

DECISION



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

26470

FILE: B-212263; B-212263.2 **DATE:** October 11, 1983

MATTER OF: K & P Incorporated and Kirsch Maintenance
Service, Inc.

DIGEST:

1. A contracting officer can, pursuant to DAR § 2-406.3(e)(1) (1976 ed.), request documentation to substantiate that a bid is without error.
2. A procuring agency that suspects that a bid is mistaken should accept that bid after it has been verified, both orally and in writing, where the documentation submitted by the bidder who did not allege mistake supports (verifies) the bidder's final bid price. The fact that the documentation also indicates price discrepancies between the bid and government estimate does not change the conclusion.

K & P Incorporated (K & P) and Kirsch Maintenance Services, Inc. (Kirsch), have filed protests with our Office against the actions of the Department of the Navy, Naval Air Station, Sewells Point Area, Norfolk, Virginia (Navy), concerning the procurement of janitorial services for the air station.

K & P's protest concerns the Navy's decision to reject K & P's bid, submitted pursuant to invitation for bids (IFB) No. N62470-82-B-4933, due to an alleged mistake in the bid. Kirsch's protest involves the termination of its contract for essentially the same janitorial services solicited under IFB-4933. In addition, Kirsch objects to the Navy's subsequent "sole-source award" to High's Carpet and Janitorial Services (High's), an 8(a) firm, for those services. Even though we have been advised that K & P and Kirsch have been consolidated, we will refer to them as separate entities for purposes of this decision.

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K & P and Kirsch filed separate actions in the United States District Court for the Eastern District of Virginia, Civil Actions Nos. 83-443-N and 83-444-N, respectively. In regard to K & P's and Kirsch's applications for injunctive relief, the court issued an order, based on the stipulations of the parties, that Kirsch would continue to perform its contract until July 15, 1983, and that the Navy would not make an award under IFB-4933 pending a decision by our Office. Subsequently, the court found that inherent to Kirsch's right to perform the contract until July 15 was the right of the Navy to make the necessary arrangements for the continuation of the services provided by Kirsch. Moreover, the court held that there was nothing illegal or out of order in regard to the Navy's arrangement with High's, i.e., it was just a "necessary arrangement on a short term basis pending GAO determination on the bid protest."

We sustain K & P's protest. In regard to Kirsch's protest, Kirsch, at an August 18, 1983, GAO conference stipulated that since an award to K & P would result in the termination of High's "award," it would withdraw its protest if K & P's protest was sustained. In this light, Kirsch's protest is dismissed.

K & P submitted a bid in the amount of \$849,000 (firm-fixed price), the sixth lowest, pursuant to IFB-4933. The Navy, after rejecting the five low bids as nonresponsive or allowing them to be withdrawn as erroneous as the case may be, requested that K & P verify its bid and submit the bid preparation papers. On December 20, 1982, K & P verified its bid--confirmed its price. Subsequently, K & P, over the next 6 to 8 months, which included an informal conference at our Office, attempted to convince the Navy that its bid did not contain a mistake. Moreover, K & P "has offered to waive any right that it might have for future claim of bid error" concerning this IFB.

The Navy submits that it cannot accept K & P's bid verification. It is the Navy's position that it made its request to K & P based on the Navy's experience with the first five low bidders and the fact that the Navy estimate for this contract was \$1,388,897.53. While the Navy does admit that K & P did confirm its bid, the Navy argues that after a review of K & P's bid preparation material, it concluded that the bid contained "significant errors." The Navy posits that it could not accept K & P's verification since that would not satisfy its duty to perform a full and complete bid verification.

More specifically, the Navy contends that K & P's bid did not include any cost for "Health and Welfare." The Navy advises that the estimated cost for this item is \$79,595.28 [110,549 direct labor hours (required by amendment No.3) x \$0.72 per hour (required by the Department of Labor wage determination)]. K & P's response is that it would pay all these benefits as required by the wage determination. K & P advises that it was aware of the \$0.72 figure but, nonetheless, estimated that the cost for this item under the contract would be zero. The reason for the estimate was the fact that K & P had built up credits under its insurance programs due to favorable experience ratings. K & P has submitted a letter to our Office which confirms that such credits did exist at the time K & P submitted its bid.

In regard to sick leave, the Navy once again questions the cost allocated by K & P. The Navy points out that the wage determination requires the contractor to pay \$0.12 per direct labor hour, or \$12,159.84. The Navy objects to K & P's figure of \$6,941. K & P argues that its cost is based on the company's experience. K & P submits that since the wage determination requires that \$0.12 per hour be allocated to sick leave after 30 days on the job and since 13 percent of its employees never complete the initial 30-day period, it is not required to use the maximum amount.

The Navy in regard to the vacation benefit argues that while the wage determination requires that \$0.36 per hour after the first year be paid by the contractor, some costs should have been considered by K & P. The Navy believes that K & P's failure to consider any amount was a significant error in its bid. K & P disagrees. K & P's position is that since K & P had the option of hiring all new employees, no vacation pay is required during the first year of the contract. Therefore, its estimate was zero.

There were three additional categories, Managers/ Supervisors, Material and Equipment and G & A Expenses, which the Navy also questions. K & P's responses to these categories, as with those mentioned above, were considered inadequate and further clarifications were requested by the Navy.

K & P protested to our Office and requested a determination as to whether the Navy's proposed rejection of its bid was proper. The proposed rejection of a bid on the basis of a suspected mistake where the bidder consistently asserts that no mistake was made is a serious matter which

our Office will closely scrutinize. See Verne Corporation, B-190448, April 6, 1978, 78-1 CPD 275. We think that the issues in dispute involve matters of business judgment and not mistakes within the meaning of the mistake in bid regulations. See Handy Tool & Manufacturing Co., Inc., 60 Comp. Gen. 189 (1981), 81-1 CPD 27. Therefore, we suggest that the Navy consider the bid as verified.

It is clear that the Navy suspected an error in K & P's bid. This suspicion was based on the Navy's experience with the five lower bidders and the discrepancy between K & P's bid and the government estimate. Defense Acquisition Regulation (DAR) § 2-406.3(e)(1) (1976 ed.) sets forth the contracting officer's responsibility once there is a suspected mistake. That section, in pertinent part, provides:

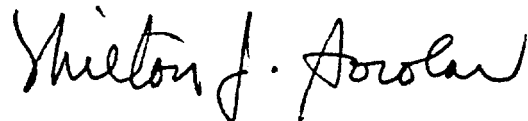
"In the case of any suspected mistake in bid, the contracting officer will immediately contact the bidder in question calling attention to the suspected mistake, and request verification of his bid. The action taken to verify bids must be sufficient to . . . reasonably assure the contracting officer that the bid as confirmed is without error To insure that the bidder concerned will be put on notice of a mistake suspected by the contracting officer, the bidder should be advised, as is appropriate, of (i) the fact that his bid is so much lower than the other bid or bids as to indicate a possibility of error, (ii) important or unusual characteristics of the specifications, (iii) changes in requirements from previous purchases of a similar item, or (iv) such other data proper for disclosure to the bidder as will give him notice of the suspected mistake. If the bid is verified, the contracting officer will consider the bid as originally submitted. . . ."

While we have held that a verification without substantiation is all that is required to accept a bid as submitted, Colton Construction Co., Inc., B-191575, July 6, 1978, 78-2 CPD 12; 47 Comp. Gen. 616 (1968), a contracting officer can, as here, pursuant to DAR § 2-406.3(e)(1), above, request substantiation when it is needed "to reasonably assure [him] that the bid as confirmed is without error." Nonetheless, a bidder is not required to convincingly prove that no mistake had been made. See G. T. Murphy, Inc., B-204351, February 23, 1982, 82-1 CPD 161.

The Navy, based on the record before our Office, has satisfied its duty to bring to K & P's attention what the Navy believed to be the nature and extent of the suspected mistake. However, we are not persuaded by the Navy's argument that the bid was properly rejected because of mistake in bid. We find that the documents submitted by the protester and the Navy, while indicating price discrepancies between K & P's bid and the government's estimate, do not indicate that the bid was in error or that it would be unconscionable to accept it. See Reaction Instruments, Inc., B-189168, November 30, 1977, 77-2 CPD 424. Rather, the documents submitted by K & P explain why K & P bid as it did. An award of a contract to K & P would legally obligate it to perform all the work required by the contract notwithstanding how it chose to allocate its prices for bidding purposes, which is solely a matter of business judgment.

Furthermore, the fact that K & P may have proposed rates lower than that specified in the wage determination does not mean that K & P intends to violate the Service Contract Act, 41 U.S.C. § 351, et seq. (1976), or that it will not comply with the act. It is possible that K & P may have submitted a below-cost bid with respect to those items. In this regard, we have held that there is no legal impediment to awarding to a bidder because it offers a below-cost bid so long as that bidder is determined to be responsible. See SEACO, Inc., B-211226, August 1, 1983, 83-2 CPD ____.

K & P's protest is sustained. Therefore, the Navy should award to K & P assuming K & P is otherwise eligible for award.



Acting Comptroller General
of the United States