



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Reynosa Construction, Inc.

File: B-278364

Date: December 15, 1997

Douglas Seegmiller, Esq., for the protester.

Barbara Bear, Esq., Department of the Army, for the agency.

Jennifer Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where correction of bid did not result in displacement of lower bid, agency properly relied on evidence extraneous to the invitation for bids and bid itself in determining that bidder had demonstrated, by clear and convincing evidence, both the existence of a mistake and the bid intended.

DECISION

Reynosa Construction, Inc. protests the decision of the U.S. Army Corps of Engineers to allow Elkhorn Construction, L.L.C. to make an upward correction in its low bid under invitation for bids (IFB) No. DACA63-97-B-0059, for construction of a loading ramp and parking lot extension at the Marine Corps Reserve Center in Amarillo, Texas.

We deny the protest.

The IFB asked bidders for a single lump-sum price for the construction work. Four bids were received by the September 24, 1997, opening date. Elkhorn's bid of \$188,424 was lowest of the four; Reynosa's bid of \$383,000 was second low. The government estimate for the work was \$317,170.

Elkhorn's manager, Jerry Bublitz, telephoned the agency after bid opening and was told that his company was the apparent low bidder with a bid of \$188,424.

Mr. Bublitz responded that this was not his company's bid, and immediately faxed to the agency copies of Elkhorn's computer worksheets for this solicitation and for a second solicitation issued by the same contracting office, IFB No. DACA63-97-B-0021, for construction work at the Marine Corps Reserve Center in Broken Arrow, Oklahoma, for which his company had also submitted a bid on September 24.

Mr. Bublitz explained that he had been preparing his company's bids on the two projects simultaneously, and that in hastening to complete the two bid schedules, he had inadvertently entered the bid price from his working papers for IFB No. -0021

on the bid schedule for IFB No. -0059, and the bid price from his working papers for IFB No. -0059 on the bidding schedule for IFB No. -0021. Mr. Bublitz was advised that if an error existed, Elkhorn should ask either to withdraw its bid or to correct it.

Elkhorn subsequently submitted a request that it be permitted to correct its bid amount from \$188,424 to \$362,670. In an affidavit accompanying the request, Mr. Bublitz explained in greater detail how he had interchanged the two bid schedules. Mr. Bublitz noted that, since both IFBs required the submission of a copy of the bid with the original, he had sent his office manager out to make copies of the bid forms. When the office manager returned the forms to him, he had placed the bid form pertaining to IFB No. -0059 on the bid package pertaining to IFB No. -0021, and the bid form pertaining to IFB No. -0021 on the bid package pertaining to IFB No. -0059. As a result, he had entered the sum that he intended to bid for IFB No. -0059--i.e., \$362,670--on the form pertaining to IFB No. -0021, and the sum that he had intended to bid for IFB No. -0021--i.e., \$188,424--on the form pertaining to IFB No. -0059. The work papers submitted support Mr. Bublitz's claim in that they show an intended bid of \$188,427 for the Broken Arrow project¹ and an intended bid of \$362,670 for the Amarillo project. The bid abstract pertaining to IFB No. -0021 also supports Mr. Bublitz's claim in that it shows that the agency received a bid of \$362,670 from Elkhorn.

The agency determined that Elkhorn had submitted clear and convincing evidence that a mistake had been made, the manner in which it occurred, and of the bid actually intended. It therefore permitted Elkhorn to correct the amount of its bid. Reynosa's protest to our Office followed.

Reynosa first argues that the agency improperly relied on evidence outside of Elkhorn's bid in deciding to allow correction of the bid. In this regard, the applicable Federal Acquisition Regulation (FAR) provision, FAR § 14.407-3(a), states:

If a bidder requests permission to correct a mistake and clear and convincing evidence establishes both the existence of the mistake and the bid actually intended, the agency head may make a determination permitting the bidder to correct the mistake; provided, that if this correction would result in displacing one or more lower bids, such a determination shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself.

¹The protester points out that there is a \$3 discrepancy between the amount on Elkhorn's worksheet for the Broken Arrow project and the amount of the bid that it submitted under IFB -0059. We view the discrepancy as de minimis.

Reynosa contends that Elkhorn displaced it as the bidder in line for award when it was permitted to correct its bid since Elkhorn's bid, as uncorrected, was so far out of line with the other bids and the government estimate that the agency could not have accepted it. The protester thus asserts, citing the final clause of FAR § 14.407-3(a), that since the corrected bid could not be determined without reference to evidence outside the bid, it was improper to allow correction.

FAR § 14.407-3(a) requires that the existence of a mistake and the bid actually intended be ascertainable from the IFB and the bid itself only where a bidder is requesting permission to make a downward correction in its bid that would result in displacing one or more lower bids. In other words, the FAR permits the submission of proof outside the confines of the IFB and the bid itself where a bidder is seeking upward correction of its bid amount. There is no suggestion in the applicable FAR provisions that a different standard of proof is to be applied depending on how low the mistaken bid is. On the contrary, FAR § 14.407-3(g)(5), the FAR provision which addresses rejection of very low mistaken bids, calls for rejection of such a bid where the bidder "fails or refuses to furnish evidence in support of [the] suspected or alleged mistake"--clearly a reference to information outside the bid itself.

Where, as here, a bidder requests upward correction of its bid, there must be clear and convincing evidence of the mistake and the intended bid. FAR § 14.407-3(a). Whether the evidence furnished in support of a correction meets the clear and convincing standard is a question of fact and we will not question an agency's determination based on the evidence unless it is unreasonable. Merrick Constr. Co., Inc., B-270661, Apr. 8, 1996, 96-1 CPD ¶ 181 at 2. In considering an upward correction of a 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. Id.

Here, there was a large disparity between the awardee's bid (\$188,424), and the protester's second low bid (\$383,000) and the government estimate (\$317,170). This disparity, coupled with the disparity on the other solicitation for which the awardee simultaneously submitted a bid, reasonably indicated to the agency that the awardee had made a mistake in its bid. The awardee's worksheets and the affidavit from Mr. Bublitz confirmed that the awardee had made a mistake and intended to bid \$362,670 for this project. Under these circumstances we conclude that the agency reasonably determined that the awardee's evidence of mistake and its intended price were clear and convincing, and thus that correction of the bid was proper. See W.H. Hussey & Assocs., Inc., B-237207, Feb. 1, 1990, 90-1 CPD ¶ 137 at 3, recon. denied, B-237207.2, May 2, 1990, 90-1 CPD ¶ 442.

In challenging the agency's decision to allow correction here, Reynosa argues that a review of Elkhorn's worksheets reveals that Elkhorn made a number of errors in calculating its bid. The protester contends that, for example, Elkhorn's allowances

for meals and lodging and for time for its job foreman, and for time for its concrete finishers and for its laborers, are all mistakenly low, since each translates to only about 2 months of work, whereas the contract provides for a performance period of 150 days. Reynosa argues that if Elkhorn were to have based its bid on a more realistic projection as to the number of days work that would be required to complete the project, Elkhorn's price would have been higher than its own. The protester contends that if a contractor's worksheets show errors other than those on which the request for correction is based, which more than account for the difference between its bid and the next low bid, then relief for mistake should be denied.

Assuming, for the sake of argument, that Reynosa is correct in its allegation that Elkhorn underestimated the number of days of work that would be required to complete this project and based its bid on that faulty estimate, this is not the type of mistake for which correction would be permitted under the FAR mistake-in-bid procedures. The FAR permits correction of a mistake only where it can be demonstrated that the bidder intended a bid other than the one submitted--that is, where the mistake is attributable to something other than the bidder's exercise of his own business judgment. The rule that allows bid correction does not extend to permitting the bidder to recalculate its bid to include factors which the bidder did not have in mind when the bid was submitted. Thus, a bidder will not be permitted to correct its bid if, after bid opening, it decides that it has underestimated the number of hours that will be required to perform the job. Paul Schmidt Constr. Co., B-204009, Aug. 5, 1981, 81-2 CPD ¶ 99 at 2. Since Elkhorn could not have obtained correction of its bid on the basis that its initial estimate regarding the number of work hours that would be required to complete the project was faulty, we do not think that this provides a basis upon which to question the amount of its intended bid.

Finally, the protester alleges that Elkhorn's bid should have been rejected because Elkhorn did not submit a revised bid bond sufficient to cover the amount of its revised bid, as required by FAR § 28.101-4(c)(5).² The penal sum of Elkhorn's bid bond was expressed as a percentage of its bid price--i.e., 20 percent, up to a

²FAR § 28.101-4(c)(5) permits the waiver of noncompliance with a solicitation requirement for a bid guarantee where the guarantee becomes inadequate as a result of the correction of a mistake under FAR § 14.407--"but only if the bidder will increase the bid guarantee to the level required for the corrected bid."

maximum bid amount of \$500,000--and not as a specific amount. Thus, the bid guarantee did not become inadequate as a result of Elkhorn's upward correction of its bid.

The protest is denied.

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