



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Special Systems Services, Inc.

File: B-259865.2

Date: May 12, 1995

Ronald W. Messerly, Esq., Bradach Law Offices, for the protester.
Cynthia S. Guill, Esq., and Christopher Bellomy, Esq., Department of the Navy, for the agency.
Richard P. Burkard, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly allowed the upward correction of awardee's low bid where agency could not reasonably conclude that record contained clear and convincing evidence of intended bid; record contained no explanation of how the bid was prepared or how the mistake occurred, and worksheets submitted in support of correction were not in good order.

DECISION

Special Systems Services, Inc. protests the award of a contract to Monaco Enterprises, Inc., under invitation for bids (IFB) No. N68711-94-B-1439, issued by the Department of the Navy for the installation of fire reporting and fire protection systems at the Navy Auxiliary Landing in San Clemente Island, California. Special Systems contends that Monaco improperly was permitted to upwardly adjust its low bid prior to award.

We sustain the protest.

The IFB requested single-lump-sum bids for installing new fire alarm systems and upgrading existing fire alarm systems in various buildings; providing a fire reporting system using radio transmission from the local fire alarm systems to a receiver-processor in a central location; providing a standby engine-generator and power system at the central receiver-processor location; upgrading exit and egress lighting in several buildings; and incidental related work. The IFB also contained special requirements concerning transportation of materials, equipment, and personnel to San Clemente Island and required that the contractor provide

"portable housing units for all subcontractor and prime contractor personnel."

The Navy received seven bids by the September 19, 1994, bid opening date, ranging from Monaco's low bid of \$182,210 to \$627,000. Special Systems's bid was second low at \$288,720, and the government estimate was \$326,840. On September 20, the contracting officer requested that Monaco review its bid for possible mistakes, noting the large disparity between Monaco's bid, the other bids, and the government estimate.

On September 22, the president of Monaco advised the contracting officer in a telephone conversation that Monaco had made a mistake in its bid. The record contains no contemporaneous record of that conversation, but the contracting officer confirmed the conversation in a September 23 letter to Monaco, as follows: "You stated after reevaluating your bid, you discovered an error had been made in the Electrical Division of your price, under 'transfer switches.'" The letter requested that Monaco "submit a written request for correction; provide a statement indicating the error and how it occurred; provide the amount of the error and the corrected intended bid price." In addition, the letter requested that Monaco provide "original worksheets and any pertinent data that may support the mistake."

In response, by letter of September 23, Monaco requested permission to correct its bid. Concerning the nature of the mistake, the letter stated only that Monaco was providing documents "that show that both pages of our bid price workup were not included with our submitted bid of \$182,210. This resulted in our bid price being \$81,770 lower than intended." The letter included copies of "both pages of our bid price workup," (also described as two "recap estimate sheets"), prepared by Mr. Monaco and certified by him as "original bid documents."

After receiving the September 23 letter, the contracting officer telephoned Mr. Monaco to request that the firm clarify its request for correction. In response to the phone call, Monaco submitted another letter, dated September 26, which was intended to "describe our situation in greater detail." This letter, also signed by Mr. Monaco, explained that the "bid price workup for this project was prepared by me" and included two pages--one for "radio transceivers and detection devices and one for a 15 KVA Generator." It stated further that the "workup sheet for the radio transceivers and detection devices" set forth equipment, labor, and markup costs for "a total bid price for items on this page of \$182,210."

The letter also explained that the "workup sheet for the 15 KVA Generator" showed equipment costs, labor costs, and markup costs (at the same rate as for the transceivers); and that "we added an estimate for housing of \$20,000," which "brought our bid price for items on this page to \$81,770." The letter concluded that it "was [Mr. Monaco's] intent to add the two workup sheets together for a total bid price of \$263,980. By not including the second workup sheet in our bid price, our price was \$81,770 too low." Mr. Monaco certified that the worksheets are accurate and true.

Based on the information submitted, the Navy allowed the correction. Noting that Monaco's bid was significantly below the government estimate and the bids of the other bidders, the agency found that "a review of the bid documents clearly shows that the Monaco bid contains a mistake." As to the bid actually intended, the Navy found that "it is clear that Monaco intended to include the second page of its worksheets because the 15 KVA transformer is a significant portion of the contract's scope of work." Accordingly, the agency allowed correction of the bid by \$81,770, from \$182,210 to \$263,980. The Navy awarded the contract to Monaco on December 22. This protest followed.

Special Systems argues that Monaco has not produced clear and convincing evidence of the price it intended to bid. The protester contends that the awardee's explanation of its mistake initially as an error involving pricing of transfer switches, and later as an omission of a worksheet page setting forth its substantial generator and housing prices, demonstrates a "shifting position." The protester points out that, according to the contracting officer's confirmation of the September 23 phone conversation, Monaco's first explanation did not mention a "failure to add in an alleged second page of Monaco's bid estimate."

Concerning the "workup sheets" furnished by Monaco, Special Systems contends that the "second page must be viewed with some distrust." It points to "irregularities" in the worksheets: (1) the first page of the recap estimate sheet states that it is "PAGE NO. 1 of 1 PAGES"; (2) on the second page, no total is forwarded (from the first page) to the place provided; and (3) the columns are used differently on the two pages. The protester concludes that, given the inconsistent explanations of the mistake and the fact that the worksheets are not in "good order," the agency could not reasonably conclude that clear and convincing evidence demonstrated Monaco's intended bid. We agree.

Federal Acquisition Regulation (FAR) § 14.406 requires a high standard of proof--clear and convincing evidence of the mistake and of the bid actually intended--before an agency may permit correction of a bid, in order to protect the

competitive system from abuse. Three O Constr., S.E., B-255749, Mar. 28, 1994, 94-1 CPD ¶ 216. In considering upward correction of a low bid, worksheets may constitute clear and convincing evidence if they are in good order and there is no contravening evidence. Great Lakes Dredge & Dock Co., B-248007.2, Sept. 3, 1992, 92-2 CPD ¶ 151. Whether the evidence meets the clear and convincing standard is a question of fact, and we will not question an agency's decision based on this evidence unless it lacks a reasonable basis. RJS Constrs., B-257457, Oct. 7, 1994, 94-2 CPD ¶ 130. However, where this high standard has not been met, correction should not be permitted, notwithstanding the good faith of the parties. Southwind Constr. Corp., B-228013, Oct. 8, 1987, 87-2 CPD ¶ 346.

We find unreasonable the contracting officer's determination that there was clear and convincing evidence of Monaco's intended bid price.

The only evidence of Monaco's intended bid price for the generator and housing requirements of the contract is on page 2 of the "bid price workup," or recap estimate sheet, which the agency concluded contained the total to be added to the awardee's bid. That page contains material, labor, and markup costs for the generator and three related items, including a transfer switch. With respect to Monaco's pricing of temporary housing, the page merely contains the notation "5 months" and "\$20,000." There is no indication in the record, however, of how these figures were derived or to what degree, if at all, they were based on supplier or subcontractor quotes. Thus, it is quite possible that the figures on this sheet were preliminary estimates subject to change when more reliable and detailed data could be obtained. We note, in this regard, that Monaco states that the "workup sheet" containing these unsupported and unexplained cost figures was prepared 5 days before bid opening.

Even assuming that the figures on the workup sheets were current estimates which had not changed from September 14 to September 19, when the bid appears to have been submitted, there is no evidence in the record explaining how or when¹ Monaco's bid itself was prepared or the circumstances surrounding the mistake. Thus, the Navy, in allowing the correction, has no factual basis for its conclusion that the person preparing the bid actually used the two pages of the workup sheet when he prepared the bid. Moreover, the agency has no information about the circumstances which gave rise to the mistake itself, since, despite the apparent simplicity of preparing the bid (adding the totals of the

¹The bid is dated September 19, the date of bid opening.

two worksheets and entering the figure on the bid), no explanation was provided concerning how the mistake occurred. Absent this explanation of the events surrounding the preparation of the bid and how the mistake occurred, we do not think the agency's decision--that Mr. Monaco intended to bid a total price of \$263,980--is supported by the high standard of proof--clear and convincing evidence--required by the regulation.

In addition to the lack of a detailed description of the events surrounding the bid and mistake, the sole piece of evidence supporting the agency's conclusion that Monaco's intended price was \$263,980--the two-page worksheet--cannot be considered to be in good order. First, page one clearly states that it is "PAGE NO. 1 OF 1." Second, while there is a "forward" column on page two, the page one total is not brought forward, nor is there any indication on either page that the page two is a continuation of page one. In our view, these discrepancies are especially significant because the omitted work items all appear on page two of the worksheet, which contains no information or indicia connecting it to page one of the worksheet.

Our conclusion that Monaco's worksheets are not in good order is further evidenced by the firm's failure to clearly identify to the agency, in its September 22 telephone conversation, the omitted generator and housing costs. While Monaco advised the Navy that both sheets were prepared at the same time, on September 14, and both were subsequently submitted to the Navy, there has been no explanation in the record why, given the existence of both worksheets, Monaco could not have provided a complete and accurate description of the nature of the mistake and the omitted items during that telephone conversation, which occurred 2 days after the Navy requested Monaco to verify its bid.

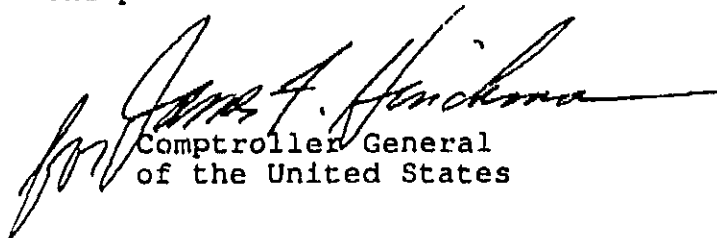
Rather, as the protester points out, Monaco's initial explanation of the mistake was so incomplete as to render it inconsistent with the later-submitted written explanation of the mistake. According to the contracting officer's September 23 confirmation letter, the only specific reference to a mistake in the bid was related to "transfer switches." We note, in this regard, that the worksheet shows that the transfer switch was a relatively minor aspect of the omitted work, constituting less than 15 percent of the total value of the work contained on the second workup sheet.

Under these circumstances, while we agree that there was adequate evidence of a mistake in Monaco's bid, we conclude that the Navy unreasonably determined that there was clear and convincing evidence of Monaco's intended bid.

Accordingly, upward correction of Monaco's bid price should not have been allowed. Further, since there is no basis for concluding that Monaco's intended bid necessarily would have been lower than Special Systems's second-low bid, the award to Monaco was improper. See William G. Tadlock Constr., B-251996, May 13, 1993, 93-1 CPD ¶ 382.

We recommend that the Navy terminate Monaco's contract for the convenience of the government and make award to Special Systems, if that bidder is otherwise eligible. We also find that Special Systems is entitled to recover the costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1995). Special Systems should file its claim, detailing and certifying the time expended and costs incurred, directly with the Navy within 60 days after receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.



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