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

Decision

Matter of: Seaward Services, Inc.

File: B-250685

Date: February 16, 1993

Kirk Sorenson for the protester.
Joseph A. Artabane, Esq., Elliott, Bray & Riley, for International Marine, Inc., an interested party.
Timothy A. Beyland, Esq., Department of the Air Force, for the agency.
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of the upward correction of a low bid to within .53 percent of the next low bid is denied where record shows that agency had a rational basis to conclude that there was clear and convincing evidence of the existence of a mistake and the intended bid price.

DECISION

Seaward Services, Inc. protests the decision of the Department of the Air Force to permit upward correction of the low bid submitted by International Marine, Inc. (IMI) in response to invitation for bids (IFB) No. F08637-92-B0020, for the operation of the Watercraft Branch at Tyndall Air Force Base, Florida. Seaward alleges that the agency's decision to permit correction is not reasonable.

We deny the protest.

Under the IFB, bidders were to submit prices for five line items representing a base contract year and 4 option years. Nineteen bids were received and opened on June 24, 1992. The total of the line item prices submitted by IMI, whose bid was low, was $2,466,191;[1] Seaward's bid was second low at $3,395,999.84. IMI's president, who attended the bid

[1]IMI made an error in adding its line item prices and submitted a total price of $2,466,491; correction of the arithmetical error was permitted and is not disputed by the protester. For clarity's sake, this decision reports the correct total.

pening, discussed his firm's bid price with contracting officials immediately after opening and he was advised that the agency intended to review the bid and contact him later. By letter dated June 26, the agency informed IMI that it suspected a mistake because IMI's price was considerably lower than the other bids received and the government estimate.

IMI responded on July 1 by claiming a mistake in the amount of $911,853 and requesting an upward correction of its price to $3,378,044. Supporting evidence was supplied in the form of affidavits explaining the nature of the mistake and a set of workpapers. This evidence was later supplemented by IMI at the agency's request. The materials supplied by IMI indicate that the firm had orally agreed to subcontract for a portion of the labor required under the contract with another firm, SEACOR, at a meeting between the firms on June 10. The firms agreed that IMI would receive a lump-sum quotation from SEACOR, which would be added to IMI's separately calculated price without overhead, general and administrative (G&A) expenses, or profit to arrive at a total price, and SEACOR submitted a quotation to IMI on June 17 in the amount of the claimed mistake. IMI further explained that the mistake occurred during a busy period of time when the firm was preparing a number of bids at once.

Since the application of even nominal indirect costs such as G&A or profit to the subcontractor quotation would make IMI's corrected price higher than Seaward's, the agency requested and received additional information from IMI and SEACOR. That evidence, in the form of affidavits and SEACOR's workpapers, confirms the agreement between the firms and the amount of SEACOR's quotation and explains the methodology used by SEACOR in preparing its quotation.

The contracting officer initially concluded that IMI should be permitted to withdraw its bid rather than correct it because, in his view, the intended price had not been supported by clear and convincing evidence. Agency counsel reached a contrary conclusion. Subsequently, the Staff Judge Advocate at the Headquarters, Air Force Materiel Command, concluded that clear and convincing evidence had been presented both as to the mistake and as to the amount of the intended bid and he, therefore, determined that the bid should be corrected.

Seaward basically contends that the contracting officer's initial decision to permit withdrawal was correct in light of the evident mistake. Seaward disagrees, however, with the final agency determination to permit upward correction of the awardee's bid price to within .53 percent of the protester's bid price. Seaward argues that the record contains a number of discrepancies which call into question

whether the intended price was shown by clear and convincing evidence. For example, Seaward questions IMI's purported subcontracting arrangement with SEACOR and notes the lack of a written agreement; in this regard, the protester submits that the agency should not have considered affidavits in support of the arrangement from either SEACOR or IMI because both firms are motivated by self interest. Seaward questions why G&A rates were not applied to SEACOR's quotation by IMI. Seaward also questions IMI's claim of mistake in light of what it alleges was IMI's president's confirmation of the original price at bid opening a week before. Finally, Seaward questions whether SEACOR's participation as a subcontractor would violate the terms of the IFB which provided that 50 percent of the costs under the contract had to be represented by the costs of the prime contractor.

In order to establish entitlement to an upward correction in bid price, a bidder must establish by clear and convincing evidence that a mistake occurred and the intended price. The closer the intended price is to the next low bid, the more difficult it is to establish the bid actually intended. United Rigging & Hauling, Inc., B-239416, Aug. 28, 1990, 90-2 CPD ¶ 163. This does not, however, mean that a bid may not be upwardly corrected to within even .3 percent of the next low bid if the record contains clear and convincing evidence of the intended price. See Vrooman Constructors, Inc., B-226965.2, June 17, 1987, 87-1 CPD ¶ 606. Since the authority to correct mistakes alleged prior to award is vested in contracting agencies and because the weight to be accorded to supporting evidence is essentially a question of fact, we will not disturb an agency's determination to permit correction unless it lacks a rational basis. Id. Agencies are specifically authorized to consider affidavits, workpapers, and subcontractor quotations in reaching their determinations. Federal Acquisition Regulation § 14.406-3. Finally, the fact that agency officials may disagree about whether correction should be permitted does not establish that the evidence submitted in support of a mistake is not clear and convincing. United Rigging & Hauling, Inc., supra.

We have reviewed the record in light of Seaward's concerns and conclude that the agency had a rational basis to determine that IMI had established both the mistake and its intended price by clear and convincing evidence.

A June 24 letter submitted with IMI's bid states that SEACOR was its "proposed subcontractor." IMI's worksheets, which appear to be in good order and are dated June 22, 1992, show that IMI prepared its bid price based on 18,720 labor hours per year to be provided by IMI, an estimated cost of materials and the application of reasonable overhead, G&A,

and profit rates. The figures on the worksheets, when totaled, amount to the price actually bid. The worksheets also contain a separate page which is an annotated copy of a quotation from SEACOR in the amount of $911,853; other evidence shows that this quotation was sent to IMI on June 17. On IMI's copy are handwritten instructions stating that SEACOR's total price is to be added to IMI's total without the application of profit and G&A. SEACOR's worksheets show that it prepared its quotation based on 12,000 labor hours per year plus separately calculated overhead, G&A, and profit rates. This evidence is consistent with the affidavits submitted by both firms describing the subcontracting arrangement they agreed to on June 10. Furthermore, the record shows that this arrangement is consistent with IMI's bidding practice in the past with other subcontractors. While Seaward calls the arrangement between the two firms into question, the record contains no evidence suggesting that the arrangement was not in effect or that it was not followed by the parties. Moreover, the nature of the mistake is supported by a comparison of the separately calculated prices to the price actually bid and the affidavit from IMI's president describing how the mistake occurred is reasonable on its face. See United Rigging & Hauling, Inc., supra.

In short, we find that there is clear and convincing evidence to support the agency's findings that a mistake was made and that the intended price was the total of IMI's and SEACOR's separate calculations--$3,378,044.[2] Accordingly, we agree that correction was permissible here even though the low bid as corrected comes very close to the next low bid.

Finally, we find no support in the record for the contention that the subcontracting arrangement between IMI and SEACOR may have violated the IFB limitation on subcontracting. An

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[2]We agree with the agency's not attaching significance to the conversations between IMI's president and contracting officials at bid opening. His remarks, to the effect that IMI's bid price was proper and "competitive"; were apparently made if at all on the basis of a misunderstanding concerning the agency's doubts about the "competitiveness" of IMI's original bid. In any event, whether IMI orally confirmed its price at that time is not relevant to the issue of whether clear and convincing evidence in support of the requested correction was provided the following week in response to the agency's June 26 request.

examination of the workpapers submitted by each firm reveals IMI will perform a majority of the contract effort.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel