

Protest of) Date: June 5, 1987
DAWSON CONSTRUCTION AND ELECTRIC)
Solicitation No. 059900-87-A-0013) P.S. Protest No. 87-28

DECISION

Dawson Construction and Electric (Dawson) protests the contracting officer's determination to permit the low bidder, Heinz H. Steinmann (Steinmann), to increase its bid from \$176,001 to \$184,626 after bid opening but before award and the subsequent award to Steinmann of a contract for construction of a post office under Invitation For Bid (IFB) No. 059900-87-A-0013.

IFB No. 059900-87-A-0013, issued December 10, 1986, by the Facilities Service Office, Western Region, sought bids for construction of a post office in Llano, California. When bids were opened January 9, Steinmann's bid of \$176,001 was the lowest of two bids received. Dawson's bid was second low at \$252,360.

The contracting officer on January 15 requested that Steinmann verify his bid. By letter of February 10, Steinmann responded that a mistake was made in preparing his bid price, the cost of sprinklers was omitted. As evidence, Steinmann submitted his original worksheets and other data used in preparing his bid. Steinmann claimed that the omission of the cost of the sprinkler system in his bid was a result of having used figures taken from an adding machine tape listing the costs of a similar postal facility under construction. The tape did not include the cost of the sprinkler system because the other facility had not required sprinklers. Steinmann also submitted quotations prepared after bid opening from two companies proposing to do the omitted sprinkler work, requesting that the bid be increased by \$8,625, the amount of the lower of the two new quotations plus a markup for supervision and contingencies to reflect his intended bid price. The contracting officer approved Steinmann's request on March 10, and on March 12 the contract was awarded to Steinmann at \$184,626. This protest followed on March 18.

Dawson asserts that Steinmann's omission of an item in its bid price is a violation of paragraph 5 of the Instructions to Bidders (P.S. Form 7389) of the solicitation which provides, "Where the bid form explicitly requires that the bidder bid on all items, failure to do so will disqualify the bid," and Steinmann's bid was nonresponsive. Dawson

alleges that the contracting officer's determination to allow Steinmann to increase his bid price after bid opening was improper and failed to promote fairness in the competitive bidding process since Steinmann was aware of Dawson's bid when making his mistake claim. Dawson contends that there are several options available to the contracting officer in resolving its bid protest: 1) that Steinmann be required to perform at his original bid price, 2) that the contract be awarded to the next responsive bidder, or, 3) that the project be resolicited. Finally, Dawson claims that Postal Contracting Manual (PCM) regulations regarding mistakes are inaccessible to bidders.^{1/}

In her report to this office, the contracting officer states that because she suspected a mistake in bid price had been made she requested Steinmann to verify his low bid. According to the contracting officer, Steinmann responded, as required by PCM 2-406.3, submitting supporting evidence of the mistake. The contracting officer contends that Steinmann's request to increase the bid price and the determination to award the contract to him are both in accordance with PCM 2-406.3 (b).

Discussion

We do not agree that Steinmann's bid was nonresponsive because Steinmann failed to bid on all items in violation of paragraph 5 of the Instructions to Bidders. The solicitation required submission of a lump sum bid and bids on individual items were not required. In this context, paragraph 5 does not apply.

Dawson's main argument and the circumstances of this case are governed by PCM 2-406.3, Other Mistakes Discovered Before Award. That section provides, in pertinent part:

- (a) Contracting Officers are authorized to make the following administrative determinations in connection with mistakes in bids, other than apparent clerical mistakes, alleged after opening of bids and prior to award:

* * *

- (iii) Where the bidder requests permission to correct a mistake in his bid and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended, a determination permitting the bidder to correct the mistake may be made; provided that, in the event such correction would result in displacing one or more lower bids, the determination shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself. If the evidence is clear and convincing only as to

^{1/}Dawson alleges that the PCM regulations are "hidden away in some obscure manual, with contractors completely unaware of it." We find Dawson's allegation unpersuasive in light of its statement that it has 15 years of federal government contracting experience "which include 5 post offices, both as an individual and joint venture." PCM regulations, incorporated by reference in the Code of Federal Regulations at 39 CFR & 601.100, have the force and effect of law, and bidders are held to constructive notice of them. DeMatteo Construction Co. v. United States 600 F.2d 1384, 1391 (Ct. Cl. 1979); Quality Roofing Co. Inc., P.S. Protest No. 85-97, March 20, 1986.

the mistake, but not as to the intended bid, a determination permitting the bidder to withdraw his bid may be made.

The weight given to evidence to increase a low bid as a result of a mistake alleged prior to award is a question of fact to be determined by the contracting officer, and we will not disturb that decision unless it is without a reasonable basis. B. R. Abbot Construction Co., P. S. Protest No. 75-73, November 10, 1975.

The contracting officer's determination that Steinmann made a mistake in bid rests on a reasonable factual basis, and we will not disturb it. It is apparent from the data used in preparing the bid that the sprinklers were erroneously omitted from Steinmann's bid.

However, the contracting officer's determination that Steinmann has demonstrated his intended bid by clear and convincing evidence is not similarly supported by a reasonable factual basis. The evidence Steinmann submitted of the cost of the work allegedly omitted was subcontractors' quotes for sprinkler installation prepared more than a month after bid opening. The contracting officer accepted this evidence as proof that a mistake was made in the claimed amount and that the bid should be increased.

An erroneous bid cannot be corrected if the cost proposal for items omitted from the bid price was prepared after bid opening and correction would be a recalculation of the bid to include factors which the low bidder did not have in mind when his bid was submitted. Amtech Elevator Services, Comp. Gen. Dec.

B-216067, January 11, 1985, 85-1 CPD & 31; General Elevator Company, Inc., Comp. Gen. Dec. B-190605, January 31, 1978, 78-1 CPD & 81.¹⁷ The contracting officer's determination to allow Steinmann to increase his bid lacked a reasonable basis, since Steinmann proffered clear and convincing evidence only of the omission of the sprinkler system, and not of his intended bid.

Given the circumstances, PCM 2-406.3 does not permit an upward adjustment of the bid, and, therefore, the award of a contract to Steinmann upon the modified bid must be considered improper and invalid. See Grant Rental, Inc., P.S. Protest No. 77-40, November 4, 1977; John Schomaker, P.S. Protest No. 75-49, January 20, 1976. Steinmann may be permitted to perform the contract at the original bid price. If Steinmann declines, a contract may be awarded to Dawson if Dawson's bid is responsive and reasonable as to price and Dawson is considered responsible. Otherwise, the project should be resolicited.

The protest is sustained.

William J. Jones

¹⁷The same rule applies in the correction of a contract price when a mistake in bid is alleged after contract award. Edward Heitman Inc., P. S. Mistake Claim 81-5, March 9, 1982; The Davignon Co., P. S. Mistake Claim 83-6, October 24, 1983.

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[Compared to original WJJ 3/3/93]