



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Reynosa Construction, Inc.--Reconsideration

File: B-278364.2

Date: April 28, 1998

Douglas Seegmiller, Esq., for the protester.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for reconsideration of decision upholding agency's decision to allow awardee to correct its bid is denied where, even if, as protester argues, awardee's bid was based on an unreasonably low estimate of the number of hours required to complete the job, such an error in judgment is not subject to the rules pertaining to mistakes in bids.
2. Request for reconsideration of decision concluding that awardee's bid bond was adequate even after correction of awardee's bid is denied where, even assuming that amount of bond was less than required by the solicitation, amount was greater than difference between awardee's bid and next higher acceptable bid.

DECISION

Reynosa Construction, Inc. requests reconsideration of our decision, Reynosa Constr., Inc., B-278364, Dec. 15, 1997, 97-2 CPD ¶ 165, in which we denied its protest of the decision by the U.S. Army Corps of Engineers to allow Elkhorn Construction, L.L.C. to make an upward correction in its low bid under invitation for bids (IFB) No. DACA63-97-B-0059, for construction of a loading ramp and parking lot extension at the Marine Corps Reserve Center in Amarillo, Texas. We upheld the Corps's decision to permit correction based on our finding that Elkhorn had demonstrated clear and convincing evidence of a mistake and of its intended bid. Reynosa contends that we erred in concluding that errors in Elkhorn's bid, other than the one on which it based its request for correction, did not call into question the amount of its intended bid and in concluding that Elkhorn's bid guarantee was adequate.

We deny the request for reconsideration.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must either show that our prior decision contains errors of fact or law, or present information not previously considered that warrants reversal or modification of our

decision. 4 C.F.R. § 21.14(a) (1997); Lovelace Scientific Resources, Inc.--Recon., B-256315.2, Nov. 25, 1994, 94-2 CPD ¶ 209 at 1. Reynosa has not made such a showing here.

Reynosa first challenges our conclusion that, even if Elkhorn did base its bid on a faulty estimate as to the number of days that would be required to complete the project, this did not call into question the amount of Elkhorn's intended bid since an error in estimating the amount of time that a project will take is not the type of mistake for which correction is permitted under the Federal Acquisition Regulation (FAR). In this regard, we stated in our decision that 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 his own business judgment. Citing Paul Schmidt Constr. Co., B-204009, Aug. 5, 1981, 81-2 CPD ¶ 99 at 2, we stated that a bidder thus will not be permitted to correct its bid if, after bid opening, it decides that it has underestimated the number of hours that will be required to perform the job.

Reynosa argues that the reasoning in Paul Schmidt should be applied only where both the original and the revised estimates are within a reasonable range (i.e., the difference between the two estimates represents nothing more than would reasonably be expected between two competent estimators). The protester contends that where the difference is larger than that, the original estimate should be viewed as a mistake--and thus subject to correction under mistake-in-bid procedures. According to Reynosa, since the awardee in this case has offered no explanation for the alleged estimating error, it cannot be determined whether the awardee's bid, as corrected, would remain low. Thus, Reynosa argues, the awardee's bid cannot be accepted.

The rule proposed by the protester is not the rule applicable in these instances. A bidder's error in judgment, such as the alleged estimating mistake here, is subject to the rules pertaining to mistakes in bids only where the error is so egregious that acceptance of the bid by the government would be unconscionable (i.e., where an award to the bidder would mean that the government was obviously getting something for nothing). Handy Tool & Mfg. Co., Inc., 60 Comp. Gen. 189, 192 (1981), 81-1 CPD ¶ 27 at 5, citing Ruggiero v. United States, 420 F.2d 709, 713 (Ct. Cl. 1970); see also C.W.R. Constr., Inc., B-224301, Dec. 2, 1986, 86-2 CPD ¶ 629 at 3-5. Here, Reynosa has demonstrated neither that Elkhorn's estimate of the number of labor hours required to complete the project was egregiously low nor that acceptance of Elkhorn's bid, without correction of the alleged error, was unconscionable. In fact, and as noted above, not only was Elkhorn's price of \$362,670 not significantly lower than Reynosa's own price of \$383,000, it was considerably higher than the government estimate of \$317,170.

Reynosa also argues that we erred in allowing the Corps of Engineers to disregard the omission of allowances for certain required items from Elkhorn's worksheets.

Reynosa alleged that Elkhorn omitted from its bid worksheet allowances for a critical cement pump, for a required environmental waste management plan, and for required carpenters, form setters, and steel setters. Reynosa did not allege, however, that the alleged omissions would have accounted for more than the difference between Elkhorn's bid, as corrected, and its own; in other words, Reynosa did not allege that it was prejudiced by the Corps's failure to require correction of these omissions. In this regard, the protester proffered no estimate as to the amount by which Elkhorn's price would have increased had it included in its estimate allowances for carpenters, form setters, and steel setters. Further, Reynosa's estimate of the amount by which inclusion of allowances for a cement pump and for an environmental plan would have increased the bid price was \$10,000, which is less than half the difference between Elkhorn's bid, as corrected, and Reynosa's.

Next, Reynosa argues that we erred in holding that because the penal sum of Elkhorn's bid bond was expressed as a percentage of its bid price, and not as a specific amount, Elkhorn's upward correction of its bid did not render the bid guarantee inadequate. The protester contends that the surety's obligation was set at the time of bid opening (as 20 percent of its bid of \$188,424, or \$37,684.80), and did not increase as a result of Elkhorn's correction of its bid price.

We see no basis to conclude that we erred in finding that Elkhorn's bid guarantee, the penal sum of which was expressed as a percentage of the bid price, increased as a result of Elkhorn's correction of its price. Although the protester insists that the surety's obligation was set at the time of bid opening (as 20 percent of its mistaken bid price), it has cited no authority in support of its position, and we are aware of none.

Moreover, even assuming that the protester is correct that the amount of Elkhorn's bond was set at an amount certain (\$37,684.80) at the time of bid opening, rejection of the bond as insufficient would not have been required since the amount of the bond was still greater than \$20,330, the difference between Elkhorn's bid, as corrected, of \$362,670 and Reynosa's next low bid of \$383,000. In this regard, FAR § 28.101-4(c)(2) provides that noncompliance with a solicitation requirement for a bid guarantee shall be waived when the amount of the bid guarantee submitted is less than required, but equal to or greater than the difference between the bid and the next higher acceptable bid. See S.J. Amoroso Constr. Co., Inc., B-240687, Nov. 27, 1990, 90-2 CPD ¶ 432 at 2. Thus, the amount of the original obligation was sufficient to permit waiver of the noncompliance.

The request for reconsideration is denied.

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