



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Dynalectric Company

File: B-265762.2

Date: February 15, 1996

Joseph D. West, Esq., Arnold & Porter, for the protester.
Sean Brew, Esq., Corona & Balistreri, for Steiny & Company, an interested party.
Leonard G. Crowley, Esq., and Christopher M. Bellomy, Esq., Department of the Navy, for the agency.

Adam Vodraska, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where a low bidder alleging a mistake after bid opening does not clearly show that its intended bid would have remained low in all circumstances because of uncertainties in estimating the omitted cost, the agency properly rejected the bid without permitting the bidder to waive the mistake.

DECISION

Dynalectric Company protests the award of a contract to Steiny & Company under invitation for bids (IFB) No. N68711-93-B-1444 issued by the Naval Facilities Engineering Command for airfield communication and electrical system infrastructure upgrades at the Marine Corps Air Station, Camp Pendleton, California.

We deny the protest.

The IFB sought lump-sum prices for the construction of concrete ductbanks, including manholes, handholes, and conduits to support the communication and electrical system at the Camp Pendleton Marine Corps Air Station. Detailed specifications and drawings described the required construction work. Among other things, the contractor was required to perform "core borings" in two locations to allow conduits to cross beneath the airfield taxiways.¹ The IFB did not specify the length of core boring required; rather, bidders were to determine the length themselves from scaled drawings.

¹Core boring here involves horizontal underground auguring from a boring pit located near the taxiway.

The three lowest bids received at bid opening and the government's estimate were the following:

Helix Electric	\$2,949,000
Dynalectric	\$3,444,995
Steiny	\$3,514,900
Estimate	\$5,216,385

The Navy permitted Helix to withdraw its bid after bid opening because of a mistake and then asked Dynalectric to verify its bid. Dynalectric initially informed the Navy that it had failed to obtain a subcontractor quotation of approximately \$55,000 to \$60,000 for the two core borings required under the "Underground Electrical Work" specification and asked permission to withdraw its bid. The Navy requested that, in accordance with Federal Acquisition Regulation (FAR) § 14.407-3 (FAC 90-29), Dynalectric identify the nature and cause of the mistake claimed and provide its original bid worksheets. Dynalectric responded that it no longer intended to withdraw its bid or to seek any adjustment to its original bid price, but would perform at the price bid. In this regard, Dynalectric informed the Navy that it had discovered that its bid also had inadvertently charged sales tax twice for the same item and that it could otherwise lower its material costs; these "offsetting savings" allegedly mitigated Dynalectric's omission of any costs for performing the core borings.

In response to the agency's renewed request, Dynalectric provided the agency with its bid worksheets, which do not show any entries or calculations for the core borings, and post-bid opening quotes from a proposed subcontractor for the core borings. Dynalectric's subcontractor's quote contains two entries: one for a bore of 290 linear feet (l.f.) at \$225 per l.f., and the other for a bore of 125 l.f. at \$225 per l.f. The subcontractor later reduced the price to \$190 per l.f. for both estimates. Dynalectric informed the agency that, in Dynalectric's view, its proposed subcontractor overestimated the length of the core borings required; specifically, Dynalectric contended that the subcontractor's estimated lengths of 290 l.f. and 125 l.f. were "outer range estimate[s]" for two different sizes of borings and do not reflect the actual boring length required, and that the price will depend on the actual length of core boring performed. To calculate its omitted cost, Dynalectric multiplied its own estimates of the length of the core borings required, which are 200 l.f. and 63 l.f., respectively, for a total of 263 feet, by the \$190 per l.f. price, and by a percentage markup and bond premium, for a core boring estimate of \$52,792. When this claimed cost is added to Dynalectric's bid, the protester's bid remains low.

After analyzing Dynalectric's mistake in bid claim, the Navy rejected Dynalectric's bid, declining to allow Dynalectric to waive the mistake and perform at its bid price, because Dynalectric "failed to provide sufficient evidence that in all circumstances, [Dynalectric's] intended bid would be significantly below the next lowest bidder." The Navy disputes Dynalectric's estimate of the core boring required, stating that the Navy estimated that 395 l.f. of boring would be required, which is consistent with Dynalectric's subcontractor's estimate of 415 l.f. Applying the \$190 per l.f. quote, the use of either the Navy's or the subcontractor's core boring length estimate to calculate the omitted costs results in Dynalectric's bid exceeding Steiny's next low bid.

Dynalectric protests the rejection of its bid, arguing that the Navy should have accepted its reasonable estimate of the omitted cost and allowed it to waive its mistake.

Where a bidder alleges that it made a mistake and then seeks to abandon or waive the claim, award may not be made to that bidder, who might have been low by virtue of a mistake in its bid, unless it is clear that the bid would have been low regardless of any mistake. Prince Constr. Co., 63 Comp. Gen. 200 (1984), 84-1 CPD ¶ 159; William G. Tadlock Constr., B-251996, May 13, 1993, 93-1 CPD ¶ 382. The intended bid need not be established with the certainty required by the rules applicable to the correction of bids and may be ascertained by reference to reasonable estimations of omitted costs. Bruce-Andersen Co., Inc., 61 Comp. Gen. 30 (1981), 81-2 CPD ¶ 310; Oregon Iron Works, Inc., B-247845, May 27, 1992, 92-1 CPD ¶ 474.

Here, the record does not establish that Dynalectric's bid would have remained low if it had included its alleged omitted cost for core borings in its bid. This is so because the reasonableness of the estimate of the length of the core borings on which Dynalectric's claim is based has not been established. Since Dynalectric simply forgot to include these costs in its bid, it has no contemporaneous documentation showing its pre-bid opening calculation of the length of the core boring required. The record shows that Dynalectric calculated its post opening 263 l.f. estimate of the length of the two core borings by estimating the width of the taxiways. The Navy challenges this estimate, stating that it does not take into account the additional boring that is necessary under the paved apron on either side of the taxiway or to properly place the boring pits—a challenge that Dynalectric has not shown is unfounded. Further, according to Dynalectric's own core boring subcontractor, each of the four bidders to which it provided quotations had different estimates on the length of boring needed for this project. Indeed, the subcontractor's quotation to Dynalectric itself casts doubt on the reasonableness of Dynalectric's claimed omitted cost; as noted above, Dynalectric's subcontractor estimated the length of the required core borings to be 415 l.f., which is close to the Navy's estimate of 395 l.f.

Since the cost of the omitted item is not reflected on Dynalectric's bid worksheets and depends on Dynalectric's post-bid opening judgment as to the length of core boring required, which has not been established as reasonable, there is no way of knowing with any degree of certainty that Dynalectric's bid would have been low had the protester priced this item in the first place. See Atlantic Servs., Inc., B-245763, Jan. 30, 1992, 92-1 CPD ¶ 125; LABCO Constr., Inc., B-219437, Aug. 28, 1985, 85-2 CPD ¶ 240. In this regard, multiplying the Navy's estimate of 315 l.f. by \$190 per l.f. results in an omitted cost of \$75,050, an amount which even without applicable mark-up and bond premium, results in Dynalectric's bid exceeding Steiny's bid. Given the uncertainties in estimating the omitted core boring cost and the small price difference between the bids (\$69,905, or approximately 2 percent), Dynalectric has not clearly shown that its intended bid would remain low under all circumstances. See, e.g., National Heat & Power Corp., B-212923, Jan. 27, 1984, 84-1 CPD ¶ 125.

Dynalectric argues that even if the omitted core boring estimate causes the protester's intended bid price to exceed Steiny's, Dynalectric's bid would still be low, considering that its bid worksheets evidenced that \$39,469 in state sales tax had mistakenly been double-counted in calculating its bid price, which should be offset from the omitted bore coring costs to calculate its intended bid price.² A bidder may not be permitted to waive a claim of error or waive part of its claim of error (selective correction) to remain the low bidder. Bruce-Andersen Co., Inc., supra. To allow Dynalectric to offset the increase in its intended bid to account for the omitted cost of core borings with the asserted "savings" from its double-counted sales tax--a mistake claim that Dynalectric had no obligation to assert had it otherwise been the successful low bidder--is tantamount to permitting Dynalectric the option, after bid opening, of determining whether its bid would be low. See 42 Comp. Gen. 723 (1963); 37 Comp. Gen. 851 (1958). Dynalectric is essentially seeking recognition of the legitimacy, or the putative correction, of its intended bid price to account for its asserted offsetting mistake of the double-counted sales tax because this claim, if recognized, would allow Dynalectric's intended bid price, including the omitted core boring costs, to displace Steiny's bid price. Dynalectric's recalculation of its bid in this manner cannot be allowed as it is inconsistent with

²Another possible offset of its bid price mentioned by Dynalectric is \$10,700, representing savings attainable by switching to a lower-priced supplier for high voltage sectionalizing switches; that supplier which submitted its quotation after bid opening. Consideration of this offset to determine Dynalectric's intended bid is unacceptable, however, since it would result in a bid based in part on a quote from a subcontractor other than the one upon which the original bid was based. See C Constr. Co., Inc., B-242717, June 6, 1991, 91-1 CPD ¶ 540; Roebbelen Eng'g, Inc., B-219929, Dec. 20, 1985, 85-2 CPD ¶ 691.

the integrity of the competitive bidding system and prejudicial to Steiny. See id.; United Digital Networks, Inc., B-222422, July 17, 1986, 86-2 CPD ¶ 79; Roebbelen Eng'g, Inc., supra, aff'd, B-219929.2, Mar. 31, 1986, 86-1 CPD ¶ 301; Da-Green Elecs., Ltd., B-212159, Nov. 15, 1983, 83-2 CPD ¶ 563; see also FAR § 14.406-7(a) (providing that a bid correction that would displace a lower bidder may only be allowed where clear and convincing evidence of the existence of the mistake and the bid actually intended is substantially ascertainable from the IFB and the bid itself—here, only Dynalectric's bid worksheets substantiate this mistake claim); JJS Servs., Inc., B-256302, June 6, 1994, 94-1 CPD ¶ 348.

In sum, we find the Navy reasonably refused to allow Dynalectric to waive its mistake and properly rejected Dynalectric's bid.

The protest is denied.

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