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**DECISION**



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

FILE: B-203190.2

DATE: September 29, 1981

MATTER OF: Fortec Constructors

**DIGEST:**

Where there is clear and convincing evidence of error in low bid, but not of exact intended bid price or that estimated intended bid price would remain low bid, bid may not be corrected nor may error be waived.

Fortec Constructors (Fortec) protests the Department of the Army, Corps of Engineers (Corps), determination to permit the Renshaw Construction Company, Inc. (Renshaw), to correct an alleged mistake in its bid submitted in response to invitation for bids (IFB) No. DACA31-81-B-0044.

The protest is sustained.

Subsequent to filing this protest, Fortec filed suit in the United States District Court for the District of Maryland (Civil Action No. N81-2002), requesting declaratory and injunctive relief and raising the same issues as those before us in this protest. Consequently, we dismissed Fortec's protest in Fortec Constructors, B-203190, August 17, 1981, 81-2 CPD \_\_\_\_\_, because it is the policy of our Office not to decide protests where the material issues are pending before a court of competent jurisdiction unless the court expresses an interest in our decision. 4 C.F.R. § 21.10 (1981). At that time, it was our understanding that the court had not expressed such interest. However, by letter of August 24, 1981, received at GAO on August 26, counsel for Fortec transmitted an order from the court, dated August 14, 1981, requesting our decision on the merits of the protest.

Bids were opened on April 23, 1981. Renshaw was the apparent low bidder at \$1,676,000; Fortec was the

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next low bidder at \$2,045,000. The Government estimate was \$2,889,756. Due to the discrepancy between Renshaw's bid and the other bids and Government estimate, the Corps decided that Renshaw may have made an error and intended to request that Renshaw verify its bid. Before the request could be made, Renshaw notified the Corps, by telephone on April 24, that it had made a mistake in its bid price.

By letter of April 27, and during a meeting with the Corps on April 28, Renshaw explained its bid preparation and error as follows. Its bid preparation worksheets consist of a "cut/add" sheet which shows initial estimates for various costs and additions to or subtractions from those estimates based on suppliers' and subcontractors' later price quotations. The additions and subtractions are totaled on the "cut/add" sheet and that total is carried forward to the "recap" sheet as an adjustment.

The "recap" sheet consists of more general cost categories within which the cost categories of the "cut/add" sheet are subsumed. The estimates for these categories are based on the unadjusted estimates shown on the "cut/add" sheet. Those estimates are totaled, percentages for sales tax and labor overhead are added, and amounts for insurance and bonds are added to reach a total estimated cost. Then adjustments are made using the total brought forward from the "cut/add" sheet to reach a total actual cost. A markup figure, which represents profit and general overhead, is added to reach the final bid price.

According to Renshaw, the error occurred in the following way. The initial total adjustment figure on the "cut/add" sheet was a \$291,842 deduction. Several additional adjustments were made increasing the total deduction to \$322,450. However, both the initial total and the corrected total were inadvertently carried forward to the "recap" sheet. Both amounts were deducted rather than just the corrected amount of \$322,450. Therefore, an error of \$291,842 was made. Renshaw requested an upward adjustment in that amount.

Defense Acquisition Regulation § 2-406.3(2) (1976 ed.) provides that a mistake alleged after bid opening

and prior to award may be corrected "[i]f the evidence is clear and convincing both as to the existence of a mistake and the bid actually intended, and if the bid, both as uncorrected and corrected, is the lowest received."

The report of the contracting officer prepared in response to Renshaw's request for correction and prior to Fortec's protest states that "[t]he evidence is clear and convincing that an error occurred and the manner in which it occurred." The report goes on to say that, had the mistake not occurred, Renshaw's bid would have been:

"\$1,676,000.00 (amount bid), plus \$291,842.00 (error), plus additional markup, if any \* \* \*. \* \* \* [The firm's estimator] was unable to state how much markup, if any, would have been added to the bid price had the mistake not occurred."

The contracting officer then notes that the markup in the uncorrected bid was approximately 18.5 percent of Renshaw's costs. The contracting officer rounded this off at 19 percent. Applying that percentage to the increased costs claimed in the request for correction would result in a \$55,450 additional markup. This calculation results in a corrected bid price of \$2,023,292--still the low bid by approximately \$22,000. Based on this analysis, the contracting officer concluded that the bid should be corrected as requested, because while the intended bid price was not exactly discernible, the evidence was clear and convincing that the intended price would be the low price.

When Fortec protested the proposed correction, one of its arguments was, even assuming the validity of the mistake claim, the intended price was not discernible because there was no way to ascertain the amount of Renshaw's markup. In response to this argument, Renshaw submitted affidavits setting forth its method of calculating markup. Renshaw stated that it does not base markup on a percentage of the cost of a project. Rather, the markup is a lump-sum figure based on the scope of work of the

project, its duration, the degree of difficulty and risk involved, and the amount of work to be performed by Renshaw employees rather than subcontractors. The figure for this bid (\$260,000) was calculated in the following way. Renshaw attempts to make a gross profit (markup) of \$780,000 to \$800,000 per year. Renshaw calculated that this project would constitute one-third of its yearly volume. Therefore, the markup had to be one-third of \$780,000, or about \$260,000. Renshaw states that its markup would not have been increased beyond \$260,000, regardless of what the direct costs were on the project.

The Findings and Determination by the Corps' Chief Counsel states that:

"The administrative file indicates that there was considerable discussion with Renshaw as to its intended bid, due to uncertainty as to what mark-up Renshaw would have used. However, Renshaw has submitted affidavits to the effect that mark-up was determined as a lump sum quote independent of its calculations for direct costs and that therefore mark-up would not be affected by the error in direct costs."

Based on that finding, the Chief Counsel granted permission to correct Renshaw's bid as requested.

As the Corps points out, GAO will not disturb the determination of a contracting agency concerning a request for correction of a mistake in bid unless the determination is without a reasonable basis. In this case, we find that the Corps' decision was without a reasonable basis.

Our decisions follow DAR § 2-406.3(a)(2) in stating the general rule that, to permit correction of an alleged error in bid price, the bidder must submit clear and convincing evidence that an error has been made, the manner in which it occurred, and the intended bid price. Teledyne McCormick Selph, B-182026, March 26, 1975, 75-1 CPD 136. We have also found, in limited circumstances, that correction was proper even when the intended bid could not be

determined exactly. However, to permit correction when the exact amount of the intended bid is uncertain, there must be clear and convincing evidence that the intended bid would remain the low bid. Western States Construction Company, Inc., B-191209, August 29, 1978, 78-2 CPD 149.

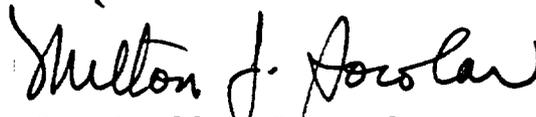
In judging the sufficiency of the evidence in those situations, we consider the circumstances of each case such as the closeness of the corrected bid and the next low bid, George C. Martin, Inc., B-1876381, January 19, 1977, 77-1 CPD 39, and the range of uncertainty in the intended bid, Treweek Construction, B-183387, April 15, 1975, 75-1 CPD 227. For example, in Fortec Constructors, B-189949, November 15, 1977, 77-2 CPD 372, and in Western States Construction Company, Inc., supra, we recommended correction where there was clear and convincing evidence that certain direct costs were omitted by mistake, but where the intended bid was not exactly ascertainable due to doubt over the amount of additional markup that should be added. In both cases the worksheets provided evidence of the approximate amount of markup that should be added, but left a narrow range of uncertainty as to the exact amount. In both cases, using the upper limit of that range of uncertainty still left the corrected bid substantially below the next low bid. On the other hand, in Treweek Construction, supra, we did not permit correction where the mistake was clearly shown, but where the intended bid was in doubt because it was not clear what additional bond premium should be added to the bid. We found that the worksheets showed only a lump sum figure for the bond premium, and no formula for calculating the figure. Since the corrected bid, without the bond premium, was very close to the next low bid and there was no formula for calculating the additional premium, we found that there was no clear and convincing evidence that the intended bid would still be the low bid.

Here, the record provides clear and convincing evidence that the error occurred as alleged, but does not provide clear and convincing evidence of either the exact intended bid price or of an approximate

intended bid price that would certainly be the low bid. The worksheets show only the final markup figure as a lump sum listed after all direct costs and adjustments, with no indication of how that figure was reached, as in the Treweek case. The pre-protest report of the contracting officer states that the amount of additional markup to be added to the bid could not be determined exactly, even after meeting with the firm's estimator. The contracting officer's percentage formula for estimating additional markup is not based on evidence from Renshaw's bid or worksheets, but rather on his opinion of what a reasonable bidder would have done. That, however, is not the appropriate evidentiary standard. In fact, there is no evidence supporting the use of a percentage formula for computing markup in this case, and Renshaw claims that it never uses a percentage formula.

Renshaw's affidavits, submitted after the intended bid price was brought into question by the protest, are the only evidence of Renshaw's intended bid. While we do not doubt the veracity of the affidavits, in circumstances like this where the amount of the error is substantial and the difference between the corrected bid and the next low bid is relatively small, to accept such evidence as the sole evidence of intended bid price would adversely affect the integrity of the competitive bidding system. Treweek Construction, supra; Dynamech Corporation, B-182647, February 12, 1975, 75-1 CPD 92.

Consequently, Renshaw's bid may not be corrected, nor may Renshaw be permitted to waive its error and accept the bid at its uncorrected price. Regis Milk Company, B-180930, June 17, 1974, 74-1 CPD 328.



Acting Comptroller General  
of the United States