

Support

19763

DECISION



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

FILE: B-203777

DATE: October 14, 1981

MATTER OF: Bruce-Andersen Co., Inc.

DIGEST:

Where the low bidder, alleging two mistakes in bid before award, presents clear and convincing documentary evidence of mistake and intended bid with respect to only one error, correction is allowed as to that error, and waiver of second mistake due to omission of costs is allowed where record discloses that "intended bid" would remain low.

Bruce-Andersen Co., Inc. (B-A), protests the failure of the Army Corps of Engineers (Corps) to award it a contract because the Corps denied correction of two errors in its apparent low bid under invitation for bids (IFB) No. DACA63-81-B-0061 issued by the Corps, Fort Worth District, for the construction of an Army Reserve Center at Houston, Texas.

We conclude that correction of one error may be permitted, the second error may be waived, and the B-A bid may be considered for award.

B-A bid \$3,634,026 for the base bid and \$233,000 for additive No. 1. The second low bid was submitted by Fortec Constructors in the amount of \$4,172,000 for the base bid and \$282,000 for additive No. 1.

After bid opening, B-A alleged two mistakes in its bid and requested correction or permission to withdraw. The errors consisted of omitted costs for specification requirements covering chemical composition concrete (\$44,239 for the base bid, \$6,972 for additive No. 1) and interior grade beam framing, excavation and backfill (\$174,258 for the base bid, \$23,432 for additive No. 1). B-A subsequently

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offered to waive the concrete error only. B-A would remain the low bidder by over \$300,000 if correction was permitted.

The Corps found clear and convincing evidence of the mistake and intended bid with respect to interior grade beam framing, excavation and backfill. This was based on a detailed review of B-A's worksheets which showed that the firm failed to carry forward these costs into the bid. The Corps found clear and convincing evidence of an inadvertent omission of concrete costs. However, no clear and convincing evidence of an intended amount was found because the worksheets did not reflect this omitted item and the requested correction was based on B-A's post-bid-opening estimate. Therefore, the Corps decided that B-A should be allowed only to withdraw the bid.

B-A contends that there is no dispute as to the error relating to other than concrete since the amount of that error has been established by clear and convincing evidence; therefore, the only issue of any consequence is whether B-A may waive the concrete error. The protester argues that waiver of a claimed error is allowed where the evidence is clear that, even with correction, the bidder will still be low. B-A further states that, although the amount of any error of omission can never be ascertained with any absolute degree of certainty, in cases involving requests for correction, reasonable approximations are accepted as being consistent with the standard of "clear and convincing" evidence. B-A finally contends that no reasonable estimation of the omitted costs for concrete would approach the amount necessary to displace B-A as the low bidder.

Fortec argues that bid correction is not proper here since B-A is unable to establish a "precise intended bid prior to bid opening." The firm also questions whether B-A's workpapers demonstrate by clear and convincing evidence that any mistake occurred. Fortec contends that, in any event, the claimed errors were of judgment and estimating, which do not attain the certainty or credibility requisite for bid correction. Fortec argues that B-A's offer

to waive the costs of concrete is an attempt to redefine the legal requirements respecting an acceptable intended bid; by excluding consideration of these costs, B-A is attempting to avoid the very costs which signify the absence of an intended bid.

Where a bidder, whether intentionally or not, is in the position, after the other bid prices have been revealed, of withdrawing its bid, asking for correction or requesting waiver of an error, whichever is in the bidder's best interest, consideration of that bid ordinarily would be detrimental to the Federal procurement system. 42 Comp. Gen. 723 (1963). A bidder may not be permitted to waive a claim of error or waive part of its claim of error (selective correction) to remain the low bidder. 42 Comp. Gen., supra; 37 Comp. Gen. 851 (1958); North Star Electric Contracting Corporation, National Electrical Contractors Association, B-187384, January 28, 1977, 77-1 CPD 73; Technology Incorporated, B-185829, May 10, 1976, 76-1 CPD 305. However, where correction of a low bid could not be permitted because the amount of the intended bid was not established with the certainty required by the rules applicable to correction of mistakes in bids, the acceptance of such a low bid would not be prejudicial to other bidders if the evidence clearly indicated that the correct or "intended" bid would have been lowest. See 52 Comp. Gen. 262 (1972) (sales); 42 Comp. Gen., supra; B-155432, December 1, 1964; B-165405, October 24, 1968; B-168673, April 7, 1970. Waiver of mistake has been permitted in these circumstances even where the mistake involved the bidder's failure to consider and include cost items in computing the bid. See B-165405, supra. Whether the corrected or "intended" bid would have been lowest may be ascertained by reference to reasonable estimations of omitted costs. See 42 Comp. Gen., supra; B-165405, supra; B-168673, supra; B-155432, supra.

Our examination of B-A's workpapers confirms the Corps' conclusion that clear and convincing evidence shows that B-A intended to bid \$3,808,284 for the base bid (\$3,634,026 bid plus \$174,258 for the interior grade beam framing, excavation and backfill) and \$256,432 (\$233,000 plus \$23,432) for

additive No. 1. Therefore, we find no legal objection to correction. Defense Acquisition Regulation § 2-406.3 (1976 ed.). As for the omitted concrete costs, we agree with the Corps that B-A inadvertently omitted costs for this item. Although the record does not show what price the other bidders included for this item, the contracting officer indicates that the estimates prepared by B-A "may be reasonable," and Fortec has not submitted any evidence to the contrary. Of particular significance, the monetary amounts of the two errors, whether considered in the aggregate or separately, provide reasonable assurance that B-A's bid remained materially lower than Fortec's absent the mistakes.

In these circumstances, we conclude that B-A's bid may be corrected upward with respect to the interior grade beam framing, excavation and backfill to \$3,808,284 for the base bid and \$256,432 for additive No. 1, the concrete error may be waived, and the B-A bid may be considered for award.

Protest sustained.

for 
Comptroller General
of the United States