

Calhoun
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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: McInnis Brothers Construction, Inc.

File: B-251138

Date: March 1, 1993

Mark E. Davis, Esq., Seltzer and Rosen, P.C., for the protester.
James A. Pemberton, Esq., Winstead, Sechrest & Minick, for Key Constructors, Inc., an interested party.
Lester Edelman, Esq., and Tracy N. Gruis, Esq., Department of the Army, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where workpapers contain clear and convincing evidence that the low bidder mistakenly omitted an element of cost from its bid, the contracting agency properly permitted upward correction of the bid; even though the intended bid could not be determined exactly, it would fall within a narrow range of uncertainty and would remain low after correction.

DECISION

McInnis Brothers Construction, Inc. protests the decision by the Department of the Army to permit Key Constructors, Inc. to correct an alleged mistake in its bid under invitation for bids (IFB) No. DACW38-92-B-0046, issued by the U.S. Army Corps of Engineers, Vicksburg District. The IFB calls for furnishing all plant, labor, materials and equipment for constructing a maintenance facility at a lock and dam on the Red River in Natchitoches Parish, Louisiana.

We deny the protest.

The solicitation was issued on March 16, 1992, and required bidders to submit a price for seven separate contract line item numbers (CLIN), as well as a total bid price for the project.¹ At the April 15 bid opening, Key's bid of

¹CLIN 0001 is for mobilization and demobilization; CLIN 0002 is for parking lots and roads; CLIN 0003 is for site grading and landscaping; CLIN 0004 is for the administrative/

(continued...)

\$3,978,000 was the lowest of six bids. McInnis's bid of \$4,779,000 was next low; the government estimate for the project was \$4,367,610. The next day, April 16, Key notified the Army by letter that a comparison of its bid with the competing prices and with the government estimate had led Key to conclude that it made a mistake in its bid. According to the April 16 letter, Key discovered that in its computation of the direct costs for CLINs 0004, 0005, and 0007, it failed to include the costs for foundation and masonry work. Key asserted that this error resulted in its intended bid being \$599,000 higher than the bid submitted, for a total price of \$4,577,000. The letter requested permission to correct the mistake and included supporting documents.

In May, Key submitted two letters in response to questions raised in two separate meetings between Key and the agency. In these letters, Key provided a more detailed explanation and additional documentation intended to support the alleged mistake. Specifically, Key explained that it uses item analysis sheets (IAS) to determine the costs of individual items in its bid. If more than one IAS is required, a total is calculated for each IAS and carried forward to the final IAS. The total costs on the final IAS are then entered into Key's computerized spreadsheet and the bid price is developed. Key stated that it normally uses a separate IAS for each CLIN; however, it used joint IASs for CLINs 0004, 0005, and 0007 because most of the subcontractor quotations received quoted these three items together. Key states that five IASs were completed for CLINs 0004, 0005, and 0007, and that the direct cost listed on one IAS, for foundation and masonry work, was mistakenly omitted from the total direct cost listed on the final IAS. Consequently, an incorrect total cost was entered into the computer and an incorrect bid was calculated.

Key stated that it calculated its submitted bid in the following manner. To obtain the total direct costs for CLINs 0004, 0005, and 0007, it added the direct costs reflected on each IAS for those CLINs except the one for foundation and masonry work;² the resulting amount was \$877,325. From that amount, Key deducted \$128,095 in specific reductions in subcontractor quotations, and reduced the resulting amount by an additional 2 percent to reflect

¹(...continued)

maintenance building; CLIN 0005 is for other buildings; CLIN 0006 is for the docking facility; and CLIN 0007 is for utilities.

²Key states that it does not know how it omitted this IAS from its bid calculations.

its judgment that it could get better subcontractor prices; these deductions lowered the total direct cost for the three CLINs to \$734,245. Key added an amount for sales tax to increase the cost to \$746,993, and arbitrarily rounded the figure down to \$740,000. Key finally allocated the \$740,000 among the three CLINs and entered the resulting costs into the computerized spreadsheet,³ where they appeared under the heading "sub-contractors."

On the spreadsheet, the total direct costs for CLINs 0004, 0005, and 0007 (all of which were listed as subcontractor costs) were added to the subcontractor costs for all other CLINs, as well as to the total contractor costs; the result was a total for all direct costs of \$3,493,138. Key added an amount for sales tax to the costs of the permanent materials and supplies; to the resulting amount Key added a bond premium; to that amount Key added its markup. These additions produced a tentative bid of \$4,004,446. Because it said it did not want to bid just over a round number, Key reduced the bid by \$25,000 and rounded the resulting amount off for a new tentative bid of \$3,979,000. Key reduced the bid by another \$1,000 to avoid bidding an amount "headed" by the number 9; that reduction brought the bid to the submitted amount of \$3,978,000.⁴

Key asserted that it would have calculated its intended bid, for \$4,577,329, in a similar manner. The direct cost for the foundation and masonry work for CLINs 0004, 0005, and

³Of the \$740,000, Key allocated 35 percent to CLIN 0004, 45 percent to CLIN 0005, and 20 percent to CLIN 0007. Key made a mathematical error in its allocation to CLIN 0005; while 45 percent of \$740,000 is \$333,000, Key allocated \$330,000 to CLIN 0005 and transferred that incorrect amount to the spreadsheet.

Total subcontractor costs	\$ 1,019,148
Total contractor costs	+ 2,473,990
Subtotal	3,493,138
Add 6.5% tax on materials and supplies	+ 118,375
Subtotal	3,611,513
Add .8% bond premium	+ 28,892
Subtotal	3,640,405
Add 10% markup	+ 364,041
Tentative bid	4,004,446
Arbitrary reduction	- 25,000
Rounded off tentative bid	3,979,000
Arbitrary reduction	- 1,000
Submitted bid	\$ 3,978,000

0007 was listed on the omitted IAS as \$510,551.⁵ When that amount is added to the other direct costs for these three CLINs, the total direct cost is \$1,387,876. Key asserts that it would then make the same adjustments as it did on its submitted bid: a deduction of \$128,095 in specific subcontractor quotation reductions, a further reduction by 2 percent to reflect lower subcontractor prices; and an addition of a 6.5 percent sales tax. The resulting total direct cost for the three CLINs would be \$1,253,669. Key states that, as with its submitted bid, it would allocate the \$1,253,669 among the three CLINs and enter the resulting amounts into the computerized spreadsheet under the column "sub-contractors."

On the spreadsheet, the total direct cost for CLINs 0004, 0005, and 0007 (all of which would be listed as subcontractor costs) would be added to all other subcontractor and contractor costs, for a subtotal direct cost of \$4,128,182. Key asserts that it would make the same adjustments as with the bid it submitted: an addition of the sales tax applied to the costs of the permanent materials and supplies; an addition of the bond premium; and an addition of the markup. These additions would produce a bid price of \$4,577,329. Key states that this figure would not have caused it to reduce the bid by \$26,000 as it did in its submitted bid.⁶

On June 23, the contracting officer concurred with the District's Engineering Division in its recommendation against allowing correction because, while it did appear that a mistake was made, it could not determine what the intended total costs would have been, and thus what the intended bid would have been. The contracting officer did, however, recommend that Key be allowed to withdraw its bid. The Division concurred in both of these recommendations.

⁵This figure is the result of several mathematical errors on the IAS; if all the errors were corrected, the figure would be \$510,452.

⁶ Total subcontractor direct costs	\$ 1,535,817
Total contractor direct costs	+ 2,473,990
Total direct costs	4,009,807
Add 6.5% tax on materials and supplies	+ 118,375
Subtotal	4,128,182
Add .8% bond premium	+ 33,025
Subtotal rounded up	4,161,208
Add 10% markup	+ 416,125
Total corrected bid	\$ 4,577,329

The matter was then sent to the Corps's Chief Counsel, who initially sent Key's documentation to the Civil Works Directorate, Cost Engineering Branch, for review. While the Directorate reported that Key's worksheets did not provide a clear trail by which to discern the intended bid, the Corps's Chief Counsel disagreed. On October 21, he determined to allow correction of Key's bid upward to \$4,551,000, rather than the requested \$4,577,000; the Chief Counsel found that since Key reduced its bid price by \$26,000 prior to bid opening, its corrected bid price must also include this reduction. This protest followed.

McInnis contends that Key did not submit clear and convincing evidence to demonstrate its intended bid.⁷ McInnis argues that discrepancies present throughout Key's worksheets--IASSs--and spreadsheets, as well as what it describes as the "unavailability and inconsistencies" in Key's subcontractor quotations, prevent a determination of Key's intended bid price.

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 the intended bid price, and there is no contravening evidence. Id.; Bush Painting, Inc., B-239904, Aug. 30, 1990, 90-2 CPD ¶ 188. 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 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.

⁷In its initial protest, McInnis also complained that Key had not shown it had made a mistake or the manner in which that mistake was made. The agency in its report responded to these allegations, and McInnis in its comments did not rebut the agency's response. We consider these issues to be abandoned by the protester and will not consider them. See TM Sys., Inc., B-228220, Dec. 10, 1987, 87-2 CPD ¶ 573.

Here, we have examined Key's worksheets, spreadsheets, and subcontractor quotations, and conclude that the Corps's decision to permit Key to correct its bid was reasonable. We examine each of the protester's contentions in turn.⁸

With regard to Key's worksheets, several of the discrepancies cited by McInnis have been explained by Key in sworn statements, and an examination of all of the worksheets confirms the reasonableness of Key's explanations. For example, McInnis argues that Key may have duplicated some of its subcontractor reductions because two of the worksheets contain notations to that effect. Specifically, the worksheet labeled "Structural Steel Work" contains a notation to "cut crane" by \$13,000 and to "cut steel" by \$8,400, and the final worksheet contains a notation to "cut crane" by \$13,116 and to "cut structural steel" by \$8,398.⁹ However, Key has explained, and its worksheets confirm, that while it did make these reductions on the first worksheet, and in fact lined out the pre-reduction totals in both the permanent materials and total direct cost columns to replace them with post-reduction totals, it did not carry the post-reduction total direct cost over to the final worksheet. It is apparent from an examination of the worksheets that the pre-reduction total direct cost was carried over to the final worksheet; the listed total direct cost for all of the worksheets is correct only when the pre-reduction total is used. Consequently, it is clear that Key did not make a duplication of these two subcontractor reductions.⁹

Other worksheet discrepancies cited by McInnis are in the nature of mathematical errors, failures to carry over figures both within an IAS and to the final IAS, and

⁸Throughout its comments, the protester cites various alleged discrepancies in Key's bid on the other CLINs in this solicitation in support of its argument that there is no clear and convincing evidence of Key's intended bid. Since Key did not claim a mistake in bid for those CLINs, we decline to consider these alleged discrepancies; they are not a part of the work affected by the error. See North Star Elec. Contracting Corp. National Elec. Contractors Assoc., B-187384, Jan. 28, 1977, 77-1 CPD ¶ 73; Active Fire Sprinkler Corp., B-187039, Aug. 17, 1976, 76-2 CPD ¶ 168.

⁹McInnis also argues that while Key's final worksheet contains sales tax calculations on permanent materials and supplies, the total direct cost on that worksheet does not include this sales tax. The worksheets and spreadsheets reveal that while Key calculated the sales tax on permanent materials and supplies on the final worksheet, it did not add that sales tax into the bid price until after the direct costs were transferred to the spreadsheet.

failures to identify some costs and unit costs. We find that while these discrepancies do exist, they do not prevent ascertaining Key's intended bid. The mathematical errors and failures to carry over are readily susceptible to correction, see P.K. Painting Co., supra, and the remainder of these cited discrepancies cause the bid to fall within a narrow range of uncertainty that remains significantly below the next low bid. See Price/CIRI Constr., supra.

As for Key's spreadsheets, we find that the discrepancies cited by the protester are easily correctable or have been reasonably explained by Key. The protester primarily queries Key's method of calculating its bid price. For example, McInnis questions Key's decision to put all of the direct costs for CLINs 0004, 0005, and 0007 into the subcontractor cost column, when the worksheets reflected direct costs not only to subcontractors, but to the contractor. Key has explained that by bid time, it expected to subcontract these combined CLINs, as they were not the type of work Key usually performs. Consequently, all of the direct costs for CLINs 0004, 0005, and 0007 were considered to be subcontractor costs.

Finally, McInnis contends that the subcontractor quotations submitted by Key are inadequate to show Key's intended bid. McInnis first asserts that the subcontractor quotations Key submitted to support its direct costs do not correspond with the items listed on the omitted worksheet. McInnis further argues that the subcontractor quotations Key submitted to support its reduction for lower subcontractor costs are not consistent with the amount claimed for that reduction.

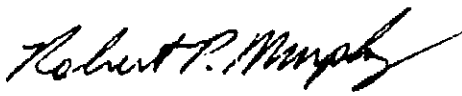
The omitted worksheet contained the costs for two items, foundation work and masonry work. Key has explained that it based its costs for the foundation work on its own computations, and that it based its costs for the masonry work primarily on a subcontractor's quotation of \$337,775. On the worksheet, the amount listed as a subcontractor cost for the masonry work is \$347,775. McInnis argues that the \$10,000 difference between the subcontractor's quotation and the amount listed on the worksheet indicates that Key made two entries for the cost of coping; the subcontractor's quotation noted that it would charge an additional \$10,000 for testing, welding, and coping, but the worksheet contained a separate entry for the cost of coping. However, Key has explained that the additional \$10,000 represents the costs of testing, not the costs of coping; we have no basis upon which to find otherwise.

McInnis complains that the subcontractor quotations submitted by Key to support its specific \$128,095 reduction in subcontractor quotations are not consistent with that

amount, due primarily to incomparable quantities and lack of detail. While some quotations do lack similar quantities and detail, McInnis has presented no evidence to show that the agency's reliance upon them as clear and convincing evidence of Key's intended bid was unreasonable. Key has explained that it received lower-priced quotations as bid opening day approached; rather than replace the initial entries on their respective worksheets, it apparently chose to take all of these reductions from the final direct cost of the three CLINS. While perhaps not the best method of bid calculation, that decision was within Key's discretion.¹⁰

In conclusion, while some of the discrepancies described by the protester do prevent an exact determination of Key's intended bid, as discussed above, 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., supra. We find that to be the case here; even after correction Key's bid remains 4.75 percent lower than McInnis's next low bid. As a result, the agency's decision to allow Key to correct its bid was reasonable.

The protest is denied.


for James F. Hinchman
General Counsel

¹⁰McInnis's contention that the subcontractor quotations do not add up to the claimed reduction amount is correct; however, the difference is only \$1,845, an amount that is clearly de minimis considering that the difference between Key's corrected bid and the second low bid is \$228,000.