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D. Gordon



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Great Lakes Dredge & Dock Company

File: B-248007.2

Date: September 3, 1992

Daniel C. Sauls, Esq., Steptoe & Johnson, for the protester. S. Leo Arnold, Esq., Ashley, Ashley & Arnold, for Ford Contracting Corporation, an interested party. Lester Edelman, Esq., and Mary S. Byers, Esq., Department of the Army, for the agency. Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly allowed correction of two mistakes in apparent low bids where there is no reasonable basis to determine the amount of the intended bid, either precisely or within a narrow range.

DECISION

Great Lakes Dredge & Dock Company protests the decision by the Department of the Army to permit Ford Contracting Corporation to correct two alleged mistakes in its bid under invitation for bids (IFB) No. DACW21-92-B-0007, which was issued by the U.S. Army Corps of Engineers. The IFB calls for the construction of a pumped storage tailwater conveyance channel at the Richard B. Russell Dam and Lake in Georgia and South Carolina.

We sustain the protest.

At bid opening on March 5, 1992, Ford's bid of \$5,581,493.50 was the lowest of eight bids. Great Lakes's bid of \$7,641,670.50 was next low. The next day, March 6, Ford notified the Army by letter that review of the competing prices had led Ford to realize "that there was probably something wrong with our bid." As a result, Ford had reviewed its computations and had its subcontractors do the same. According to the March 6 letter, the review revealed that Ford's main subcontractor, Mid-South Dredging, Inc., "had made a computer generated mathematical error that would result in our bid being approximately \$1,550,000.00 higher

than was submitted--or approximately \$7,131,000.00." The letter requested permission to correct the mistake and stated that the exact amount of the mistake, along with supporting documents, would be forwarded to the agency as soon as possible.

On March 11, 1992, Ford wrote to the agency again, this time providing a more detailed explanation and documentation intended to support the alleged mistake. The March 11 letter requested that Ford's bid be raised to \$6,982,621.50 (an increase of approximately \$1,400,000) rather than to \$7,131,000, as had been requested 5 days earlier.

According to the March 11 letter, two mistakes had occurred. The first mistake involved contract line item number (CLIN) 0021, "Phase I - Mobilization and Demobilization of the Dredge, Onsite Assembly, and Other Work Relating to Dredge, Equipment, Complete." The second mistake related to CLIN 0022, "Phase II - Construction Dredging." We address each alleged mistake in turn.

CLIN 0021

The alleged mistake in pricing CLIN 0021 relates to Mid-South's eight worksheets pertaining to this item. The first seven of those worksheets contain handwritten numbers and words organized in an outline breaking down the costs into main parts (labeled with roman numerals) and various subparts (labeled with letters). The eighth page, entitled "Summary," has one line for each roman numeral and letter of the outline. Unlike the other pages, the eighth page is divided into columns, labeled "Florida," "Ft. Smith," "Pipeline," "Proj Mob/Demob," and "Chat." Although the record is not entirely clear, at least three of the columns (Florida, Fort Smith and "Chat.," which apparently stands for Chattanooga) seem to identify the location at which tasks would be performed. There is no explanation of how "Pipeline" and "Proj Mob/Demob" fit into this pattern.

On the summary sheet, the numbers in the "Proj Mob/Demob" column have been correctly added to a total of \$272,000. There is a handwritten notation indicating that, after overhead is added, the total is \$300,000 (representing a mark-up of approximately 10.294 percent of \$272,000). It is this \$300,000 figure that Mid-South relayed to Ford as Mid-South's price for CLIN 0021. Ford added \$100,000 to that figure for its mark-up and bid \$400,000 for CLIN 0021.

The alleged mistake consisted of Mid-South's ignoring all numbers on page 8 of the worksheets (the summary sheet) except those in the column marked "Proj Mob/Demob."

According to Mid-South and Ford, the other numbers on the summary sheet, those said to have been inadvertently omitted, total \$630,100.

Even if it is assumed that \$630,100 is the amount of the omission, neither Mid-South's nor Ford's workpapers unambiguously indicated the subcontractor and prime contractor mark-ups that should be applied to that figure. Indeed, the record is replete with confusion on the issue of the mark-ups.¹ The confusion in the contemporaneous workpapers was compounded when Ford offered, in its March 11, 1992, letter to the agency, to accept, as the prime contractor mark-up, what was characterized as a reduced mark-up of 17.083 percent of Mid-South's revised quotation, rather than the 25 percent rate said to have been used in the original bid.² Ford did not claim that the lower rate represented its pre-bid-opening intent or that it was anything other than a post-bid-opening attempt to negotiate an acceptable price. The lower mark-up resulted in a revised total bid of \$1,200,000 for CLIN 0021. Ford recognized in its March 11 letter that a post-bid-opening reduction in the mark-up percentage might not be permitted as a mistake correction; accordingly, Ford calculated the revised amount using what it termed the 25 percent rate as \$1,326,666.67 for CLIN 0021.

¹Thus, in its March 11, 1992, claim for mistake, Ford stated that the \$630,100 was being marked up to \$695,000 in order to replicate the mark-up which Mid-South used with the original \$272,000 figure. The March 11 letter described Mid-South's mark-up, both from \$272,000 to \$300,000 and from \$630,100 to \$695,000, as a 9.33 percent mark-up. That description reflects the fact that the \$28,000 mark-up from \$272,000 to \$300,000 represents 9.33 percent of the \$300,000 burdened total, and the \$64,900 mark-up from \$630,100 to \$695,000 represents 9.33 percent of the burdened total. The 9.33 percent figure actually represents, not a mark-up, but rather the percentage of the burdened price attributable to the 10.294 percent mark-up; nothing was marked up 9.33 percent. As noted below, Ford's and Mid-South's references to a 9.33 percent mark-up appear to have confused the agency.

²Review of Ford's calculations reveals that, as with Mid-South, Ford's mark-up percentages actually refer to the percent of the total burdened figure attributable to each burden. Thus, when Ford refers to a 25 percent mark-up for general and administrative (G&A) and profit, it means that one quarter of the burdened price reflects G&A and profit; the mark-up was actually 33 percent. Again, this non-standard terminology has led to considerable confusion in the record.

The Corps of Engineers's Cost Engineering Branch, apparently working in support of the Savannah District office of the Corps, reviewed the data and concluded that it could not determine with any certainty the contractor's intended bid. While relying on the Cost Engineering Branch's analysis and recognizing that uncertainty about the level of mark-ups raised doubt about Ford's intended bid, the contracting officer concluded that a narrow range of uncertainty existed and recommended that correction of the mistake be allowed to the lower end of that range.³ The contracting officer accepted the Cost Engineering Branch's use of a 33 percent mark-up as Ford's mark-up and therefore recommended that \$1,314,989 be accepted as the corrected bid for CLIN 0021.

The South Atlantic Division of the Corps disagreed with the contracting officer's recommendation. Although not challenging the basic \$630,100 omission, the Division expressed concern about the confusion in the record regarding the intended mark-ups. Consequently, the Division concluded that neither a sum certain nor a limited range of uncertainty could be established for the intended CLIN 0021 bid; the Division therefore recommended that the request for bid correction be denied.

The matter was then sent to the Corps's Chief Counsel. As at the lower levels of review, the \$630,100 omission was accepted. Mid-South's mark-up was viewed as clearly having been 10.294 percent, bringing Mid-South's quote to Ford to \$995,000. The Chief Counsel found "some uncertainty" in the record regarding the level of Ford's mark-up: 25 percent, 33 percent, or a lower figure based on Ford's offer to reduce its mark-up on the corrected amount. The Chief

³The contracting officer appears to have believed that the record contained two different figures for Mid-South's mark-up: 9.33 percent and 10.294 percent. He concluded that the difference between the two percentages constituted a range of uncertainty and recommended allowing a correction to the bottom of that range. That is, he recommended that only a 9.33 percent mark-up be allowed for Mid-South's mark-up, raising the \$630,100 to \$688,888. Since, as explained above, the 9.33 percent figure was not actually a mark-up, but rather simply indicated the percentage of the burdened cost attributable to the 10.294 percent mark-up, the contracting officer's use of the 9.33 percent figure as a mark-up was plainly inconsistent with Mid-South's intent. Indeed, the contracting officer went on to apply the 9.33 percent mark-up to change the mark-up of \$272,000 from \$300,000 to \$297,378--thus changing a figure that was clearly contained in Mid-South's original summary sheet and was not included in the alleged mistake.

Counsel decided that the government could accept Ford's offer of a reduced mark-up; accordingly, he granted Ford's request to correct the bid for CLIN 0021 to \$1,200,000, an increase of \$800,000.

The protester concedes that Ford made a mistake in its bid for CLIN 0021. However, Great Lakes contests the amount of the sum omitted from Mid-South's worksheets as well as the appropriate percentages for Mid-South's and Ford's mark-up. Its challenge to Mid-South's and Ford's mark-ups for the most part simply highlights the wide range of mark-ups in the record. Concerning the underlying mistake in calculating the sum of the figures from Mid-South's worksheets, however, Great Lakes raises points that the agency appears not to have considered.

Most significant is the "uncertainty, unexplained anywhere in the record, concerning the amount that Mid-South intended to use for line IV-A&B in Mid-South's summary sheet (page 8 of the worksheets). In the underlying worksheets, that item is entitled "Pipe Cost"; on the summary sheet, it is entitled "Pipe [illegible letters] Dredging + Pipe to Chat." The underlying worksheets contain a \$78,000 figure for IV-A and a \$35,000 figure for IV-B, along with calculations supporting those two figures. On the summary sheet, however, two totally different and unexplained numbers appear. One is \$16,000, listed in the column headed "Chat." This amount was included in the bidder's mistake claim. The other number, which is not legible, appears in the column entitled "Pipeline" on the summary sheet. It was ignored, without explanation or comment, in Mid-South's and Ford's calculation of the alleged mistake.⁴

⁴In addition, Great Lakes points out that, although line VII-H of the summary sheet has a \$10,000 figure under the "Florida" column, that number is unsupported by the underlying worksheets, which show \$9,000 (with supporting calculations) for that item. We also note that line VII-C appears to have been changed from \$4,000 to \$5,000, or vice versa, and there is no way to be certain which was the "corrected" number, since the underlying workpapers show both numbers. Finally, line VII-I/J/K is unclear (\$12,100, \$12,700, or \$12,900), and the underlying workpaper notations are cryptic and, in part, indecipherable.

CLIN 0022

The mistake claimed in the price bid for CLIN 0022 also arose because of Mid-South's action, but it is alleged to have been caused, not by an error in a manual calculation, but by a computer programming problem. Ford has submitted a printout of Mid-South's original workpapers.

In calculating its direct project overhead (DPOH) expense for CLIN 0022, Mid-South allegedly used a software program that automatically added the components of the monthly DPOH expense and then transferred the sum to another part of the program, which used the DPOH figure both to calculate the applicable G&A cost and then to total Mid-South's quotation for CLIN 0022. The DPOH expense totaled \$33,599.81 per month. According to Ford, because one line item in the DPOH calculation was deleted shortly before Mid-South submitted its quotation to Ford, the DPOH sum, \$33,599.81, appeared one line higher than the program anticipated. As a result, when the program transferred the DPOH sum to the calculation of G&A and the total price for CLIN 0022, it transferred zero, rather than \$33,599.81, since the program found nothing on the line where the DPOH total should have appeared. With a zero figure, the computer program calculated a G&A of zero and included nothing for DPOH in Mid-South's quotation for CLIN 0022.

The workpapers appear to show where the \$33,599.81 DPOH figure should have been included in the total calculation, as well as the percentage G&A (9.20 percent) that would have been calculated, if a figure other than zero had been transferred for DPOH. Those workpapers also show the profit rate (5.00 percent). Nonetheless, the workpapers, both the original and even the "corrected" ones, are replete with inconsistencies and errors. As the Cost Engineering Branch wrote in its analysis, "virtually every calculation Mid-South made in arriving at [its revised quotation for CLIN 0022] is in error."⁵

⁵A few examples from the "corrected" workpapers should suffice to demonstrate the pervasive nature of the problem. At one point, the workpapers clearly state that the DPOH expense is to be multiplied "times 7.83." Yet, when the revised workpapers show \$33,600 (rounded in the workpapers from \$33,599.81) multiplied by 7.83, the result is shown as \$263,220--but the correct result is plainly \$263,088. The workpapers clearly state that the next step is to take the product previously reached and "divide by 5.83." Again, this is simple arithmetic: \$263,220 (the incorrectly reached product from the previous calculation) divided by 5.83 should be \$45,149--but in Mid-South's workpapers the
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In addition, the record is unclear as to the amount that Ford would have added to Mid-South's quotation, due to uncertainty about Ford's intended mark-up as well as Ford's having apparently added its own field costs to Mid-South's quotation. Without detailing all of the complexities of the calculations, we briefly summarize here the chronology of the various efforts by Ford and the agency to compute Ford's intended bid.

The Cost Engineering Branch calculated six different possible "intended" bids for CLIN 0022, ranging from \$3,418,263 to \$3,553,495 (a difference of more than \$130,000), and concluded that there was not clear and convincing evidence of the actual intended bid. The contracting officer nonetheless concluded that there was clear and convincing evidence that the intended bid for CLIN 0022 was \$3,531,892 (not one of the six variations calculated by the Cost Engineering Branch). Ford's March 11, 1992, letter claimed that the intended amount was \$3,545,703, but that Ford was willing to accept \$3,528,360 on the basis of a lowered mark-up. The Corps's Division Office calculated eight different possible bids for CLIN 0022 and concluded that there was not clear and convincing evidence of the intended bid for that item. The Division concluded that "maintaining the integrity of the competitive bid system outweighs correction in this case."

The agency's Chief Counsel, in his May 13, 1992, decision to allow correction, stated that the range of uncertainty was "rather narrow," extending, by his calculation, from a low of \$3,441,957 to a high of \$3,531,892. The Chief Counsel described the low end of that range, \$3,441,957, as the amount Ford indicated in its March 11, 1992, letter that it

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result is \$45,119. Another instance: the revised workpapers show Mid-South's total monthly cost for CLIN 0022 as \$468,015, which is then multiplied by 5.83 months to reach a total cost of \$2,730,368--but the correct product is \$2,728,527. One final example of the persistent problems determining the quotation that Mid-South would have submitted to Ford, if Mid-South had discovered its omission of DPOH expenses: while Mid-South submitted revised workpapers in March 1992 showing a total price for CLIN 0022 of \$2,861,892, Ford claims in its comments on the agency report that the very same Mid-South worksheets show an intended quotation of \$2,866,089, several thousand dollars more.

was willing to accept.⁶ As a final point in this brief chronology, we note that Ford, in its comments on the agency report, claims that there is clear and convincing evidence that the intended bid was \$3,550,719.36, which is \$5,000 higher than the figure cited in Ford's own letter of March 11, 1992, and \$19,000 above the high end of the "rather narrow" range that the Chief Counsel believed existed.

In sum, the effect of the corrections granted by the agency was to raise Ford's bid from \$5,581,493.50 to \$6,896,218.50, an increase of \$1,314,725 (\$800,000 for CLIN 0021 and \$514,725 for CLIN 0022). Even with this correction, Ford's bid remains almost \$700,000 (approximately 10 percent) below the next low bid.

DISCUSSION

Initially, the agency argues that Great Lakes is not an interested party for the purpose of filing a protest because Ford is the low bidder regardless of whether correction of the mistake is allowed. The protester does not contend that any proposed calculation of Ford's intended bid could lead to Ford's being other than the low bidder. Accordingly, the agency contends that Great Lakes lacks the direct economic interest required by our bid protest regulations, 4 C.F.R. § 21.0(a) (1992). We find that Great Lakes is an interested party because, if it prevails and correction is disallowed, there is a possibility that Ford's bid will be withdrawn, either at its own request or by the direction of the agency, in which case Great Lakes would be in line for award. This possibility provides the requisite economic interest to a second-low bidder challenging the correction of the low bid. Weather Data Servs., Inc., B-241621, Feb. 19, 1991, 91-1 CPD ¶ 185.⁷

An agency may permit correction of a bid where clear and convincing evidence establishes both the existence of a mistake and the bid actually intended. Federal Acquisition Regulation (FAR) § 14.406-3(a). For upward correction of a low bid, workpapers may constitute part of that clear and convincing evidence if they are in good order and indicate

⁶As noted above, Ford's March 11 letter actually offered to accept \$3,528,360, not \$3,441,957.

⁷Although the agency made a determination, pursuant to 31 U.S.C. § 3553(d)(2)(A)(i) (1988), that it was in the best interests of the United States to have Ford continue with contract performance despite the pendency of the protest, that determination cannot affect Great Lakes's status as an interested party.

the intended bid price, and there is no contravening evidence. Id.; Bush Painting, Inc., B-239904, Aug. 30, 1990, 90-2 CPD ¶ 188. Correction based on subcontractors' mistakes are permitted, if the standard for correction is otherwise satisfied. See C Constr. Co., Inc., B-242717, June 6, 1991, 91-1 CPD ¶ 540. Correction may be allowed, even though the intended bid price cannot be determined exactly, provided 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. Price/CIRI Constr., B-230603, May 25, 1988, 88-1 CPD ¶ 500. Our Office treats the question of whether the evidence of the intended bid amount meets the clear and convincing standard as a question of fact, and we will not question an agency's decision in this regard unless it lacks a reasonable basis. P.K. Painting Co., B-247357, May 5, 1992, 92-1 CPD ¶ 424.

There is no dispute in this case that Ford's bid for CLINs 0021 and 0022 contained mistakes. Moreover, granting the correction to Ford would not bring that company's bid price above, or even close to, Great Lakes's second-low bid. We conclude, however, that the agency could not reasonably find that clear and convincing evidence existed as to the amount that Ford intended to bid for those line items.

Concerning CLIN 0021, we need not reach the dispute concerning the amount of Mid-South's and Ford's mark-ups, because the supporting documentation provides no basis for the agency to find that clear and convincing evidence established the basic amount, before mark-up, which Mid-South intended to extract from its workpapers. In particular, there is no way to divine from Mid-South's workpapers whether line IV-A&B of Mid-South's bid outline was intended to be the illegible number, or \$16,000, or both. The underlying workpapers do not support any figure except \$113,000 for line IV-A&B, and the workpaper summary sheet does not support that figure. The evidence is simply too ambiguous and, indeed, contradictory to support a finding that any amount claimed to be the figure intended for line IV-A&B would meet the "clear and convincing evidence" standard.

The uncertainty concerning line IV-A&B would grow, as Mid-South's and then Ford's mark-ups are added, to well over \$130,000. In the context of an \$800,000 correction, such a spread cannot be deemed a narrow range of uncertainty permitting correction.⁸

⁸We also note that there is no sense in which the correction to \$1,200,000 granted by the agency reflects Ford's intended
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Although the amount of the initial underlying mistake is somewhat more certain for CLIN 0022 than for CLIN 0021, the amount of the intended bid, including Mid-South's calculations and the subcontractor's and prime contractor's mark-ups, is equally uncertain.⁹ The record casts into doubt both ends of the range of uncertainty described by the agency. The \$3,531,892 figure at the high end, while it is the number that the contracting officer concluded was appropriate, remains considerably lower than the \$3,550,719 figure that Ford, in its comments on the agency report, still claims is the amount it really intended. However, the amount which a bidder says it intended must surely be included in the range of bids that the bidder may have intended. See, e.g., Eutaw Constr. Co., Inc., B-230987, July 28, 1988, 88-2 CPD ¶ 98; Price/CIRI Constr., supra. The \$3,441,957 figure at the low end, said to be based on Ford's March 11, 1992, letter, is in fact some \$100,000 less than the number that the contractor claimed in that letter was clearly and convincingly the amount that Ford intended to bid, and it is approximately \$90,000 less than Ford's March 11 letter offered to accept based on a mark-up reduced from the rate used in the original bid.¹⁰

In sum, in defining the range of bids that Ford may have intended, the agency ignored the very amount that Ford claims it did intend, and the agency eventually decided that Ford intended the one amount that was explicitly presented as an offer to depart from Ford's intended mark-up. In these circumstances, we find that the agency lacked a

⁸(...continued)

bid. The \$1,200,000 figure was unquestionably a post-bid-opening settlement offer by Ford to reduce its intended mark-up in order to reach a mutually agreeable amount. Accordingly, it can play no role in determining the amount that, but for the mistake, Ford intended to bid.

⁹The numerous errors and inconsistencies throughout Mid-South's computerized workpapers suggest that either the figures on the workpapers are not the result of a computer's calculations or, as our review of the computer program syntax indicates, the computer was programmed to perform calculations somewhat different from those described in the text of the workpapers. Whichever is the case, the result is an added layer of doubt concerning the amount Ford intended to bid.

¹⁰Indeed, neither the contracting officer nor the Division nor (perhaps most tellingly) Ford has ever suggested a figure within \$80,000 of the \$3,441,957 figure adopted by the agency.

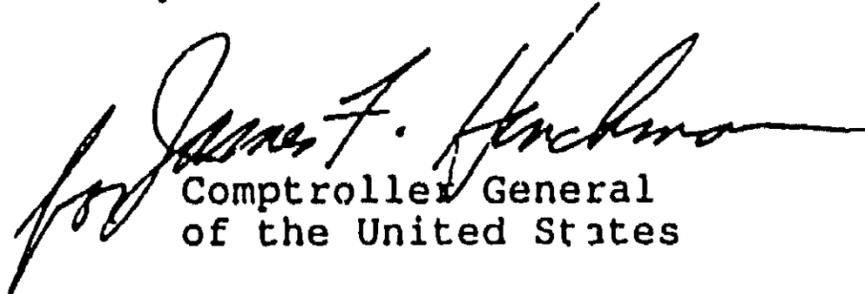
reasonable basis to find, even as part of a range, that clear and convincing evidence exists that Ford intended to bid \$3,441,957 for CLIN 0022. The record is inadequate to establish a narrow range of uncertainty for Ford's intended bid for CLIN 0022.

In contrast with the clear and convincing evidence required for bid correction, bid withdrawal requires a lesser degree of proof. Thus, our decision that there is insufficient evidence to permit correction would generally not preclude a determination that a bidder should be permitted to withdraw its bid, where, as here, there is clear and convincing evidence that a mistake occurred, FAR § 14.406-3(c). As noted above, Ford would remain the low bidder under any interpretation provided in the record of that company's intended bid.

Here, the agency made a determination, pursuant to 31 U.S.C. § 3553(d)(2)(A)(i) (1988), that it was in the best interests of the United States to have Ford continue with contract performance despite the pendency of the protest. Although performance has begun, Ford has indicated that it recognizes that our Office may find that the mistake correction was improper. Ford has stated that, in that eventuality, it would be willing to continue performance at the amount originally bid. Accordingly, in the event that Ford elects to continue to perform, we recommend that Ford's contract price be modified to reflect the amount that Ford initially bid.

In addition, Great Lakes is entitled to recover the costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1992). Great Lakes should submit its claim for such costs directly to the agency.

The protest is sustained.


Comptroller General
of the United States