



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Southwest Marine, Inc.

File: B-225686

Date: May 14, 1987

DIGEST

Protest that agency improperly permitted awardee to correct its bid is sustained where the worksheets submitted by the awardee to establish the mistake do not provide for profit or overhead or otherwise clearly indicate the intended bid.

DECISION

Southwest Marine, Inc., protests the award of a contract to Continental Maritime of San Diego, Inc., under invitation for bids (IFB) No. N62791-87-B-0004, issued by the Department of the Navy for the repair of the U.S.S. David R. Ray. Southwest contends that the Navy improperly permitted Continental to correct a mistake in its bid.

We sustain the protest.

The protest concerns line item 0001, the repair of the ship, for which bidders were required to offer a lump-sum price. The Navy received four responses to the IFB for line item 0001, ranging from Continental's low bid of \$2,700,000 to \$4,697,315. Southwest submitted the second low bid of \$3,349,786. Because Continental's bid was well below the government estimate and the other bids, the contracting officer suspected that Continental had made an error in its bid. Before the Navy could ask Continental to verify the bid, however, Continental contacted the Navy and asserted that it mistakenly had omitted ship berthing costs from the bid, an error of \$420,780, and that its intended bid was \$3,120,780, approximately 7 percent below Southwest's next low bid.

Continental explained that, in computing its bid, it originally intended to lease a pier at which to perform the repairs, and included the \$420,780 lease cost (plus associated costs, including guard services) in the subcontractor estimate portion of its bid worksheets.

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Shortly before bid opening, however, Continental decided to perform the work at its own recently completed berthing facility. Continental's vice president claimed he accordingly instructed the estimator to delete from subcontractor costs the \$420,780 lease, together with associated costs, and transfer the \$420,780 lease cost to the section of the worksheets for Continental's own material costs. The estimator was also instructed to subtract from subcontractor costs amounts which resulted when Continental received lower quotations from certain subcontractors to perform different aspects of the repair work. The estimator subtracted all the costs, as instructed, but failed to add the \$420,780 back into Continental's material costs. Consequently, Continental claimed that its bid as submitted mistakenly did not include any costs for the use of Continental's pier.

The contracting officer reviewed Continental's claim and supporting documentation and determined that Continental had provided clear and convincing evidence of the mistake, how the error occurred and its actual intended bid, and therefore recommended to the Deputy Commander for contract management that Continental be permitted to correct its bid. The Deputy Commander concurred with this decision and Continental was awarded a contract at its requested corrected price. Southwest alleges that Continental did not provide sufficient evidence to demonstrate its actual intended bid and, consequently, that the Navy improperly permitted the correction.

The Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.406-3(a) (1986), requires that a high standard of proof be met--clear and convincing evidence of the mistake and the bid actually intended--before correction is authorized, in order to protect the competitive system from abuse. Where, as here, the correction would not displace any other bidder, the bidder's worksheets may constitute sufficient evidence where they are in good order, and there is no contravening evidence. See G.N. Constr., B-209641, June 2, 1983, 83-1 C.P.D. ¶ 98. Because the weight to be given evidence in support of an asserted mistake is a question of fact, we will disturb an agency's determination that the standard for bid correction has been met unless only if there was no reasonable basis for the decision. Montgomery Construction Co., Inc., B-221317, Feb. 28, 1986, 86-1 C.P.D. ¶ 210.

To support its mistake claim Continental submitted statements by its vice president, its estimator and its operations manager as well as its original bid estimation worksheets, consisting of a "low side summary sheet," a subcontractor bid package summary, individual subcontractor quotation sheets and various other worksheets. It is clear

from Continental's low side summary sheet that Continental did in fact reduce its subcontractor costs by an amount equal to the \$420,780 leasing cost plus the lower subcontractor quotations, and that Continental did not increase its material costs by a corresponding amount.

The determinative question, then, is whether Continental intended, but mistakenly failed, to retain the \$420,780 lease cost in the bid as part of its material cost. The only objective evidence presented on this point is Continental's bid package summary, showing the \$420,780 entry for the lease cost crossed out and, beside this crossed-out entry, a notation, "Not required, put into material for CMSD facility." We do not believe this evidence alone is sufficient to permit bid correction.

The adequacy of the evidence here depends upon the credibility of Continental's worksheets. Our review of all of Continental's worksheets indicates that they only include raw subcontractor quotations and other costs; they include no entries for overhead or profit. We have found that it is significant in determining the bid intended that worksheets submitted to support a request for bid correction do not -- reveal what provisions the bidder intended for profit and overhead, since bidders on government contracts generally intend to gain some profit from performing the contract. Thus, a bidder's failure to provide for these items in the calculations used to arrive at the allegedly intended bid calls into question whether that was indeed the bid price actually intended. Montgomery Construction Company, Inc., B-221317, supra. Permitting correction of allegedly omitted costs in cases where the bid worksheets also omit profit and overhead could encourage bidders to submit the bids without these costs and to seek recovery of all or part of these costs through mistake claims after learning that the bid was low. There is no evidence that the Navy ever questioned the omission of profit and overhead, or that Continental ever explained the omission.

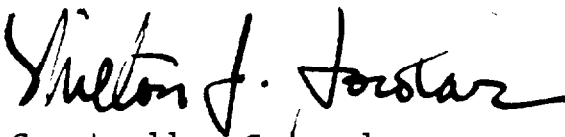
Also detracting from the credibility of the worksheets, the record does not indicate why Continental's \$420,780 lease cost would be precisely the same as the amount it allegedly planned to charge based on use of its own facility. Continental's asserts, simply, that it considered the costs to be the same, but does not explain why this would be the case. As the protester points out, the costs of leasing and ownership would be expected to be different in several respects, including profit; given the absence of profit from the rest of Continental's bid, there would be no reason to assume that Continental intended to retain as its own profit

the portion of the lease cost that presumably would have represented profit to the subcontractor. We further think it conceivable that a company might reasonably decide not to charge for use of its own pier where strong competition is anticipated, or where the pier otherwise might go unleased.

Therefore, while the only objective evidence demonstrating that Continental intended to include \$420,780 in its bid as the cost of using its own facility is the notation in the subcontractor summary sheet, there are substantial reasons to question the credibility of these worksheets in determining Continental's intent. In the final analysis, we do not believe that this evidence reasonably can be deemed to establish clearly and convincingly that Continental intended to include an additional \$420,780 in its bid. Consequently, we sustain Southwest's protest.

By contrast with the clear and convincing evidence required for bid correction, withdrawal of a bid requires a lesser degree of proof and may be allowed if it reasonably appears that an error was made. See Pneumatic Construction Co., B-207871, Aug. 31, 1982, 82-2 C.P.D. ¶ 193. Since there is some evidence here that there may have been a mistake in Continental's bid, this standard applies, and withdrawal of the bid and award to Southwest (if otherwise proper) would be the appropriate remedy. However, Southwest submitted its protest to our Office more than 10 days after Continental was awarded the contract. Consequently, the Navy was not required to, and did not, suspend performance during the protest, and at this juncture Continental's performance is more than 50 percent complete. Thus, while we sustain the protest, it is impracticable for our Office to recommend relief. Instead, we find that Southwest should be reimbursed its bid preparation costs and the costs of filing and pursuing its protest, including attorney's fees. 4 C.F.R. § 21.6(d) and (e); Hobart Brothers Co.--Reconsideration, B-222579.2, Sept. 19, 1986, 86-2 C.P.D. ¶ 323. Southwest should submit its claim for these costs directly to the Navy. 4 C.F.R. § 21.6(f).

Acting


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