



Decision

Matter of: M. A. Mortenson Company

File: B-256636

Date: July 14, 1994

Dale R. Ulin, Esq., Ulin & Lawbe, for the protester.
John P. Ahlers, Esq., and C. Craig Holley, Esq., Barokas & Martin, for Fletcher Wright, Inc., an interested party.
Paul M. Fisher, Esq., and Amy M. Steed, Esq., Department of the Navy, for the agency.
David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly denied request for bid correction where the bidder was unable to show clear and convincing evidence of the intended bid.

DECISION

M. A. Mortenson Company protests the rejection of its bid under invitation for bids (IFB) No. N44255-93-B-4000, issued by the Department of the Navy for construction to be performed at the Puget Sound Naval Shipyard, Bremerton, Washington. Mortenson's low bid was rejected because the agency determined that Mortenson, who had alleged a mistake in its bid, could not clearly and convincingly establish its intended bid price but for the mistake. Mortenson, contending that it has established that a mistake was made and its intended bid price, seeks award based on its corrected price.

We deny the protest.

The IFB, as amended, required the submission by January 25, 1994, of a lump-sum price for all the required work. Eight bids were received. Mortenson submitted the low price of \$10,949,000. Fletcher Wright, Inc. submitted the second low price of \$11,990,000. Since Mortenson's bid was 8.95 percent lower than the \$11,929,439 government estimate for the work, Mortenson was asked to review its bid work sheets for possible errors and to confirm its price if there had been no mistake or, if a mistake had occurred, either to request permission to withdraw its bid or to correct it on

the basis of evidence showing the existence of a mistake, the manner in which it occurred, and the bid price actually intended.

Mortenson advised the agency that it had made a mistake in its bid and had intended to bid a price of \$11,798,715. It stated that the mistake had occurred when the total of the prices for subcontracted work representing 105 items incorrectly was stated as \$8,242,554, rather than \$9,052,519. The difference between these two prices plus the additional bid markups on the difference for taxes, insurance, and margin resulted in Mortenson's intended bid price of \$11,798,715.

Mortenson explained that the mistake occurred during the preparation of its bid because of its use of a new version of a bid estimator software program. The program is used to create a subcontractor cost matrix from which the program then chooses the lowest subcontractor quotes for appropriate line items and transfers them to the computer spreadsheet--prices may also be inserted directly on to the spreadsheet by the program operator. Mortenson's employees, who were using the new version of the program for the first time, did not realize that when prices were changed, it was necessary to recompute the total price shown on the spreadsheet by using a recalculate function in the program. Previous versions of the program had not required the operator to use the recalculation function whenever adjustments were made to prices, since the program automatically recalculated the subcontractor subtotal on the spreadsheet. In this case, the error assertedly occurred when Mortenson's employees failed to recalculate the total prices for the various work items as set out in the last (1:31 p.m.) computer printout made prior to the 2:00 p.m. bid opening. This printout represented the last time the program was used for bid preparation purposes. Further changes in later submitted subcontractor prices were computed by hand on the last page of the printout. To substantiate its request for correction, Mortenson submitted this printout (computer spreadsheet and matrix) as its work sheets, along with information on the quotes that it had obtained for the line items being subcontracted, certified the printout to be the original, and requested that its bid price be corrected accordingly.

In early February, the contracting officer, as part of the consideration of Mortenson's request for correction, advised the bidder that three entries on its spreadsheet were not listed in the matrix and asked that this be explained. Mortenson stated that these were "direct entry" items, which would typically represent portions of work that are performed by Mortenson. Mortenson submitted workpapers showing how it had computed the prices for the work it

intended to perform which were listed on the spreadsheet but not on the matrix and showed that the two other contractors listed (again on the spreadsheet but not on the matrix) were listed simply because add-ons to their prices (for work being performed as part of work Mortenson was performing itself) had required these as adjustments to the Mortenson prices listed on the spreadsheet. Mortenson was also asked how the \$8,242,554 subcontractor subtotal shown on the spreadsheet was developed. Mortenson attempted to reconstruct how this figure had been computed, but was unable to do so. Mortenson requested that that figure be disregarded and that the subtotal of \$9,052,519, the total price for the 105 line items, be accepted as its intended bid.

The contracting officer recommended correction based on the addition error and the bidder's explanation of how the error occurred. The head of the contracting activity declined to permit correction because Mortenson could not show how the \$8,242,554 figure had been calculated and the bid correction to \$11,798,715 requested by Mortenson would be 1.6 percent below Fletcher Wright's bid price. The agency thus concluded that the material presented by Mortenson could not be considered to provide sufficiently clear and convincing evidence of its intended bid price. The request for correction was, consequently, denied, and Mortenson was advised that it would be permitted to withdraw its bid.

Mortenson contends that the nature of its mistake is simply clerical and that having shown that a mistake existed, how the mistake occurred, and what its intended bid price would have been but for the mistake, it should be permitted to correct its price. It contends that there is no basis for the Navy's requirement that it establishes how it reached the "unintended" subtotal price of \$8,242,554 for subcontracted work since it clearly is not the sum of the individual line items on the work sheet and that the only matter for consideration is the failure to properly add the items to arrive at the correct subtotal for the subcontractor prices on its spreadsheet.

Generally, under Federal Acquisition Regulation § 14.406-3(a), a procuring agency may permit a low bidder to correct a mistake in its bid prior to contract award where the bidder submits clear and convincing evidence that a mistake was made, the manner in which the mistake occurred, and the intended bid price. Whether the evidence meets the clear and convincing standard is a question of fact, and we will not question an agency's decision unless it lacks a reasonable basis. Precon Constr. Co., B-255294.1; B-255294.2, Apr. 6, 1994, 94-1 CPD ¶ 239. For upward correction of a low bid, work sheets may constitute clear and convincing evidence if they are in good order and

indicate the intended bid price, and there is no contravening evidence. Fishermen's Boat Shop, Inc., B-752560, July 9, 1993, 93-2 CPD ¶ 11.

The agency basically expresses concern as to whether Mortenson's spreadsheet provide sufficiently clear and convincing evidence of Mortenson's intended bid. Such a concern is legitimate when a bidder requests to change its bid price; indeed, it is because of the risk that correction could lead to abuse of the competitive system that correction is permitted only where a high standard of proof has been met. Southwind Constr. Corp., B-228013, Oct. 8, 1987, 87-2 CPD ¶ 346. As the agency notes, where correcting a bid would bring it very close to the next low bid, as in this case, the documentation supporting the claimed mistake will be subject to particularly strict scrutiny. Vrooman Constructors, Inc., B-226965.2, June 17, 1987, 87-1 CPD ¶ 606.

We believe that the agency had sufficient reason to deny Mortenson's request that its total bid price be corrected. From the work sheets furnished, it is clear that the prices for the various work items listed on Mortenson's spreadsheet resulted in a subtotal of \$9,652,519, not the \$8,242,554 subtotal on the work sheet. However, the agency was reasonably concerned that, based on that work sheet alone, it could not be determined with any certainty whether the \$9,652,519 or \$8,242,554 figure was actually the intended bid, id., the asserted error might have been in the line items rather than the stated total. Thus, the agency requested Mortenson to explain how the lower figure had been determined. In response, Mortenson only stated that individual line items on the spreadsheet should add up to that total, but do not, but admitted that it was unable to determine how the computer program generated the \$8,242,554 subtotal. While the protester argues that the agency has no reason to require the backup for the \$8,242,554 subtotal since it was not the intended amount based on totaling the 105 items on the final work sheet, we think the agency had a right to this information, and to make an adverse inference when it could not be produced, in order to rule out the possibility that the lower figure was the intended amount. Cf. J. Schouten Const., Inc., B-256710, June 6, 1994, 94-1 CPD ¶ ____ (where the bidder already provided the agency with clear and convincing evidence of its intended bid, an agency may not reject the bidder's request for correction because the bidder cannot provide information that had no bearing on the calculation of the intended bid).

Since Mortenson's work sheets do not clearly provide a basis for correction, Mortenson cannot be awarded the contract and therefore withdrawal of the bid is appropriate, based on the

disparity of bid prices received, Mortenson's assertion of a mistake and the Navy's determination that the record supports the existence of some mistake.

The protest is denied.

/s/ James A. Spangenberg
for Robert P. Murphy
Acting General Counsel