

Gilhooley



Comptroller General  
of the United States  
Washington, D.C. 20548

# Decision

**Matter of:** Humphrey Construction, Inc.  
**File:** B-236550  
**Date:** November 13, 1989

## DIGEST

Agency's decision to permit correction of low bid will not be questioned unless it lacks a reasonable basis. Correction is proper where the work sheets submitted to support the allegations of mistake establish the mistake and the claimed intended bid by clear and convincing evidence.

## DECISION

Humphrey Construction, Inc., the second-low bidder, protests the Army Corps of Engineers' decision to allow correction of three mistakes, alleged after bid opening, in the low bid of Morgen & Oswood Construction Co., Inc., under invitation for bids (IFB) No. DACW68-89-B-0034, for the construction of the Clearwater Fish Hatchery, Orofino, Idaho.

We deny the protest.

Of the three bids received in response to the IFB, Morgen & Oswood's bid of \$15,583,040 was low, and Humphrey's bid of \$16,697,050 was next low. The government estimate was \$16,083,099. At bid opening, the contracting officer corrected three obvious clerical errors in Morgen & Oswood's bid, resulting in a bid of \$15,583,840. The following day, Morgen & Oswood alleged three additional errors: (1) Omission of bond costs, insurance and Tribal Employment Reservation Ordinance (TERO) tax allowance in item 1; (2) erroneous labor burden costs in bid item 17; and (3) omission of overhead costs in bid item 18.

To support its claim, Morgen & Oswood submitted a sworn affidavit from its vice-president describing the nature and validity of the errors, and the original certified summary work sheets.

The Corps determined that Morgen & Oswood had submitted clear and convincing evidence of its mistakes, the manner in which they occurred and the intended bid amounts. The Corps

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therefore allowed Morgen & Oswood to correct its bid upward by \$539,000, resulting in a bid of \$16,122,840, noting that this corrected bid was still 3.4 percent below Humphrey's next low bid. Humphrey, which has not been provided with a copy of Morgen & Oswood's workpapers, argues that there appears to be insufficient evidence of the intended bid to permit correction.<sup>1/</sup>

An agency may permit upward correction of a low bid before award, to an amount that still is less than the next low bid, where clear and convincing evidence establishing both the existence of a mistake and the bid actually intended. Federal Acquisition Regulation (FAR) § 14.406-3; Lash Corp., 68 Comp. Gen. 232, supra. Whether the evidence meets the clear and convincing standard is a question of fact, and we will not question an agency's decision based on this evidence unless it lacks a reasonable basis. DeRalco, Inc., B-228721, Oct. 7, 1987, 87-2 CPD ¶ 343. In this respect, in considering upward correction of a low bid, worksheets may constitute clear and convincing evidence if they are in good order and indicate the intended bid price, and there is no contravening evidence. BAL/BOA Servs., Inc., B-233157, Feb. 9, 1989, 89-1 CPD ¶ 138.

Our examination of Morgen & Oswood's workpapers and the affidavit furnished by the firm provides no basis to question the Corps' determination that Morgen & Oswood submitted clear and convincing evidence that it intended to include in its bid \$174,525 for bond, risk insurance and TERO tax costs, and that its total intended bid for item 1 should have been \$611,600, as claimed. The \$78,600 Morgen & Oswood alleges as the estimated cost for performance and payment bonds is corroborated by its pre-bid opening working papers and its bid sheet entitled "Bond-License-Fees-Insurance." The latter sheet also indicates that risk insurance costs were calculated at \$20,935, and TERO tax was calculated at \$75,000. The three amounts total

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<sup>1/</sup> Humphrey contends that the agency should have released the documents upon which the determination to permit correction was made. The Army withheld Morgen & Oswood's workpapers from the protester, however, on the basis that they contained proprietary information. The Competition in Contracting Act of 1984, 31 U.S.C. § 3553(f) (Supp. IV 1986), does not require the disclosure of a firm's proprietary information. See Lash Corp., 68 Comp. Gen. 232 (1989), 89-1 CPD ¶ 120. However, our Office has examined all of the evidence relied on by the agency in determining to permit correction.

\$174,525, which amount is reflected in the bid recapitulation spread sheets from which Morgen & Oswood prepared its bid. Adding the company's 10 percent markup (consistently applied to other bid items) to this figure results in an intended rounded off total of \$611,600 for the first bid item.

The record also supports Morgen & Oswood's allegations that it incorrectly calculated its total payroll tax for item 17, and that its intended bid amount for the item should have been \$3,699,900. The work sheets show two separate payroll taxes of \$288 and \$130,731, which total \$131,019, rather than the \$13,359 total indicated on the work sheets. Morgen & Oswood appears to have inadvertently added \$288 to \$13,071, rather than to \$130,731. The intended bid price of \$3,699,900 for item 17 is ascertainable by adding the \$117,660 ( $\$131,019 - \$13,359 = \$117,660$ ) by which total payroll taxes were understated plus the company's 10 percent markup for this figure, to the submitted bid item amount of \$3,570,500.

The record also indicates that the Corps reasonably determined that Morgen & Oswood omitted \$200,000 in overhead costs when calculating its bid amount for item 18, and that its bid price of \$1,277,300 should be increased by \$220,000 (\$220,000 plus 10 percent markup). The firm failed to add the \$200,000 entered on its bid recapitulation spreadsheet as overhead for item 18 to a subtotal for item 18. As a result, the total cost for item 18 was understated by \$200,000, plus the 10 percent markup. That Morgen & Oswood intended to include the \$200,000 in overhead is supported by reference to its general estimate sheet for job "overload" (overhead). The general estimate sheet includes \$1,157,475 as overhead for items 1, 4, 14, 17, 18, 20 and 23. This amount is consistent with allocating \$200,000 in overhead to item 18, since the amounts entered on the bid recapitulation spreadsheets for the other items total \$957,475. Based on this information, we believe the Corps reasonably permitted correction upward in the amount of \$1,220,000 for item 18 to reflect the intended bid amount of \$1,497,300 claimed by Morgen & Oswood.

The record thus provides a reasonable basis for the Corps' determination to allow correction. Since Morgen & Oswood's bid as corrected remains low, the award was proper.

The protest is denied.

*for* *Seymour Egan*  
James F. Hinchman  
General Counsel