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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: William G. Tadlock Construction

File: B-251996

Date: May 13, 1993

Thomas M. Finrow, Esq., for the protester.
Garrett L. Ressing, Esq., Leonard G. Crowley, Esq., and Paul M. Fisher, Esq., Naval Facilities Engineering Command, for the agency.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where protester was given written reason for denial of bid correction request 36 working days before second written denial for the same reason, its protest filed after second notification was untimely; protest had to be filed not later than 10 working days after first notice of agency's adverse determination.

2. After correction of mistake was denied, bidder may not waive mistake and receive award at its original price where there is insufficient evidence to show what the intended bid price was and that it would remain the low bid; the agency properly permitted only withdrawal of the bid.

DECISION

William G. Tadlock Construction protests the Department of the Navy's denial of the firm's preaward request for upward correction of its low bid submitted in response to invitation for bids (IFB) No. N68711-91-B-2111, issued by the Department of the Navy for repair of bachelor enlisted quarters at Camp Pendleton, California. Tadlock principally contends that the denial of the request for correction was improper.

We dismiss the protest in part as untimely filed and deny it in part.

The solicitation required labor and materials for repair of a building, including exterior cast-in-place concrete masonry walls, interior concrete masonry walls, doors and finish hardware, suspended acoustic and plaster ceilings, ceramic floor and wall tile, and plumbing and lighting

fixtures. Of the 10 bids submitted at bid opening on September 25, 1992, Tadlock's was low at $2,349,529; the next low bid was $2,668,800. After bid opening, Tadlock claimed a mistake in its bid related to the concrete work and requested that it be allowed to withdraw the bid. Tadlock subsequently revised this request and asked that it be allowed to make an upward correction of $190,017 (for a total corrected bid of $2,539,546). The Navy determined that although the difference between Tadlock's bid, the other bids received, and the government estimate reasonably supported the existence of a mistake, it was insufficient to establish clearly and convincingly the amount of the intended bid. Both factors must be established to support upward correction of an alleged mistake. Federal Acquisition Regulation (FAR) § 14.406-3(a); see Capitol Contractors, Inc. and Baker Roofing Co., B-248944; B-248944.2, Oct. 22, 1992, 92-2 CPD ¶ 267. Consequently, by letter dated November 6 (received by Tadlock that same date), the Navy denied Tadlock's correction request and stated the basis for the denial. In the same letter, the Navy informed Tadlock that it would be allowed to withdraw its bid.

Thereafter, in response to a congressional inquiry, the Navy requested additional information from Tadlock, which the protester submitted. By letter dated December 30, and received by Tadlock on January 2, 1993, the Navy notified Tadlock that its request for bid correction had again been denied, because this new material still provided no clear and convincing evidence of the intended bid. In the same letter, the Navy notified Tadlock that it could not accept the firm's bid as submitted, and that award would be made to the next low responsive, responsible bidder. On January 14 Tadlock filed this protest with our Office.

Our Bid Protest Regulations require that protests be filed within 10 working days after the basis for the protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1993). Generally, a protester is charged with knowledge of a basis of protest if (1) the protester's interests are threatened, and (2) the agency conveys to the protester a position adverse to the protester's interests. See Storage Technology Corp., B-194549, May 9, 1980, 80-1 CPD ¶ 333.

The Navy maintains that Tadlock's protest is untimely because the November 6 letter denying the correction request put Tadlock on notice that the Navy had adopted a position adverse to Tadlock's interests, but Tadlock did not file its protest until January 14, more than 10 days after this notice. Tadlock argues that the November 6 letter did not put the firm on notice of the agency's final position but, rather, was merely a request for further information.

Tadlock believes it thus properly delayed protesting to our Office until the agency made its final determination to disallow bid correction on December 30, after review of the new data the protester submitted. We agree with the Navy that the protest was untimely filed.

The November 6 letter stated that the Navy "denied [the firm's] request for bid correction" and that "permission may be given to withdraw [the firm's] bid." The letter established that the agency had taken a position regarding the merits of the firm's correction request contrary to the protester. Tadlock's purported interpretation of the November 6 letter as merely a request for additional information is based on a request in the letter that Tadlock "please provide a response by November 13, 1992." It is clear, however, that this request related to the previous sentence, which stated that "permission may be given to withdraw your bid"; in other words, the agency was requesting a response as to whether Tadlock would withdraw its bid, not additional information for the purpose of making an initial decision on the correction request. Indeed, the record shows that Tadlock recognized the adverse nature of the agency's letter; in a November 12 letter seeking congressional assistance, Tadlock explained that "[o]n 6 November, we received a letter from the Navy denying our request for reformation."

Tadlock's continuing attempt to persuade the agency to change its position by contacting a Member of Congress, which resulted in the agency's second letter reiterating the denial of correction, did not suspend our timeliness requirements. Whether or not Tadlock chose to continue pursuing the matter with the agency, the protest had to be filed in our Office within 10 days of the initial notice of the agency's adverse position. See Phoenix Prods., Inc., B-248790, Aug. 17, 1992, 92-2 CPD ¶ 111. Because the protest was not filed until well after November 6, it is untimely and we will not consider it.

Tadlock further argues that, even if its correction request properly was denied, it was entitled to award at its mistaken bid price. Ordinarily, where a bidder alleges mistake after bid opening, it is not then free to waive its mistake claim and receive award at the original price.

C Constr. Co., Inc., B-242717, June 6, 1991, 91-1 CPD ¶ 540.[1] However, there is a limited exception to this rule against waiver of a mistake where the bidder can prove by clear evidence that the intended bid would remain the low bid, even though the bidder could not prove the amount of the intended bid for the purpose of bid correction. See id.; DSG Corp., B-210818.3; B-213173, Apr. 25, 1984, 84-1 CPD ¶ 476. There is no such clear evidence here.

Tadlock's claimed mistake was its failure to double its concrete costs to allow for the fact that the IFB drawings showed only half (i.e., one of two wings) of the building to be repaired. Tadlock developed a written final bid sheet based on worksheets that contained a detailed list of items needed for each major element of the project and the cost of those items, but the concrete costs on these worksheets allegedly were based on only the portion of the building shown in the drawings. The total amount of the claimed error is $190,017, consisting of $171,921 for the concrete costs, and an additional $18,096 for overhead, profit, and bond costs.

There is nothing in Tadlock's bid or worksheets supporting the claimed intended bid. Tadlock points to notations on the top of its concrete worksheets--"3-STORY, TYP. 2" on the first 2 pages and "2-STORY, TYP. 2" on the third page--as evidence of its intent to multiply the concrete costs by 2. However, these notations do not indicate an intent to double the worksheet costs; "TYP. 2" cannot reasonably be interpreted as meaning multiply by 2. Rather, the notations appear to represent headings to identify the work in the solicitation drawings. There is nothing else in the record clearly showing that Tadlock's intended bid would be lower than the next low bid. For example, there is no indication that there was a pattern by Tadlock of doubling costs in other areas, and no explanation by Tadlock as to why the "doubling" problem affected only the concrete work. The government's estimate for the concrete work was $518,525. Although Tadlock's claimed intended bid would remain low by $129,254, the bid would not remain low if the concrete work were priced in line with the estimate. Obviously, without some evidence supporting Tadlock's alleged intent, there is no basis for concluding that

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[1]To permit the bidder to do so would be to allow the bidder the impermissible option of either affirming its low bid or withdrawing it, depending upon which appeared to be in its best interest. 52 Comp. Gen. 258 (1972). Permitting such a choice would be inconsistent with the integrity of the competitive sealed-bidding system and would be prejudicial to other bidders. See Bruce-Anderson Co., 61 Comp. Gen. 30 (1981), 81-2 CPD ¶ 310.

Tadlock's intended bid clearly would be low. The agency therefore properly determined that the error here could not be waived, but only withdrawn. See Roebbelen Eng'g, Inc., B-219929, Dec. 20, 1985, 85-2 CPD ¶ 691.

The protest is dismissed in part and denied in part.

for James F. Hinchman
General Counsel