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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: B&M Cillessen Construction Co., Inc.

File: B-287449.2

Date: June 5, 2001

Seth V. Bingham, Esq., Miller Stratvert & Torgerson, for the protester.
David P. Gorman, Esq., Sheehan, Sheehan & Stelzner, for HB Construction of Albuquerque, Inc., an intervenor.
James L. Weiner, Esq., and Alton E. Woods, Esq., United States Department of the Interior, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's decision to allow awardee to upwardly correct its low bid is not objectionable where the agency reasonably concluded that the awardee presented clear and convincing evidence of the claimed mistake and the intended bid price.

DECISION

B&M Cillessen Construction Co., Inc. protests the award of a contract to HB Construction of Albuquerque, Inc., under invitation for bids (IFB) No. RMK66010001, issued by the Bureau of Indian Affairs, United States Department of the Interior, for building construction at the Huerfano Dormitory-School, Huerfano Community, New Mexico. B&M contends that the agency improperly allowed HB to make an upward correction of its low bid.

We deny the protest.

The IFB was issued on January 15, 2001, and, as amended, contained a bid schedule with three line items--a base bid item (construction of a new dormitory and a new kindergarten classroom) and two additive bid items (renovation of two different buildings). For each item, bidders were required to submit a lump sum price; to arrive at the firm's total bid price, bidders were required to add the three prices together. As relevant here, the IFB contained the clause at Federal Acquisition Regulation (FAR) § 52.229-3, captioned "Federal, State, and Local Taxes," which provides that "[t]he contract price includes all applicable Federal, State, and local

taxes and duties.” FAR § 52.229-3(b). In this case, the applicable taxes include a 5.75-percent New Mexico Gross Receipts Tax (NMGRT) and a 3-percent Navajo Business Activities Tax (BAT).¹

Five firms, including B&M and HB, submitted bids by the 2 p.m. bid opening time on February 27. HB submitted the apparent low bid of \$4,579,000, and B&M submitted the apparent second low bid of \$4,855,000. As relevant here, the breakdown of HB’s total bid was as follows: base bid—\$4,409,000; additive 1—\$89,000; and additive 2—\$81,000. On February 27, after bids were opened, HB’s president notified the agency’s administrative contracting officer that he mistakenly omitted from the firm’s bid an amount for the NMGRT; he requested an opportunity to add an amount to its bid representing the 5.75-percent NMGRT. The contracting officer informed him that she was sending the firm a letter requesting bid verification and that he should submit a response.

In responding, HB’s president confirmed the firm’s total bid of \$4,579,000 with respect to the construction items, but stated that the firm did not include in the bid an amount for the NMGRT. To support his mistake claim, HB’s president submitted two computer-generated bid worksheets. The first worksheet, dated “27 Feb 01” at “01:13 PM,” showed that HB included in its price for the base bid item an amount for “gross receipts tax,” calculated by multiplying 5.75 percent by the firm’s original base bid subtotal; this worksheet did not show a 3-percent tax. The second worksheet, dated “27 Feb 01” at “01:48 PM,” showed that HB changed the “gross receipts tax” percentage from 5.75 percent to 3 percent, and recalculated the amount shown on the worksheet for this tax by multiplying 3 percent by the firm’s revised base bid subtotal. In an affidavit dated March 5, HB’s president provided the following explanation of the claimed mistake:

By law the gross receipts tax percentage for this project is 5.75% or \$263,293 on HB’s bid of \$4,579,000. The total amount of HB’s bid including NMGRT should have been \$4,842,293. Our bid should have included a line item of 3.0% Tribal Tax + 5.75% NMGRT for a total of 8.75% GRT. At approximately 1:13 PM on bid day I was told to **add** 3%

¹ The Navajo BAT is calculated based on “gross receipts,” defined by the Navajo Tax Commission as including “all money received in the performance of [a] contract on the Navajo Nation. . . . [U]nder the BAT law, gross receipts from construction activity include[] amounts designated as tax payments in the construction contract.” Jaynes Corp., Navajo Tax Comm’n, No. 91-028, slip op. at 5 (Dec. 20, 1991). The 3-percent Navajo BAT “applies to the total contract amount, including any reimbursement for taxes,” which would include the amount calculated for the NMGRT. Letter to the Department of the Interior from the Office of the Navajo Tax Commission (May 8, 2001).

to Gross Receipt Tax when in fact, I **changed** the Gross Receipt Tax to 3%.

Agency Report (AR), Tab 6A, Affidavit of HB's President (Mar. 5, 2001).

After doing its own calculations, the agency concluded that, as submitted at bid opening, HB's bid did not include an amount for the 5.75-percent NMGRT; HB's bid only included an amount for the 3-percent Navajo BAT. The agency further concluded that HB clearly intended to include in its bid an amount for the 5.75-percent NMGRT, although it was not clear why the percentage was changed from 5.75 percent to 3 percent (in the second worksheet) in lieu of adding 3 percent to the NMGRT, as explained in the above-referenced affidavit, since HB would have remained the low bidder. AR, Tab 9, Contracting Officer's Memorandum (Mar. 22, 2001). The contracting officer determined that the upward correction of HB's low bid to include the 5.75-percent NMGRT was appropriate because the addition of this amount would not displace other bidders. Specifically, HB's uncorrected bid, which included a 3-percent tax amount, was \$4,579,000; adding 5.75 percent--\$263,293 ($\$4,579,000 \times .0575$)--to the uncorrected bid yielded a total corrected bid of \$4,842,293,² which was \$12,707 lower than B&M's second low bid. The contracting officer determined that HB would be allowed to correct its mistake, as requested, since the firm's corrected bid would remain low. On April 20, the agency awarded the contract to HB for \$4,842,293.

As an initial matter, B&M complains that since HB omitted the NMGRT from its bid, HB's bid was nonresponsive and should have been rejected.

A responsive bid is one that provides an unequivocal offer to tender the exact thing called for in the IFB such that acceptance of the bid will bind the contractor in accordance with the solicitation's material terms and conditions. Oregon Iron Works, Inc., B-247845, May 27, 1992, 92-1 CPD ¶ 474 at 6. Only where a bidder provides information with its bid that reduces, limits, or modifies a solicitation requirement may the bid be rejected as nonresponsive. Id.

Here, HB did not take any exception on the face of its bid to the NMGRT requirement; rather, HB failed to properly calculate this tax and thereby did not include the cost of this tax in its bid. Notwithstanding this omission, HB

² The contracting officer noted that HB did not add an amount representing the 3-percent Navajo BAT on the NMGRT increase. If this had been done, \$7,899 ($\$263,293 \times .03$) also would have been added to HB's bid, for a total corrected bid of \$4,850,192, which would have made HB's bid \$4,808 lower than B&M's bid.

unequivocally committed to perform the IFB requirements and its bid is therefore responsive.³

The thrust of B&M's protest is that HB did not provide clear and convincing evidence of its mistake and, accordingly, the agency improperly allowed HB to make an upward correction of its low bid.

A bidder who seeks upward correction of its bid prior to award must submit clear and convincing evidence that a mistake was made, the manner in which the mistake occurred, and the intended bid price. FAR § 14.407-3(a); C Constr. Co., Inc., B-253198.2, Sept. 30, 1993, 93-2 CPD ¶ 198 at 2. The exact amount of the intended bid need not be established, provided that there is clear and convincing evidence that the amount of the intended bid would fall within a narrow range of uncertainty and would remain low after correction. Id. For an upward adjustment of a bid, workpapers, including hard copy printouts of computer-generated software spreadsheets/worksheets, may constitute part of that clear and convincing evidence if they are in good order and indicate the intended bid price, and there is no contravening evidence. Id. at 2-3. Whether evidence of the intended bid amount meets the clear and convincing evidence standard is a question of fact, and we will not question an agency's decision in this regard unless it lacks a reasonable basis. Id. at 3.

Under the terms of the IFB, bidders were responsible for taxes, including a 5.75-percent NMGR and a 3-percent Navajo BAT. HB claimed that in arriving at its total bid price of \$4,579,000, it omitted an amount equal to the 5.75-percent NMGR. To support its mistake claim, the firm submitted two worksheets--the first one showing the application of a 5.75-percent "gross receipts tax" and the second one, which was the basis for the calculation of HB's total bid price, as referenced above, showing the application of a 3-percent "gross receipts tax." Thus, HB's bid as submitted at bid opening included an amount corresponding to the 3-percent tax, but omitted an amount corresponding to the 5.75-percent tax. To correct its bid, HB multiplied its total bid price by the NMGR percentage (\$4,579,000 X .0575) to arrive at a figure of \$263,293. When this figure was added to HB's total bid, as originally submitted, HB's corrected bid became \$4,842,293, which was \$12,707 lower than B&M's bid. On this record, we have no basis to object to the agency's decision to allow HB to upwardly correct its low bid where the agency reasonably concluded

³ For the same reason, we reject B&M's argument that HB's bid was nonresponsive because while the firm's worksheets contain an amount for a performance bond, the worksheets do not reflect an amount attributable to a payment bond. Again, HB did not take any exception on the face of its bid to the IFB requirement that the awardee furnish payment and performance bonds for 100 percent of the contract price within 10 calendar days of award. HB committed to the terms of the IFB and its bid is responsive.

that HB provided clear and convincing evidence of its mistake, the manner in which the mistake occurred, and the firm's intended bid price.⁴

Finally, B&M argues, based on its review of HB's worksheets, that HB understated various costs it will be required to pay, e.g., the Navajo BAT, the cost of a payment bond, and the overhead costs associated with administering and paying additional taxes. B&M maintains that if these costs were properly accounted for, HB would no longer be the low bidder.⁵ Protester's Comments at 11-14.

This argument, in essence, constitutes a challenge that HB submitted a below-cost bid which will not allow it to cover its costs. However, the submission of a below-cost bid is not illegal, and the government cannot withhold an award merely because a responsive low bid is below cost. Ambulancias de Emergencias, Inc., B-216936, Nov. 26, 1984, 84-2 CPD ¶ 562. Whether a low price is so low that the bidder will not be able to perform the contract satisfactorily is a question concerning the bidder's responsibility. Id. A determination that a bidder is capable of performing a contract is based, in large measure, on subjective judgments which generally are not susceptible to reasoned review. Thus, an agency's affirmative determination of a contractor's responsibility will not be reviewed by our Office absent a showing of possible bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may not have been met. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2001). Neither exception applies here.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁴ We point out that no matter what order the fixed percentages for the NMGR and the Navajo BAT are applied to the total price of the base bid and two additive items (e.g., 3 percent, then 5.75 percent; 5.75 percent, then 3 percent; or even a combined 8.75 percent), HB's bid remains low.

⁵ HB did not assert a mistake regarding any of these items.