

DECISION

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

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FILE: B-215111

DATE: July 12, 1984

MATTER OF: Aleutian Constructors

DIGEST:

GAO will not question the contracting agency's decision to allow the bidder to withdraw its bid rather than permit correction where, although there was clear and convincing evidence that a mistake occurred, there was conflicting evidence concerning the profit the bidder intended to charge for one of the bid items; GAO cannot conclude that the agency's determination that the evidence of the bid actually intended was not clear and convincing was without a reasonable basis.

Aleutian Constructors (Aleutian) protests a determination by the United States Army Corps of Engineers (Army) not to allow Aleutian to correct its bid submitted in response to invitation for bids (IFB) No. DACA85-84-B-0002, issued by the United States Army Engineer District, Anchorage, Alaska. The protester contends that it should be allowed to correct its bid because it has presented the Army with clear and convincing evidence both that its bid contained a mistake and of the bid actually intended.

We deny the protest.

The IFB solicited bids for the construction of a hangar and maintenance facility and other related work at Shemya Air Force Base, Alaska. The bidding schedule was as follows: schedule "A"-hangar/maintenance facility; schedule "B"-repair airfield pavement; and schedule "C"-pave roadway. Award was to be made to the low bidder for the total of the base bids for all three schedules.

The apparent low bid for this project was submitted by Aleutian in the amount of \$15,032,151. The second low bid of \$16,937,000 was submitted by Shemya Constructors (Shemya). Shortly after bid opening, Aleutian claimed a mistake in its bid for item 2 of schedule "A," the omission of its estimated direct costs of \$1,778,857. Aleutian provided the Army with its worksheets and a sworn affidavit

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from its project manager who had been responsible for preparing the bid document. Aleutian requested that its bid for item 2 of schedule "A" be corrected upward by \$1,778,857; however, Aleutian did not claim any adjustment for overhead or profit. If allowed to be corrected, Aleutian's bid would total \$16,811,008, just \$125,992 below Shemya's.

According to the project manager's affidavit, Aleutian's bid for item 2 was supposed to include the following elements:

Subcontractors and Suppliers	\$5,466,962
Aleutian's Direct Costs	1,778,857
Overhead	738,929
Profit	<u>225,000</u>
Total	\$8,209,748

The omission of Aleutian's direct costs (\$1,778,857) from the item resulted in a bid of only \$6,430,000 (rounded off from \$6,430,981). The project manager emphasized in his affidavit that the figures for overhead and profit had been estimated amounts and had not been developed as a percentage of cost. In other words, the project manager was claiming that Aleutian's full charges for overhead and profit had already been included in the bid and did not have to be revised upward as a result of the requested bid correction.

After obtaining the views of both Aleutian and Shemya (which opposed Aleutian's request), the Army held that, while there was clear and convincing evidence of the existence of a mistake, the evidence was not clear and convincing as to the bid actually intended. In the Army's opinion, Aleutian had provided clear and convincing evidence with respect to its direct costs for item 2 of schedule "A" and its overhead, but it had not submitted clear and convincing evidence with respect to its markup for profit. Consequently, the Army denied Aleutian's request to correct its bid and Aleutian protested here.

In making its case before the Army and our Office, Aleutian has presented its workpapers and sworn affidavits from the two individuals directly responsible for preparing Aleutian's bid as well as sworn affidavits from Aleutian's two principals. The two bid preparers explained in their

sworn statements how in the last-minute rush to complete the bid, they had inadvertently failed to include the cost of work to be performed by Aleutian's own forces (\$1,778,857), but they again stressed that overhead and profit had been calculated as estimated amounts and, therefore, required no upward revision.

In their affidavits, the principals also emphasized that overhead and profit needed no revision. They stated that they had been satisfied with the overhead allocation that the bid preparers had determined, but that they had not been satisfied with the preparers' profit figure. According to the principals, profit had been calculated as a factor of 46 percent of base labor costs, resulting in a total profit of \$1,274,376; however, they believed that the use of this figure would preclude Aleutian from being the low bidder. They therefore instructed the bid preparers to include a total profit figure of approximately \$1 million. According to the principals, these instructions resulted in \$225,000 being allocated to item 2 of schedule "A" and the remaining profit being allocated to the other bid items in schedules "A," "B" and "C" for a total profit figure of \$1,005,000.

There is nothing in writing which explicitly lays out the principals' instructions to the bid preparers to keep the total profit figure at approximately \$1 million. However, Aleutian maintains that its workpapers support this conclusion. According to Aleutian, its worksheets for schedule "A" specifically show that for item 2, it intended to include material and subcontractor costs (\$5,466,962), overhead (\$738,929), and profit (\$225,000). These three figures come to a total of \$6,430,891, which is the amount Aleutian actually entered on its bid. Only Aleutian's direct costs (\$1,778,857) are missing from the calculations for item 2, and these costs are readily found on a separate worksheet. In Aleutian's opinion, there is no reason to complicate the situation beyond the simple fact that its direct costs were omitted from its final calculations. It points out that its profit figure of \$225,000 for item 2 (labeled "MU" for markup on the worksheet) bears no relationship to any percentage of any other figure in the bid. On its face, Aleutian argues, the \$225,000 figure appears to be totally arbitrary; it only makes sense when it is added to the other profit figure on the same worksheet. According to Aleutian, this figure--\$780,103--is the total profit Aleutian intended to charge for all three schedules ("A," "B" and "C") less the profit for item 2 of schedule "A." When \$780,103 is added to \$225,000, the total--approximately

\$1,005,000--is exactly what Aleutian has claimed to have been its intended total profit figure.

Based on the foregoing, Aleutian maintains that it has demonstrated what its intended profit figure was and, as a result, has also presented the clear and convincing evidence needed to prove the bid it actually intended.

Aleutian notes that the Army believed that because Aleutian's corrected bid would only be 0.74 percent below the second low bid, our prior decisions require that a higher standard of proof for bid correction be applied in such a case. Applying this standard, the Army held that Aleutian had failed to meet its burden of proof because of the inconsistency between the way the protester used its worksheets to calculate overhead costs and the way it used the worksheets to calculate profit; in other words, Aleutian followed a clear-cut methodology in determining its overhead costs, but deviated from this methodology in calculating its profit.

Aleutian, however, points out that the difference in real terms between its corrected bid and Shemya's is \$125,992. In Aleutian's opinion, this is a sizable difference and hardly justifies the application of a higher standard of proof because of the artificial "closeness" of its bid and Shemya's on a percentage basis. Moreover, Aleutian challenges the notion that a higher standard of proof is applicable in this type of situation. In Aleutian's opinion, the burden of proof for bid correction is the same under any circumstances--clear and convincing evidence--and Aleutian believes that it has met this burden. Aleutian requests that we direct the Army to permit the bid correction and award the contract to Aleutian at the corrected bid price of \$16,811,008.

The Army does not question the veracity of Aleutian's four affidavits or the written evidence that Aleutian has presented. In the Army's opinion, its ultimate duty is to protect the integrity of the competitive procurement system and, in the performance of this duty, it must apply the well-recognized rules for bid correction. In reaching its decision in the Aleutian case, the Army states that it relied on Defense Acquisition Regulation (DAR), § 2-406.3(a)(1), reprinted in 32 C.F.R. pts. 1-39 (1983), and the prior decisions of our Office which establish the general rule, that for the correction of a bid, there must be clear and convincing evidence of both the existence of the mistake and the bid actually intended. In addition,

citing D.L. Draper Associates, B-213177, Dec. 9, 1983, 83-2 C.P.D. ¶ 662, and G.N. Construction, Inc., B-209641, June 2, 1983, 83-1 C.P.D. ¶ 598, the Army states that it also relied on the general rule that the closer an asserted intended bid is to the next low bid, the more difficult it is to provide the clear and convincing evidence needed to establish the bid actually intended and, as a result, correction often may not be allowed when the corrected bid comes too close to the next low bid.

As noted above, the Army ruled that because Aleutian's corrected bid would be only 0.74 percent below Shemya's, it was obligated to apply the higher standard of proof required by D.L. Draper Associates and G.N. Construction, Inc. Applying this higher standard, the Army found inconsistencies between Aleutian's worksheets and its assertion that only \$225,000 was allocated for profit for item 2 of schedule "A." The Army notes that there was a clear pattern in the way Aleutian had calculated its overhead and had transferred the figures to its bid, but this pattern was not apparent in the way Aleutian handled its calculations for profit. In the Army's opinion, Aleutian's methodology for preparing its bid is quite meticulous except when it came to determining its profit.

Besides the doubts raised by what the Army saw as a deviation from Aleutian's customary methods of bid preparation, the Army was further influenced by a document discovered by Shemya. This piece of paper, which Aleutian characterizes as merely a scratch sheet and not actually part of its official workpapers, shows that one of the Aleutian bid preparers calculated profit on all three schedules, including item 2 of schedule "A," by taking 46 percent of the labor costs and coming up with a total profit figure of \$1,274,376. In light of this information, it appeared to the Army that Aleutian might have intended to allocate \$494,273 (\$1,274,376 - \$780,103) as profit on item 2 rather than \$225,000.

In effect, the Army concluded that it did not really know what amount Aleutian intended to allocate to its bid for profit on item 2, and this was really the key point of the entire dispute. Since Aleutian's worksheets did not show with certainty what profit was intended for item 2, the Army found that Aleutian had failed to provide the clear and convincing evidence of the intended bid. Consequently, while the Army believed that Aleutian had submitted clear and convincing evidence of the existence of a mistake and

could be allowed to withdraw its bid, it held that Aleutian could not be allowed to correct its 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 C.P.D. ¶ 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 C.P.D. ¶ 149.

Whether the evidence of a mistake or of the bid actually intended is clear and convincing is a question of fact, and we will not question an agency's determination in such cases unless the determination is without a reasonable basis. In judging the sufficiency of the evidence, we consider factors such as the closeness of the corrected bid and the next low bid as well as the range of uncertainty in the intended bid. In general, 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 and, for this reason, correction may be disallowed when a corrected bid would come too close to the next low bid. See Crimson Enterprises, Inc., B-213239, May 8, 1984, 84-1 C.P.D. ¶ 513, and cases cited.

In view of the above, we do not agree with Aleutian that the contracting agency should not have taken into consideration how close Aleutian's corrected bid would come to Shemya's next low bid. Clearly, this is a major factor in any agency's determination whether clear and convincing evidence of the bid actually intended has been submitted. See Crimson Enterprises, Inc., B-213239, *supra*; D.L. Draper Associates, B-213177, *supra*; and G.N. Construction, Inc., B-209641, *supra*. Moreover, the closeness of the bids has been regularly viewed on a percentage basis. While we agree with Aleutian that \$125,992 is a large sum of money in and of itself, when viewed in the context of two bids each totaling more than \$16 million, it is a relatively small

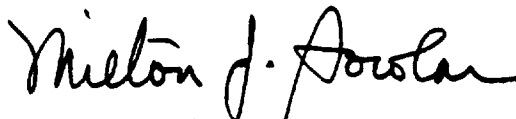
differential. Consequently, we find that the Army has used a recognized method for judging the sufficiency of the evidence presented to support a request for bid correction.

As noted above, along with the closeness of the corrected bid and the next low bid, another factor commonly used to judge the sufficiency of the evidence is the range of uncertainty in the intended bid. The Army has examined the protester's worksheets and affidavits and has concluded that it cannot determine with certainty what profit Aleutian intended to charge for item 2 of schedule "A." Aleutian claims the amount intended was only \$225,000, but the scratch sheet Shemya discovered indicates that Aleutian may have intended \$494,273.

Aleutian has emphasized that a management decision was made to keep the total profit down to approximately \$1 million, but has presented nothing in writing prepared contemporaneously with the decision to support this assertion. The protester has shown how its worksheets provide some support for its claim that it intended a total profit figure of approximately \$1,005,000, but balanced against this are: the scratch sheet; the Army's concern over the apparent deviation from Aleutian's normally careful bid preparation methods when it developed its profit figures; and, finally, the closeness of Aleutian's corrected bid to Shemya's next low bid. See Fortec Constructors, B-203190.2, Sept. 29, 1981, 81-2 C.P.D. ¶ 264.

As indicated above, the general rule is that our Office will not question a contracting agency's determination concerning the sufficiency of the evidence presented to support a request for bid correction unless that determination is without a reasonable basis. Crimson Enterprises, Inc., B-213239, supra. In the present case, we cannot conclude that the Army's determination that the evidence of Aleutian's intended bid was not clear and convincing was without a reasonable basis.

We deny the protest.



Acting Comptroller General
of the United States