

DECISION

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

FILE: B-213239

DATE: May 8, 1984

MATTER OF: Crimson Enterprises, Inc.

DIGEST:

Agency properly allowed bidder to withdraw its bid rather than permit correction where, although there was clear and convincing evidence that a mistake had occurred in totaling the bidder's direct costs, the only evidence that other components of the bid would be unaffected by a change in the amount for direct costs was the bidder's affidavit, and the corrected bid (assuming the other components remained unaffected) would come within approximately 1.5 percent of the next low bid.

Crimson Enterprises, Inc. protests a determination by the Air Force not to allow Crimson to correct its bid submitted in response to invitation for bids (IFB) No. F48608-83-B0036, issued by Warren Air Force Base, Wyoming. The protester contends that it should be allowed to correct its bid because it has presented the Air Force with clear and convincing evidence both that its bid contained a mistake and of the bid actually intended. We deny the protest.

The IFB sought bids for the renovation of unaccompanied enlisted personnel housing units. When bids were opened, Crimson was the low bidder at \$1,380,078; the second low bid was \$1,649,366; nine other bids ranged between \$1,676,777 and \$2,086,000. The government's estimate for the work was \$1,600,000. Within 1 hour after bid opening, the protester informed the contracting officer that it had made a mistake. The protester said that when it reexamined its worksheets after bid opening, it discovered that it had incorrectly added

\$253 instead of \$253,000 when totaling the quotations from subcontractors and suppliers and its own estimates for various categories of the work. Two days later, the protester submitted to the contracting officer its worksheets, a calculator tape, and a notarized statement from a plumbing and heating subcontractor indicating that the subcontractor had quoted Crimson a price of \$253,000 just prior to bid opening. Although this quote had been entered correctly on the worksheet, the calculator tape showed only a figure of \$253. The total indicated on the tape apparently was combined with amounts for supervision, bond, overhead and profit to arrive (after rounding off) at a total bid price of \$1,380,078. The protester requested that it be allowed to increase its bid to \$1,632,825 to account for the \$252,747 difference between the subcontractor's quote of \$253,000 and the \$253 mistakenly used in calculating the bid. In the alternative, the protester requested permission to withdraw the bid.

Upon reviewing the materials submitted by the protester, the contracting officer discovered an additional discrepancy: the total shown on the calculator tape was \$6,000 higher than the actual sum of the figures on the tape. The protester, through counsel, then requested that its bid be corrected to reflect both mistakes. The Air Force determined that although the evidence indicated that the bid as submitted was mistaken, Crimson had not presented clear and convincing evidence as to the bid actually intended as Defense Acquisition Regulation (DAR) § 2-406.3(a)(2) requires before an allegedly mistaken bid may be corrected. The Air Force denied Crimson's request for correction, but stated that Crimson would be allowed to withdraw its bid from consideration.

In its protest here, Crimson contends that it should be allowed to correct its bid to reflect both an increase of \$252,747 and a decrease of \$6,000, or a net increase of \$246,747. The protester explains that the \$6,000 discrepancy occurred because a \$6,000 figure mistakenly was either entered on or not cleared from the calculator the protester used to total its direct costs. In addition, the protester contends that since it calculated its cost for bonds at 1.5 percent of its direct costs, its corrected bid price should include an additional \$3,686.95 to reflect the increase in the amount for bonds that would result from

an increase in direct costs.¹ The protester says that the amounts for supervision, overhead and profit were "predetermined" lump sums that would not be affected by any change in the amount of direct costs. Crimson says that its intended bid price was \$1,630,511.91, or \$18,854.09 lower than the next low bid.

Although this Office has retained the right to review agency decisions regarding the correction of bids, the authority to permit a bidder to correct a mistake alleged after bid opening but prior to award is vested in the procuring agency. National Heat and Power Corporation, B-212923, Jan. 27, 1984, 84-1 CPD ¶ 125. As indicated, the regulations state that an agency may permit correction of a bid when clear and convincing evidence establishes both the existence of a mistake and the bid actually intended. DAR § 2-406.3(a)(2). In addition, this Office has recognized that, in limited circumstances, correction may be proper even though the intended bid cannot be determined exactly, provided there is clear and convincing evidence that the intended bid would remain low in any event. See, e.g., Western States Construction Company, Inc., B-191209, Aug. 29, 1978, 78-2 CPD ¶ 149.

Whether the evidence of a mistake or of the bid actually intended is clear and convincing is a question of fact, National Heat and Power Corporation, *supra*; we will not question an agency's determination in such cases unless the determination is without a reasonable basis. See Dadson Corporation, B-210413, June 7, 1983, 83-1 CPD ¶ 618. In judging the sufficiency of the evidence, we consider factors such as the closeness of the corrected bid and the next low bid, George C. Martin, Inc., B-187638, Jan. 19, 1977, 77-1 CPD ¶ 39, and the range of uncertainty, if any, in the intended bid, Treweek Construction, B-183387, April 15, 1975, 75-1 CPD ¶ 227. In general,

¹Although the protester states that the amount shown on the worksheet for bonds was calculated by taking 1.5 percent of the direct costs subtotal, we note that 1.5 percent of the subtotal shown on the worksheet (\$1,245,382.96) is \$18,680.74, and not the \$18,695 shown on the worksheet. In addition, 1.5 percent of the \$246,747 increase in the subtotal sought by the protester is \$3,701.20, not the \$3,686.95 that the protester seeks.

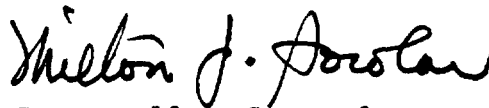
the closer an asserted intended bid is to the next low bid, the more difficult it is to establish that it was the bid actually intended. See G.N. Construction, Inc., B-209641, June 2, 1983, 83-1 CPD ¶ 598. For this reason, correction may be disallowed when a corrected bid would come too close to the next low bid. See Broken Lance Enterprises, Inc., 56 Comp. Gen. 1 (1976), 76-2 CPD ¶ 314.

In this case, when the agency denied Crimson's request for correction, it did not indicate its reasons for concluding that Crimson had not presented clear and convincing evidence as to the bid actually intended; however, the record contains memoranda prepared by the agency in response to Crimson's protest to this Office explaining the basis for this conclusion. In these memoranda, which the agency did not provide to the protester, the Air Force explains that although the protester claims that the amounts indicated for supervision, overhead and profit were "predetermined" and would not have been affected by any change in the amount of the direct costs, this claim is difficult to verify. The agency notes that Crimson's bid would be very close to, or even exceed, the next low bid were additional amounts for supervision, overhead and profit added to the corrected total of direct costs to maintain the same percentage relationship of these items to direct costs as that reflected in the uncorrected bid.

The facts of this case are similar to those in Fortec Constructors, B-203190.2, Sept. 29, 1981, 81-2 CPD ¶ 264. There, as here, a bidder presented clear and convincing evidence concerning a mistake made in totaling its direct costs. The bidder submitted affidavits stating that its markup was a lump-sum figure based on the nature and duration of the project and would not be affected by any change in its direct costs. We sustained a protest against the agency's determination to permit correction in that case because the worksheets did not show how the bidder had calculated its markup and the only evidence that the markup was a fixed, lump-sum amount were the affidavits of the bidder. Although we did not question the veracity of the affidavits, we said that to accept such evidence as the sole evidence of the intended bid would affect adversely the integrity of the competitive bidding system since the amount of the mistake was substantial (\$291,842) and the difference between the corrected bid and the next low bid was relatively small (approximately 1.5 percent, assuming no increase in markup).

In this case, Crimson does not argue that its bid would remain low despite whatever range of uncertainty there might be in determining its intended bid. Compare Fortec Constructors, B-189949, Nov. 15, 1977, 77-2 CPD ¶ 372; Western States Construction Company, Inc., supra. Rather, the protester contends that there is "absolutely no uncertainty in regard to Crimson's intended bid." This certainty exists, says the protester, because the amounts shown on its worksheets for supervision, overhead and profit would not be affected by any change in the total of its direct costs. The only evidence of this, however, is Crimson's own affidavit; Crimson's method for calculating these items is not apparent from its worksheets. Although we do not question the veracity of the affidavit, nor, presumably, did the agency, we note that Crimson's asserted intended bid of \$1,630,511.91 would be within approximately 1 percent of the next low bid. Under these circumstances, we cannot question the conclusion of the Air Force that the evidence of Crimson's intended bid was not clear and convincing. See Broken Lance Enterprises, Inc., supra.

We deny the protest.



Acting ~~Comptroller~~ Comptroller General
of the United States