



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Lambert Roofing & Construction Co., Inc.

**File:** B-255183

**Date:** February 14, 1994

Patricia T. Mandt, Esq., and John J. Park, Jr., Esq.,  
Bradley, Arant, Rose & White, for the protester.  
Alexander J. Brittin, Esq., McKenna & Cuneo, for TEK  
Contracting, Inc., an interested party.  
William E. Thomas, Jr., Esq., and John Manfredonia, Esq.,  
Department of Veterans Affairs, for the agency.  
Stefanie G. Weldon, Esq., and Dayna K. Shah, Esq. Office of  
the General Counsel, GAO, participated in the preparation of  
the decision.

### DIGEST

Agency decision to permit upward correction of mistake in bid, based on its determination that mistake is supported by clear and convincing evidence, will not be disturbed unless there is no reasonable basis for it.

### DECISION

Lambert Roofing & Construction Co., Inc. (Lambert), protests the decision of the Department of Veterans Affairs (VA) to permit upward correction of the low bid submitted by TEK Contracting, Inc. (TEK), in response to invitation for bids (IFB) No. 679-18-93, issued by the VA for repairs to the Department of Veterans Affairs Medical Center, Tuscaloosa, Alabama.

We deny the protest.

### BACKGROUND

The work involved at the Medical Center included the selective demolition and installation of handrails, miscellaneous steel, doors and hardware, door frames, swing gates, painting, sprinklers and other items. The IFB required each bidder to provide a base bid and five alternate bids, described as bid items 1 through 6. The alternate bid items, 2 through 6, were deductive, that is, each involved a successive diminution of specific items from each prior bid item.

The five bids received were opened on Friday, June 11, 1993. The apparent low bidder for item 1 was TEK, at \$143,896. Lambert's was the next low bid for item 1, \$186,800.<sup>1</sup> The government estimate was \$209,873.

On June 14, by faxed communication, TEK informed the agency of a mistake in bid. TEK reported that it had discovered a mathematical error, so that its "intended base bid price is \$173,896," but that all "amounts for deduction items 2 thru 6 remain the same."

The contracting officer asked TEK, on June 15, to submit a written request either to modify the bid or to withdraw it. The same day, TEK responded by letter, asking to modify the bid upward from \$146,896 to \$183,301 rather than the \$173,896 it had asserted the previous day. The company explained that the first upward correction had been prepared hastily.

The new, upwardly revised number was alleged to represent two changes. The first was a subcontractor item called "all metal work" that should have been \$33,465 but which had been recorded on the work sheet as \$3,465. The second change represented application of TEK's standard overhead, profit or bond fees to the \$33,465 which, because of the first matter, had been applied to \$3,465. Supporting evidence included a notarized letter from TEK, a bid summary sheet, the steel subcontractor's quote dated June 10, 1993, an undated revised bid summary sheet, and itemized pricing with tally sheets.

The contracting officer recommended that TEK be allowed to withdraw the bid and that award be made to the second low bidder. This recommendation was referred to the cognizant agency official, the Deputy Assistant Secretary for Acquisition and Material Management (A&MM) for a final determination. The A&MM requested TEK to furnish a breakdown of the steel subcontractor's quote and clarification as to how the alleged error affected the bid alternates. While a breakdown of the steel supplier's quote was provided on July 9, the record indicates that TEK did not have a breakdown of the steel subcontractor's price

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<sup>1</sup>The bids by TEK and Lambert for each alternate were:

	TEK	Lambert
Item 2	\$138,705	\$182,100
Item 3	\$134,225	\$176,800
Item 4	\$129,325	\$171,900
Item 5	\$128,725	\$171,400
Item 6	\$125,475	\$170,500

prior to bidding. As to the effect of the mistake on TEK's bid, TEK replied that the "error in our bid does not affect our bid alternate reductions."

On July 22, the A&MM determined that TEK had failed to provide clear and convincing evidence of its intended bid for items 1 through 5. That official based his decision on the fact that TEK had asserted that only the price for item 1 had been incorrect and that its alternate bids for items 2 through 5 were unchanged, even though items 2 through 5 were deductive items that also contained metal work, albeit in successively smaller increments. (Item 6 did not involve metal work.) The official concluded that the evidence established the existence of a mistake, but that without TEK's cost breakdown of items 1 through 5, it was not clear what the firm's intended bid would have been. The A&MM determined that TEK should be allowed to withdraw the bid, and that award be made to the next low bidder.

TEK protested to our Office on August 5, arguing that the contracting officer should have found the evidence that TEK submitted to support both the mistake and its intended bid to be clear and convincing. TEK maintained that its intended bid for items 2 through 5 could be ascertained by using the same numerical differences between each item as in the original bid documents.

The VA then reconsidered its earlier position. The agency concluded that based upon a review of the mistake and the original evidence submitted, TEK had established clear and convincing evidence of its intended base bid for item 1. The VA therefore awarded the contract to TEK at the price of \$183,301, and TEK withdrew its protest. Upon notification of the VA's decision to award to TEK, Lambert, the next low bidder, filed this protest.

#### DISCUSSION

In accordance with Federal Acquisition Regulation (FAR) § 14.406-3(a), a bidder who seeks upward correction of its bid prior to award must submit clear and convincing evidence that a mistake was made, and of the bid intended. American Restoration, Inc., B-250796, Jan. 11, 1993, 93-1 CPD ¶ 32. Workpapers may constitute clear and convincing evidence if they demonstrate the existence of a mistake and the intended bid, are in good order, and are not contradicted by other evidence. Interstate Construc., Inc., B-248355, Aug. 6, 1992, 92-2 CPD ¶ 86.

The protester argues that TEK has failed to meet its burden of proof. Lambert questions whether TEK in fact made a mistake, since TEK asserts that no correction is required for its bids on items 2 through 5; the protester argues that

TEK, even if it had missed the alleged error in item 1, certainly would have noticed it when it calculated its costs for the work required under items 2 through 6. Lambert questions how TEK could have calculated its alternate bids (in particular, the materials and labor in items 3 and 4, which largely involved deletions of steel work), if the company did not have a breakdown of the steel subcontractor's quote. The protester suggests that TEK's asserted item 1 bid - first \$173,896 and later \$183,301 - really is based on hindsight as to what the firm should have bid.

Lambert further complains that correction of TEK's alleged error brought the item 1 bid to within 2 percent of, and therefore impermissibly close to, Lambert's next low bid.

TEK explains that it did not use a separate cost build-up to arrive at the price of each of the bid alternates. TEK asserts that its pricing pattern was derived from calculating the base price for item 1 and estimating a deduction for labor and material for each successive item. TEK asserts that it based its deductions on supplier quotes, catalogue prices sheets, a general contractor estimator book, and experience.

Initially, we point out that we need not decide whether there was clear and convincing evidence of TEK's intended bids for items 2 through 6, since the agency made its award based on bids for item 1. We need only evaluate the evidence based on the work actually awarded. Zimmerman Plumbing and Heating Co., Inc.--Reconsideration, B-211879.2, Aug. 8, 1983, 83-2 CPD ¶ 182.

We believe that TEK has offered a reasonable explanation for how it arrived at its bid for item 1. Because the weight to be given to the evidence in support of an asserted mistake is a question of fact, we will not disturb an agency's determination that an alleged mistake is supported by clear and convincing evidence unless there is no reasonable basis for it. Tri-State Consultants, B-250700, Dec. 22, 1992, 92-2 CPD ¶ 433.

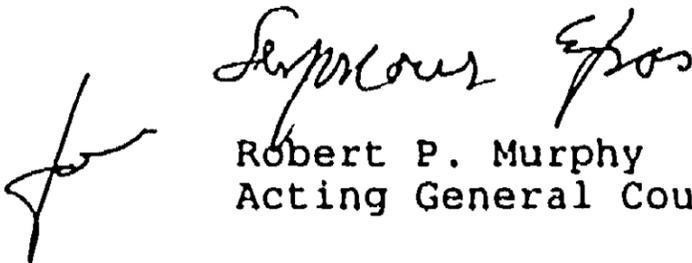
The worksheets provided by TEK show that, in calculating its base bid, TEK utilized a price of \$3,465 for the steel work, and the subcontractor quote, dated prior to bid opening, clearly shows a quotation for the steel work at \$33,465. Also, the worksheet specifies a percentage that TEK added to the subtotal of all costs for overhead, profit, and bond fees, for a total bid price. Substituting the subcontractor quote of \$33,465 for the \$3,465 recorded on the worksheet leads to a price of \$173,896, which was the intended bid claimed by TEK shortly after bid opening. Applying the company's standard overhead, profit, and bond rate yields a

total bid of \$183,301, which is the allegedly intended bid for item 1. (As stated above, TEK has explained that its initial request for upward correction had been prepared in haste.)

The result of permitting TEK upward correction to \$183,301 is that the bid comes within 2 percent of the next low bid, as Lambert notes. The fact that an intended bid is very close to the next low bid does not automatically preclude correction, however. Pacific Components, Inc., B-252585, June 21, 1993, 93-1 CPD ¶ 478. Rather, the rule is that the closer an intended bid comes to the next low bid, the more difficult it is to establish the amount of the intended bid, and the more closely we will scrutinize the claim of mistake. Vrooman Constructors, Inc., B-226965.2, June 17, 1987, 87-1 CPD ¶ 606. Where close examination confirms that a mistake was made and that the intended bid would have been lowest, we have allowed corrections to within as little as .3 percent of the next low bid. Id.

We find that the record clearly establishes both that there was a mistake in TEK's bid for item 1 and the bid intended for that item. The VA therefore reasonably permitted TEK to correct the bid.

The protest is denied.

  
Robert P. Murphy  
Acting General Counsel