



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Strand Hunt Construction, Inc.

File: B-261808

Date: October 26, 1995

Shane J. Osowski, Esq., and Frank A. Pfiffner, Esq., Hughes Thorsness Gantz Powell & Brundin, for the protester.

John Lukjanowicz, Esq., Oles Morrison & Rinker, for Moseley Enterprises, Inc., an interested party.

Nicholas P. Retson, Esq., and Michael J. O'Farrell, Jr., Esq., Department of the Army, for the agency.

Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly denied request for bid correction where the bidder failed to provide clear and convincing evidence of the intended bid.

DECISION

Strand Hunt Construction, Inc. (SHC) protests the rejection of its bid and the subsequent award of a contract to Moseley Enterprises, Inc., under invitation for bids (IFB) No. DAHA51-95-B-0002, issued by the Department of the Army, for the construction of three buildings and the demolition of one building at the Kulis Air National Guard Base, Anchorage, Alaska. SHC argues that the Army improperly denied SHC's request for upward correction of its low bid.

We deny the protest.

The IFB called for fixed prices for a base bid (the construction of the three buildings and the demolition of a fourth building) and six additives (for providing, among other things, a paved access road, landscaping, additional parking, interior painting and miscellaneous specialties, such as custom shelving, laminated counters, lockers, projection screens, storage cabinets and window blinds). For award purposes, bid amounts were calculated on the basis of the total for the base bid plus all six additive items. The Army received 11 bids by the 2 p.m., March 29, 1995, bid opening. SHC's bid of \$3,751,980 was apparently low. Moseley submitted the second-low bid of \$4,292,551.

At approximately 2:35 p.m. on March 29, SHC informed an agency secretary by telephone that its bid contained a \$476,000 excavation price omission error. In a follow-up letter to the agency dated March 31, SHC claimed to have made two

errors in its bid, the \$476,000 excavation price error reported earlier by telephone, and a \$34,240 error concerning additive item 4. SHC requested that it be permitted to correct both errors and included in its March 31 submission copies of its bid worksheets and adding machine tapes, as well as supporting affidavits from the personnel who were involved in preparing the bid or who attended the bid opening.

According to SHC, it prepared its bid for the excavation work using a price of \$223,893 for earthwork, \$155,553 for utility earthwork and backfill, and \$25,066 for construction of a retaining wall, totaling \$404,512. SHC then calculated a 20-percent markup by multiplying the \$404,512 by 1.2, which resulted in \$484,000.¹ All of these figures and calculations are on SHC's worksheet and adding machine tapes which were submitted to the agency in support of its request to correct its bid. However, SHC's submission further explained that because SHC believed that most competing bids would use a 20-percent markup, SHC ultimately decided to add only a 10-percent markup; SHC thus multiplied the \$404,512 figure by 1.1 for a total of \$444,963.20. SHC personnel rounded this figure to \$445,000, wrote \$445,000 on SHC's bid worksheet next to the \$484,000 figure, and circled the \$445,000. No calculations for this 10-percent markup are contained on the worksheet or on the adding machine tapes.

On the morning the bids were due, various SHC employees finalized component prices and "called out" these prices to a single employee who entered the component price into SHC's computer for tabulation. The computer apparently was programmed to add SHC's fee, overhead, insurance and bonding amounts to generate SHC's total bid. According to the protester, during the hectic process of inputting the component prices, and in part due to a short-term computer shut-down, the employee responsible for inputting the data inadvertently failed to input the \$445,000 excavation component. After SHC's fee, overhead, insurance and bonding are added, the omission of this \$445,000 resulted in an understatement of SHC's bid by \$471,975.

As to the \$34,240 error, SHC explained that its personnel simply failed to transfer one subcontractor bid for additive item 4 to its worksheets and to enter it into the computer. SHC supplied the agency with a copy of this subcontractor's bid.

After reviewing SHC's submissions, the agency concluded that, although the firm had provided sufficient evidence to show that two mistakes had occurred, the evidence clearly and convincingly showed the firm's intended price for additive item 4, but not for the excavation work. The agency declined to permit correction because, with respect to the alleged \$445,000 excavation price error, SHC could not

¹\$404,512 times 1.2 actually yields the product \$485,414, not \$484,000. We presume the difference is attributable to rounding; it does not affect our conclusion.

clearly and convincingly show which of the two figures, \$445,000 (the omission with 10-percent markup) or \$484,000 (20-percent markup), was the intended bid for the excavation work, and the bid correction requested by SHC would result in its bid coming within \$35,000 of the second-low bid on a \$4.3 million project. On June 16, the contracting officer wrote to SHC denying its request for upward correction and notifying SHC that award had been made to Moseley. SHC (based on the 10-percent markup) then filed this protest.

SHC argues that the claimed upward correction for the excavation work was clearly established because its intended price for this item is ascertainable from the materials furnished to the agency and from its phone call reporting the error before learning the bid results. The protester argues that the timing of SHC's verbal notification to the agency of its error "indisputably authenticates SHC's claim with independent proof" and clearly and convincingly corroborates the \$445,000 amount as SHC's bid error. Essentially, the protester argues that its intended amount could only be the \$445,000 figure because this is the only logical amount from which it could reach the \$476,000 markup figure which SHC initially claimed in the telephone notification.²

A bidder's request for upward correction of a bid before award may be granted only where the request is supported by clear and convincing evidence of both the mistake and the intended bid. Federal Acquisition Regulation § 14.406-3(a). Whether the evidence meets the clear and convincing standard is a question of fact, and we will not question an agency's decision unless it lacks a reasonable basis. M.A. Mortenson Co., B-256636, July 14, 1994, 94-2 CPD ¶ 22. For upward correction of a low bid, worksheets may constitute clear and convincing evidence if they are in good order and indicate the intended price, and there is no contravening evidence. Id.

The agency basically expresses concern as to whether SHC's worksheets provide sufficiently clear and convincing evidence of SHC's intended bid for the excavation work. Such a concern is legitimate when a bidder requests to change its bid price; indeed, it is because of the risk that correction could lead to abuse of the competitive system that correction is permitted only where a high standard of proof has been met. Southwind Constr. Corp., B-228013, Oct. 8, 1987, 87-2 CPD ¶ 346. Further, as the agency notes, where correcting a bid would bring it very close to the next low bid, as in this case, the evidence supporting the claimed mistake will be subject to particularly strict scrutiny. Vrooman Constructors., Inc., B-226965.2, June 17, 1987, 87-1 CPD ¶ 606.

²The protester notes that the \$476,000 figure was an estimation; the exact error, as noted above, is \$471,975.

The agency reasonably determined that the supporting evidence, including the worksheets, does not clearly and convincingly show the firm's intended price for the excavation work. The essential problem, as the agency points out, is that the worksheets and adding machine tapes do not conclusively point to one intended bid. There are two essentially conflicting figures which pertain to the omitted excavation work on the worksheet: one reflects a calculation resulting in \$484,000, and the other, a figure of \$445,000, circled and standing alone. The \$484,000 figure and its supporting calculations are repeated on the adding machine tape. Based on these entries, there are two possible intended bid prices for the excavation work on the worksheets, and the agency was asked to accept the lower of the two--\$445,000--based on explanatory affidavits prepared after bid opening. Absent the self-serving explanation and statements in the affidavits, however, the calculations on the worksheets and on the adding machine tapes suggest that the higher figure--\$484,000--was the intended amount. Thus, at best, the supporting documentation is ambiguous as to the intended bid and thus cannot support correction. This is particularly the case here, since even the smaller correction requested by SHC would bring its bid to within \$35,000 of the next low bid; as noted, evidence supporting a claimed mistake is subject to particularly strict scrutiny where the correction would bring the bid very close to the next low bid. Vrooman Constructors., Inc., supra.

The timing of SHC's verbal notification to the agency of its error does not change our view. Even if SHC is correct that the notification tends to support its claim, given the high standard of proof required for correction under these circumstances, this notification (given shortly after the deadline for submitting bids) is not sufficient to warrant permitting correction. Rather, in light of the conflicting information in the supporting documentation, even considering the notification

evidence, it remains ambiguous as to which of the two figures SHC actually intended to include at the time it submitted its bid. Accordingly, the Army properly refused to allow SHC to correct its bid upward.³

The protest is denied.

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³In certain circumstances where a bidder requests correction of a mistake, and the intended bid, as here, cannot be determined from the firm's work papers, award may still be made to the firm, so long as the amount of its bid may be determined within a narrow range of uncertainty and would remain low under all circumstances. Apache Enters., Inc., B-255943; B-255943.2, Apr. 20, 1994, 94-1 CPD ¶ 270. Here, though the amount of the total bid may be determined within a relatively narrow range (\$4,258,195 to \$4,297,195), SHC's bid is not low at the high end of the range; hence correction and award to SHC is impermissible. Id.