 112 weeks instead of 90 weeks, leaves doubt as to the exact price that Midwest intended to bid.

Second, Servidone believes that, even if the intended Midwest bid price is as Midwest claims, in view of the mere 1.93-percent difference between the intended bid price and the Servidone bid price (a difference of only \$101,646.70) neither correction nor waiver of the mistake should be permitted since to do so would, notwithstanding the good faith of the parties involved, adversely affect the public's confidence in the integrity of the competitive bidding

system. 48 Comp. Gen. 748 (1969); Broken Lance Enterprises, Inc., 56 Comp. Gen. 1 (1976), 76-2 CPD 314.

Third, it is argued that it is not in the best interest of the Government to make an award to Midwest, since a bidder incurring a mistake that represents 14 percent of its bid price will probably try to recoup its loss during contract performance. Last, Servidone contends that, because Midwest may not advise its payment/performance bond surety of the mistake, the Midwest bid must be rejected because the surety would have a valid defense, not being given all of the required information necessary for establishing a valid contractual relationship, against performance of its obligations under the bond should Midwest default on the contract. U.S. v. Freel, 186 U.S. 309 (1901).

Midwest contends that it has presented clear and convincing evidence of its mistake (a purely mathematical error) and of its intended bid price. Because its intended bid price is still low, Midwest asserts that it should receive award based on that intended bid price and that any decision to the contrary is arbitrary and capricious. As regards the contentions made about the manner in which it computed its indirect costs, Midwest states that the way in which it computes these costs is a judgmental matter which differs depending on the contractor.

It is our conclusion that an award to Midwest on the basis of its corrected/intended bid price would be proper.

The general rule in a mistake in bid case is that correction of a mistake alleged prior to award will be permitted only where the low bidder has submitted clear and convincing evidence showing that a mistake has been made, the manner in which the mistake occurred, and the intended bid price. The intended bid price, of course, must remain the low bid price. Southern Plate Glass Co., B-188872, August 22, 1977, 77-2 CPD 135. It is clear from the worksheet that it was incorrect to use the number 26 for the weeks on the job and that the number 112 should have been used. By the substitution of 112 for 26 in the computations, the intended bid price which would have resulted from

a correct computation is apparent. Therefore, Midwest has fulfilled the requirements that need be met in order to permit correction.

The worksheet is the best evidence of how Midwest would have bid if the error had not been made. It is conjecture that Midwest would not have utilized the indirect/direct percentage determined from the use of the correct number of weeks in the computations. While this may be considered an excessive percentage, there is no evidence that Midwest did not intend it. Even with the use of this percentage, the Midwest bid remains lower than seven other bids and the Government estimate. While Midwest may use a high indirect/direct percentage, it is apparent that it took other steps in its pricing to remain competitive. Therefore, the determination not to correct based on conjecture will not be followed.

Servidone raises the possibility that the intended bid price cannot be computed and the possibility that any computation might show that the intended bid price could be higher than the Servidone bid price. It notes the \$7,200 for "Office Help" and multiplies that by 86. However, the sum of \$7,200 represented the amount that would be allotted to approximately 22.2 percent of the required number of weeks; \$7,200 was not a weekly cost. Servidone divides the estimated indirect cost total by 26 and multiplies the quotient by 112 to determine the possible true extent of the error. However, all the cost items in the estimate were not computed on the basis of a time period. We have examined the Midwest "Indirect Cost Estimate" page, which Servidone did not have the opportunity to examine, and have made the necessary arithmetical computations. Our result is the same as the one reached by Midwest--\$947,606.

Servidone also raises the possibility that, because the difference (\$101,646.70) between the intended Midwest bid price and the Servidone bid price is only 1.93 percent, correction would be detrimental to the public's confidence in the integrity of the competitive bidding system. It cites two cases in support of that proposition. In 48 Comp. Gen. 748, supra, a bidder alleged that it forgot to include a \$21,000 subcontractor quote in its bid price. On the

bidder's worksheets the item was not separately priced, but was combined with other items at a total unitemized price of \$56,000. Other bidders had been unable to get subcontractor quotes of less than \$30,000. While we noted the small differential between the second low bid price and the "intended" bid price (the original bid price plus \$21,000) and the effect that correction might have on the public's confidence, the real problem was that doubt existed as to the intended bid price, because that had not been established by clear and convincing evidence.

In Broken Lance Enterprises, Inc., supra, we noted that the worksheets presented other possible intended bid prices in addition to the bid price that the bidder said it intended to bid. While we noted that uncertainty (as regards the intended price) within a relatively narrow range was not inconsistent with clear and convincing evidence, we concluded that, because of the small differentials (1 percent and one-half percent) between the possibly intended bid prices and the next low bid, correction could not be permitted due to a possible adverse effect on the public's confidence in the competitive bidding system. Again, however, the major factor affecting our decision was the uncertainty of the intended bid price.

As stated in George C. Martin, Inc., B-187638, January 19, 1977, 77-1 CPD 39, the closeness of the intended bid price and the next low bid price is only one factor for consideration in this type of case, and in the final analysis the decision whether to permit correction must be made on case-by-case basis after consideration of all the relevant facts and circumstances. In that case, the low bidder (\$4,490,000) requested a correction of \$271,745; the next low bid price was \$4,830,000, only \$68,225 greater than the intended bid price of the low bidder. Correction was permitted because the evidence establishing the intended bid price was clear and convincing. That is present in the immediate case. Clear and convincing evidence on all matters exists as required and, consequently, the size of the differential is unimportant.

However, we do bring one item to the attention of the District to be taken into account when it corrects the Midwest bid price. In its bid, Midwest did

not per se add its indirect costs as computed into its final bid price, but rather multiplied the "TOTAL OF ALL DIRECT COSTS" by the computed indirect/direct cost percentage (then 11.6, now 27.7); the product of this multiplication was then multiplied by the 15-percent markup and the results for all items were added to reach the total bid price. The same procedure should be followed in correcting the Midwest bid. Although this may cause a small variation in results, it is consistent with the manner in which the bid was computed and is important in fixing the intended bid.

Both the Office of the Chief of Engineers and Servidone raise questions as to the manner in which Midwest calculated its indirect costs--the use of 112 weeks instead of 90. Midwest contests the validity of these questions. We agree and do not find the questions germane to the issue of correction. First, Midwest does not contend that it made a mistake in this calculation. Second, the calculation addressed is one involving the bidder's business judgment (how to calculate the bid price) and as such is not a matter which would permit correction or withdrawal of a bid. Once a business judgment has been implemented--whether rightly or wrongly--and the bid has been submitted, as regards that judgment the bid submitted is the bid intended. 51 Comp. Gen. 18 (1971); AAA Engineering & Drafting, Inc., B-191653, June 23, 1978, 78-1 CPD 460.

The issue whether it would be in the best interest of the Government to make an award to a bidder who agrees to absorb a mistake in bid is irrelevant, since we have determined that correction should be permitted. In any event, the issue relates to bidder responsibility to perform. We do not ordinarily review affirmative determinations of responsibility. Schering Corporation, B-193872, March 30, 1979, 79-1 CPD 221.

As regards the final Servidone contention, the invitation requires the furnishing of payment/performance bonds after the award of the contract. This requirement has no effect on whether a contract may be awarded to a bidder. Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458; Soil Conservation Service--Request for decision concerning contract with Small Business Administration, B-185427, April 2, 1976, 76-1 CPD 219, affirmed, September 21, 1977, 77-2 CPD

208. Questions regarding bond requirements which are to be implemented after contract award are matters of contract administration not cognizable under our Bid Protest Procedures. 4 C.F.R. part 20 (1980). James M. Carroll and Ralph Rabatin, B-199443, July 16, 1980, 80-2 CPD _____.

Accordingly, the Midwest request for bid correction is sustained and the Servidone protest against award to Midwest is denied.



For the Comptroller General
of the United States