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Decision

Matter of: Miramar Construction, Inc.

File: B-298609

Date: October 31, 2006

Alan Dickson, Esq., Paul C. Burkholder, Esq., and Tammy Hopkins, Esq., Epstein Becker & Green, for the protester.

Kerry S. Curtis, Esq., U.S. Army Corps of Engineers, 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

Contracting agency's determination to permit bidder to upwardly correct its apparent low bid lacks a reasonable basis where bidder's explanation for alleged mistake is illogical and raises questions as to whether a mistake occurred, and where agency's determination fails to address these questions and relies on mischaracterizations of the bidder's explanation.

DECISION

Miramar Construction, Inc. protests the proposed award of a contract to ERS-JV under invitation for bids (IFB) No. W912PL-06-B-0008, issued by the U.S. Army Corps of Engineers, Los Angeles District, for the removal and replacement of sewer lagoons in wastewater treatment facilities at the Yuma Proving Ground in Arizona. Miramar primarily argues that the Army improperly permitted ERS-JV to make an upward correction to its apparent low bid.

We sustain the protest.

The Army issued the solicitation on May 15, 2006 as a competitive section 8(a) procurement.¹ Bidders were required to provide a separate lump sum price for each

¹ Section 8(a) of the Small Business Act authorizes the Small Business Administration to contract with other government agencies and to arrange for the performance of those contracts via subcontracts awarded to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (2000).

of two items, a base requirement to construct and repair existing sewer lagoons at one location, and an option requirement to perform similar work at another location. Award of a fixed-price contract was to be made to the responsible bidder that submitted the lowest responsive bid for the total of both items in the bid schedule. IFB § 00010, ¶ 16.

Four firms submitted bids by the June 21 extended closing date. The following table shows the prices submitted and the independent government estimate (IGE):

	Base Item	Option Item	Total Bid
Firm A	\$7,696,000	\$4,519,000	\$12,215,000
Firm B	5,987,980	4,010,337	9,998,317
Miramar	6,391,000	2,976,000	9,367,000
ERS-JV	4,122,900	2,758,900	6,881,800
IGE	7,824,480	2,786,580	10,611,060

ERS-JV's apparent low bid was 26.5 percent below Miramar's apparent second-low bid, and 35.1 percent below the IGE. In light of this pricing disparity, the contract specialist contacted ERS-JV's director and asked him to review the bid and confirm the price for both line items. The contract specialist states that ERS-JV's director told him he thought the firm had made an error but that he would review the bid more thoroughly and get back to the agency. Contract Specialist's (CS) Declaration at 2; Contracting Officer's (CO) Declaration at 2.

The next day, ERS-JV's director asked the contracting officer how to request withdrawal of the bid because it had made a "significant mistake in the calculations." CO Declaration at 2. The contracting officer states that she and the director reviewed the requirements in the Federal Acquisition Regulation (FAR) and Engineer FAR Supplement (EFARS) for requesting bid withdrawal, and that she faxed the director relevant pages from the FAR. Id.

Later that same day, ERS-JV's director faxed the contracting officer a letter requesting withdrawal of the bid because he had discovered "arithmetic errors" that materially affected the price. Letter from ERS-JV to CO, June 22, 2006. Attached to the letter were two undated hard copies of electronic spreadsheets and an affidavit from the director in which he claimed responsibility for the "computation of the erroneous amount" in the original bid. Affidavit of ERS-JV's Director, June 22, 2006, ¶ 4. The first spreadsheet was captioned "original," and reflected a total bid of \$6,881,800. In his affidavit, the director stated that this spreadsheet was used to compute the offered bid, was prepared before bid opening, and had not been altered since then. The second spreadsheet was captioned "extended," and reflected a total bid of \$8,313,086. In his affidavit, the director stated that the total bid should have

been as shown on this spreadsheet. The affidavit goes on to provide ERS-JV's only explanation in the record concerning how this alleged mistake was made.²

ERS-JV's "original" spreadsheet is comprised of two sections, one for the base requirement and one for the option requirement. Each section contains various line items for the work, such as labor positions and specific services. In the final column, or "cell," the spreadsheet shows a total dollar amount for each line item. The total amount is the sum of various cost elements of the line item, each of which is entered in a separate cell, displayed horizontally across the line corresponding to the line item.

In his affidavit, ERS-JV's director states that "[a] mistake was made" in the line item for [deleted] in both the base and option requirement sections of the spreadsheet. In the base requirement section, the amount listed in the final cell for the total dollar amount is [deleted]. The director states:

This mistake resulted from the positioning of [deleted] in the final cell; the amount of [deleted] was not a CALCULATED amount as it should have been. The CALCULATED amount should have been [deleted], as shown on the "Extended" spreadsheet. [deleted] was our INTENDED bid price for this item on the [base item] portion of our bid worksheet.

ERS-JV Affidavit, supra, ¶ 2. In the option requirement section of the spreadsheet, the amount listed in the final cell for the total dollar amount is [deleted]. As with the base requirement, ERS-JV's director states:

This mistake resulted from the positioning of [deleted] in the final cell; the amount of [deleted] was not a CALCULATED amount as it should have been. The CALCULATED amount should have been [deleted], as shown on the "Extended" spreadsheet. [deleted] was our INTENDED bid price for this item on the [option item] portion of our bid worksheet.

Id.

On June 26, ERS-JV's director asked the contract specialist if there was a way to remain as the low bidder. The contract specialist states that he described the procedure outlined in the FAR for permitting the correction of mistakes before

² On June 23, ERS-JV's director sent the Army another affidavit to explain a different error on the "original" spreadsheet that had not affected the original offered price. In view of our decision with respect to the originally-claimed mistake, we need not address this second alleged mistake.

award and told the director to review the requirements and to ask for correction instead of withdrawal of the bid. CS Declaration at 2.

On June 27, ERS-JV's director faxed the contract specialist a letter requesting correction of the bid and canceling its request to withdraw the bid. The letter states that, after bid opening, the director reviewed the spreadsheets and discovered "arithmetic and computer data entry errors" that materially affected the price. Attached to the letter were hard copies of electronic spreadsheets similar to those earlier submitted (this time signed and dated), a corrected bid schedule, and copies of the same affidavit and spreadsheets submitted with the request to withdraw the bid. Later that day, ERS-JV's director e-mailed the contract specialist an electronic copy of the spreadsheet he says he used to calculate the bid. However, the spreadsheet had already been altered to show the "corrected amounts" and was, as a result, no longer the original electronic spreadsheet.

The contracting officer analyzed the request for bid correction and memorialized her analysis in a memorandum sent to the Division Commander on July 21.³ On July 27, the Division Commander concurred with the contracting officer's analysis of the request and authorized an upward correction of the bid to a total of \$8,313,086. In its protest, Miramar primarily contends that ERS-JV's explanation is irrational, that there is significant contravening evidence for its claim on the face of the electronic spreadsheet, and that the agency's rationale for concluding ERS-JV provided clear and convincing evidence to support its request was erroneous.

In order to protect the integrity of the procurement process, a bidder's request for upward correction of a bid after bid opening but before award may be granted only where the request is supported by clear and convincing evidence of both the existence of a mistake and the bid actually intended, and only where the correction would not result in displacing one or more lower bids. FAR § 14.407-3(a); Stanley Contracting, Inc., B-282085, May 27, 1999, 99-1 CPD ¶ 104 at 3. The burden is on the bidder to support such a request with statements, sworn if possible, and all pertinent evidence, such as the original worksheets and other data used in preparing the bid, that establishes the existence of the error, the manner in which it occurred, and the bid actually intended. FAR § 14.407-3(g)(2). 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 Mgmt., 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.

³ Under EFARS § 14.407-3(e)(1)(i), requests for bid correction are to be submitted to the Division Commander for determination.

We conclude from the record that the agency's determination to allow ERS-JV to correct its bid lacks a reasonable basis. Our concerns are twofold. First, the bidder's explanation is illogical in view of the way its electronic spreadsheet was structured, and raises questions as to whether a mistake occurred at all. Second, the agency's rationale for concluding that clear and convincing evidence supported the bidder's request not only fails to address these questions, but relies on mischaracterizations of ERS-JV's explanation.

ERS-JV prepared its bid using a computer-generated spreadsheet that contained imbedded formulas to automatically calculate various costs, as well as the total dollar amount for each line item. For the [deleted] line item under both the base and option requirements, the spreadsheet was set up so that the manual entry of figures in the cells for estimated quantity, unit of measure, and unit price would automatically generate and insert figures in the cells for unit overhead cost, total overhead cost, total direct cost, and total dollar amount. When these first three figures are manually entered into the base requirement section of the spreadsheet, the total dollar amount in the final cell--[deleted]--is automatically calculated and inserted. Likewise, when these first three figures are manually entered into the option requirement section of the spreadsheet, the total dollar amount in the final cell--[deleted]--is automatically calculated and inserted. These figures result from operation of the spreadsheet's imbedded formulas.

ERS-JV's explanation for its alleged mistake is as follows: its director ignored the formulas set up in the spreadsheet and overrode the automatically "calculated" total amount of [deleted] for the base requirement by inserting, instead, a "non-calculated" (that is, not calculated by the formulas) amount of [deleted]--but that he actually intended for the amount to be the "calculated" amount of [deleted], the amount he overrode. Likewise, the director ignored the formulas set up in the spreadsheet and overrode the automatically "calculated" amount of [deleted] for the option requirement by inserting, instead, a "non-calculated" amount of [deleted]--but that he actually intended for the amount to be the "calculated" amount of [deleted], the amount he overrode.

In view of the automated features of the spreadsheet, which are readily apparent from its electronic version, this explanation is illogical and raises several questions ERS-JV does not answer. The ERS-JV director does not explain why he ignored the formulas set up in the spreadsheet and overrode the automatically calculated figures. He does not explain the discrepancy between that intentional act and his current claim that the figures he overrode, calculated by the formulas he ignored, were, after all, the intended figures. He does not explain the derivation of these non-calculated figures or why he inserted these particular figures. He does not explain why he did not realize an error had been made as soon as he inserted the "non-calculated" amounts, even though, with respect to the option requirement, this action automatically resulted in insertion of a negative number in the total direct cost cell, in plain sight next to the total dollar amount cell on the computer screen before him.

The questions raised by ERS-JV's incomplete explanation cast doubt on its claim that there was a mistake at all.

The agency's determination that ERS-JV's request for bid correction was supported by clear and convincing evidence fails to address these questions and, in fact, relies on mischaracterizations of ERS-JV's explanation.

In her memorandum to the Division Commander, the contracting officer states:

19. The spreadsheet program . . . allowed a person to add expenses inside the summation cell. However, if an inaccurate expense is added the end result or [total dollar amount] will also be inaccurate.

20. When ERS-JV realized it needed to separate and submit a price for both [requirements] it manually calculated each individual site to arrive at a sub total.

21. The evidence is clear and convincing that ERS-JV made a mistake. . . . ERS-JV inadvertently inserted an inaccurate expense in the [total direct cost] cell titled [deleted] which generated the mistake in the [total dollar amount] column. . . .

CO Memorandum, July 21, 2006, ¶¶ 19-21.

The contracting officer attributes to ERS-JV a rationale for its action--needing to separate and submit prices for both requirements--and an action--inadvertently inserting inaccurate expenses in the total direct cost cells--that the bidder itself does not claim. ERS-JV never provided a rationale for its action, only claimed to have inserted figures into the total dollar amount cells, and is silent as to whether this action was inadvertent or intentional. The contracting officer's version of ERS-JV's explanation is wholly unsupported by the record.⁴

The District Commander's analysis relies upon equally erroneous characterizations:

4. . . . The printout of the worksheet reveals how the erroneous [base requirement] figure for direct costs was transposed incorrectly by a factor of 100: the cost should have been [deleted] multiplied by

⁴ The legal opinion attached to the contracting officer's memorandum asserts, "ERS-JV's sworn statement that it manually mis-calculated the figures for the total direct cost of [deleted] is reasonable" Assistant District Counsel's Memorandum, July 21, 2006, ¶ 9. In his affidavit, ERS-JV's director does not make this statement.

[deleted], or [deleted] instead of the [deleted] entered onto the worksheet. Review of the worksheet in question supports ERS-JV's assertion of a simple decimal error.

6. . . . A value of [deleted] was listed in place of the accurate total of [deleted]. This is the "decimal error" noted above.

14. In the instant case it is easy to determine both the existence of a mistake and the actual intent of the bidder. An examination of the original ERS-JV worksheets discloses the transposition error made by the bidder. It mistakenly multiplied [deleted] by [deleted] with a resulting total of [deleted] rather than the correct amount of [deleted]. Thus it is abundantly clear that a mistake was made. Likewise, it is a simple matter to ascertain the true intended total to be added to the bid, [deleted] rather than [deleted]. The analysis easily explains both how the error was made and the correct price intended by the bidder. Therefore, the evidence provided by the bidder satisfies the clear and convincing standard.

Division Commander's Memorandum, July 27, 2006, ¶¶ 4, 6, 14.

The Division Commander's assertion that ERS-JV made a multiplication error that resulted in its entering the wrong figure into the total direct cost cell for [deleted] in the base requirement is not supported by the record.⁵ ERS-JV does not claim that its mistake resulted from a multiplication error, a transposition error, or a decimal error,⁶ and it does not claim that its mistake resulted from entering a figure into the total direct cost cells.

⁵ The Division Commander's claim that ERS-JV "mistakenly multiplied" the estimated quantity of [deleted] by the unit price for a total of [deleted] rather than the corrected amount of [deleted] is also confusing, as his explanation for the mistake is that ERS-JV inserted [deleted] into the total direct cost cell for the base requirement, not [deleted]. In fact, the figure of [deleted] appears in a different cost cell and was not revised in the bidder's "extended" spreadsheet.

⁶ The Division Commander attributes the insertion of [deleted] as the total cost for [deleted] for the base requirement instead of [deleted] to ERS-JV's "assertion" of a "simple decimal error." ERS-JV makes no such assertion--the firm provides no explanation for its actions. Moreover, while one can see how a decimal error might occur if the spreadsheet's formula did not automatically insert the "correct" figure of (continued...)

It appears that the Division Commander has confused the alleged cause of the error with its effect. When ERS-JV manually entered the estimated quantity, unit of measure, and unit price for the [deleted], the formulas imbedded in the spreadsheet should have automatically calculated and inserted figures into the remaining cells, including the cells for total direct costs--[deleted] for the base requirement and [deleted] for the option requirement--as well as the cells for total dollar amounts--the figures ERS-JV now claims were the intended figures. However, when ERS-JV manually inserted "non-calculated" figures into the total dollar amount cells for [deleted]--the act it claims was the cause of the alleged mistake--the formulas automatically recalculated and inserted different figures into the cells for total direct costs--[deleted] for the base requirement and [deleted] for the option requirement. This "cause and effect" is clearly visible when the electronic version of the spreadsheet is reviewed.

The Army's erroneous analysis of ERS-JV's alleged mistake may have led it to focus on the fact that, when the "logic of the spreadsheet is used," the intended bid for the [deleted] line items becomes evident. AR Legal Memorandum at 10. That is, if the spreadsheet's formulas are permitted to function, the resulting figures are those ERS-JV now claims were the intended figures. However, the Army's focus should have been on the fact that ERS-JV ignored the "logic of the spreadsheet" when it inserted "non-calculated" figures into the total dollar amount cells instead of permitting the formulas to function, and failed to provide any reason for doing so. The Army's erroneous analysis, which goes beyond what ERS-JV has offered as an explanation, cannot reasonably support a finding that ERS-JV provided clear and convincing evidence of the mistakes and the actual intended bid to support its request for bid correction.

We conclude that the Army improperly permitted ERS-JV to upwardly correct its bid.⁷ We recommend that the Army permit ERS-JV to withdraw its bid if otherwise appropriate, and make award to Miramar if otherwise appropriate. We also recommend that Miramar recover the costs of filing and pursuing its protest, including reasonable attorneys' fees. Miramar should submit its certified claim,

(...continued)

[deleted], there is no such argument to be made for the alleged mistake in the option requirement section of the spreadsheet.

⁷ Miramar also argues that the agency improperly determined that ERS-JV was a responsible bidder. Since we sustain the protest on Miramar's first basis of protest, we need not reach its second.

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(d)(1) (2006).

The protest is sustained.

Gary L. Kepplinger
General Counsel