

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.^{1/}

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

^{1/} 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