

DOCUMENT RESUME

02349 - [A1332296]

[Withdrawal of Bid under One of Three Price Schedules].
B-188053. May 6, 1977. 7 pp.

Decision re: A. Tomae and Sons, Inc.; by Paul G. Dembling,
Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: National Defense: Department of Defense -
Procurement & Contracts (058).

Organization Concerned: Weeks Stevedoring Co., Inc.; Department
of the Army: Corps of Engineers, New York District.

Authority: A.S.P.R. 2-406.1. A.S.P.R. 2-406.3(3). 49 Comp. Gen.
446. 36 Comp. Gen. 441. 36 Comp. Gen. 444. 52 Comp. Gen.
258. 52 Comp. Gen. 261. 49 Comp. Gen. 336. 49 Comp. Gen.
343. B-157348 (1965). B-160536 (1967). B-158730 (1966).
B-184260 (1976). B-184316 (1975). B-185762 (1976). Ruggiero
v. United States, 420 F.2d 709 (Ct. Cl. 1970).

The apparent low bidder on one item on a bid form containing three price schedules protested the proposed award of the contract to the low bidder on the composite schedule. The withdrawal of a bid under one schedule because of a mistake did not contravene the requirement for a bid price or "no bid" for all items. It was proper to accept the bid of the low aggregate bidder even though a mistake was made in one schedule, since the mistake had no effect on the combined bids, and the aggregate award was in the best interest of the Government. (Author/SC)

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Richard Feldman
Proc. I

DECISION



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

FILE: B-188053

DATE: May 6, 1977

MATTER OF: A. Tomae and Sons, Inc.

DIGEST:

1. When bid on Schedule II of IFB is unreasonably low (20% of next lowest bid) and contracting officer requests verification, bidder may withdraw bid after bid opening and before award where bona fide mistake in bid is shown by worksheets and sworn statement outlining nature of mistake.
2. Withdrawal of bid under one schedule because of mistake is not in contravention of paragraph 5(b) of SF 22 which requires either bid price or "no bid" for all items.
3. Where bid form contains three price schedules, the third price schedule being the aggregate of the items in the other schedules, and the bid form provides that the Government can accept any schedule or combination of schedules unless a bidder includes a restricted limitation thereon, it is proper to accept the bid of the low aggregate bidder even though a mistake was shown to be made in one schedule since mistake had no effect on combined bids and aggregate award was in best interest of Government.

A. Tomae and Sons, Inc. (Tomae), protests the proposed award of Schedule III of invitation for bids (IFB) No. DACW51-77-B-0002 to Weeks Stevedoring Co., Inc. (Weeks). The solicitation was advertised by the New York District, Corps of Engineers (Corps) for the New York Harbor, Collection and Removal of Drift Project, Liberty State Park.

As originally issued the IFB required bids to be submitted on two items under one price schedule:

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<u>ITEM NO.</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>
1.	Collection, removal and disposal of all derelict vessels, shore structures, pilings and other debris, excluding Item SS4-Pipe Trestle, complete	\$ _____
2.	Removal and disposal of Item SS 4-Pipe Trestle, complete	\$ _____
	Total Items Nos. 1 & 2	\$ _____

Paragraph 7 of the IFB entitled "Award of Contract" deleted paragraph 10(c) of the "Instruction to Bidders," Standard Form 22. Paragraph 10(c) provides that:

"(c) The Government may accept any item or combination of items of a bid unless precluded by the invitation for bids or the bidder includes in his bid a restrictive limitation."

By amendments 2 and 3, a third bid item was added to the price schedule and paragraph 7 of the IFB was amended to read as follows:

"Only one award will be made under this Invitation which award will include the totals of Items No. 1, 2 and 3."

A final amendment, No. 5, established three separate schedules each with subitems. The Corps contends that the provisions of paragraph 10(c) were reinstated by the following language of amendment No. 5:

Invitation for Bids

"Delete 'Par. 7 Award of Contract' in its entirety and substitute the following:

"Par. 7 Governments Privilege in Making Awards: For the purpose of this Invitation for Bids, the word 'item' as used in paragraph 10(c) of Standard Form 22 shall be considered to mean 'Schedule.'"

Thus paragraph 10(c) as amended provides:

"(c) The Government may accept any [schedule] or combination of [schedules] of a bid unless precluded by the invitation for bids or the bidder includes in his bid a restrictive limitation."

The Corps states that this language nullified the provisions of amendments 2 and 3, i.e., that one award would be made for all 3 items. The Corps states that amendment No. 5 reactivated the original option to award any schedule or combination of schedules in the solicitation. Schedule I now consisted of the original two items, Schedule II contained the recently added third item and Schedule III was a composite of all items listed under Schedules I and II as follows:

SCHEDULE I

<u>ITEM NO.</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>
1.	Collection, removal and disposal of all derelict vessels, shore structures, pilings and other debris, excluding Item SS 4-Pipe Trestle, and Item 129, complete	\$ _____
2.	Removal and disposal of Item SS 4-Pipe Trestle, complete	\$ _____
	Total Items 1 & 2	\$ _____

SCHEDULE II

1.	Removal and disposal of Item 129, complete	\$ _____
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SCHEDULE III

1.	Collection, removal and disposal of all derelict vessels, shore structures, pilings and other debris, excluding Item SS 4-Pipe Trestle, and Item 129, complete	\$ _____
2.	Removal and disposal of Item SS 4-Pipe Trestle, complete	\$ _____
3.	Removal and disposal of Item 129, complete	\$ _____
	Total Items Nos. 1, 2 & 3	\$ _____

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The contracting officer maintains that itemization of Schedules I and III was for informational purposes only.

Nine bids were received and opened on December 9, 1976, all acknowledging receipt of the five amendments. The bids of Weeks, the apparent low bidder for Schedules II and III, and Tomae, the apparent low bidder for Schedule I, and the Government Estimate are set forth below:

	<u>Weeks</u>	<u>Tomae</u>	<u>Government Est.</u>
Schedule I			
Item 1.	\$ 879,000	\$763,551	\$2,025,000
2.	<u>180,000</u>	<u>225,000</u>	<u>290,000</u>
Total	\$1,059,000	\$988,551	\$2,315,000
Schedule II			
	\$ 19,000	\$100,000	\$ 146,000
Schedule III			
Item 1.	\$ 879,000	\$ 763,551	\$2,025,000
2.	180,000	225,000	290,000
3.	<u>19,000</u>	<u>100,000</u>	<u>135,000</u>
Total	\$1,078,000	\$1,088,551	\$2,450,000

An examination of the bids revealed that Weeks' bid of \$19,000 for Schedule II was unreasonably low compared to the Government estimate of \$146,000 and the next low bid of \$95,000. Pursuant to ASPR 2-406.1 and 2-406.3(e) (1976 ed.), the contracting officer asked Weeks for verification of its bid, which it did by notarized letter dated December 10, 1976. Weeks confirmed its bid on Schedules I and III and requested withdrawal of its bid on Schedule II. In an affidavit by the president of Weeks he stated that it was believed that work under Schedules I and II would not be awarded separately. Weeks' costs for special equipment, mobilization, demobilization, and overhead were omitted from Schedule II and allocated totally to its Schedule I bid.

Weeks' Schedule II mistake is a mistake in omission based upon its belief that only one award for Schedules I and II would be made. However, Weeks' Schedule II mistake does not affect its Schedule III bid.

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The omitted costs which were allocated totally to Schedule I are reincorporated into the bid when Schedule I is included. Since Schedule III is a composite of all schedules the mistake has no effect on the combined bid. In view of the foregoing, the Corps intends to allow Weeks to withdraw its Schedule II bid and make award to Weeks on its Schedule III bid. If Weeks' Schedule II bid is withdrawn, award to Weeks on its Schedule III bid would result in the lowest cost to the Government.

Initially, we believe that amendment No. 5 reinstated paragraph 10(c) of standard form 22 in the IFB. The protester does not dispute this fact, and a fair reading of amendments Nos. 1 through 5 leads us to the conclusion that the Corps by virtue of paragraph 10(c) retained the option to make award on any schedule or combination of schedules which would result in the lowest cost.

Tomae protests the proposed award to Weeks of Schedule III on several grounds. Initially, Tomae contends that "the Weeks' bid for Schedule II and III should have been rejected by the Issuing Activity as a recognition of the incorrectness of Schedules II and III." Tomae states that Weeks should not be permitted to withdraw its Schedule II bid and that by so doing the Corps has allowed Weeks to make a "no bid" in Schedule II in contravention of the provision of paragraph 5(b) of the solicitation. Tomae argues that Schedules I and II should be awarded to the lowest individual bidders; consequently, Schedule I should be awarded to Tomae and Schedule II to Weeks.

With regard to mistakes in bid alleged after bid opening but prior to award it has been held that where a bidder discovers that it has made a mistake in its bid and so advises the contracting officer, the bidder is not bound by its bid, Ruggiero v. United States, 420 F.2d 709 (Ct. Cl. 1970), and cases cited therein and, therefore, acceptance of the bid does not create a binding contract. 49 Comp. Gen. 446 (1970); B-165127, October 3, 1968. See also 36 Comp. Gen. 441, 444 (1956). In United States v. Lipman, 122 F.Supp. 284, 287 (E.D. Pa. 1954), the court recognized that the so-called "firm-bid rule," designed to protect the integrity of the competitive bidding system, is inapplicable if the bidder " * * * can prove that the desire to withdraw is due solely to an honest mistake and that no fraud is involved." Where the bidder seeking withdrawal alleges such an error and furnishes evidence to make a prima facie case in support of the error, i.e., substantially establish the error, B-157348, August 4, 1965, we have stated that for the Government to make an award to that bidder the Government must virtually undertake the burden of showing that there was no error or that the

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bidder's claim of error was not made in good faith. B-160536, February 13, 1967; B-158730, May 4, 1966; 36 Comp. Gen., supra, 444. Therefore, upon the ultimate determination that a bona fide error was committed, withdrawal is permissible. B-157348, supra. See also 52 Comp. Gen. 258, 261 (1972). Conversely, where it can be concluded that no bona fide error has been committed, withdrawal is not allowable.

In mistake in bid cases involving errors of omission, a bidder's sworn statement outlining the nature of the error, its approximate magnitude and the manner in which the error occurred can constitute substantial evidence of the mistake. The agency must still weigh all the evidence to determine if a bona fide mistake was committed. See S. J. Groves & Sons Company, B-184260, March 30, 1976, 76-1 CPD 205. The Corps examined Weeks' worksheets and determined a bona fide error had been made. The Corps does not propose to accept Weeks' Schedule II bid but intends to allow its withdrawal. Our review of the worksheets and sworn statements of Weeks indicates that a bona fide error has been made and withdrawal is permissible.

Tomae alleges, as stated above, that the Corps allowed Weeks to "no bid" on Schedule II by permitting Weeks to withdraw its bid. Tomae states that this contravenes paragraph 5(b) of standard form 22 of the IFF which provides:

"* * * Where the bid form explicitly requires that the bidder bid on all items, failure to do so will disqualify the bid. When submission of a price on all items is not required, bidders should insert the words 'no bid' in the space provided for any item on which no price is submitted.

Implicit in Tomae's contention is that bidders were required to bid on each and every item. In effect, Tomae argues the withdrawal of Weeks' bid on Schedule II constitutes a "no bid" and renders its bid non-responsive.

We note that Weeks never intended a "no bid" on Schedule II nor has the Corps rejected the Schedule II bid on this basis. Weeks' bid on Schedule II was considered for award as submitted. The Corps proposes to allow withdrawal of Weeks' Schedule II bid. This is not in contravention of paragraph 5(b), supra.

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Where the bid form contains a price schedule for three items, the third being the aggregate of the first two, and the bid form provides that the Government can accept any item or combination of items unless a bidder includes a restricted limitation thereon, it is proper to accept the bid of the low aggregate bidder on the third item who "no bids" the first two items. Robert Gay Construction Company, B-184316, August 25, 1975, 75-2 CPD 124. Similarly the Government may examine each schedule independently and make an award to a bidder for any part of its bid, Huey Paper and Material, Stacor Corporation, B-185762, June 16, 1976, 76-1 CPD 382. Therefore, after Weeks' Schedule II bid is withdrawn, award to Weeks on Schedule III as the low aggregate bidder is proper. Consequently, the Corps is not required to award Schedule II to Weeks and Schedule I to Tomae.

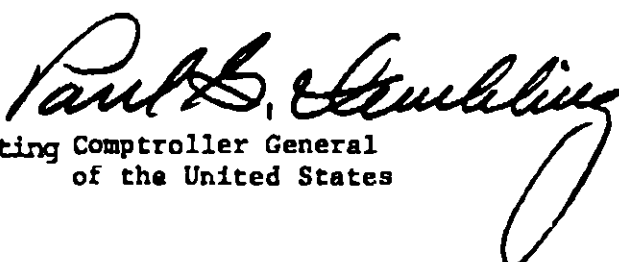
Tomae suggests that Weeks intentionally unbalanced its bid as a means of gaining an advantage over other bidders in the solicitation. Tomae contends that to accept its bid would be a threat to the bidding system.

As a general rule the fact that a bid may be unbalanced does not render it nonresponsive, nor does such a factor invalidate an award of a contract to such a bidder. 49 Comp. Gen. 336, 343 (1969). In any event, there is no evidence in the record indicating that Weeks' bid is unbalanced. Weeks' Schedule II bid is the result of a bona fide mistake in omission. Neither is there evidence of any irregularity of such substantial nature as will operate to affect fair and competitive bidding.

Tomae suggests that the item breakdown in Schedule III was requested in the solicitation for use in negotiating future contract adjustments. No evidence has been submitted by Tomae to support this allegation, nor does anything in the solicitation allude to such use of this criteria after contract award. These item prices were for informational purposes only. Absent such language item prices have no effect on future adjustments.

For the reasons previously stated, Weeks' Schedule III bid may be considered for award, as the one most advantageous to the Government.

On the basis of the foregoing, the protest is denied.


Acting Comptroller General
of the United States