



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: CRK-JVC/Shockley Joint Venture

File: B-265937

Date: January 17, 1996

John Lukjanowicz, Esq., Oles Morrison & Rinker, for the protester.
Christopher M. Bellomy, Esq., Department of the Navy, for the agency.
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DIGEST

An agency reasonably found that the protester had not presented clear and convincing evidence that it mistakenly failed to add certain tax and insurance prices to its total base bid price where the protester's mistake claim was initially based on bid worksheets that did not form the basis for the bid, and the submitted documentation and explanations in support of the mistake claim contain unexplained discrepancies and uncertainties as to the intended bid.

DECISION

CRK-JVC/Shockley Joint Venture (CRK) protests the decision of the Department of the Navy, Naval Facilities Engineering Command, to deny its request to correct a mistake in its low bid under invitation for bids (IFB) No. N62742-95-B-1305.

We deny the protest.

The IFB sought the design and construction of a Navy Exchange Distribution Center at the Naval Station, Pearl Harbor, Hawaii. The IFB requested prices for a base bid item covering the basic project and for an additive item--the construction of a mezzanine.

The protester submitted the lowest of seven bids on the June 27, 1995, bid opening date. The lowest three bids and the government estimate were as follows:

	<u>Base Bid</u>	<u>Additive Item</u>	<u>Total Bid</u>
CRK	\$10,948,000	\$730,000	\$11,678,000
Bodell Construction	\$12,205,000	\$605,000	\$12,810,000

S&M Sakamoto, Inc.	\$12,492,000	\$540,000	\$13,032,000
Government Estimate	\$12,500,000	\$725,000	\$13,225,000

On June 28, the Navy asked CRK to confirm its bid, given that the other bids and the government estimate were significantly higher. On June 30, CRK confirmed its bid. On July 6, CRK retracted its confirmation and informed the Navy that its bid contained a mistake. CRK claimed its base bid was understated by \$492,175, consisting of \$39,441 for liability insurance and \$452,734 for Hawaii Use Tax. CRK stated that it meant to include these amounts in its base bid, but a computer programming error had the effect of excluding these amounts. The requested correction would make CRK's bid \$12,170,175, or 5 percent lower, than the next low bid.

On July 12, CRK submitted the bid worksheets and other back-up data used to prepare its bid, including a series of computer spreadsheets.¹ CRK submitted 11 base bid spreadsheets and 10 additive spreadsheets generated for this project. Each base bid spreadsheet consistently excluded the prices for the liability insurance and Hawaii Use Tax items from the total base bid amount. In an affidavit, the responsible CRK employee explained how the exclusion of these prices stemmed from a computer programming oversight.²

CRK generated all spreadsheets before bid opening, except for one base bid spreadsheet that bore a computerized "4:14 PM" notation.³ The amount claimed by CRK (\$39,441 for liability insurance and \$452,734 for Hawaii Use Tax) appeared

¹CRK also submitted affidavits by members of its bidding team, who attested to the authenticity and completeness of the bid documents and explained how the bidding error occurred.

²According to the affidavit, the problem began when the employee created the base-bid spreadsheet for this project by modifying a template spreadsheet. The employee added to the template spreadsheet a Hawaii Use Tax line item and reprogrammed a "dummy" liability insurance line item. The employee explained that, when he modified the template spreadsheet, he neglected to enter the necessary codes to cause the Hawaii Use Tax and liability insurance amounts to be added into the total base bid amount.

³The time and date notations on CRK's spreadsheets were based on Pacific Daylight Time. Bid opening was 1 p.m. Hawaii Standard Time, which corresponds with 4 p.m. Pacific Daylight Time.

under these line items in the 4:14 p.m. spreadsheet. Another spreadsheet, which bore a "3:26 PM" notation, reflected \$39,773 for liability insurance and \$458,411 for Hawaii Use Tax.

CRK's actual base bid of \$10,948,000 did not appear on any of the submitted spreadsheets. The "Total Bid" amount is \$10,983,493 on the 4:14 p.m. spreadsheet (\$35,493 more than the actual bid) and \$11,120,906 on the 3:26 p.m. spreadsheet (\$172,906 more than the actual bid). CRK's lead team member explained in an affidavit that the actual bid submitted was based on the 3:26 p.m. spreadsheet. The 3:26 p.m. spreadsheet contains a handwritten notation, "cut (177,906)," which the team member stated he calculated and inscribed on the spreadsheet.⁴ The team member stated that he then arbitrarily shaved \$5,000 from the handwritten "cut" amount and directed a \$172,906 reduction to the 3:26 p.m. total base bid amount, which yields the submitted base bid of \$10,948,000.

The base bid spreadsheet program contained individual line items for taxes, insurance, overhead, bonds, and profit, including liability insurance and Hawaii Use Tax. In contrast, the additive spreadsheet program did not itemize these indirect costs, but contained a markup line item to account for them. A markup of 10.43 percent appears on CRK's 3:44 p.m. additive spreadsheet.⁵ This same 10.43-percent markup figure also appears on CRK's 3:26 p.m. and 4:14 p.m. base bid spreadsheets in an inactive cell (*i.e.*, an item not actually used to calculate the total base bid). The 10.43-percent base bid markup is the ratio between the total indirect project costs (taxes, insurance, overhead, bonds, and profit) and the total direct project costs; however, the Hawaii Use Tax and liability insurance items are not included in the 10.43-percent base bid markup.⁶

⁴According to the affidavit, the "cut" resulted from the following bid changes: (1) lower subcontractor quotes for the base bid amounting to an overall \$135,315 reduction; (2) adjustments to the additive bid—which had already been submitted to CRK's Honolulu representative based on a 3:12 p.m. additive spreadsheet—amounting to an overall \$25,000 reduction; (3) the application of a 10.4-percent markup to the foregoing items, amounting to a \$16,672 reduction; and (4) and an additional \$918 reduction so that the base bid would be a round figure.

⁵The protester did not allege an error with respect to the additive bid.

⁶A markup of 10.46 percent appears on CRK's 3:12 p.m. additive spreadsheet, the asserted basis for CRK's additive bid. The 10.46 figure corresponds with the ratio calculated from prices appearing on an earlier base bid spreadsheet (3:14 p.m.).

On August 7, the Navy's contract specialist asked the protester to clarify perceived ambiguities in the evidence, in particular, the apparent pricing discrepancies between the 3:26 p.m. and 4:14 p.m. spreadsheets, and between the base bid and additive spreadsheets. The contract specialist asked which base bid spreadsheet formed the basis for CRK's bid and its mistake claim, and why the Hawaii Use Tax and liability insurance prices differed between the 3:26 p.m. and 4:14 p.m. spreadsheets. The contract specialist also asked the protester, "[w]hy is there no Hawaii Use Tax and Liability Insurance for [the additive bid item]?"

On August 8, CRK replied that the 3:26 p.m. spreadsheet was the basis for its bid, and that the 4:14 p.m. spreadsheet, on which the mistake claim was based, was created after bid opening to highlight some revised subcontractor quotes, including one quote received after bid opening. The protester explained that the Hawaii Use Tax and liability insurance prices fluctuated between the spreadsheets because they were percentages of other variable prices, such as labor or subcontract costs. CRK also stated that, although the base bid mistakenly omitted the Hawaii Use Tax and liability insurance prices, the additive bid properly encompassed these costs through the application of a 10.43-percent markup.

On August 10, the contracting officer denied CRK's request for bid correction, citing various inconsistencies in the evidence. For example, the contracting officer was concerned that CRK purportedly based its bid on the 3:26 p.m. spreadsheet, but sought correction for prices appearing on the 4:14 p.m. spreadsheet, which were not traceable to the actual base bid submitted. Moreover, the contracting officer questioned, in view of CRK's explanation that the Hawaii Use Tax and liability insurance costs were included in the 10.43-percent additive markup, but were not in the base bid markup, whether CRK intended to omit the Hawaii Use Tax and liability insurance from its markup for both the base and additive bid. Although the contracting officer denied CRK's request for correction, he offered CRK the opportunity to withdraw its bid, given that it was much lower than the government estimate.

On August 11, CRK asked the contracting officer to reconsider his decision. CRK said that it mistakenly requested an upward adjustment for amounts appearing on the 4:14 p.m. spreadsheet, instead of the amounts appearing on the 3:26 p.m. spreadsheet. CRK also said that the contracting officer improperly compared the base bid and additive bid in resolving the mistake claim, "[s]ince we have not requested any bid correction on the [additive bid], and since the [additive bid] has no relevancy to the well documented error made on [the base bid]."

The contracting officer declined to reconsider his decision, stating that CRK's letter "reinforces our conclusion that the evidence you provided did not establish clearly and convincingly the mistake and the actual intended bid." On August 16, CRK

stated that it would accept the contract at its mistaken bid price, but would protest the agency's denial of its request for correction. This protest followed.

CRK alleges that the Navy unreasonably denied its request for bid correction. CRK claims that the Navy should have allowed an upward adjustment of its bid in the amount of \$498,184. This amount corresponds with the Hawaii Use Tax and liability insurance items on CRK's 3:26 p.m. base bid spreadsheet.

In order to protect the competitive bid system from abuse, the Federal Acquisition Regulation (FAR) imposes a high standard of proof--clear and convincing evidence--upon bidders seeking upward correction of their bids after bid opening but before award. The bidder must submit clear and convincing evidence that a mistake was made, the manner in which the mistake occurred, and the intended price. FAR § 14.406-3(a). The exact amount of the intended bid need not be established, provided that there is clear and convincing evidence that the amount of the intended bid would fall within a narrow range of uncertainty and would remain low after correction. Great Lakes Dredge & Dock Co., B-248007.2, Sept. 3, 1992, 92-2 CPD ¶ 151. Workpapers, including records of computer-generated software spreadsheets/worksheets, may constitute part of that clear and convincing evidence, if they are in good order and indicate the intended bid price, and there is no contravening evidence. RJS Constructors, B-257457, Oct. 7, 1994, 94-2 CPD ¶ 130; Northwest Builders, 67 Comp. Gen. 278 (1988), 88-1 CPD ¶ 200; Bush Painting, Inc., B-239904, Aug. 30, 1990, 90-2 CPD ¶ 188.

An agency may not permit the correction of a mistake asserted after bid opening, but before award, if the bidder's evidence fails to meet the high standard of proof established by FAR § 14.406-3(a), notwithstanding the good faith of the parties. Three O Constr., S.E., B-255749, Mar. 28, 1994, 94-1 CPD ¶ 216. Furthermore, because the contracting agency is vested with authority to correct mistakes, and because the weight to be given evidence in support of an asserted mistake is a question of fact, we will not disturb an agency's decision concerning bid correction unless there was no reasonable basis for the decision. Id.; Lash Corp., 68 Comp. Gen. 232 (1989), 89-1 CPD ¶ 120; Tri-State Consultants, B-250700, Dec. 22, 1992, 92-2 CPD ¶ 433.

The question facing the agency in this case was whether the protester had clearly and convincingly established that its base bid mistakenly omitted the costs for the Hawaii Use Tax and liability insurance and, if so, what the intended bid price would have been. The record reflects that the agency weighed the protester's evidence and discovered various ambiguities and contradictions that, in the Navy's view, precluded bid correction. Based on our review of the record, we cannot say that the agency lacked a reasonable basis in concluding that the protester's evidence was less than clear and convincing.

First, the protester based its mistake claim on two different base bid spreadsheets, neither of which reflected CRK's actual base bid of \$10,948,000. Although the protester submitted an affidavit to explain how certain manual adjustments to the 3:26 p.m. spreadsheet yielded the actual base bid, the protester maintained until its mistake request was denied that its bid was understated by amounts appearing on the 4:14 p.m. spreadsheet. These varying explanations reasonably caused the agency to question the relevance of the 4:14 p.m. spreadsheet to the protester's mistake claim and bid, and to compare the protester's spreadsheets for a consistent pattern of pricing. The agency's examination indicated certain weaknesses in the protester's evidence and brought other inconsistencies to light. For example, the agency considered the fact that the protester did not reduce the 3:26 p.m. bid according to the manual notation, "cut (177,906)"; that the 4:14 p.m. spreadsheet included a revised subcontractor quote (assertedly received after bid opening) not encompassed by the "cut (177,906)"; and that the 4:14 p.m. spreadsheet only partially documented the price reductions allegedly comprising the "cut (177,906)."

The protester argues that even though it based its bid correction request on amounts appearing in the 4:14 p.m. spreadsheet, the agency should have known that the 4:14 p.m. spreadsheet was irrelevant and should have confined its review to the 3:26 p.m. spreadsheet. The protester notes that it clarified for the Navy on August 8 that the 4:14 p.m. spreadsheet was created after bid opening to highlight some revised subcontractor quotes and that the 3:26 p.m. spreadsheet was the basis for its bid. What is troubling, however, is that CRK had been alerted to the discrepancy in its bid correction request, yet inexplicably did not revise its request to reflect the 3:26 p.m. amounts until the agency, citing (among other things) confusion over the competing spreadsheets, denied the correction request. By that time (approximately a month and a half after bid opening), it was understandable that the agency lacked confidence in the reliability of the spreadsheets to support the mistake claim. In our view, the protester is solely responsible for the agency's misgivings about how CRK calculated its bid price and which documents were relevant to those calculations. See Three O Constr., S.E., supra.

We also find that the agency reasonably questioned whether the omission of the Hawaii Use Tax and liability insurance amounts from CRK's base bid was inadvertent or intentional, in view of CRK's inconsistent explanation of its base bid and additive bid pricing. Although CRK applied the same markup of 10.43 percent to both its base and additive bid, the base bid markup, as calculated from the individual indirect cost line items, excluded the amounts for the Hawaii Use Tax and liability insurance. Had those amounts been included in the markup figure, as the protester asserts they should have been but for the programming error, CRK's base bid markup would have been 15.4 percent. Yet the protester continues to confirm that the 10.43-percent additive markup covers the Hawaii Use Tax and

liability insurance costs.⁷ Moreover, the protester has not explained why the 10.43 percent markup covered the costs for the Hawaii Use Tax and liability insurance for the additive bid, but not the base bid.

CRK argues that the agency should not have considered this perceived inconsistency because CRK did not allege an error with respect to the additive markup. Although it is possible that the protester's markup strategy for the additive item may have had little or no relation to its markup strategy for the base bid item, the record contains no explanation to this effect. See generally Franco, B-214124, May 1, 1984, 84-1 CPD ¶ 488. As the record stands, the protester has vouched for the 10.43-percent markup and because this figure demonstrably excludes the Hawaii Use Tax and liability insurance prices in the base bid, the agency could reasonably conclude that the exclusion of these prices from the base bid may have been intentional. See Gunco, Inc., B-238910, July 17, 1990, 90-2 CPD ¶ 46.

CRK argues that, if it had intended to exclude the Hawaii Use Tax and liability insurance amounts from the base bid, it would not have bothered to itemize them on the base bid spreadsheet. Although we agree that the discrepancy between the inclusion of the amounts for Hawaii Use Tax and liability insurance constitutes evidence of a mistake, we cannot say that the Navy lacked a reasonable basis for finding that the clear and convincing evidence required for bid correction was not present, given the significant and substantially unexplained discrepancies and uncertainties in CRK's supporting documentation and explanations. See Great Lakes Dredge & Dock Co., *supra*; Three O Constr., S.E., *supra*.

The protest is denied.

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⁷CRK advised the Navy on August 8, "[o]ur evaluation of [the additive] bid item prior to the bid time and the markup amount applied satisfied us that all the itemized costs, including Hawaiian Use Tax and liability insurance were adequately covered." CRK has maintained this position throughout the course of this protest.