



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Stanley Contracting, Inc.

File: B-282085

Date: May 27, 1999

Ronald W. Messerly, Esq., for the protester.

Jan D. Sokol, Esq., Stewart Sokol & Gray, for Lloyd H. Kessler, Inc., an intervenor.

James F. Zotter, Esq., Federal Highway Administration, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Intended bid was not sufficiently clear, and agency therefore improperly permitted upward correction of bid, where bidder initially claimed mistake that would make bid other than low, and subsequently abandoned this mistake claim without explanation and asserted other mistakes that would allow bid to remain low.

DECISION

Stanley Contracting, Inc. protests the award of a contract to Lloyd H. Kessler, Inc. (LHK) under invitation for bids (IFB) No. DTFH70-98-B-00015, issued by the Department of Transportation, Federal Highway Administration (FHA), for the repair of several sites damaged by high runoff and flooding and the obliteration of approximately 100 miles of roadway in Mt. Hood National Forest. Stanley asserts that the agency improperly permitted LHK to adjust its bid upward as a result of an alleged mistake.

We sustain the protest.

The agency received 10 bids by the November 17, 1998 deadline, and LHK was the apparent low bidder at \$1,966,780.25. The contracting officer, by letter dated November 23, requested that LHK review its bid for possible mistakes, directing its attention to contract line item (CLIN) Nos. 21104A through 21104N, the roadway obliteration portion of the contract. By letter dated November 30, LHK asserted that it had made a mistake in calculating its bid for roadway obliteration, stating:

The Contractor planned on working three separate crews, and it was estimated each crew could complete 1/3 of a mile per day. 1760 Feet (550 meters). Based on this the work would be completed in 100 working days.

The Contractor calculated his costs on a “per crew” basis for three crews per 100 days. In our bid review, however, it has been noticed that the crew costs were not multiplied by three to reflect the contractor’s intent in bidding. Our unit cost should have been multiplied by 3 to reflect the actual cost per unit. . . .

We would like to withdraw our bid under these circumstances

Attached to this letter was an undated handwritten document which purported to calculate the discrepancy, showing a difference of \$956,924; adding this amount to LHK’s bid would mean that Stanley’s bid for \$2,744,984 would displace it as the apparent low bid.¹

In response to LHK’s November 30 letter, the contracting officer, by letter dated December 1, stated that he needed to review LHK’s original bid worksheets, as well as any additional information that was available, to determine the existence of the mistake alleged, and therefore the propriety of allowing LHK to withdraw its bid. By letter dated December 8, LHK represented to the agency as follows:

A closer look indicates the error was not as dramatic as we thought. What was thought to be an error in all road obliteration items . . . was in fact a dropped feet-to-meter conversion in items 21104A through 21104E. These items are associated with the demolition of paved roads.

LHK’s December 8 letter essentially stated that the firm had failed to convert a linear foot price to a linear meter price (that is, the firm used a unit price of cost-per-foot where it should have used cost-per-meter), thereby understating these costs by a factor of approximately three. Attached to this letter were several undated computer spreadsheets which LHK described as its “original” and “revised” bid sheets, allegedly showing the firm’s calculations in initially preparing its bid and also showing its bid as corrected. By this letter, LHK requested that its bid be revised upward by \$190,932.75 to \$2,157,713.

In response to this second letter, the contracting officer wrote to LHK yet again, on December 28, stating that he had further concerns with the firm’s bid based on an examination of the tendered worksheets. First, the contracting officer noted that

¹Stanley was originally the third-low bidder but the second-low bid expired when the bidder declined to extend the original bid acceptance period.

LHK's "cost per days" calculations were based on an 8-hour day, whereas its "feet per hour" calculations were based on a 9-hour day. Second, the heading in the bid worksheets for road demolition read "Road demolition costs for 3 excavators w. operators & support," whereas the "cost per days" column of the worksheets reflected calculations for one excavator, one operator and half a laborer. As for this second apparent ambiguity, the contracting officer stated that it was unclear how many excavators the firm intended to have on site in order to meet its proposed demolition rate of approximately 1 mile per day (required in order for LHK to meet its proposed construction schedule).

By letter dated December 29, LHK responded to the contracting officer's question regarding the "hours per day" discrepancy that, although it would have been LHK's intent to cost the work on the basis of a 9-hour day, its bid calculations had been made using an 8-hour day; LHK therefore alleged a second error, submitted second "revised" bid sheets and requested that its bid be adjusted upward in the amount of \$240,660.75, for a total bid of \$2,207,441. As for the number of excavators, LHK stated "[t]hrough we would need to use three excavators to maintain our schedule, our costing was based on ½ mile per day for a single excavator."

On the basis of this correspondence, the agency permitted LHK to correct its bid upward to account for the "feet-to-meters" error, and declined its request to adjust its bid based on the "hours per day" error; LHK was offered the opportunity to withdraw its bid. By letter of February 3, 1998, LHK responded by revising its bid "upon . . . allowance of corrections for mistake #1 ['feet-to-meters']" and stating that it did not wish to withdraw its bid. Thereafter, the contracting officer decided to award the contract to LHK. Memorandum from the Contracting Officer to the Contract File (Feb. 10, 1999)

Stanley contends that the agency improperly allowed LHK to correct its bid without requiring LHK to explain why it had offered different accounts of how its mistake was made; that is, LHK never explained why it made and then abandoned its original assertion that it failed to multiply its costs by three, and never explained why it did not assert the "hours per day" mistake at the same time it asserted its "feet-to-meters" mistake. Stanley also contends that LHK's bid worksheets are not in good order and fail to show either its mistake or its intended bid. Since the original claimed mistake meant that LHK would no longer have been the low bidder, Stanley concludes that the upward correction should not have been permitted, and that LHK's bid should have been rejected.

In order to protect the integrity of the procurement process, a bidder's request for upward correction of a bid before award may be granted only where the request is supported by clear and convincing evidence of both the mistake made and the intended bid, so long as the correction would not result in displacing one or more lower bids. Federal Acquisition Regulation (FAR) § 14.407-3(a). For upward correction of a low bid, worksheets, including records of computer-generated

software spreadsheets, may constitute clear and convincing evidence if they are in good order and indicate the intended price, and there is no contravening evidence. Asbestos Control Management, Inc., B-279521, June 23, 1998, 98-1 CPD ¶169 at 5. Our Office will not question an agency's determination regarding the sufficiency of the evidence unless it lacks a reasonable basis. Id.

We conclude from the record here that the agency's decision to allow LHK to correct its bid was unreasonable because there was no reasonable basis to find clear or convincing evidence either of the specific mistake claimed or of the intended bid. Central to our concern are the differing explanations proffered by LHK in the course of its attempt to demonstrate that it had made a mistake; one of those explanations renders the firm's bid other than low. As noted, the record shows that on November 30, a full week after being asked by the contracting officer to review its bid, LHK represented that it had failed to multiply its per crew costs by three. This explanation was accompanied by both a detailed recalculation of LHK's bid that showed it to be other than low, and the firm's request to withdraw the bid. The record contains no explanation of why LHK subsequently abandoned its position regarding its alleged failure to multiply its per-crew costs. LHK's advancement and subsequent abandonment of this explanation cast substantial doubt on its claimed intended bid as adjusted by the subsequent claimed mistakes that permit LHK to remain the low bidder. Simply, there is no way to tell whether LHK intended to multiply its crew costs and, thus, whether its intended bid was low.²

²We note as well that, during the final round of correspondence between the contracting officer and LHK, a question arose relating to the number of excavators that would be used during contract performance. LHK specifically stated in its December 29 letter that, while it would require three excavators to meet its construction schedule, only one excavator had been used in preparing its bid. Although this representation tends to corroborate its initial explanation that it had failed to multiply its per crew costs by three, the record is silent regarding how the additional excavators were accounted for in the firm's costs.

The agency asserts it reasonably concluded that the number of excavators and/or work crews was immaterial to calculating LHK's intended bid because its bid was calculated on a "cost per meter" basis, and its cost to perform (*i.e.*, its per-meter cost) thus would remain constant regardless of the number of excavators or work crews that would be required for LHK to perform in a timely manner. Declaration of the Contracting Officer, Mar. 16, 1999, ¶ 7. However, the agency's position ignores the additional possible costs associated with using more than one excavator or work crew, for example, the additional cost for mobilization. Moreover, it ignores the fact that, whether or not multiplying crew costs was justifiable based on LHK's actual costs, LHK specifically asserted that it intended to multiply its crew costs.

It also is unclear why LHK failed to advance its two additional mistake allegations at the same time. The record contains no explanation of why LHK did not identify and assert the “hours per day” mistake claim until such time as the matter was specifically brought to its attention by the contracting officer. In this regard, the “hours per day” discrepancy should have been apparent to LHK based on an examination of its bid worksheets, given that the contracting officer observed the discrepancy during his examination of the tendered worksheets. This piecemeal presentation by LHK casts further doubt on its explanation as to its intended bid.³

We conclude that the agency improperly permitted LHK to correct its bid, and thus sustain Stanley’s protest. We recommend that the agency terminate the contract awarded to LHK for the convenience of the government, and make award to Stanley if otherwise proper. We also recommend that Stanley be paid the costs of filing and pursuing its bid protest, including reasonable attorneys’ fees. Stanley should submit its certified claim, detailing the time expended and costs incurred, for such costs directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1) (1998).

The protest is sustained.

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³As a final matter, we note that LHK’s bid worksheets are not in good order. None of the firm’s “original” worksheets is dated, and there is no way to determine when they were prepared. See Asbestos Control Management, Inc., *supra*, at 5-6 (correction disallowed where critical worksheets were undated and no evidence except bidder’s self-serving statements in affidavit served to establish when spreadsheets were prepared); cf. H.A. Sack Co., Inc., B-278359, Jan 20, 1998, 98-1 CPD ¶ 27 at 2 (correction permitted where bidder submitted diskette with file dated day of bid opening). Absent some objective evidence to establish when the “original” worksheets were prepared, there is no way to determine that they are in fact the worksheets actually used by LHK in preparing its bid.