Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: DGS Contract Services, Inc.

File: B-237157.2

Date: February 8, 1990

William F. Savarino, Esq., and Sheila C. Stark, Esq., Dickstein, Shapiro & Morin, for the protester.
Colonel Herman A. Peguese, Chief, Contract Support Division, Department of the Air Force, for the agency.
Paula A. Williams, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Procuring agency properly denied protester's request for upward correction of its low bid because of an error in its subcontractor quote where the protester established that a mistake had been made but did not submit clear and convincing evidence of its intended bid.

2. Agency properly rejected the protester's bid--which may have been low because of a mistake--where the protester first alleges that it made a mistake and then seeks to abandon or waive the claim of mistake, and it is not clear that the bid would have been low regardless of any mistake.

DECISION

DGS Contract Services, Inc., protests the denial of its preaward request to correct a mistake in its low bid and the subsequent rejection of its bid submitted in response to invitation for bids (IFB) No. F22600-89-B-0026, issued by the Air Force.

We deny the protest.

The Air Force issued the solicitation for the rental and maintenance of washers and dryers at Keesler Air Force Base, Mississippi. The bid schedule contained four line items for a base year and two 1-year options. The four line items were listed as: Item 1, Electric Clothes Washing Machines; Item 2, Electric Clothes Dryers; Item 3, Gas Clothes Dryers;

and Item 4, Gas Clothes Dryers, 30-pound Laundromat Tumblers. The statement of work (SOW) provided in relevant part for the installation of these washers and dryers at various locations on Keesler AFB. The SOW also stated that the contractor would be required to maintain the equipment in first class operating condition as defined by the specifications, furnish all repair parts and maintenance services which include lint removal and clean and maintain all machines.

A review of the bids received on July 25, 1989, indicated that DGS was the apparent low responsive bidder, at a price of $259,044.48. The second low bid was $292,716, which was $33,671.52, or approximately 13 percent higher. DGS' unit prices for Item 4 were substantially below any other bidder's.

Due to the disparity between DGS' bid and the other bids, the contracting officer requested that DGS verify its bid. DGS responded by letter dated August 9 that it had made a mistake in Item 4 of its bid. To support its claim that a mistake had been made, DGS submitted a letter dated August 7 from Whirlpool Corporation, which stated that because of the confusion concerning a new product, it had quoted DGS a price for a dryer "built for the 18 to 22 pound market only" and which would not meet the Air Force's requirement for a heavy-duty, 30-pound capacity machine. Therefore, DGS requested that it be permitted to increase its price by $25,897 to $283,516.88 or about 3 percent below the second low bid. (As the Air Force points out, the corrected "Grand Total" claimed by DGS differs by some $1,400 from the sum of its original bid plus $25,897.) Included with this request for upward correction was a post-bid opening letter from another supplier, International Dryer Corporation, giving its price to furnish the required 30-pound laundromat tumblers.

The Air Force denied DGS' request to correct its bid. Federal Acquisition Regulation (FAR) provides that a bidder may be permitted to correct its low bid only if clear and convincing evidence establishes both the existence of a mistake and the bid actually intended. FAR § 14.406-3(a) (FAC 84-32). The Air Force found that DGS had submitted evidence to show that a mistake had been made but that DGS had not submitted clear and convincing evidence to demonstrate its intended bid. The agency questioned DGS' evidence of the intended bid since the written quotation from International was not existing at the time of bid opening and was therefore subject to the control of DGS.

Specifically, the agency notes that the letter from International was dated July 28, 3 days after bid opening and 2 days after DGS was notified it was the apparent low bidder and had received a copy of the bid abstract on July 26. Furthermore, the agency points out that none of the documentation received from DGS was sworn to or notarized. In addition, the Air Force states that it was impossible to ascertain if DGS had included other costs such as labor for its service technician, parts, transportation of the equipment and installation or replacement of any dryer. In view of the fact that DGS' price, as corrected, would be only about $10,000 less than that of the second low bidder, the Air Force was not certain that DGS would remain low if these costs were taken into account.

On this basis, the Air Force notified DGS by telephone on September 7 that correction of its bid was disallowed and that it should withdraw its bid. Later, DGS reportedly called the contract specialist stating that the firm would not withdraw its bid, and that if correction of its bid was disallowed then the firm was withdrawing its mistake claim. That same day, the contracting officer received a telefaxed memorandum from DGS that the firm "wishes to withdraw [its] early notice of mistake on bid. After review we have determined there is no mistake. Please make award as stated." By letter dated September 26, the contracting officer denied DGS' request to withdraw its mistake in bid claim and rejected its original bid.

In its protest, DGS has argued both that: (1) it had presented clear and convincing evidence of both the existence of a mistake and the amount of its intended bid, at least within a reasonable degree of certainty, and therefore should have been permitted to correct its bid upward, and (2) that it subsequently discovered there was "no mistake," and therefore the Air Force should have permitted DGS to withdraw its claim of mistake and made award to DGS at its original bid price. We discuss in turn below these arguments.

We have held that errors made by a bidder's supplier are cognizable under the mistake in bid procedures even though, in a technical sense, the bid initially submitted to the contracting agency is what the bidder intended to submit since at the time the bidder was unaware of the supplier's error. See, e.g., MKB Mfg. Corp., 59 Comp. Gen. 195 (1980), 80-1 CPD ¶ 34. DGS contends that the finding by the agency that DGS had made a mistake in receiving and using a supplier's quotation on an incorrect item yet had presented insufficient evidence of the intended bid price was inconsistent and unreasonable, because in both instances,

the evidence submitted was in the form of unsworn correspondence from potential suppliers.

However, this argument ignores entirely the relevant facts set forth above and the standard of proof required to permit correction. Whether there is clear and convincing evidence of a mistake and of the intended bid is a question of fact and we will not question an agency's decision based on this evidence unless it lacks a reasonable basis. See Continental Heller Corp., B-230559, June 14, 1988, 88-1 CPD ¶ 571 at 3. We find the Air Force's decision not to allow correction of DGS' bid was reasonable.

First, as to whether there was sufficient evidence upon which the Air Force could conclude that a mistake had been made, we note that DGS' price for Item 4 was so out of line with those of the other bidders that it prompted a request by the Air Force that DGS verify its bid. DGS responded to this request with a claim that a mistake had been made and as support, provided a letter from Whirlpool, which stated with reference to the "Keesler AFB washer/dryer contract" that because of the confusion surrounding a new product that the model of gas dryer for which Whirlpool had provided a quotation to DGS was of a smaller capacity than that required by the Air Force specifications. There is nothing in the record which shows this advice to have been in error. Although DGS has subsequently claimed that "there is no mistake" it has provided no support for this assertion such as, for example, a letter from Whirlpool retracting or correcting its earlier advice. In view of the disparity in bid prices and the credible letter from Whirlpool, we think the Air Force reasonably concluded that there was sufficient evidence that a bona fide mistake had been made to at least permit DGS to withdraw its bid.

As to the amount of DGS' intended bid, however, the record clearly shows that DGS did not furnish any pertinent evidence to support its alleged intended bid such as bidder worksheets, adding machine tapes, its file copy of the bid, affidavits or any information that it obtained subcontractor quotes for the correct dryer model prior to bid opening. In addition, as the agency reported, the uncertainty involved in determining if the claimed corrected bid price of $283,516.88 included all costs associated with the installation and maintenance of the laundromat tumblers renders DGS' intended bid impossible to ascertain. DGS does not explain why it failed to furnish additional evidence to support its request for correction.

DGS contends alternatively that its request for correction should have been granted since its intended bid could have

been determined within a reasonable range of certainty. As support for this position, DGS relies on our line of cases in the mistake-in-bid area which state that correction is permissible even though the intended bid cannot be determined to an absolute certainty. See, e.g., Price/CIRI Constr., B-230603, May 25, 1988, 88-1 CPD ¶ 500; J. C. K. Contracting Co., Inc., B-224538, Jan. 9, 1987, 87-1 CPD ¶ 43. The protester is correct that in limited circumstances, correction may be allowed even though the intended bid price cannot be determined exactly, provided there is clear and convincing evidence that the amount of the intended bid would fall within a narrow range of uncertainty and would remain low after correction. Avanti Constr. Corp., B-229839, Mar. 14, 1988, 88-1 CPD ¶ 262 at 3. However, in Price/CIRI Constr., B-230603, supra, we clearly stated that correction will be permitted only if the bidder meets the stringent requirement of "clear and convincing evidence" that its intended bid falls within a narrow range of uncertainty. Contrary to the protester's assertion, this rule is inapplicable under the circumstances of this case since the "pricing data" submitted by DGS falls far short of that burden of proof; therefore, DGS cannot avail itself of this rule.

Finally, DGS argues that it should have been allowed to withdraw its request for correction and receive the award at its original bid price. DGS asserts that while its request for correction was pending, it discussed the purported mistake with "its subcontractor" and determined that no mistake had in fact been made by "its subcontractor." DGS states that it so informed the agency by telephone on September 6 and at that time orally withdrew its mistake in bid claim and affirmed its original bid. This was confirmed by a September 7 telefacsimile to the contracting officer.

While the parties dispute whether the request to withdraw DGS' mistake in bid claim preceded the agency's notification to the protester that its request for upward correction was denied, we need not resolve this matter since award could not have been made to DGS at its original bid price. Where a bidder alleges that it made a mistake and then seeks to abandon or waive the claim, award may not be made to that bidder, who might have been low by virtue of a mistake in its bid, unless it is clear that the bid would have been low

regardless of any mistake. Prince Constr. Co., 63 Comp. Gen. 200 (1984), 84-1 CPD ¶ 159. It is not clear here that DGS is entitled to award under this test. Thus, the agency properly rejected the bid.

Accordingly, the protest is denied.

for Seymour Efros
James F. Hinchman
General Counsel