



Comptroller General
of the United States

930309

Washington, D.C. 20548

Decision

Matter of: C Construction Company, Inc.

File: B-253198.2

Date: September 30, 1993

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Smith, Currie & Hancock, for the protester.

Michael L. Hogan, for Reid & Gary Strickland, Co., an
interested party.

Beth Kelly, Esq., U.S. Army Corps of Engineers, for the
agency.

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of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

The contracting agency properly allowed an upward correction of the awardee's low bid where the agency reasonably concluded that the awardee's work papers--hard copies of computer spreadsheets printed before bid opening--presented clear and convincing evidence of the claimed mistake in the awardee's bid and the intended bid price.

DECISION

C Construction Company, Inc. protests the decision of the Department of the Army, United States Army Corps of Engineers to permit Reid & Gary Strickland Co. (R&GS) to correct an alleged mistake in its low bid under invitation for bids (IFB) No. DACA47-93-B-0020, issued by the Corps for the construction of six small bay aircraft maintenance docks at Cannon Air Force Base, New Mexico.

We deny the protest.

The bid schedule consisted of 2 lots--one with 7 contract line items (CLIN) and one with 15 CLINs. The bulk of the contract work was included in CLIN No. 1.1 of lot No. 1. Bidders were required to enter a price for each CLIN, and were advised that a single award would be made to the bidder with the lowest total price for all CLINs. Paragraph 16 of the Instructions to Bidders further advised bidders that:

"NEW MEXICO GROSS RECEIPTS TAX

The [c]ontractor should be aware that NMGR [New Mexico Gross Receipts] tax is applicable to this

contract and the rate may vary for each county and city."

R&GS submitted the second low bid of \$6,485,600 (\$6,394,158 for lot No. 1 and \$91,442 for lot No. 2), and C Construction the next low bid of \$7,174,537.¹ The government's estimate for the work was \$8,934,678. Following bid opening on April 15, R&GS telephonically advised the Corps that it had discovered a mistake in its bid.² Hearing Transcript³ (Tr.) at 15. R&GS stated that it had mistakenly omitted \$351,054.00--"the amount of the New Mexico Gross Receipts Tax and applicable bonds"--from its total bid amount.⁴ R&GS specifically requested that the agency permit it to upwardly adjust its CLIN No. 1.1 bid price by the omitted amount.

A bidder who seeks upward correction of its bid prior to award must submit clear and convincing evidence that a mistake was made, the manner in which the mistake occurred, and the intended price. FAR § 14.406-3(a); Red Samm Constr., Inc., B-250891.2, Feb. 25, 1993, 93-1 CPD ¶ 178. The exact amount of the intended bid need not be established, provided that 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. Vrooman Constructors, Inc., B-226965.2, June 17, 1987, 87-1 CPD ¶ 606. For an upward adjustment of a bid, work papers, including records of computer generated software spreadsheets/worksheets (hard copy printouts, computer disks, tapes or other software media), 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

¹A low bid of \$6,031,959 was submitted by another bidder, but that bidder claimed a mistake in its bid and requested permission to withdraw its bid. R&GS became the apparent low bidder when the Corps allowed the withdrawal of the low bid.

²R&GS confirmed the oral advice 6 days later by a letter dated April 21, 1993.

³A hearing was conducted, pursuant to 4 C.F.R. § 21.5 (1993), to receive testimony regarding the nature of the mistake and whether correction of the bid was proper.

⁴The applicable bonds represent a small percentage of the tax amount; for discussion purposes in this decision, we will use the term "Tax" to describe the sum of the New Mexico tax amount and the bond amount that is based on that tax amount.

contravening evidence. Northwest Builders, 67 Comp. Gen. 200 (1988), 88-1 CPD ¶ 278; Interstate Constr., Inc., B-248355, Aug. 6, 1992, 92-2 CPD ¶ 86; Bush Painting, Inc., B-239904, Aug. 30, 1990, 90-2 CPD ¶ 188. Whether evidence of the intended bid amount meets the clear and convincing evidence standard is a question of fact, and we will not question an agency's decision in this regard unless it lacks a reasonable basis. Lash Corp., 68 Comp. Gen. 232 (1989), 89-1 CPD ¶ 120; Tri-State Consultants, B-250700, Dec. 22, 1992, 92-2 CPD ¶ 433.

In support of its request for an upward bid price adjustment, R&GS provided the Corps with its bid work papers, consisting of two spreadsheet printouts generated before bid opening,⁵ a computer disk containing R&GS's Lotus 1-2-3 spreadsheet programs, and various other supporting documentation, including copies of subcontractor quotes. The spreadsheets contained information on R&GS's direct and indirect costs, and included pricing based on subcontractor, supplier and vendor quotes. The work papers were accompanied by an explanation of how R&GS made the mistake and sworn affidavits from those involved in the mistake and preparation of the bid attesting to the authenticity of its submissions. R&GS also provided documentation from two other government construction projects, bid in New Mexico, showing R&GS standard procedure for including the Tax and rounding off figures in the course of making bid adjustments. In response to requests from the Corps, R&GS provided additional explanations of its mistake by letters of April 29 and May 7.

R&GS explained that its mistake resulted from the combination of its use of a computer spreadsheet macro⁶ in its Lotus 1-2-3 program and its mistaken reliance on what appeared on the computer display screen in designating its

⁵R&GS printed the spreadsheets on April 15, 1993, at 1:09 p.m. CDST [Central Daylight Savings Time] and 2:19 p.m. CDST. Bid opening was 2:00 p.m. local time (i.e., Mountain time) which corresponds to 3:00 p.m. CDST.

⁶Generally, a computer "macro" is a user-generated computer "short-cut" that is used--within software such as a spreadsheet or word processor--to allow the user to enter a complex series of commands or keystrokes by simply entering a two-key stroke command (e.g., R&GS's "ALT-T" macro is activated by simultaneously depressing the computer keyboard's ALT and T keys), or a short-name command (e.g., entering the command "total.mac"). Such macros are commonly used on large spreadsheets to traverse the different work areas--e.g., R&GS's "ALT-T" macro moves the user's screen view of the spreadsheet to a summary or recap area.

total bid price. R&GS uses a macro called "ALT-T" to move its screen view of the spreadsheet to a recap area of the spreadsheet containing a line labeled "COMPUTED BID TOTAL," Tr. 20. This line contains a total figure that R&GS uses when bidding in Texas where there is no gross receipts tax, Tr. 87. The spreadsheet contains several additional lines, below the "COMPUTED BID TOTAL" line; the first labeled "GROSS RECEIPTS TAX" (GRT), the next labeled "BOND ON GRT" and a final line labeled "TOTAL BID" that R&GS uses as its bid price for work in New Mexico that is covered by the Tax.⁷ These lines, including the "TOTAL BID" line, are not visible on the screen that is automatically presented by the "ALT-T" macro; to see the "TOTAL BID" line, the user must manually scroll the screen downward.

R&GS explained that it calculates its total bid price based on its labor and material costs, subcontractor quotes, profit, overhead and taxes, and then "backs into" the pricing format required in the IFB bid schedule. Tr. 53, 75, 78, 81. R&GS stated that it takes the information it receives from its subcontractor quotes--the quotes often cover overlapping areas of work--and breaks it down into categories of work in the spreadsheet to ascertain which subcontractors are low for what work. As bid opening approaches, R&GS selects the low subcontractor in each category and uses its Lotus 1-2-3 program to calculate a bottom-line bid price--a figure that includes all costs, profit and Taxes. Under R&GS's approach, the Taxes are calculated as a separate line on the spreadsheet through the application of a formula and no Tax costs are otherwise included on the spreadsheet; that is, the Taxes are not counted twice in calculating the bottom-line bid price. Tr. 25 through 26. Meanwhile, based on the cost data collected on the foregoing spreadsheets, R&GS separately calculates the specific prices for all of the CLINs in both lots, except for CLIN No. 1.1.⁸ The vast majority (18 of 21) of these CLIN price calculations included a factor to account for Taxes. Tr. 68 through 70. R&GS then subtracted the total of these 21 CLINs from its bottom-line bid price figure, calculated as stated above, and thus backed into its

⁷The GRT line contains a cell holding a formula that calculates the applicable tax from the sum in the preceding cell labeled "COMPUTED BID TOTAL"; the "BOND ON GRT" line contains a cell holding a formula that calculates the applicable bond cost from the amount in the GRT cell; and the "TOTAL BID" line contains a cell that totals the "COMPUTED BID TOTAL," GRT, and "BOND ON GRT" lines to determine the "TOTAL BID".

⁸All the CLINs save CLIN No. 1.1 are discrete and most constitute minor items of contract work.

bid amount for CLIN No. 1.1--which, as stated above, accounts for the bulk of the contract work.

On bid opening day, R&GS prepared its bid at two locations, Amarillo, Texas, and Albuquerque, New Mexico, Tr. 58. R&GS used its computer in Amarillo to track changing subcontractor quotes and calculate applicable taxes, bond costs, fees, overhead and profit, Tr. 59. Some of the quotes for mechanical and electrical work were phoned to Amarillo by the personnel in Albuquerque; other quotes were phoned directly to Amarillo by the subcontractors. After the changes were entered in the spreadsheet, Amarillo phoned the numbers to be placed on the bid schedule to Albuquerque. In Albuquerque, there was a pre-signed bid that included a partially completed bid schedule, specifically the lot No. 2 prices. Tr. 89.

R&GS states that the mistake occurred when personnel in Amarillo attempted to read R&GS's "TOTAL BID" figure off the computer display screen after executing the "ALT-T" macro. However, the individual performing this task forgot, due to press of time, to scroll the screen down to the "TOTAL BID" line. As a result of this lapse, the Amarillo individual read the \$6,482,615 figure displayed on the "COMPUTED BID TOTAL" line instead of the intended \$6,833,669 "TOTAL BID" figure. This "COMPUTED BID TOTAL" figure, which did not include the \$351,054 for taxes applicable to all CLINs, was phoned to Albuquerque for insertion in the bid schedule as R&GS's total bid. In order to provide some contingency in the bid because of some last minute subcontractor quotes and to round off its bid, R&GS then increased its total bid by \$2,985 to \$6,485,600 before submitting it to the Corps. R&GS contends that by mistakenly basing its bid on the \$6,482,615 "COMPUTED BID TOTAL" figure, R&GS understated its intended total bid price by \$351,054, and that its \$4,544,362 CLIN No. 1.1 price should be upwardly adjusted in this amount.

Based upon the information provided, the Corps determined that R&GS had established by clear and convincing evidence the existence of a bid mistake and the bid actually intended. The Corps therefore allowed an upward adjustment to CLIN No. 1.1 of R&GS's bid of \$348,000 to make R&GS's total bid \$6,833,600. The bid correction amount was calculated by subtracting the unsubstantiated approximate \$3,000 that R&GS had tacked on to the "COMPUTED BID TOTAL" figure when it submitted its bid from the approximate \$351,000 that represented Taxes.⁹

⁹As noted above, R&GS had a policy of rounding off its bids.

From our review of the record, we find that the Corps had a reasonable basis for finding that there was clear and convincing evidence that R&GS had made a mistake by omitting from its bid price the amount calculated for the Tax. Additionally, R&GS was reasonably found to have presented clear and convincing evidence of its intended price and that the \$348,000 additional price was to have been allocated completely to CLIN No. 1.1. As observed by the Corps, this correction is within a very narrow range of uncertainty since it only involves the "question of whether approximately \$3,000 in a \$6.8 million procurement would or would not have been included in the total bid priced had the mistake not been made." See Vrooman Constructors, Inc., supra.

At the hearing conducted on this protest, the bid preparation process and how the mistake occurred was convincingly demonstrated on a computer loaded with R&GS's Lotus 1-2-3 program. This demonstration showed how the operator could, in the press of time in preparing the bid, have failed to scroll down to ascertain the "TOTAL BID" and thereby have omitted the amount for the Tax from the bid price. In addition, the R&GS work papers appear to be in good order, are entirely consistent with R&GS's explanation of its mistake and intended bid, confirm that the Tax in the amount of \$351,054 was on a separate line above the "TOTAL BID" line, and substantiate that this \$351,054 was intended to be included, but was not due to the mistake in bid, in R&GS's bid price.

C Construction questions the evidentiary value of the computer disk that R&GS provided the Corps because the Lotus 1-2-3 program on the disk was saved four days after bid opening. We have no reason to question the Corps' consideration of the computer disk as evidence in arriving at its decision to allow correction, particularly given that the disk was accompanied by two hard copy spreadsheets printed out before bid opening. R&GS's representative explained that the date on the disk's Lotus 1-2-3 file changed when R&GS saved the file after making a copy for the Corps. Tr. 125. Under the circumstances, the Corps could rely upon the hard copies of the spreadsheets, as supported by the Lotus 1-2-3 disk file, in allowing the bid correction.

C Construction also contends that R&GS's explanation of its mistake is unacceptable because the "'ALT T' command could have been easily changed to reflect the correct 'Total Bid' amount," and R&GS's failure to reprogram its ALT-T macro to show the TOTAL BID figure was an error in judgment that does not warrant correction. It is clear from the pre-bid spreadsheets that R&GS intended to figure in the Tax in its total bid, so it cannot be said that there was an error in

judgment regarding R&GS's inclusion of the omitted Tax in its bid. Therefore, this protest contention has no merit.

C Construction's primary attack on the reasonableness of the correction concerns the allocation of the entire \$348,000 to CLIN No. 1.1 of R&GS's bid. C Construction's claims that the correction therefore assertedly allows R&GS to realize a "double recovery" of the omitted Tax because a portion of the Tax had been figured into 18 of the 21 other CLINs in the bid submitted. In this regard, C Construction calculates that R&GS's bid allowed \$2,750.44 for Tax on lot No. 1 (CLIN Nos. 1.4 through 1.7) and \$4,671.59 for Tax on lot No. 2 (CLIN Nos. 2.1 through 2.14)--a total Tax allowance of \$7,422.03. Thus, the protester claims, the omitted Tax, if any, should be considered to be only \$343,631.97, not the \$351,054 Tax claimed, and the \$348,000 correction to CLIN No. 1.1 was improper.

The record does not support C Construction's assertions that allowing the correction to CLIN No. 1.1 will result in a "double recovery" of the Tax. As explained above, the total bid calculation was separately done from the breakdown of that total price into the various CLINs on the IFB bid schedule. Thus, the shortfall caused by the clerical error of not adding the Tax allowance into the total bid price caused that bottom-line bid to be understated by that amount. The record not only confirms that R&GS's bid CLIN breakdown was premised on its bottom line price, see Tr. 78 through 81, it also shows that the only CLIN that this understatement could affect was CLIN No. 1.1 because that bid amount was calculated (1) only after all the other CLIN prices had been calculated and (2) by then "backing out" those correctly computed CLIN prices from what was thought, albeit erroneously, to be the total bid price. In other words, although the amount that was deleted from the total bid was to allow for the Tax, it lost its character as Tax when this amount was deleted from the total bid, in view of the fact that the CLIN prices were separately computed from the total bid price. Thus, the corrected amount added back into the bid was simply to cover the substantiated understatement in price for CLIN No. 1.1 that was caused by R&GS's mistake and did not represent an undeserved double recovery of the Tax.¹⁰

¹⁰In any case, the \$7,400 that is alleged to be a double recovery of taxes, even if true, should not bar the correction of R&GS's bid, since this alleged discrepancy is within a narrow range of uncertainty, given the \$6.8 million magnitude of this contract.

In sum, the agency acted reasonably in correcting R&GS's bid.

The protest is denied.



James F. Hinchman
General Counsel