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# Decision

**Matter of:** Herman Construction Group, Inc.

**File:** B-415480

**Date:** January 5, 2018

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William L. Bruckner, Esq., and Jessica L. Mulvaney, Esq., Bruckner Law Firm, APC, for the protester.

Brian A. Darst, Esq., Brian A. Darst Law Office, for Talion Construction, LLC, an intervenor.

Kate Gorney, Esq., Department of Veterans Affairs, for the agency.

Todd C. Culliton, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Agency unreasonably determined that awardee had demonstrated by clear and convincing evidence a mistake in its bid where the existence of the alleged mistake was not corroborated by the record.
2. Agency unreasonably determined that awardee had demonstrated by clear and convincing evidence its intended bid price where the awardee failed to show that it intended to use a particular subcontractor quotation prior to bid submission.

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## DECISION

Herman Construction Group, Inc., of Escondido, California, protests the award of a contract to Talion Construction, LLC, of Honolulu, Hawaii, under invitation for bids (IFB) No. VA261-17-B-0330, issued by the Department of Veterans Affairs (VA) for construction services. The protester alleges that the agency improperly allowed Talion to correct a mistake in its bid.

We sustain the protest.

## BACKGROUND

The IFB was issued on April 12, 2017, for the renovation and expansion of the emergency department at the VA Palo Alto Health Care System campus in Palo Alto, California. IFB at 2, 10. The IFB contemplated a single award, and required that bids

be submitted by June 8, 2017. IFB at 2, 13. Bidders were instructed to provide a base bid item price and four alternate bid item prices depending on what design features were selected. IFB at 11-14.

Five bidders responded to the IFB. Talion submitted the low bid of \$6,635,332, and Herman submitted the second-low bid of \$7,820,508.<sup>1</sup> Contracting Officer's Statement of Facts at 2. The following day, on June 9, Talion informed the agency that it had a mistake in its bid and requested that the agency permit it to either correct or withdraw its bid. Agency Report (AR), Ex. 2 at 1. Talion explained that it computed its prices for the base bid item and four alternate bid items using an erroneous amount for drywall services. Id. Talion stated "[o]ur estimate carried a subcontract bid cost of \$500,000.00 but should have been \$1,498,770.00." Id. Based on the alleged error, Talion sought to correct its bid price to \$7,771,658. Id.

On June 12, Talion provided more information to the agency regarding its mistake. AR, Ex. 2 at 3. It explained that the erroneous \$500,000 subcontractor quotation reflected in its prices was a "plug" number and that it had failed to include the actual subcontractor quotation when it submitted the bid. Id. Talion also provided its worksheet which it stated reflected the mistake and its corrected worksheet. The worksheets contain line-item numbers, item descriptions, subcontractor names, and prices. The worksheet containing the alleged mistake shows a value of \$500,000 for drywall installation and reads "Talion Priced" under the subcontractor name column. Id. at 5. The corrected worksheet shows a value of \$1,498,770 and also reads "Talion Priced" under the subcontractor name. Id. at 17.

On June 19, Talion forwarded a copy of its subcontractor quotation and fax cover sheet to the agency. AR, Ex. 3 at 3. The subcontractor quotation was dated June 7, and the fax cover sheet confirmed that Talion had received it on that date. Id. at 3, 4. Talion also explained that its error resulted from Talion's business practice; Talion typically receives all subcontractor quotations on the day of bid submittal and thus had omitted this information since it received the quotation one day early. Id. at 1. Based on the information, the agency permitted Talion to revise its bid to include the cost of the subcontractor quotation. AR, Ex. 4 at 2.

On September 29, the agency made award to Talion in the amount of \$7,771,658, and notified Herman that its bid was not selected. On October 6, Herman filed the instant protest with our Office.

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<sup>1</sup> At the time of bid opening, Herman submitted the third-low bid, but the second-low bidder immediately requested to revise a clerical error in its bid. Contracting Officer's Statement of Facts at 2. After that bidder revised its clerical error, Herman was the second-low bidder. Id.

## DISCUSSION

Herman protests that the agency improperly permitted Talion to correct the alleged mistake in its bid because Talion's bid does not provide clear and convincing evidence of a mistake or the intended bid.<sup>2</sup> Protester's Comments at 3-5. The agency responds that Talion submitted clear and convincing evidence of a mistake and its intended bid based on its low price and the accompanying worksheets showing that Talion included a placeholder value for drywall installation. Agency Memorandum of Law at 3.

A bidder may be permitted to upwardly correct its bid price prior to award where there is clear and convincing evidence that both a mistake was made and the intended bid price. Federal Acquisition Regulation (FAR) § 14.407-3(a); Prudent Techs., Inc., B-401736.3, Dec. 9, 2009, 2009 CPD ¶ 254 at 4. In situations where a bidder seeks upward correction but will remain the lowest-priced, a request for correction must be supported by statements and shall include all pertinent evidence, including original worksheets and other data used to prepare the bid, subcontractors' quotations, if any, published price lists, and any other evidence that establishes the existence of the error and the intended bid price. Cooper Constr., Inc., B-285880, Sept. 18, 2000, 2000 CPD ¶ 153 at 4; see, e.g., 51 Comp. Gen. 503, 505 (1972) (considering employees' affidavits and worksheets with erasure marks as evidence of 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 based on this evidence unless it lacks a reasonable basis. Ultimate Concrete, LLC, B-412255, B-412255.2, Jan. 13, 2016, 2016 CPD ¶ 20 at 8. The requirement for clear and convincing evidence reflects the need to protect the integrity of the sealed bid procurement process, where, except for narrowly defined circumstances, award should be made on the basis of the bids as submitted. Id.

In our view, the agency unreasonably determined that Talion could upwardly correct its bid because the evidence submitted does not show that a mistake was made or that Talion intended to include the subcontractor quotation as part of its bid price. As noted above, Talion submitted only its worksheet, the subcontractor's quotation, and a statement from a company official explaining how the error occurred. Critically lacking,

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<sup>2</sup> In its protest, Herman also alleged that Talion's original bid should have been rejected as nonresponsive based on its low price. Protest at 3. The agency responded that Talion's bid was responsive and that Herman failed to allege that Talion's bid contained unbalanced pricing. Agency Legal Memorandum at 5-6. Herman's comments offered no rebuttal to the agency's response. Where, as here, an agency provides a detailed response to a protester's assertion and the protester fails to rebut the agency's argument in its comments, the protester fails to provide us with a basis to conclude that the agency's position with respect to the issue is unreasonable, and as a result, the protester abandons that assertion. IntegriGuard, LLC d/b/a HMS Federal--Protest and Recon., B-407691.3, B-407691.4, Sept. 30, 2013, 2013 CPD ¶ 241 at 5; Atmospheric Research Sys., Inc., B-240187, Oct. 26, 1990, 90-2 CPD ¶ 338 at 3.

however, is any evidence connecting the worksheet and the subcontractor's quotation. See Duro Paper Bag Mfg. Co., B-217227, Jan. 3, 1986, 86-1 CPD ¶ 6 at 6 (explaining that a price list without a connection to the worksheets used was insufficient evidence to establish a mistake or the intended bid price by clear and convincing evidence).

The worksheet itself does not clearly and convincingly evidence any mistake. The worksheet reads "Talion priced" and includes a \$500,000 value for the cost of drywall installation. Unlike cases where we have found that the agency reasonably determined that the bidder had established the existence of a mistake by clear and convincing evidence, there is nothing irregular about the entry for drywall installation that would lead one to believe that a mistake had been made. See, e.g., Fishermen's Boat Shop, Inc., B-252560, July 9, 1993, 93-2 CPD ¶ 11 at 3 (concluding that the worksheets evidenced a mistake because the omitted line item prices were for floor covering work and the subcontractor quotations were also for floor covering work); Lambert Roofing & Constr. Co., Inc., B-255183, Feb. 14, 1994, 94-1 CPD ¶ 103 at 4 (incorrect decimal place on the worksheet evidenced mistake because the subcontractor quotations was for a figure exactly ten times the amount included on the worksheet); PCL Constructors Canada, Inc., B-274697, Dec. 24, 1996, 96-2 CPD ¶ 239 at 4 (two spreadsheets and accompanying affidavit showed the firm failed to remove a downward adjustment from its bid price after receiving a lower-priced subcontractor quotation); Cooper Constr., Inc., supra at 6 (misalignment of numerical figures in the worksheet led to improper total calculation). Indeed, the worksheet, which includes other subcontractor names above and below the entry for drywall installation, would not lead any reasonable person to conclude that Talion mistakenly included the \$500,000 price or that it intended to employ a subcontractor for drywall installation and had included a "plug" number for convenience. Furthermore, we note that several line items contained the phrase "Talion priced," meaning that the use of that phrase was not indicative of an error.

We also do not consider Talion's bid price clear and convincing evidence of a mistake. The IFB specified that the cost range for this work was between \$5 and 10 million. IFB at 7. The internal government estimate (IGE) for this project was \$[DELETED]. Furthermore, the agency explicitly found that Talion's original bid was not considered unreasonably low. AR, Ex. 4 at 2. In light of those facts, we do not consider Talion's original bid price to be on its face clear and convincing evidence of a mistake because the bid is not completely out of line with the government's estimates or expectations. See Duro Paper Bag Mfg. Co., supra at 6 (bid prices did not evidence a mistake because, while lower than the second-low bidder, they were not so out of line as to establish a mistake by themselves).

The only evidence of a mistake is the Talion explanation that the \$500,000 value was a "plug" number which was omitted because the subcontractor submitted its estimate one day early. This evidence, however, is insufficient to establish a mistake by clear and convincing evidence because the worksheet does not indicate that the \$500,000 value is a "plug" number requiring removal upon receipt of the particular subcontractor quotation or any other subcontractor quotation; and the worksheet itself indicates that the source of the pricing was to be Talion itself and not any subcontractor. Thus, we

consider the Talion explanation as uncorroborated and self-serving, as well as not offering clear and convincing proof of a mistake, because the explanation has no connection to the worksheet other than the amount of the mistaken value. Compare Circle, Inc., B-279896, July 29, 1998, 98-2 CPD ¶ 67 at 4-5 (agency reasonably determined that uncorroborated and self-serving statements without any support from the worksheets did not meet the clear and convincing standard) with Cooper Constr., Inc., supra at 6 (protester demonstrated its mistake by clear and convincing evidence when statements were consistent with the worksheets). Accordingly, we do not find that the agency reasonably determined that Talion had demonstrated by clear and convincing evidence the existence of a mistake because the record does not contain any evidence that would corroborate the alleged mistake.

Likewise, we also do not find that the agency reasonably determined that Talion demonstrated by clear and convincing evidence its intended bid price. As noted above, the worksheet does not indicate that Talion intended to use any subcontractor quotation, and there is no other evidence in the record to show that Talion was bound to using the specific subcontractor quotation. Thus, while the record contains the subcontractor quotation, this is evidence only of the cost of the work if done by that subcontractor; it does not establish that Talion intended to include this amount in its bid. Bush Painting, Inc., B-239904, Aug. 30, 1990, 90-2 CPD ¶ 188 at 3-4 (concluding that a subcontractor quotation without anything binding it to the submitted worksheet was evidence only of the cost of work done by a particular subcontractor and did not establish that the awardee intended to include that specific amount in its bid). Accordingly, we do not find that the agency reasonably determined that the record clearly and convincingly established Talion's intended bid price because there is insufficient evidence to demonstrate that Talion intended to use the particular subcontractor quotation.

## RECOMMENDATION

Since we find that the agency improperly permitted Talion to correct the mistake in its bid, we recommend that the contract awarded to Talion be terminated for the convenience of the government. The agency may then award the contract to Talion at the original bid price or consider whether withdrawal of Talion's bid is appropriate under the circumstances. We further recommend that the agency reimburse Herman the costs associated with filing and pursuing its protest, including reasonable attorney's fees. The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong  
General Counsel