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Decision

Matter of: Cooper Construction, Inc.

File: B-285880

Date: September 18, 2000

Lawrence J. Sklute, Esq., Sklute & Associates, for the protester.
Christine S. Trafford, Esq., and Joseph J. Summerill, Esq., Department of Justice, Federal Bureau of Prisons, for the agency.
Tania Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that contracting agency improperly denied request for bid correction is sustained where the worksheets submitted by the low bidder to support the claimed mistake in bid establish the existence of the mistake and the intended bid by clear and convincing evidence, and where the affidavit submitted along with the claim is entirely consistent with the worksheets.

DECISION

Cooper Construction, Inc., protests the decision by the Department of Justice, Federal Bureau of Prisons, to deny its request to correct a mistake in its low bid under invitation for bids (IFB) No. 50703-4053, issued for demolition and the construction of a new accessible stair and elevator corridor at the Federal Correctional Institution in El Reno, Oklahoma. Cooper contends that the agency's decision was unreasonable.

We sustain the protest.

Bidders were required to submit a single lump-sum bid to perform the solicited work. The details of that work were set forth in narrative specifications and a set of drawings. IFB attach. II, III. On May 19, 2000, Cooper submitted the apparent low bid of \$444,000. The remaining two bids were for \$594,000 and \$614,000.

In preparing to award the contract to Cooper, the contracting officer asked the firm to cure several minor omissions in its bid by June 6.¹ The day before that deadline, Cooper verbally notified the contracting officer that the firm had made a mistake in its bid. Pursuant to the contracting officer's instruction, later that same day Cooper submitted a written claim of mistake in bid accompanied by the firm's handwritten worksheets and a sworn affidavit from the firm's president. Cooper's president attested that he had prepared the worksheets and the bid, and that the worksheets existed prior to bid opening and were the original and only worksheets used to prepare the bid.

Cooper's undated worksheets consist of 12 pages of yellow lined paper with handwritten, penciled entries. Ten of these pages are "breakout" pages that itemize and price specific work to be performed under the contract. Each of these pages is numbered sequentially one through ten and, with one exception, has a heading that corresponds with an IFB drawing number.² The itemized work on each breakout page corresponds with the work represented on the relevant IFB drawing. Next to each item on each breakout sheet is a figure generally followed by the letter "k," presumably shorthand for "thousand." Each breakout page totals all of the itemized figures on the page to arrive at a sum. Most of the breakout pages accomplish this by transferring each itemized figure into a column in the left margin of the page and totaling the column at the bottom of the page. This total is then circled.

The eleventh page of the worksheets carries forward the headings and totals from each breakout page and adds them together to arrive at the figure of \$377,000. In his affidavit, Cooper's president refers to this page of the worksheets as the summary page. The twelfth page of the worksheets carries forward the figure "377" from the summary page and labels that figure as the base bid. The worksheet shows that the base bid amount was multiplied by a specified percentage for profit. To the resulting product, Cooper added a specified fixed amount for overhead and a specified fixed amount for delays and loss of work. The resulting sum, labeled "Bid," is \$444,000, the precise amount of Cooper's bid.

In his affidavit, Cooper's president stated that the base bid amount of \$377,000 was incorrect because it included an incorrect total carried over from one of the breakout pages. On that breakout page, he misaligned some dollar amounts in the summary column, resulting in an incorrect sum. This incorrect sum was carried over

¹ Since Cooper's bid was within 3 percent of the independent government estimate, the contracting officer states that he had no basis to suspect a mistake in bid or to ask Cooper to verify its bid. See Federal Acquisition Regulation (FAR) § 14.407-3(g).

² The heading of the first breakout page does not correspond with an IFB drawing number, but contains various tasks common to all construction projects, such as mobilization and bonds.

to the summary page, resulting in an incorrect base bid, and this incorrect base bid was used to calculate the erroneous final bid price.

The breakout page at issue is the second of three breakout pages associated with IFB Drawing A1. The seven items on the page are associated with work described in sections two and four of that drawing. As with all of the breakout sheets, next to each item on the page is a figure and the letter “k.”

The left margin of the page contains the following column of numbers:

$$\begin{array}{r} 80 \\ 15 \\ 5 \\ 30 \\ \hline 130 \\ 13 \\ 3 \\ \hline 29K \end{array}$$

The first four figures in the column correspond with those next to the first four items on the page. All of these items concern work associated with the elevator. The fifth figure in the column, 130, is the correct sum of the first four figures but is clearly misaligned. The sixth figure in the column (13) is the sum of the figures next to the fifth and sixth items on the page (8 and 5), both of which concern work associated with the second floor of the project.³ The seventh figure in the column (3) corresponds with that next to the seventh item on the page. The final figure in the column is a short-hand version of the sum of the misaligned figures, a circled “29K.”

Cooper’s president correctly stated that, if the figures in the column are properly aligned, the correct total for this breakout page is \$146,000 and not \$29,000. If the correct total is substituted for the incorrect total on the summary page, the correct base bid amount is \$494,000. Applying the same percentage for profit, the same fixed amount for overhead, and the same fixed amount for delays and loss of work as used in the worksheets, Cooper’s president stated that the bid should be increased from \$444,000 to \$573,400, an amount still below the second low bid of \$594,000.

The contracting officer determined that clear and convincing evidence did not exist to allow Cooper to modify its bid and that the firm should perform the contract at the originally submitted price or be permitted to withdraw its bid. Agency counsel concurred with this decision. The determination that documents this decision

³ With respect to this sum only, the agency is correct that the “figures do not correspond with the numbers on the page.” When viewed in context, however, it is clear that the figure in the column is the sum of the prices for these two items.

contains no supporting rationale, but appears to emphasize the fact that the worksheets were undated.

An agency may permit correction of a bid where clear and convincing evidence establishes both the existence of a mistake and the bid actually intended, so long as the correction would not result in displacing one or more lower bids. FAR § 14.407-3(a); Reliable Mechanical, Inc., B-282847.2, Sept. 13, 1999, 99-2 CPD ¶ 52 at 2; Holmes Mechanical, Inc., B-281417, Jan. 13, 1999, 99-1 CPD ¶ 6 at 2. A request to correct a bid 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, the manner in which it occurred, and the bid actually intended. FAR § 14.407-3(g)(2). 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. J. Schouten Constr., Inc., B-256710, June 6, 1994, 94-1 CPD ¶ 353 at 3. We have reviewed the evidence submitted by Cooper in support of its claim, as well as the agency's contemporaneous and post-protest rationale for denying the claim, and conclude that the agency's decision was unreasonable.

The critical piece of evidence submitted by Cooper in support of its claim is its worksheets. This Office has held that, as long as the bid remains low after correction, worksheets may constitute clear and convincing evidence if they are in good order and indicate the intended bid price, and there is no contravening evidence. See, e.g., Reliable Mechanical, Inc., *supra*; J. Schouten Constr., Inc., *supra*. We are unpersuaded by the agency's arguments that Cooper's worksheets are not in good order.

The Bureau of Prisons contends that the handwritten worksheets make it difficult to locate the alleged error or to decipher the estimates and materials contained within the worksheets, and that the figures were totaled in the margin "haphazardly."

The fact that the worksheets are handwritten is not dispositive. The FAR does not require that worksheets be prepared in any particular manner, and we have frequently upheld agency decisions to allow correction of mistakes in bids based on handwritten worksheets. See, e.g., Hampton Roads Mechanical Contractors, Inc., B-257908, Nov. 23, 1994, 94-2 CPD ¶ 201 at 4; Fisherman's Boat Shop, Inc., B-252560, July 9, 1993, 93-2 CPD ¶ 11 at 3-4. The key consideration is whether or not the worksheets are clear and convincing evidence of the mistake and the intended bid.⁴

⁴ If the agency's objection to the handwritten nature of the worksheets is rooted in a concern that the worksheets are not authentic, this Office has approved the use of handwritten and computer printout sheets, both of which are readily susceptible to tampering, in part because the penalties prescribed by 18 U.S.C. § 1001 (Supp. IV (continued...))

Holmes Mechanical, Inc., *supra*, at 4. Here, this Office had no difficulty locating the error or deciphering the estimates even without reference to Cooper's explanatory affidavit. First, the relationships between the breakout sheets and the IFB's drawings are clear, and each breakout sheet is internally consistent and easily understood. The figures in the column at issue are "haphazard" only to the extent that they are misaligned; while the figures are not as neatly written as they might be, each figure can be easily traced, in a logical order, from the line items on the page. Second, the worksheets' summary page clearly tracks the breakout pages in a logical, consistent order. Third, the formula used to load the base bid and arrive at the final bid price is clearly delineated and consistent with the bid itself. Unlike in cases cited by the agency in support of its position, Asbestos Control Management, Inc., B-279521, June 23, 1998, 98-1 CPD ¶ 169 and Pueblo Enters., Inc., B-278279, Jan. 14, 1998, 98-1 CPD ¶ 15, there are no internal discrepancies within the worksheets preventing ascertainment of the mistake and the intended bid.

Citing the fact that the worksheets are undated, the agency argues that there is no objective evidence substantiating when and how the undated worksheets were prepared or that they were actually used by Cooper in preparing its bid. However, there is no requirement that worksheets be dated, Tri-State Consultants, B-250700, Dec. 22, 1992, 92-2 CPD ¶ 433 at 3; Fortec Constructors, B-203627, Feb. 16, 1982, 82-1 CPD ¶ 132 at 4, and the fact that these worksheets are undated does not demonstrate that they were not prepared prior to bid opening or not used to prepare the bid. Aleutian Constructors, a Joint Venture, B-253276, Sept. 8, 1993, 93-2 CPD ¶ 147 at 3 n.2.

In his affidavit, Cooper's president represented that he prepared the worksheets prior to bid opening and used them to prepare the bid. An agency may properly rely upon a sworn statement as evidence supporting a claimed mistake in bid. FAR § 14.407-3(g)(2); Michaels Constr. Co., B-257764, 94-2 CPD ¶ 176 at 3; Seaward Servs., Inc., B-250685, Feb. 16, 1993, 93-1 CPD ¶ 141 at 3. Since Cooper's president has sworn to the authenticity of the worksheets, and there is no contravening evidence, the fact that they are undated does not preclude their consideration in correcting a bid. Hampton Roads Mechanical Contractors, Inc., *supra*, at 4.

Citing our decision in Circle, Inc., B-279896, July 29, 1998, 98-2 CPD ¶ 67 at 5, the agency asserts that it may reasonably refuse to accept uncorroborated, self-serving statements as the basis for permitting an upward correction. The decision in Circle

(...continued)

1998) could apply to false statements or representations by a bidder. Schoutten Constr. Co., B-215663, Sept. 18, 1984, 84-2 CPD ¶ 318 at 5; *see also* Severino Trucking Co., Inc., B-259080.2, Mar. 23, 1995, 95-1 CPD ¶ 160 at 4. Here, Cooper's president submitted a sworn statement attesting to the authenticity of the worksheets, which we have no basis to question.

is inapposite here. In Circle, the explanation provided in the statement was not corroborated by any of the worksheets or other affidavits submitted by the protester. In this case, the explanation provided in the statement is corroborated by and entirely consistent with the worksheets submitted by Cooper.⁵ As a result, we find the worksheets to be in good order, and further find that they constitute clear and convincing evidence of the existence of a mistake and the intended bid.

It is readily apparent that a mathematical error resulted from the misalignment of figures in a column on one of the breakout pages, and that an erroneous sum was carried over to the summary worksheet to form the basis for the final bid calculation. A mistake was clearly made. Since the worksheets unambiguously set forth the formula used to load the base bid to arrive at a final bid price, the mathematical error in the worksheets is readily susceptible to correction, allowing a straightforward, mechanical recalculation of the bid. See P.K. Painting Co., B-247357, May 5, 1992, 92-1 CPD ¶ 424 at 3.

While the agency objects that there is no back-up data to support the worksheets, such as subcontractor quotes or price lists, the FAR does not require that such data be provided in every case. The determinative question is whether such data is required by the circumstances and facts of a particular case. Here, Cooper's president asserts that the estimates in the worksheets are based solely on his many years of experience in the construction industry and with contracts of similar requirements. There is nothing improper with a bidder using estimates for cost components or relying on experience in other projects to calculate expected costs. J. Schouten Constr., Inc., *supra*. In this case, the figures themselves are not at issue but, rather, their calculation, which is readily apparent from the worksheets. See Unico Constr. Co., Inc., B-258862, Jan. 24, 1995, 95-1 CPD ¶ 42 at 4.

Finally, the agency cites our decision in American Museum Constr. Div. of Byer Indus., Inc., B-210022, Mar. 31, 1983, 83-1 CPD ¶ 337, for the proposition that acceptance of an asserted intended bid would adversely affect the integrity of the competitive bidding system where the amount of the alleged error is substantial and the difference between the corrected bid and the next low bid is small. The agency has misconstrued our previous decisions in this area. There is no particular

⁵ We do not agree with the agency that there is a discrepancy between the worksheets and the affidavit because the affidavit does not explain whether the figures in the left margin of the breakout page were intended to be totals or whether they were intended to represent updated quotes received prior to bid submission. The fact that the summary page of the worksheets uses the sum of that column shows that the figures in the column were intended to be totals. Under the circumstances, there was no need for Cooper's president to provide such an explanation.

percentage or dollar amount at which bids are too close to allow correction so long as clear and convincing evidence of the mistake is provided. Rather, the closer the intended bid comes to the next-low bid, the more difficult it is to establish the amount of the intended bid, and the closer we will scrutinize the worksheets and the mistake claim. Vrooman Constructors, Inc., B-226965.2, June 17, 1987, 87-1 CPD ¶ 606 at 6; R.H. Whelan Co., B-203248, Aug. 11, 1981, 81-2 CPD ¶ 123 at 4; see also Asbestos Control Management, Inc., supra, at 5. As discussed above, close scrutiny of the evidence here clearly reveals that Cooper did in fact make a mistake and that its intended bid would have been the lowest.

We recommend that the agency permit Cooper to correct its mistake in bid and to award the contract to the firm if otherwise appropriate. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2000). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

Anthony H. Gamboa
Acting General Counsel