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Decision

Matter of: Ultimate Concrete, L.L.C.

File: B-412255; B-412255.2

Date: January 13, 2016

Bret S. Wacker, Esq., Thomas M. Keranen, Esq., and Jeffrey M. Gallant, Esq., Clark Hill, PLC, for the protester.

David A. Rose, Esq., Moser Rose, LLP, for Fortis Networks, Inc., the intervenor.
Charles L. Webster III, Esq., and Lloyd R. Crosswhite, Esq., Department of the Army, Army Corps of Engineers, for the agency.

Evan D. Wesser, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. An agency improperly permitted the awardee to modify its bid by reallocating prices among contract line items after bid submission where there was not clear and convincing evidence of the awardee's intended allocation of line item prices.
 2. Notwithstanding the improper reallocation of contract line items, the protester failed to establish competitive prejudice where the reallocated bid did not change the bidders' relative competitive positions and the agency reasonably found that the awardee's originally submitted bid, although mathematically unbalanced, was not materially unbalanced, and otherwise reasonably evaluated the risk associated with the awardee's proposed pricing.
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DECISION

Ultimate Concrete, L.L.C., a small business, of El Paso, Texas, protests the award of a contract to Fortis Networks, Inc., a small business, of Phoenix, Arizona, under invitation for bids (IFB) No. W9126G-15-B-0028, which was issued by the Department of the Army, Army Corps of Engineers-Fort Worth District, for the replacement of approximately 2.5 miles of an existing section of the United States Border Patrol legacy fence in Sunland Park, New Mexico, along the United States/Mexico International Border. Ultimate Concrete argues that the Army unreasonably allowed Fortis to revise its bid by reallocating contract line items after bid submission, and that the Army could not reasonably make award based on Fortis' original bid because it was materially unbalanced.

We deny the protest.

BACKGROUND

The IFB, which the Army originally released on August 12, 2015, and subsequently amended four times, sought sealed bids for the removal and replacement of approximately 2.5 miles of an existing section of fencing on the United States/Mexico International Border and associated construction, including roads, retaining walls, culverts, and vehicle and drainage gates. IFB at 3-5. The IFB was set aside for small businesses. IFB, amend. No. 0001, at 1. The Army contemplated awarding a single fixed-price contract. IFB at 6.

The IFB's scope of work was divided into 11 contract line items, or "CLINs." Id. at 3-5. Three of the CLINs, which respectively cover the base scope of work and two optional scopes of work, are relevant here. CLIN 0001 covered the base fence replacement requirement, which will require the vendor to remove and replace approximately 3,850 linear feet (LF) of fence. IFB, amend. No. 0002, at 2. The IFB stated that the bid for the base work was to include "all components necessary to complete the removal and construction, including all materials (except [government-furnished materials]), labor, and equipment," and the construction of "a patrol road, retaining wall, culverts, and vehicle and drainage gates." Id. CLIN 0004 was for optional project No. 1, which covers a fence replacement requirement for an additional 3,100 LF of fence. IFB at 4. The option includes the same requirements as set forth above for the base fence requirement. Id. CLIN 0007 is for optional project No. 2, which covers the construction of an access road. Id. This option similarly includes a requirement that the contract line item is to include "all components necessary to complete the construction, including all materials, labor, and equipment." Id.

The contractor is to complete the base fence requirement (CLIN 0001) by 210 days after receipt of a notice to proceed (NTP). IFB, amend. No. 0004, at 2. The contractor is to complete the optional fence requirement (CLIN 0004) by 120 days after receipt of a NTP, and the optional access road (CLIN 0007) by 45 days after receipt of a NTP. IFB at 4. For both optional tasks, the IFB states that "[w]ork for [these] item[s] will be completed concurrent with the base item," but also provides that the contract's period of performance will be extended as necessary to complete the optional work based on when the associated NTPs for the options are issued. Id.; see also Agency Report (AR), Tab 6, Pre-Bid Inquiry Contractor Report (Aug. 26, 2015), at 1 ("The period of performance for the option items will begin when the contractor receives the [NTP] for that item. They will probably run simultaneously [with the base work], but could require extension of the [210] days period of performance based upon when they are exercised.").

The IFB also incorporated by reference Federal Acquisition Regulation (FAR) clause 52.214-19, Contract Award--Sealed Bidding--Construction. IFB at 9. That clause provides, in relevant part, that:

The Government may reject a bid as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the Government even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.

FAR clause 52.214-19(d). See also FAR §§ 14.404-2(f), 15.404-1(g).

The Army received five bids in response to the IFB prior to the September 11 bid submission deadline. AR, Tab 10, Bid Abstract (Sept. 11, 2015), at 1. The total proposed project prices and proposed prices for CLINs 0001, 0004, and 0007 for the independent government estimate (IGE) and five bids were as follows:

	CLIN 0001	CLIN 0004	CLIN 0007	TOTAL (ALL CLINS)
IGE	\$6,759,616	\$3,760,500	\$174,143	\$10,879,721
Fortis	\$3,017,500	\$2,528,000	\$4,301,682	\$10,086,116
Ultimate Concrete	\$6,991,543	\$3,029,191	\$196,483	\$10,393,119
Firm 3	\$9,731,516	\$4,596,531	\$129,118	\$14,681,973
Firm 4	\$9,030,000	\$5,653,000	\$709,300	\$15,727,723
Firm 5	\$5,285,000	\$6,835,000	\$300,000	\$12,780,000

Id.

On September 14, the contracting specialist contacted Fortis to confirm whether it could perform the requirements for the total bid price of \$10,086,116. AR, Tab 11, Email from Contracting Specialist (Sept. 14, 2015), at 1. Fortis confirmed that it could perform at its proposed price. Id., Email from Fortis (Sept. 14, 2015), at 1. The contracting specialist subsequently contacted Fortis again, and stated: “Your offered CLIN prices appear unbalanced . . . Can you explain your pricing rational[e] – why your price for CLIN 0007 is so high compared to CLINS 0001 and 0004?” Id., Email from Contracting Specialist (Sept. 14, 2015), at 1.

On September 15, Ultimate Concrete sent the contracting officer a letter expressing concern that Fortis' bid was materially unbalanced because the base and optional fence replacement contract line items (CLINs 0001 and 0004) were "disproportionally underbid," while the optional access road contract line item (CLIN 0007) was "excessively over bid." AR, Tab 12, Letter from Ultimate Concrete (Sept. 15, 2015), at 2. Ultimate Concrete alleged that, assuming the optional access road contemplated by CLIN 0007 was constructed first, "the Government would effectively be 'loaning' Fortis nearly \$5,000,000 upon completion of the initial elements of the work, and would be exposed to significant financial risk for the balance of the work should Fortis fail to complete it." Id.

Also on September 15, the contracting specialist emailed Fortis regarding the apparent unbalance between the price for the optional access road work under CLIN 0007 and the other contract line items, and stated:

Although we plan on awarding CLIN 0007, Option 2 (the access road) at time of contract award, [NTP] could be delayed as the Government must go complete condemnation procedures prior to issuing the NTP. There is a chance that the Government would be unable to issue NTP and have to terminate CLIN 0007 for convenience. In that event, the entire value of CLIN 0007 would be deobligated. . . . Your bid cannot be altered, however you can withdraw your bid. If you do not withdraw your bid and we award the contract to you, you cannot bill for any of CLIN 0007 until after NTP has been issued for that CLIN and a percentage of that work has been completed and agreed upon by the Government as complete. Please respond within two hours that you acknowledge the above guidance and your confirmation of your bid as submitted.

AR, Tab 15A, Email from Contracting Specialist (Sept. 15, 2015), at 1.¹

On the same day, Fortis alleged a mistake in its bid. See id., Email from Fortis (Sept. 15, 2015), at 1. Fortis requested that the contracting officer: "allow us to redistribute the CLIN numbers to be more balanced. We do not wish to raise our bid price. The total price is acceptable, we can preform [sic] the work for the bid amount." Id. The contracting specialist requested evidence that the submitted bid included a mistake. Id., Email from Contracting Specialist (Sept. 15, 2015), at 1.

¹ As of the date of the submission of the agency report, the Army represents that the potential delay in authorizing performance of CLIN 0007 due to the pending condemnation proceedings persists. Contracting Officer's Statement of Facts (COSF) (Nov. 9, 2015) at 9 n.1.

Beginning on September 15, Fortis submitted multiple emails and iterations of its “master bid” estimating worksheets to demonstrate the alleged mistake and the intended allocation of its bid across CLINs. As discussed below, Fortis ultimately submitted at least 11 iterations of this Microsoft Excel spreadsheet, correcting and clarifying its “intended” bid price. All of the iterations appear to have been created--or at least materially modified--post-bid submission.

Fortis represented that it had initially prepared a single bid price for the entire project, and subsequently erred when allocating the total bid among contract line items. AR, Tab 17, Letter from Fortis (Sept. 23, 2015), at 1. Specifically, Fortis represented that it “mistaken[]ly read [CLIN 0001] and [CLIN 0004] to be fence only” and CLIN 0007 “as ALL roads/culverts/retaining,” and erred in putting all of the associated costs for roads, culverts, and retaining walls in CLIN 0007, as opposed to allocating such costs to CLINs 0001 and 0004. AR, Tab 15B, Second Revised Bid Support Spreadsheet – Mistake CLINs Worksheet (Sept. 16, 2015). Fortis’ original and final proposed reallocated prices for CLINs 0001, 0004, and 0007 were as follows:

	CLIN 0001	CLIN 0004	CLIN 0007	TOTAL (ALL CLINS)
Original	\$3,017,500	\$2,528,000	\$4,301,682	\$10,086,116
Final Reallocated	\$6,455,344	\$3,108,313	\$283,525	\$10,086,116

AR, Tab 14, Letter from Fortis (Sept. 17, 2015), at 1.

On September 17, the contracting officer prepared a memorandum to the Principal Assistant Responsible for Contracting (PARC) recommending that Fortis be allowed to correct its bid. AR, Tab 16, Contracting Officer’s Memo. to the PARC (Sept. 17, 2015), at 1.² The memorandum first explains that, while the original bid submitted by Fortis was mathematically unbalanced, the contracting officer found that the unbalance did not pose an unacceptable risk to the government so as to be nonresponsive. Specifically, the contracting officer determined that there was very little risk that Fortis’ bid would result in higher costs to the government because the base item was priced “lower than appears to be correct,” while the access road option, “which may not be awarded,” was priced higher. *Id.* at 1-2. The memorandum next explained that the contracting officer had concluded that Fortis had demonstrated the existence of both a mistake and the intended bid allocation

² Pursuant to FAR § 14.407-3(a), the agency head may make a determination permitting a bidder to correct a bid mistake. The head of the Army has delegated this authority to the PARC. Army Federal Acquisition Regulation Supplement § 5114.407-3(e).

by clear and convincing evidence. Id. at 2. In this regard, the contracting officer explained that it understood Fortis' mistake "was the result of an error in Fortis' reading of the CLINs." Id. The contracting officer also found the spreadsheets submitted by Fortis sufficiently demonstrated how the total road and related construction work costs for the project were compiled and the intended allocation of such costs across contract line items. Id.

Notwithstanding the contracting officer's memorandum to the PARC determining that Fortis had submitted clear and convincing evidence as to the mistake and intended allocation of its bid, the contracting specialist continued to work with Fortis to better understand the firm's basis for the proposed reallocations. See, e.g., AR, Tab 18, Contracting Specialist Decl. (Nov. 9, 2015), at 5-6. Prior to the contracting officer's submission to the PARC, Fortis submitted at least seven revisions of its documentation supporting its claimed mistake and intended allocation. Id. at 3-4. After submission of the memorandum to the PARC, Fortis, in consultation with the contracting specialist, prepared at least four further iterations of the documentation further clarifying and correcting the previously submitted information. Id. at 5.

On September 25, the PARC approved the contracting officer's recommendation that Fortis be allowed to revise its bid. AR, Tab 20, PARC Memo. (Sept. 25, 2015), at 2. On the same day, the Army awarded the contract to Fortis. The agency exercised, among other CLINs, the base fence (CLIN 0001), option fence (CLIN 0004), and option access road (CLIN 0007) requirements at the reallocated prices. AR, Tab 22, Contract No. W9126G-15-C-0056, at 3-5.

On September 28, the contracting officer responded to Ultimate Concrete's September 15 letter of concern. The contracting officer's response did not disclose that the Army had allowed Fortis to reallocate its bid, but, rather, responded to Ultimate Concrete's arguments regarding the risk of advance payment associated with Fortis' initially submitted bid:

The Fortis bid will result in the lowest overall cost to the Government and the imbalance presents no risk of allowing an advance payment: The base item, which will be awarded, is priced lower than appears correct and an option item, which may or may not be awarded, is priced higher than appears correct. Therefore the Contracting Officer has determined that the Fortis bid is not materially unbalanced, not unresponsive and rejection of the bid is unwarranted.

AR, Tab 23, Contracting Officer's Letter (Sept. 28, 2015), at 1. This protest followed.

DISCUSSION

Ultimate Concrete challenges the Army's award to Fortis, arguing that the agency could not accept either its reallocated bid or its originally submitted bid. The protester first argues that the agency improperly allowed the awardee to reallocate its bid because Fortis failed to demonstrate both the existence of a mistake and its intended bid by clear and convincing evidence. Ultimate Concrete also argues that award based on Fortis' originally submitted bid would have been improper because the bid was so far out of line with the other bids received, would be prejudicial to the other bidders, and was nonresponsive because it was materially unbalanced.

As set forth below, we find that the agency improperly allowed Fortis to reallocate its bid because the awardee did not present clear and convincing evidence of what its intended bid would have been, but for the mistake. We find, however, that the agency's determination that Fortis' originally submitted bid was not materially unbalanced and did not present unacceptable risk to the government was reasonable. Because Fortis' alleged mistake did not affect its total low proposed bid, and because the Army could have made award to Fortis based on its originally submitted bid with the same total proposed price as the reallocated bid, we find that the protester has failed to establish competitive prejudice, and therefore deny the protest.

Bid Revision

Ultimate Concrete first challenges the Army's decision to allow Fortis to reallocate its bid after bid submission. The protester first contends that there was no clear and convincing evidence of a mistake warranting correction, as the awardee allocated its bid exactly as it intended to do based on the exercise of its own business judgment. See Protester's Comments (Nov. 23, 2015) at 39, 48-50. Moreover, Ultimate Concrete argues that reallocation was improper because Fortis failed to submit clear and convincing evidence of what its intended bid would have been, but for the alleged mistake. See id. at 50-59. The Army responds that Fortis submitted clear and convincing evidence of a mistake based on a misinterpretation of the IFB's work allocation, not a judgmental error, and of the awardee's intended bid.

In general, agencies may permit correction of bids, but only those that are, as submitted, responsive to the solicitation; bids may not be corrected to make them responsive. FAR § 14.407-3.³ Because a materially unbalanced bid is considered

³ Our Office has found that agencies may permit the correction of a nonresponsive bid--in effect authorizing a waiver of the technical nonresponsiveness of a bid--when the result would clearly not be prejudicial to other bidders and the competitive bid system would not be adversely affected. Wynn Constr. Co., B-220649, Feb. 21, 1986, 86-1 CPD ¶ 184 at 3, recon. denied, B-220649.2, Apr. 14, 1986, 86-1 CPD

(continued...)

nonresponsive, FAR clause 52.214-19(d), we generally will not consider whether an alleged mistake is correctable if the bid, as submitted, is unbalanced. See McKnight Constr. Co., B-257782, Nov. 7, 1994, 94-2 CPD ¶ 177 at 3-4. However, we have recognized an exception for situations, as this one, where the alleged mistake involves only the allocation among line item prices and has no bearing on the ranking of bids for purposes of award. Id. at 4; Satellite Servs., Inc., B-224412, Nov. 5, 1986, 86-2 CPD ¶ 521 at 2.

In order to warrant reallocation, a bidder must submit clear and convincing evidence of both the existence of a mistake and the bid actually intended, but for the mistake. FAR § 14.407-3(a); McKnight Constr. Co., supra. 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. Unico Constr. Co., Inc., B-258862, Jan. 24, 1995, 95-1 CPD ¶ 42 at 3. Whether, in fact, 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. M.A. Mortenson Co., B-254152, Nov. 19, 1993, 93-2 CPD ¶ 296.

Here, as discussed above, correction of the mistake did not alter Fortis' overall price or the ranking of bids; it simply changed the allocation of line item prices within that total. Accordingly, bid correction could be permissible in this case, but only if there were clear and convincing evidence of both the existence of a mistake and the intended allocation of prices. See McKnight Constr. Co., supra. Here, while it is arguable that there was the existence of a mistake subject to correction, we find that there was not clear and convincing evidence regarding what Fortis' intended bid would have been, but for the mistake.

First, there is some question as to whether the alleged mistake at issue resulted from a genuine mistake, as opposed to an error in judgement or understanding on the part of Fortis. The FAR permits correction of a mistake only where it can be demonstrated that the bidder intended a bid other than the one submitted--that is, where the mistake is attributable to something other than the bidder's exercise of its business judgment. Odyssey Int'l, Inc., B-296855.2, Nov. 16, 2005, 2006 CPD ¶ 49 at 8. Similarly, we have held that the kinds of mistakes that may be corrected under FAR § 14.407-3 do not include mistaken or erroneous interpretations of the solicitation specifications. Aquila Fitness Consulting Sys., Ltd., B-286488, Jan. 17, 2001, 2001 CPD ¶ 4 at 3; Astro Quality Servs., Inc., B-280676, Nov. 5, 1998, 98-2 CPD ¶ 107 at 3.

(...continued)

¶ 360. In such circumstances, however, the bidder must still establish both the existence of a mistake and its intended bid by clear and convincing evidence. Wynn Constr. Co.--Recon., B-220649.2, Apr. 14, 1986, 86-1 CPD ¶ 360 at 4.

Fortis alleged in its post-award correspondence with the Army that it had originally prepared its bid for the project on a total price basis, without separating the prices into the constituent contract line items. AR, Tab 17, Letter from Fortis (Sept. 23, 2015), at 1. The awardee submitted that, after preparing its total project price, it manually divided the costs among contract line items and mistakenly included certain costs in the optional access road line item (CLIN 0007) that were properly attributable to the base and optional fence replacement line items (CLINs 0001 and 0004). Id. Fortis also represented that it misread the requirements for the base and optional fencing line items to only include fencing, while all road, retaining wall, and other construction was to be covered under the optional access road line item. AR, Tab 15B, Second Revised Bid Support Spreadsheet – Mistake CLINs Worksheet (Sept. 16, 2015). It is not clear, however, how the protester reached this interpretation, as it is inconsistent with the terms of the IFB, which make clear that both of the fence replacement line items were to include construction of “a patrol road, retaining wall, culverts, and vehicle and drainage gates.” IFB, amend. No. 0002, at 2; IFB 4.⁴

On the other hand, this is not a case where the alleged mistake involved the bidder failing to include within its bid required work to be performed based on an erroneous interpretation of the solicitation’s requirements. See, e.g., Aquila Fitness Consulting Sys., Ltd., supra; Astro Quality Servs., Inc., supra. Here, Fortis included all of the equipment, materials, and labor necessary to perform the IFB’s road, retaining wall, and other associated construction requirements, but placed the associated prices for them under the wrong contract line item. In this regard, this case is closer to the facts of Wynn Construction Co., where we found that a bidder had established clear and convincing evidence of a mistake where it erroneously placed two pieces of equipment under the wrong contract line item, and thus bid correction was found to have been proper. Wynn Constr. Co., supra.

In any event, regardless of whether Fortis’ “mistake” was subject to correction, we find that the Army erred in allowing Fortis to reallocate its bid because there was insufficient evidence to satisfy the high burden for clear and convincing evidence of the intended allocation of line item prices. As an initial matter, the record is devoid of any contemporaneous supporting documentation from Fortis establishing what its

⁴ Additionally, as addressed herein, although after bid-submission it emerged that the NTP for CLIN 0007 may be delayed or the work may ultimately not be performed, based on the information available at the time Fortis submitted its bid, the awardee could have made a business decision to attempt to front-load its bid on the assumption that CLIN 0007 would be performed first. See IFB at 4 (stating that the optional tasks would be “completed concurrent with the base item”); AR, Tab 6, Pre-Bid Inquiry Contractor Report (Aug. 26, 2015), at 1 (stating that performance of the base and optional tasks would “probably run simultaneously”).

“intended” bid would have been, but for the mistake. Furthermore, the contemporaneous record is devoid of any declarations, affidavits, or detailed narratives explaining the basis for the reallocated contract line prices. Rather, the only contemporaneous documentation included in the agency report consists of the numerous exchanges between the agency and awardee in response to the agency’s post-bid inquiries. These documents, and the bulk of the figures and supporting clarifications, all appear to have been prepared post-bid, as they include new Microsoft Excel worksheets (e.g., a “Mistake CLINs” worksheet) and changing figures and clarifying notes. Moreover, we note that it took at least 11 iterations of the supporting documentation submitted over the course of approximately two weeks to substantiate the awardee’s “intended” bid.

More significantly, the documentation submitted by Fortis fails to provide any meaningful basis for determining what the awardee’s “intended” bid was, but for the mistake, at the time the original bid was submitted. Our Office has found that the clear and convincing evidence standard for correction of a bid mistake is satisfied where the bid or supporting workpapers establish that the bidder, for example, merely misplaced a decimal point, erred in copying a number, or otherwise made a clerical error. See, e.g., Wynn Constr. Co., supra, at 2 (finding sufficient evidence where supporting worksheets established fixed-prices for two pieces of equipment erroneously put into a wrong CLIN and the associated bond, profit, and overhead percentages); Satellite Servs., Inc., supra, at 3-4 (same, where the bidder’s contemporaneous workpapers, the solicitation’s work allocation, and the other bids demonstrated that the bidder erroneously assigned 20 percent, as opposed to 2 percent, of the total price to a CLIN). Here, in contrast, Fortis’ proposed reallocations are largely unexplained and lack support. Although the record contains numerous unexplained reallocations, we address only a few representative examples here.

In several instances, all of the costs allocated to the optional access road line item (CLIN 0007) were transferred to the base fence replacement line item (CLIN 0001). Such costs included the entirety of proposed costs for grading, excavation and backfill, soil cement, rip rap with fabric, engineered backfill, concrete for retaining walls, and soil treatment. AR, Tab 15N, Eleventh Revised Bid Support Spreadsheet – Master Bid Worksheet (Sept. 24, 2015). The supporting documentation, however, is devoid of any explanation for why the reallocated costs were not proportionally allocated between the base fence requirement (CLIN 0001) and the optional fence requirement (CLIN 0004). As set forth above, the two CLINs cover two stretches of fence that are to be removed and replaced, and include the same requirements. Compare IFB, amend. No. 0004, at 2 with IFB at 4. For example, both CLINs 0001 and 004 will require the construction of retaining walls. IFB, amend. No. 0004, at 2; IFB at 4; id., Appendix No. 1, Construction Drawings, at C-3.01-C.3.16 (denoting for each section of fencing to be installed under both CLINs the location and requirements for “fence foundation or retaining wall”). Per the revised “intended” bid, however, all of the associated costs for the retaining walls (e.g., concrete for

retaining walls) have been moved to the base fence replacement line item (CLIN 0001), with no associated costs allocated to the optional fence replacement line item (CLIN 0004). AR, Tab 15N, Eleventh Revised Bid Support Spreadsheet – Master Bid Worksheet (Sept. 24, 2015). The contemporaneous record fails to explain why all of these and other costs were moved to the base CLIN, only.

In other instances, there is no supporting evidence in the record explaining how other costs were subsequently reallocated between the fence replacement line items (CLINs 0001 and 0004) and the optional road access line item (CLIN 0007). For some items, such as trucks and equipment and manpower, 100% of the prices reallocated from CLIN 0007 were transferred to CLIN 0001 only. Id. In other cases, such as box culverts and aggregate 3/4” rock, varying percentages of the prices were redistributed between CLINs 0001 and 0004. Id. In other instances, such as grease for equipment and miscellaneous materials, prices were redistributed equally to CLINs 0001 and 0004. Id. The record, again, is devoid of any meaningful support for the disparate proposed reallocations.⁵

On this record, we find that the Army improperly allowed Fortis to reallocate its bid because, even assuming that it had established clear and convincing evidence of a mistake subject to correction, the awardee failed to provide clear and convincing evidence of what its intended bid was, but for the mistake.

Consideration of Fortis’ Initially Submitted Bid

The Army argues that, even if improper, allowing Fortis to reallocate its bid was not prejudicial to Ultimate Concrete because it did not change the bidders’ relative competitive positions, as Fortis’ total low proposed price did not change, and the original bid submitted by Fortis, although mathematically unbalanced, was not materially unbalanced or otherwise non-responsive. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency’s actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. HP Enter. Servs., LLC, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 6; Booz Allen Hamilton Eng’g Servs., LLC, B-411065, May 1, 2015, 2015 CPD ¶ 138 at 10 n.16. For the reasons discussed below, we agree with the agency that Ultimate Concrete was not prejudiced by allowing Fortis to reallocate its bid.

⁵ In the case of fuel for trucks and equipment, Fortis actually reallocated prices from CLIN 0004 to CLIN 0001. AR, Tab 15N, Eleventh Revised Bid Support Spreadsheet – Master Bid Worksheet (Sept. 24, 2015). The record is devoid of any explanation for why the alleged mistake (i.e., that prices were inadvertently allocated to CLIN 0007) would justify moving costs between the fence replacement line items (i.e., from CLIN 0004 to CLIN 0001).

Ultimate Concrete argues that the Army could not have reasonably considered Fortis' original bid pursuant to FAR § 14.407-3(g)(5) because the amount of the bid was so far out of line with the amounts of the other bids received, and accepting such an erroneous bid would be unfair to the other bidders. See Protester's Comments (Nov. 23, 2015) at 59-65.

As relevant here, the Army could consider a mistaken bid under the following circumstances:

Where the bidder fails or refuses to furnish evidence in support of a suspected or alleged mistake, the contracting officer shall consider the bid as submitted unless (i) the amount of the bid is so far out of line with the amounts of other bids received, or with the amount estimated by the agency or determined by the contracting officer to be reasonable, or (ii) there are other indications of error so clear, as to reasonably justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide bidders.

FAR § 14.407-3(g)(5).

Thus, the Army was required to reasonably consider Fortis' original, mistaken bid unless one of the two above-identified predicate conditions existed. Neither predicate exists here.

First, Fortis' total bid price, which was not affected by the alleged mistake (as shown by the post-award reallocation), was the lowest bid received. The awardee's total bid price was only approximately 7.57 percent less than the independent government estimate, and approximately 3 percent less than Ultimate Concrete's second-lowest bid. AR, Tab 10, Bid Abstract (Sept. 11, 2015), at 1. While Fortis' individual line item prices diverged from the government's estimate and the other bidders' line item bids, its total proposed price cannot reasonably be characterized as being so far out of line with the other bids.

Second, acceptance of the original, mistaken bid would not prejudice other bidders. Ultimate Concrete argues that we should not allow the agency to consider the original bid where Fortis claimed a mistake. See Protester's Comments (Nov. 23, 2015) at 65. We have found prejudice to other bidders where the lowest bidder may have been the lowest only because it made a mistake. See, e.g., R.P. Richards Constr. Co.--Recon., B-260543.2, Aug. 23, 1995, 95-2 CPD ¶ 80 at 3; Atlantic Servs., Inc., B-245763, Jan. 30, 1992, 92-1 CPD ¶ 125 at 5. Here, however, the alleged mistake involves only the allocation of the bid across line items, not a failure by the awardee to account for work that will need to be performed under the contract, or a situation where the awardee underbid the total project and is now seeking an upward adjustment to its total bid. Thus, regardless of the "mistake,"

Fortis' bid would remain the lowest bid received. Under the facts here, we do not find that the integrity of the procurement process would be compromised by considering Fortis' originally submitted bid. We next consider the protester's challenge to the Army's determination that the awardee's originally submitted bid was not materially unbalanced.

Unbalanced Pricing

Ultimate Concrete challenges the Army's determination that Fortis' original bid was not materially unbalanced. The Army found that Fortis' original bid was not materially unbalanced and did not warrant rejection as non-responsive because, although it was mathematically unbalanced with the optional access road line item (CLIN 0007) being disproportionately high, it was likely that the NTP for CLIN 0007 would be delayed--or potentially never issued--due to ongoing condemnation proceedings, thus reducing the likelihood of any risk of an advance payment to Fortis. See AR, Tab 16, Contracting Officer's Memo. to the PARC (Sept. 17, 2015), at 1; Tab 23, Contracting Officer's Letter (Sept. 28, 2015), at 1. We conclude that the agency reasonably found that Fortis' bid was not materially unbalanced; for this reason, we find no basis to conclude that award to Fortis was improper.

As addressed above, "[t]he Government may reject a bid as nonresponsive if the prices bid are materially unbalanced between line items or subline items." FAR clause 52.214-19(d). A bid is materially unbalanced if it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work. Id.; Ronsons SDVOSB P&L JV-1, B-410605, Jan. 6, 2015, 2015 CPD ¶ 1 at 4. While unbalanced pricing may increase risk to the government, agencies are not required to reject a bid solely because it is mathematically unbalanced. InfoZen, Inc., B-411530, B-411530.2, Aug. 12, 2015, 2015 CPD ¶ 270 at 7. Rather, where the contracting officer receives an unbalanced bid, the contracting officer is required to consider the risks to the government associated with the unbalanced pricing in making the award decision, and whether a contract will result in unreasonably high prices for contract performance. Id.; Enco Dredging, B-284107, Feb. 22, 2000, 2000 CPD ¶ 44 at 5. Our Office will review for reasonableness both the agency's determination as to whether a bidder's prices are unbalanced, and an agency's determination as to whether a bidder's unbalanced prices pose an unacceptable risk to the government. Ronsons SDVOSB P&L JV-1, supra.

Based on the above standards, we find no basis to sustain the protest. First, Ultimate Concrete argues that the awardee's bid was so mathematically unbalanced that it should have been rejected as non-responsive on that basis alone. Protester's Comments (Nov. 23, 2015) at 27-29. As set forth above, however, an agency is not required to reject a bid merely because it is mathematically unbalanced. Rather, the agency must reasonably consider any attendant risks associated with the unbalanced pricing. InfoZen, Inc., supra. Thus, the protester's contention that the

mathematical imbalance of Fortis' original bid, standing alone, was sufficient to warrant rejection of the bid is without merit.

Next, Ultimate Concrete argues that the awardee improperly front-loaded its bid, creating an unreasonable risk of advance payment, where it overbid the price for the optional access road line item (CLIN 0007), which the protester argues will logically be completed first. Protester's Comments (Nov. 23, 2015) at 32-33, 36-38. As an initial matter, we note that FAR § 14.404-2(g) states that "any bid may be rejected if the prices for any line items or subline items are materially unbalanced (see 15.404-1(g))." The current version of FAR § 15.404-1(g), postdating the 1997 FAR part 15 rewrite, no longer provides for rejection of unbalanced bids where acceptance would be tantamount to an advance payment, and instead requires the agency to perform a risk analysis. See FAR; Part 15 Rewrite; Contracting by Negotiation & Competitive Range Determination, 62 Fed. Reg. 51224, 51225 (Sept. 30, 1997); Gulf Master Gen. Trading, LLC, B-407941.2, July 15, 2013, 2013 CPD ¶ 210 at 6 n.2; JND Thomas Co., Inc., B-402240, Jan. 28, 2010, 2010 CPD ¶ 40 at 3 n.2.⁶ Thus, a bid may not automatically be rejected merely because it presents some risk of an advance payment; rather, the government must conduct a reasonable assessment of the potential risks.

In any event, the Army here reasonably determined that the risk of an advance payment to Fortis was minimal. Ultimate Concrete's advance payment theory is predicated on its belief that the optional access road work covered by CLIN 0007 will need to be performed prior to the base or optional fence replacement work. See Protest (Oct. 5, 2015) at 11-13. The agency, however, reasonably concluded that this scenario was unlikely. The IFB and associated pre-bid questions and answers indicate that, although the Army contemplated awarding the base and optional fence replacement line items (CLINs 0001 and 0004) and optional access road line item (CLIN 0007) simultaneously, each CLIN would be subject to different NTPs, which might not be issued simultaneously. IFB at 4; id., amend. No. 0004, at 2; AR, Tab 6, Pre-Bid Inquiry Contractor Report, at 1.

Furthermore, the Army, both prior to award and in response to the protest, articulated that the NTP for CLIN 0007 may be delayed--or never even issued--due to ongoing condemnation proceedings. AR, Tab 15A, Email from Contracting Specialist (Sept. 15, 2015), at 1; COSF (Nov. 9, 2015) at 9 n.1. Based on these facts, the Army determined that the risk that the government would be subject to making an unreasonable advance payment to Fortis based on the award and

⁶ We note that both parties cite extensively to the provision concerning advance payments in FAR clause 52.214-19(d). Our Office has previously addressed this apparent inconsistency between FAR clause 52.214-19(d) and FAR part 15, concluding that the risk of advance payment, standing alone, is no longer cited as a concern in FAR part 15. See, e.g., Enco Dredging, supra, at 6 n.2.

completion of the optional access road CLIN prior to the base work was doubtful. See AR, Tab 16, Contracting Officer's Memo. to the PARC (Sept. 17, 2015), at 1; Tab 23, Contracting Officer's Letter (Sept. 28, 2015), at 1. On this record, we find that the Army reasonably evaluated the potential risk of advance payment as part of its unbalanced pricing analysis.

Alternatively, Ultimate Concrete argues that, if the optional access road contract line item is not performed first, the Army unreasonably failed to consider the performance risks associated with Fortis' underbidding of the base and optional fence replacement line items (CLINs 0001 and 0004). Protester's Comments (Nov. 23, 2015) at 33-34. We find, however, that the protester's arguments that the agency failed to reasonably evaluate the potential risk associated with Fortis' underbidding of the base and optional fence replacement line items (CLINs 0001 and 0004) in the event that the optional access road line item (CLIN 0007) is not performed are irrelevant to the Army's unbalanced pricing analysis. The concern with unbalanced pricing is that the government will ultimately pay unreasonably high prices. FAR §§ 14.408-2, 15.404-1(g); Burney & Burney Constr. Co., Inc., B-292458.2, Mar. 19, 2004, 2004 CPD ¶ 49 at 2 n.1; HSG Philipp Holzmann Technischer Serv. GmbH, B-289607, Mar. 22, 2002, 2002 CPD ¶ 67 at 6. Vendors are not prohibited from submitting below-cost quotes on fixed-price contracts, and the ability of a vendor to perform at the price offered is an issue of contractor responsibility, not unbalanced pricing. JCMCS, B-409407, Apr. 8, 2014, 2014 CPD ¶ 125 at 2; Semont Travel, Inc., B-291179, Nov. 20, 2002, 2002 CPD ¶ 200 at 5; Atlantic Maint., Inc., B-239621.2, June 1, 1990, 90-1 CPD ¶ 523 at 1-2. Therefore, we find no basis to sustain Ultimate Concrete's objection that the Army failed to consider the risk associated with Fortis bidding a price too low to perform the base and optional fence replacement CLINs as part of its unbalanced pricing analysis.

For the reasons set forth herein, we find no basis to sustain Ultimate Concrete's protest. Pursuant to FAR § 14.407-3, the Army identified an apparent mistake in Fortis' bid and sought verification of the bid. Fortis claimed that the allocation, but not the total, of its proposed bid price was based on a mistake, and sought permission to reallocate its bid. As set forth above, because the awardee did not provide clear and convincing evidence of what its intended bid was, but for the mistake, the agency's decision to allow reallocation was improper. Rather, the Army was required, pursuant to FAR § 14.407-3(g)(5), to consider Fortis' originally submitted bid. The agency reasonably found that Fortis' originally submitted bid was not materially unbalanced or otherwise did not present a material risk that the government would ultimately pay an unreasonably high price for performance. Therefore, because Fortis' originally submitted bid was responsive and award could

have been made based on that bid, we find that Ultimate Concrete was not prejudiced by the Army's improper decision to accept the awardee's reallocated bid.

We deny the protest.

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