

DECISION

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

60519

FILE: B-185536

DATE: February 13, 1976

MATTER OF: Plastics Diversified Limited, Products and
Services Division

98606

DIGEST:

1. Where low bidder alleging mistake in bid prior to award seeks correction thereof, and record indicates several apparent mistakes but does not contain clear and convincing evidence of intended bid price, rejection of bid and award to second low bidder is proper.
2. Contention by small business low bidder that agency denial of request for correction of alleged error in its bid should have been referred to SBA, prior to rejection of bid and award to second low bidder, is without merit since case does not involve a determination of nonresponsibility.
3. Record contains no basis for the award of bid preparation expenses or any other form of monetary relief.

The subject protest involves an allegation that the contracting officer improperly refused to permit the correction of alleged errors in the protester's bid, which would still be the low bid after correction, and that the award to the second low bidder was therefore improper. The protester also contends that the contracting agency was required to submit the matter to the Small Business Administration (SBA) prior to awarding the contract to the second low bidder. Relief is requested in the form of cancellation and reaward to the protester, or by compensation in an "equitable manner."

The subject invitation for bids No. 3-794893 was issued by the National Aeronautics and Space Administration (NASA), Lewis Research Center, Cleveland, Ohio, as a 100 percent small business set-aside for the procurement of two bevel gear test rig drive assemblies.

Upon the opening of bids on September 19, 1975, it was ascertained that the protester, Plastics Diversified Limited (PDL), had submitted the low bid price of \$44,500 followed by that of Christopher Tool and Manufacturing Company at \$56,000. Other bids

ranged from \$59,750 to \$198,600. Since the Government estimate was \$84,159, and because of what NASA considered to be a significant difference between the bid of the protester and the other bids submitted, the contracting officer requested that the protester verify its bid in light of a possible error.

The protester advised that it had made two mistakes totaling \$9,700, and thereby requested correction of its bid to \$54,200. The alleged mistakes consisted of the failure to double (since two units were specified) the cost entry for estimated machining and assembly to be performed in-house because the entry on the worksheets of \$7,800 for those tasks was for one unit only. The protester further stated that the figure of \$7,800 for machining and assembly was for only those items for which it had prints on hand at the time when the worksheets were being compiled. The protester estimates that \$1,900 in assembly costs was omitted from its bid because prints for some components were in the hands of prospective subcontractors when the protester compiled its bid. The total of the two alleged mistakes constituted the requested correction of \$9,700.

The worksheets submitted with the protester's correspondence included the entry of \$7,800 for machining and assembly, but provide no indication of the latter estimate of \$1,900 for the second alleged mistake. In this regard, the protester advised the contracting officer that the latter possessed all of the original worksheets and that it regretted its inability to provide any evidence of the \$1,900 machining and assembly estimate, but stated that the estimate could be "reconfirmed by recalculation by our engineer."

NASA Procurement Regulation 2-406-3(a)(2) (1975 ed.) provides that bids may be corrected only where clear and convincing evidence establishes both the existence of a mistake and the bid actually intended. In reviewing the evidence under the foregoing standard, NASA reports:

"Based on an analysis of the worksheets we can ascertain that a mistake-in-bid has been made; however, we cannot ascertain the bid intended. The analysis also revealed that Products & Service Div., PDL worksheets did not include a line item for the assembly of various components in the alleged amount of \$1,900.00; however, the worksheet does have a line item of \$7,800.00 for machining and assembly but it cannot be determined as to the components the estimate is for.

"Further analysis indicated a mistake in the Products & Service Div., PDL cost estimating procedures such as:

"Chesterfield Tool Detail's quote dated September 12, 1975, states two (2) pieces each of Det. 38 (reference drawing number CF-852404) and Det. 40 (reference drawing number CF-852405) for a total cost of \$2,170.00 for these two (2) details, the requirement of Det. 38 and Det. 40 is four (4) pieces each. Based on quantity requirements, Chesterfield Tool Detail's quote also has a possible mistake in their quotation to Products & Service Div., PDL in the amount of \$2,170.00. Also, there is no evidence in the worksheets submitted by Products & Service Div., PDL of this mistake nor labor hour application and hourly rates applied thereto.

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"Based on the Government's knowledge of procedures required to develop an estimate, Products & Service Div., PDL worksheets are totally lacking in such areas as material breakdown, manufacturing and assembly manhours, shipping cost and hourly rates. A comparison of Products & Service Div., PDL worksheets and the Government's estimate cannot be made as their estimate does not clearly define all parts required."

Accordingly, it was determined that there was clear and convincing evidence that a mistake had been committed but that the intended bid price could not be ascertained from the evidence.

Consequently, the award was made to Christopher (which had confirmed its price) on December 5, 1975, and the protester was so notified by letter of the same date.

While this Office originally considered correction of mistakes in bids alleged after bid opening and prior to award, this authority was subsequently delegated to the procuring agencies. 51 Comp. Gen. 1, 3 (1971). Although we have retained the right to review the administrative determination, the weight to be given the evidence is a question of fact to be considered by the administratively designated evaluator of the evidence, and such determination will not be disturbed by our Office unless there is no reasonable basis for the determination. 51 Comp. Gen. 1, 3, supra. Moreover, while the evidence necessary to establish the existence of a mistake must also be "clear and convincing," the degree of proof is in no way comparable to that necessary to allow correction. 52 Comp. Gen. 258, 261 (1972).

With regard to the \$1,900 estimate which was allegedly omitted, the protester does not request correction of an error manifested by its worksheets, but rather seeks correction of an alleged mistake on the basis of a computation to be "recalculated" by its engineer after bid opening. This Office has refused to permit the correction of bids by such process. See Dynamech Corporation, B-182647, February 12, 1975, 75-1 CPD 92. Moreover, as pointed out by NASA officials, the evidence in the record is insufficiently detailed with regard to the \$7,800 cost subcomponents to establish conclusively that the \$1,900 machining and assembly estimate could not have been included therein.

Finally, with regard to the additional possible mistake of \$2,170 uncovered by NASA's examination of the worksheets, the protester does not deny this further apparent error but only submits that "any error in a quote to us from another firm is an internal matter for us to solve and no concern to NASA."

In view of these factors which we consider as rendering virtually impossible any determination of the actual intended bid price from the evidence included in the record, and based upon our careful scrutiny of that record, we find no basis for disagreeing with the contracting officer's conclusion that while the protester committed some errors in its bid, the evidence was not clear and convincing as to the intended bid price. Consequently, we have no basis to object to the rejection of the protester's bid and the award to Christopher.

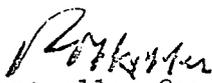
As for the allegation that NASA was required to submit the matter to the SBA before making award, the protester apparently refers to the provisions in the procurement regulations governing agency determinations of nonresponsibility of small business concerns, in certain instances of which the contracting officer is required to forward the matter to SBA for a certificate of competency or possible SBA appeal of a finding of lack of perseverance and tenacity. Since the instant case does not involve such circumstances, and since we are aware of no other regulatory requirements that would have required SBA referral in this case, the allegation is without legal merit.

With regard to the request for "equitable compensation," the protester's correspondence is insufficiently detailed to determine the nature of the requested compensation. However, it is well established that anticipated profits may not be awarded to an unsuccessful bidder not a party to a contract. See Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974); Keco Industries, Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970); Heyer Products

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Company v. United States, 140 F. Supp. 409 (Ct. Cl. 1956). Under certain circumstances, where it is shown that a bid was not fairly or properly considered for award because of subjective bad faith or actions contrary to law or regulation on the part of procuring officials, or that there was no reasonable basis for the agency's action, bid preparation expenses may be awarded. Keco Industries, Inc. v. United States, 492 F.2d 1200, supra; The McCarty Corporation v. United States, 499 F.2d 633 (Ct. Cl. 1974). Here, however, the record does not support a finding of any such impropriety.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States