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

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B-176326

December 29, 1972

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Dear General Robinson:

Further reference is made to the protest by Henry Spen & Company, Incorporated (Spen), against the award of a contract to any other firm under invitation for bids (IFB) No. DSA700-72-B-2207, issued by the Defense Construction Supply Center (DCSC), Columbus, Ohio, which was the subject of a report dated August 18, 1972, from the Assistant Counsel, Headquarters, Defense Supply Agency.

The IFB was issued on April 21, 1972, for a total quantity of 67 lubrication and servicing units (items 1 through 4), together with first article testing and related data (items 5 through 17). Bids were opened on June 6, 1972. Of the four (4) bids received, Spen submitted the lowest bid of $6,000 each on items 1 through 4 and is the lowest aggregate bidder on all items.

Spen's unit price of $6,000 for items 1 through 4 was considered out of line with the other bids received, and the prices bid on items 1 through 5 on page 12 of its bid were misaligned so that it could not be determined whether the bid was on an f.o.b. origin or f.o.b. destination basis. Spen was therefore contacted by telephone on June 9, 1972, and requested to confirm the unit price of $6,000 and the delivery basis. Spen confirmed that it was bidding f.o.b. origin, but stated that it had sent a telegram on June 5, 1972, increasing the unit price of items 1 through 4 by $1,982, and the total price of item 5 by $9,437. Spen mailed a copy of the telegram referred to in this telephone conversation, which was received by DCSC on June 13, 1972.

By letter of June 15, 1972, DCSC advised Spen that the telegraphic amendment had not been received from the telegraph company, and Spen was advised of the procedure to be followed in requesting the withdrawal or correction of its bid because of mistake. Reply was requested to be made not later than June 23, 1972. By letter of June 19, 1972, Spen advised that it would reply to the letter of June 15, 1972, after review by its attorney. On June 22, 1972, Spen was further informed that it must reply to the letter of June 15, 1972, by the close of business on June 26, 1972. By its telegram of June 23, 1972, Spen filed its protest with our Office.

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PUBLISHED DECISION
52 Comp. Gen.

By letter of July 10, 1972, from its attorneys the basis of Spen's protest was detailed. It is reported that Spen submitted its bid by mail on June 2, 1972, prior to receiving final quotes from suppliers, in order to make a timely submission. At Spen's final bid review conference on June 5, 1972, after which most suppliers had responded, it was discovered that some components and items had either been omitted from or erroneously priced in its bid. A telegram, correcting the omissions, was reportedly dispatched at 5:45 p.m. on June 5 via telephone to the IFB-designated location for bid opening. After it was informed that the telegram had not been received by DCSC, Spen made inquiries of Western Union and was informed that for some unexplained reason their Columbus, Ohio, facility had no record of said telegram, although the sending office did.

It is contended that Spen should be allowed to correct its bid and should receive the award, since the telegram, worksheets, affidavits, and supporting exhibits attached to your letter clearly and convincingly demonstrate, as required by Armed Services Procurement Regulation (ASPR) 2-406.3(a)(2), that a mistake was made by Spen in the preparation of its bid and what its intended bid price was.

On August 18, 1972, the Defense Supply Agency forwarded its report to our Office wherein it recommended that Spen be authorized to correct its bid by increasing the unit price of items 1 through 4 to $7,982, and that no correction be authorized on the first article testing requirements covered by item 5 of Spen's bid.

By letter of October 25, 1972, Spen's attorneys dispute the contracting officer's conclusion that no mistake was made on the price originally submitted for item 5 for the cost of the preproduction unit to be delivered and the cost of 200 hours for running time tests. It is stated that Spen's normal practice is not to refurbish the first article and then deliver it as a production unit, but rather to include the cost of an end item as a portion of its cost for a first article. Therefore, it is contended that Spen has established the making of a mistake in omitting the cost of a production unit ($7,982) from item 5. In addition, affidavits and worksheets are submitted to establish that Spen adheres to an industry practice of adding a factor of approximately 40 percent to 50 percent for running time tests to reflect the actual anticipated costs of the test, and that the sum representing this factor in the amount of $1,500 was omitted from its June 2 submission. It is contended, therefore, that Spen should also be authorized to correct its bid of $12,500 for item 5 by the additional amount of $9,437.

Under the applicable regulation, ASPR 2-406.3, where a bidder alleges a mistake after the opening of bids and prior to award, and clear and convincing evidence establishes both the existence of the mistake and the bid actually intended, the bid may be corrected, provided such correction will not displace lower bids. If the evidence is clear and convincing as to the mistake, but not as to the intended bid, a determination permitting the bidder to withdraw his bid may be made.

With respect to item 5, your agency believes that while the telegram of June 5 establishes that Spen intended to increase its price by $9,437, the evidence of record does not clearly and convincingly establish that the original bid of $12,500 was in fact occasioned by a mistake. This determination is based primarily upon the fact that since the applicable first article clause does not require that the preproduction unit be delivered as part of the contract quantity, there is not sufficient evidence to support the claim that Spen inadvertently omitted the cost for an additional production unit. Also, the contracting officer points out that there is no objective evidence to support the claim that it is an industry practice to include a 40 to 50 percent factor for running time tests and that such factor was inadvertently omitted.

On items 1 through 4, your agency proposes to allow correction of the unit price from $6,000 to $7,982 on the basis that the $6,000 price was predicated on cost estimates that were substantially erroneous and did not include the cost of packing. In this connection, the bidder's affidavits reveal that the unit price of $6,000 was prepared on the basis of a previous bid which was believed to cover a substantially identical item, and that when the bid was reviewed by the bidder on June 5, 1972, it was discovered that the cost of the lubrication equipment and the compressor had been seriously underestimated and that the cost of crating had not been included in the price. Since the Western Union has acknowledged that the Spen telegram was filed on June 5, your agency believes that this telegram may be considered as proof that Spen would have bid a unit price of $7,982 (f.o.b. origin), in the absence of a mistake, citing B-165434, dated December 2, 1968, and B-170311, June 3, 1971.

Based on the evidence of record, we do not believe it would be proper to permit correction of any part of Spen's bid. As stated, Spen's bid of $6,000 was prepared and submitted on the basis of a previous bid which was believed to cover a substantially identical item. Spen's evidence of mistake includes a "Preliminary B/M" (bill of materials), dated June 1, 1972, showing how the $6,000 was computed. The bill of materials reveals that the lubrication equipment cost was estimated on the basis of a 1968 vendor quote presumably

furnished to Spen in connection with its previous bid for the "substantially identical item". The 1968 vendor quote indicates a cost of $1,306 per unit for the lubrication equipment. To this cost, Spen added a factor of 25 percent (apparently to reflect price increases and design changes in the equipment since 1968), to arrive at an estimated cost of $1,650 per unit for this equipment. The same pattern was followed by Spen in connection with the compressor, indicating a unit cost of $780 (including motor). On the last page of this June 1 bill of materials the following statements appear: "Bid $6,000" and "adjust when quotes are furnished". On June 5, 1972, after verbal quotes on the lubrication equipment and compressor components were received, Spen prepared a revised bill of materials to reflect units costs of $2,947 and $837, respectively, for these components, or a total cost of $1,404 more than the costs estimated for these components on the initial bill of materials. Spen subsequently received written confirmation of these verbal quotes from its suppliers, which it has submitted with its claim of mistake. We have examined these written quotes and compared them to the 1968 quotes used by Spen in preparing the initial bill of materials; however, we are unable to determine from these quotes the extent to which the increased costs of $1,404 may be attributed to price increases since 1968, design differences in the equipment covered by the prior and current quotes, or to other factors. In addition to these increased component costs, the revised bill of materials includes crating costs of $300. This element of cost appears to have been entirely omitted from the June 1 bill of materials.

In any event, it is clear that the revised price of $7,982 per unit (and the increased price of $9,437 on item 5), represents a recalculation of bid based on factors not considered by the bidder until after the bid was prepared and submitted. We have held that the rule which permits bid correction upon the establishment of evidence of mistake and the intended bid does not extend to permitting a bidder to recalculate and change its bid to include factors which the bidder did not have in mind when the bid was submitted. 50 Comp. Gen. 655, 660 (1971). In the cited case, a bidder overlooked certain applicable union wage rates in preparing its bid. We refused to allow correction since the wage rates were never a factor in the preparation of the bid, although the bidder was permitted to withdraw the bid. Similarly, in B-174620, February 2, 1972, a bidder erroneously bid one model of camera and after discovery of the error offered to furnish another model which met specifications, but at a higher price. Correction was not permitted since it would have allowed the bidder to recalculate and change its bid in violation of the rule. As noted in that decision, the bidder was not merely

seeking to have the bid corrected so as to include a previously calculated cost item which had been inadvertently omitted from the amount of the submitted bid. See also, B-176899, November 24, 1972.

We are aware of our holding that a telegram received too late to be considered as a bid modification may nevertheless be considered as evidence in establishing the existence of a mistake and the bid actually intended. B-176314, December 4, 1972, B-165434, supra, and B-170311, supra. In B-176314, however, an award was made to the bidder based on its submitted bid price, despite the bidder's claim of error. We found that the late bid modification, when considered in conjunction with the other evidence of record, was adequate to establish the existence of a mistake and the intended price, and we concluded that the contract could properly be amended to reflect the intended bid price. Our decision of June 3, 1970 (B-170311), involved a similar situation (an award was made despite the bidder's claim of error). And in B-165434, it appears that the evidence of record was considered sufficient to permit bid correction under ASPR 2-406.3, but the bid was nevertheless rejected by the contracting officer because he felt that since the late bid modification could not be considered under the late bid rules, it should not be considered under the rules applicable to mistake. We do not believe that these decisions are applicable to the instant situation.

For the reasons stated above, we do not find that the evidence of record justifies correction of Spen's bid. On the other hand, we find a sufficient basis to allow withdrawal of the bid. In this connection, we have recognized that the degree of proof required to justify withdrawal of a bid before award on the basis of mistake is in no way comparable to that necessary to allow correction. 36 Comp. Gen. 441, 444 (1956). Accordingly, the bid may be withdrawn from consideration for award.

Sincerely yours,

Paul G. Dembling

Acting Comptroller General
of the United States

Lieutenant General Wallace H. Robinson, Jr.
Director, Defense Supply Agency