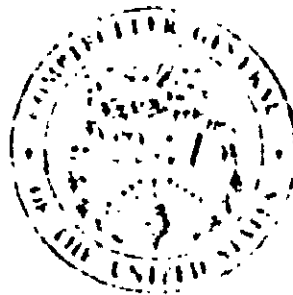


DECISION



Rowell  
118490  
THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20540

FILE: R-205186

DATE: May 25, 1982

MATTER OF: Ovchinikov Brothers

DIGEST:

Contract award subject to resolution of the bidder's preaward claim of mistake should be rescinded where the agency had constructive notice of the mistake before award and where the firm has furnished evidence that reasonably supports its claim of mistake.

Rodian and Erofev Ovchinikov, doing business as the Ovchinikov Brothers, claim a mistake in their bid under invitation for bids No. R6-2-81-45, issued by the Forest Service for tree thinning and related work in Fremont National Forest, Oregon. The Ovchinikov firm was the low bidder on item 2 of the IFB, but sought to withdraw the bid based on an alleged mistake in the bid price. The Forest Service, however, concluded that the Ovchinikov Brothers did not present clear and convincing evidence that a mistake occurred, and awarded a contract to the firm for item 2. We believe that the evidence submitted by the firm is sufficient to show a mistake in bid, and that the award therefore should be rescinded.

The solicitation contained two items, each relating to a different geographic area within the forest. Performance of each item included both tree cutting and "bucking," which essentially involves cutting large trees and limbs to smaller lengths. Bidders were permitted to qualify their bids to limit the amount of work they would perform. Ten bids were received on item 1, and nine bids on item 2. The Ovchinikov Brothers were the apparent low bidders on both items, with a bid of \$40 per acre (\$9,840 total) on item 1, and \$50 per acre (\$13,400 total) on item 2. However, since the Ovchinikovs had qualified their bid with a \$13,400 ceiling, they were

ineligible to receive awards . both items. The contracting officer determined that the Government's interest would be best served by pairing the Ovchinkovs' low bid on item 2 with the second low bid on item 1.

In a pre-award telephone conversation, the contract specialist told Nicolas Ovchinikov (the brother of Rodian and Erofey) that his brothers' firm would be awarded a contract on item 2 of the IFB. According to the contract specialist, she notified Nicolas of the award since neither Rodian nor Erofey spoke English well enough to conduct a business conversation. During this discussion Nicolas stated for the first time that he thought a mistake had been made in his brothers' bid.

The contract specialist then mailed to the firm a letter requesting verification of the bid. According to the letter, the reason for the request was that the Forest Service was on constructive notice of a bidding mistake because the bid of \$13,400 was substantially below the Government estimate of \$18,485.05. In response, the firm claimed a mistake in the bid. Nicolas stated in his brothers' behalf that he had surveyed the land for them and recommended that they bid \$50 per acre for thinning and \$100 per acre for bucking. As stated above, however, the bid on item 2 was only \$50 per acre. The firm asserted that the bid price was a mistake in that it contemplated only thinning, not bucking. That mistake, the firm contended, arose from Rodian's difficulty in understanding the contract specifications. As substantive evidence of the alleged mistake, the firm furnished a copy of the bidding schedule on which the bids had been recalculated to show what the brothers would have bid if they had included the cost of bucking in their bid price.

The Forest Service did not view the Ovchinikov Brothers' bare allegation of mistake and the recalculated schedule as the type of clear and convincing evidence required by Federal Procurement Regulations § 1-2.406-3 (1964 ed.) to substantiate a claim of mistake in bid so that the bid may be withdrawn. The firm therefore was awarded a contract for item 2, but has appealed the Forest Service's decision to our Office.

The requirement in FPR § 1-2.406-3 that there be clear and convincing evidence of a mistake before a bidder may be permitted to withdraw the bid applies only to administrative determinations by executive agencies. B&A Electric Co., B-197437, February 18, 1981, 81-1 CPD 147. The regulation also provides that no bidder may be deprived of its right to have the matter reviewed by our Office, FPR § 1-2.406-3(e), and we will allow withdrawal whenever it reasonably appears that an error was made in a bid. Murphy Brothers, Inc.--Reconsideration, 58 Comp. Gen. 185 (1978), 78-2 CPD 440. Thus, we have stated that where a bidder seeking withdrawal alleges an error and furnishes evidence which, though not clear and convincing, substantially establishes the error, the Government virtually must undertake the burden of proving that there was no error or that the bidder's claim of error was not made in good faith in order to make an award to that bidder. S. J. Groves & Sons Co., 55 Comp. Gen. 936 (1976), 76-1 CPD 205; 36 Comp. Gen. 441, 444 (1956). We previously have held that a bidder's submission of its bid worksheets plus a sworn statement outlining the nature of the error, its approximate magnitude and the manner in which the error occurred, can constitute sufficient evidence of the mistake. S. J. Groves & Sons Company, supra.

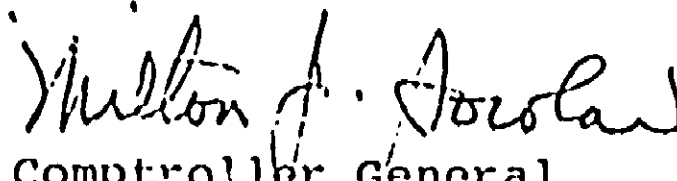
Here, the Forest Service admits that, because the Ovchinikov firm's bid was substantially below the Government estimate, the agency was on constructive notice prior to the award that a mistake had been made. While the Forest Service's request for verification mentioned only that the bid was substantially (27 percent) below the Government estimate, the record also shows that the bid was 35 percent lower than the next low bid. Moreover, when the contract specialist sought verification of the bid as a result of the price disparity, the bidder confirmed that it had made a mistake in bid. As evidence of that mistake, the firm submitted its worksheet with the figures recalculated to show what the original bid would have been if it had included the cost of bucking.

Although the Ovchinikov Brothers did not submit a sworn statement describing the nature of the error, the firm did send two post-award letters to this Office explaining how the error occurred. Furthermore, the brothers enclosed copies of two solicitations on which Nicolas had bid in the recent past as exhibits accompanying one of the letters. In

those solicitations, the bucking requirement was specifically set out as a separate sub-item. Therefore, the brothers maintained, when bucking was not detailed as a sub-item in solicitation R6-2-81-45, they reasonably (and mistakenly) assumed that it was not required. As a result, the firm did not include the cost of bucking in its initial bid price. Finally, the brothers have submitted maps of the areas involved in it, 2, which the Forest Service furnished with the IFB, that include annotations by the firm that the thinning would cost \$50 per acre and bucking, had it been required, would cost \$100 per acre.

We believe that the record in this case supports a finding that a bona fide mistake was made. The Forest Service admittedly had constructive notice of the mistake prior to the award, the bid was substantially lower than the other bids, and the evidence submitted by the firm, including the second worksheet, two letters of explanation, copies of prior solicitations, and the area maps, reasonably indicate that a mistake was made in the brothers' bid.

Thus, the Forest Service's award to the firm did not consummate a valid and binding contract. B&A Electric Co., supra. Since the Forest Services advises that no work has been performed to date, the purported award should be rescinded. See Al Johnson Construction Company, D-189346, August 25, 1978, 78-2 CPD 114 at p. 4.

for   
Comptroller General  
of the United States