

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Holmes & Narver Constructors, Inc.) ASBCA Nos. 52429, 52551
)
Under Contract No. F41622-98-C-0034)

APPEARANCES FOR THE APPELLANT: Karen L. Manos, Esq.
Sheldon T. Bradshaw, Esq.
Howrey Simon Arnold & White LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Jean R. Love, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAGE
ON THE GOVERNMENT’ S MOTION FOR SUMMARY JUDGMENT

Appellant seeks relief for (1) an alleged unilateral mistake in its offer that was not discovered until after award, and (2) allegedly misleading tax information provided by Government officials during the solicitation process. The Government moves for summary judgment, contending that appellant cannot establish a *prima facie* case with respect to either of these allegations. For the reasons discussed *infra*, we deny the motion with respect to appellant’s unilateral mistake claim. With regard to appellant’s misrepresentation claim, we grant the motion. We also dismiss ASBCA No. 52429 because it was superseded by ASBCA No. 52551.

STATEMENT OF FACTS
FOR PURPOSES OF THE MOTION

The RFP

1. In April 1998, the Department of the Air Force (Air Force or Government) issued Request for Proposals (RFP) No. F41622-98-R-0012. The RFP solicited offers for the demolition of existing military family housing at Columbus AFB, Mississippi, and the design and construction of new housing. Appellant, Holmes & Narver Constructors, Inc. (H&N), was one of three offerors to submit a complete proposal to the Air Force in response to the RFP. H&N eventually was awarded the contract in September of 1998. (R4, tab 1; affidavit of Paul Vaughn at ¶¶ 6-7, 9, 12, 17)

2. The solicitation was conducted as a “best value” procurement, whereby the Government intended to award the contract to the offeror that, in the Government’s estimation, provided the greatest overall benefit to the Government in response to the requirement. The RFP specified the maximum price (cost limit) that the Air Force would be willing to pay for the project, and identified various minimum features of the new housing that offerors were required to incorporate into their respective designs. The RFP encouraged offerors to suggest improvements or enhancements in their designs beyond the minimal requirements, so long as applicable cost limitations were not exceeded. (R4, tab 1; decl. of Michael Koppi at ¶ 3; Vaughn aff. at ¶¶ 7-8, 11; compl. and answer ¶ 18)

Unilateral Mistake

3. In competing for the contract, H&N’s strategy was not to offer the Government the lowest possible price, but rather to offer the maximum housing value, including size and enhancements, within the designated cost ceiling (decl. of Garr Smith at ¶ 3).

4. Before preparing its proposal, H&N initially generated an estimate of the cost of the project based upon the minimum technical requirements in the RFP without any added enhancements (Koppi decl. at ¶ 2; Smith decl. at ¶¶ 4-6). The estimate was prepared using a computerized spreadsheet which contained numerous line items. The price of some line items (*e.g.*, windows) was determined simply by multiplying the total number of items by the expected price per item. The price of other line items (*e.g.*, roofing) was computed by multiplying the expected price per square foot by the total gross square footage of the underlying structures. As a result, under appellant’s methodology, there was some correlation between the gross square footage of the structures and the total cost of construction. After each line item was computed, the spreadsheet aggregated these costs to arrive at the overall cost estimate. According to appellant, the methodology used in the spreadsheet is similar to that employed by the Air Force to arrive at its own estimate of the costs of construction. (Koppi decl. at ¶ 10; decl. of Daraius Tarapore at ¶¶ 2-3; Gov’ t mot. SJ at ex. D)

5. After the initial cost estimate was prepared, H&N employees and managers agreed upon enhancements to the designs that would be submitted to the Air Force. Among the more significant proposed improvements were an increase in the size of the living area; additional exterior storage areas; and a two-car garage in lieu of the single-car garage required by the RFP. These enhancements significantly increased the gross square footage of the housing, and, proportionately, raised the cost of construction. (Decl. of William Ellis at ¶¶ 3-4; Koppi decl. at ¶ 3; Smith decl. at ¶ 7; Tarapore decl. at ¶¶ 3-4)

6. Appellant maintains that, although it normally would have prepared a revised cost estimate to reflect the added cost of proposed enhancements before submitting its final offer, it inadvertently neglected to do so in this particular instance. Instead, in its proposal

to the Air Force, H&N mistakenly used the gross square footage data (and corresponding prices) based upon the minimum requirements of the RFP, without added enhancements. According to H&N, this error was caused by a clerical oversight and was not a strategic decision on the part of the company or an error in estimating the cost of the enhancements. (Ellis decl. at ¶¶ 3-4; Koppi decl. at ¶¶ 5-8; Smith decl. at ¶¶ 5-6, 8-9; Tarapore decl. at ¶ 5)

7. The parties vigorously dispute whether the Air Force should have been aware of an error in H&N's proposal prior to acceptance. Appellant maintains that the Government could not realistically have believed that appellant intended to build the structures proposed for the price quoted. H&N observes that its offer was within 1% of the Government's own estimate, even though the buildings that H&N proposed to construct were significantly larger and included numerous value-added enhancements, whereas the Government's estimate was based merely on the minimum requirements of the RFP (Koppi decl. at ¶ 10). Appellant further argues that its alleged mistake would have been conspicuous on the face of the proposal. For example, appellant in its technical proposal reported a "total interior area" that exceeded the available "gross square footage" for several housing designs. In addition, the floor plans submitted showed dimensions that, when totaled, surpassed the reported "gross square footage." In response, the Air Force insists that it did not perceive the error in appellant's proposal, and emphasizes that H&N's offer was comparable in price to those of other offerors and to the Government's own estimate (Vaughn aff. at ¶¶ 12-13). The Air Force maintains that it had no way of knowing specifically how appellant derived its price proposal, and that the Government could not reasonably have noticed the purported discrepancies in the square footage figures because appellant did not provide this information as part of its pricing proposal, but only as part of its technical proposal and floor plans (aff. of Ronald Littman at ¶ 5; Vaughn aff. at ¶¶ 15-16; R4, tabs 14-15).

Misrepresentation

8. Shortly after the RFP was issued, the Air Force convened a conference with prospective offerors to review the contents of the solicitation and respond to inquiries. During the conference, a question reportedly was raised as to whether the project would be subject to Mississippi state sales tax. The contracting officer indicated that the Air Force would respond in writing to this question and others at a later time. (R4, tab 5; Koppi decl. at ¶ 12; Vaughn aff. at ¶ 10)

9. In July 1998, the Air Force issued RFP Amendment 0004. Question #50 and its answer read as follows:

QUESTION: Are Mississippi State Taxes applicable?

ANSWER: The State of Mississippi assesses a 3.5% contractor tax on all construction contracts over \$10,000, except residential construction. However, it is the contractor's responsibility to ensure compliance with all state and local taxes.

(R4, tab 12 at 11; Vaughn aff. at ¶ 18)

10. For purposes of this litigation, it is undisputed that the State of Mississippi draws a distinction between “contractor tax” and “sales tax,” and that, while the project may largely have been exempt from Mississippi’s contractor tax of 3.5%, it nevertheless was fully subject to the State’s 7% sales tax. (R4, tab 19, exs. 13-14)

11. The contracting officer insists that Question #50 and its answer were intended merely to alert offerors that Mississippi would impose an extra 3.5% tax on any non-residential construction, in addition to all other taxes assessed by the state (Vaughn aff. at ¶ 18; aff. of Neil Cole at ¶ 4). He explains that, at the time he drafted the question and answer, he had “no knowledge as to whether sales taxes applied in the state of Mississippi” (Vaughn aff. at ¶¶ 18-19).

12. H&N maintains that the Air Force’s response to Question #50 falsely implied that the project would be exempt from Mississippi sales tax. According to appellant, “[i]t did not occur to [H&N] that in response to the question whether ‘ Mississippi State Taxes’ were applicable, the Government would respond by mentioning only a type of tax that was not applicable, while failing to mention a different type of State tax that was applicable” (decl. of Edvin Remund at ¶ 3). Purportedly relying upon the information furnished by the Government, H&N removed the cost of sales tax from the proposal that it eventually submitted to the Air Force (Koppi decl. at ¶ 13; Remund decl. at ¶ 5).

13. The record contains no indication that appellant sought the assistance of counsel or performed its own research to determine whether the project would be exempt from Mississippi sales tax. Nor does appellant offer any explanation as to why it could not have discovered Mississippi law for itself.

14. H&N maintains that the Air Force should have known that its answer to Question #50 was misleading, because the Air Force recently had experienced a similar incident at the same Air Force base in which a “contractor omitted state taxes from his bid price only to discover after award that the project was subject to state tax.” The Air Force denies this allegation. (Compl. and answer at ¶ 43)

Contract Formation, Final Decisions, and Appeals

15. On 29 September 1998, the Air Force awarded Contract No. F41622-98-C-0034 (contract) to H&N (Vaughn aff. at ¶¶ 12, 17). The award was made without discussions, and the Air Force did not ask H&N to verify the accuracy of its proposal before acceptance. The contract incorporated, *inter alia*, standardized Federal Acquisition Regulation (FAR) clause 52.229-3, FEDERAL, STATE, AND LOCAL TAXES (JAN 1991) (Vaughn aff. at ¶ 20). The clause pertinently provides that “[t]he contract price includes all applicable Federal, State, and local taxes and duties.” FAR 52.229-3(b).

16. After performance was underway, H&N submitted to the Air Force a request for equitable adjustment (REA) seeking compensation for the alleged unilateral mistake in its offer, and for the allegedly misleading tax information provided by the Government. As relief for its alleged mistake in bid, the contractor sought rescission of Option 2, CLIN 0003, which had not been exercised. Because H&N had already begun demolition and design work under CLINS 0001 and 0002, rescission was not practicable as to them. H&N proposed reformation of the contract by increasing the price of CLIN 0001 by \$581,905 and increasing the price of CLIN 0002 by \$466,477, plus markups. Or, appellant contended, the contract could be reformed to reduce the square footage of the units in CLINS 0001 and 0002. In the event neither reformation nor rescission were deemed acceptable remedies, H&N requested restitution in the amounts asserted to compensate the contractor on a *quantum meruit* or *quantum valebant* basis for the reasonable value of goods and services accepted by the Government. With respect to its alleged detrimental reliance upon misleading information from the Government regarding State of Mississippi sales taxes, H&N also sought reformation of the contract to correct the parties’ “mutual mistake” to permit recovery of Mississippi sales taxes by increasing the price of CLIN 0001 by \$252,216 and increasing the price of CLIN 0002 by \$256,461, plus markups. (R4, tab 19 at 18-19)

17. Although the REA was uncertified and made no demand for a final decision, the contracting officer denied the REA by final decision dated 19 October 1999 (R4, tabs 19, 22). H&N appealed to this Board and the dispute was docketed as ASBCA No. 52429. Subsequently, appellant resubmitted its REA to the contracting officer as a certified claim (R4, tab 23). The contracting officer denied the claim, and H&N again appealed to this Board (R4, tab 24). The latter appeal was docketed as ASBCA No. 52551. By motion dated 8 May 2002, appellant sought to withdraw ASBCA No. 52429, explaining that it was a protective appeal which was superseded by ASBCA No. 52551. (Vaughn aff. at ¶¶ 4-5; Board correspondence files)

DECISION

The Government now moves for summary judgment in these appeals. We evaluate the motion under the established standard that:

Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. . . . The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment.

Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987); Fed. R. Civ. P. 56. Although the onus is on the moving party to persuade us that it is entitled to summary judgment, the movant may obtain summary judgment, if the non-movant bears the burden of proof at trial, by demonstrating that there is an absence of evidence to support the non-moving party's case. *E.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Summary judgment is appropriate in that situation, even though some factual issues may remain unresolved, because "a complete failure of proof concerning an essential element of a nonmoving party's case necessarily renders all other facts immaterial." *Id.*, 477 U.S. at 323.

Mindful of these principles, we first consider the Government's motion with respect to appellant's claim of unilateral mistake. We then address appellant's misrepresentation claim. Since H&N ultimately bears the burden of proving its allegations against the Government, the Air Force is entitled to summary judgment if we conclude that appellant cannot establish one or more crucial aspects of its case.

Unilateral Mistake

A contractor seeking post-award reformation of its contract on grounds of unilateral mistake has the burden of proving by clear and convincing evidence the following five elements:

"(1) a mistake in fact occurred prior to contract award; (2) the mistake was a clear-cut, clerical or mathematical error or a misreading of the specifications and not a judgmental error; (3) prior to award the Government knew, or should have known, that a mistake had been made and, therefore, should have requested bid verification; (4) the Government did not request bid verification or its request for bid verification was inadequate; and (5) proof of the intended bid is established."

McClure Elec. Constructors, Inc. v. Dalton, 132 F.3d 709, 711 (Fed. Cir. 1997), quoting *Solar Foam Insulation*, ASBCA No. 46921, 94-2 BCA ¶ 26,901,¹ *see also Giesler v. United States*, 232 F.3d 864, 869 (Fed. Cir. 2000). A contractor is not precluded from recovery for unilateral mistake even though the contractor itself may have been negligent

in preparing its bid or proposal. *Ruggiero v. United States*, 420 F.2d 709, 713 (Ct. Cl. 1970).

H&N contends that the affidavits and evidence offered establish a *prima facie* case of unilateral mistake. Appellant has explained that, prior to award of the contract, H&N committed a “clerical” error in preparing its proposal by failing to revise the price of its offer to reflect the cost of design enhancements; that this error stemmed from a clerical oversight and was not a deliberate choice or strategy on the part of the company; that internal inconsistencies in the offer should have alerted the Air Force to the probability of error, and that H&N’s proposal, which showed larger units and more value-adding enhancements, should have put the Government on notice of an error when compared with those of other offerors and the Government’s own estimate; that the Air Force failed to request verification of H&N’s proposal and instead awarded the contract without discussions; and that the price of H&N’s intended offer can readily be determined by mathematical computation based on the size of the structures and the value of the various enhancements. (SOF 3-7, 15).

The Air Force disputes the adequacy of H&N’s proof with respect to each of these elements, and contends that “[a]ppellant’s own submissions (documentary and testimonial) are contradictory as to how its alleged mistake occurred, the exact amount of the alleged mistake, the nature of the alleged mistake and the intended [offer].” (Gov’ t. reply at 1) Since H&N cannot prevail on the merits if it fails to prove even one required element, the Government insists that it should now be entitled to summary judgment. We cannot agree. In evaluating a motion for summary judgment, our role is not “to weigh the evidence and determine the truth of the matter,” but rather to ascertain whether material facts are disputed and whether there exists any genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Jay v. Sec’y of Dep’t of Health & Human Servs.*, 998 F.2d 979, 982 (Fed. Cir. 1993); *Atlantic Dry Dock Corp.*, ASBCA No. 42679, 94-1 BCA ¶ 26,593 at 132,325. The evidence of the non-movant is to be believed for purposes of the motion, and we must resolve any doubts over factual issues in favor of the party opposing summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255; *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1574 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985). Here, viewing the available record in the light most favorable to appellant, and crediting the evidence offered by appellant for purposes of the motion, we conclude that H&N has set forth a *prima facie* case of unilateral mistake. Although the Air Force offers an extensive critique of appellant’s evidence, the Board is in no position to resolve such matters on summary judgment. If anything, the Air Force’s analysis confirms that material facts are indeed disputed and will require an evidentiary hearing to resolve.

Citing *Rockwell Int’l Corp.*, ASBCA No. 41095, 95-1 BCA ¶ 27,459, *aff’d on recons.*, 95-2 BCA ¶ 27,897, the Air Force next contends that H&N cannot establish element (2) of the above test because the purported error was not “clear-cut,” but instead was a convoluted and confusing mistake requiring “a long, tortured explanation” to

recount. (Gov' t mot. at 13) Appellant objects that it need only establish that its error was *purely* a mathematical or clerical mistake, not an error of business judgment. In appellant's view, the complexity of the mistake is largely irrelevant, except insofar as it may influence whether the Government should reasonably have perceived the error. (App. opp' n mot. at 11 n.3)

In *Rockwell*, the contractor maintained that it had inadvertently utilized the wrong algorithm (mathematical formula) to calculate option prices under a contract. The contractor conceded that its error was not a simple arithmetical concept, but argued that the mistake nevertheless was mathematical in character and not an error of judgment. The Government moved for summary judgment, and the Board agreed to base its decision "solely on one element of the mistake in bid doctrine -- whether appellant's use of the wrong algorithm was a mistake of the type that would entitle appellant to relief." *Rockwell*, 95-1 BCA at 136,805. The Board then granted summary judgment for the Government, and denied the appeal in pertinent part, explaining:

Our reading of the cases on reformation based on mistake in bid leads us to conclude that even where the Court or Board uses "mathematical" to describe the error, the facts of the cases involve clearly evident errors, such as misplacing a decimal point, or in processes such as addition, subtraction, division, or multiplication. [Citations omitted]. The error described by appellant does not meet that standard.

Further, the case law, whether using "arithmetical" or "mathematical" to describe the type of error, is preceded in all instances by "clear cut." Clear-cut is defined as "Evident: plain." *Webster's II New Riverside University Dictionary*, Houghton Mifflin Company, 1988. The error described by appellant in its claim . . . is not evident or plain.

Rockwell, 95-1 BCA at 136,808-09. We reiterated that a claim of unilateral mistake "require[s] proof of both the 'clear cut clerical, arithmetical, or misreading of specifications' type of error *and* that the error was not judgmental." *Rockwell*, 95-1 BCA at 136,809 (emphasis in original).

We agree with the Air Force that, under *Rockwell*, it is not sufficient that H&N demonstrate that it committed a mathematical or clerical mistake that was not an error of business judgment: the mistake must also have been "clear-cut." On the other hand, the Government disregards potentially significant distinctions between *Rockwell* and these appeals. Although H&N's pricing calculations were performed via computerized spreadsheet, rather than with pen and paper, appellant contends that its spreadsheet merely automates simple arithmetical functions such as addition and multiplication. (SOF 4) The

benefit of a more complete record is necessary to determine whether the error in question was “clear-cut.”

The Air Force lastly argues that appellant’s proof of element (3) is doomed to fail because the contracting officer had no actual knowledge of the reported mistake, and any errors in H&N’s offer were so abstruse that the Air Force could not possibly have noticed them. (SOF 7) Again, we find the issue unsuitable for resolution by summary judgment. Assuming, for the sake of argument, that the contracting officer had no actual knowledge of H&N’s mistake, we still must determine whether the contracting officer had constructive knowledge of the error (*i.e.*, whether the contracting officer should have perceived the error). “In determining whether the Government should have known of the mistake, a reasonable person standard is used.” *The Kato Corp.*, ASBCA No. 47601, 97-2 BCA ¶ 29,130 at 144,932. The contractor:

“may recover only if [the Government’s] responsible officials knew or should have known of the mistake at the time the bid was accepted. The test of what an official in charge of accepting bids “should” have known must be that of reasonableness, *i.e.*, whether under the facts and circumstances of the case there were any factors which reasonably should have raised the presumption of error in the mind of the contracting officer; among such factors are obvious wide range of bids, and gross disparity between the price bid and the value of the article which was the subject of the bid.”

Id., 97-2 BCA at 144,932-33, quoting *Chernick v. United States*, 372 F.2d 492, 496 (Ct. Cl. 1967). Thus, we can reach a decision as to whether the Government should “reasonably” have perceived a unilateral mistake only on a case-by-case basis, following an examination of the unique circumstances of each case and the specific information available to Government personnel. *E.g.*, *Triax Pacific, Inc.*, ASBCA No. 41891, 93-1 BCA ¶ 25,441 at 126,693 (denying Government’s motion for summary judgment on unilateral mistake claim because the decision rests on numerous factual questions and “there is no numerical threshold of price disparity which, standing alone, indicates a mistake.”)

We deny the motion with respect to appellant’s unilateral mistake claim.

Misrepresentation

The Government also seeks summary judgment on appellant’s claim of misrepresentation. The claim is premised on the contention that Air Force officials misled appellant into the mistaken belief that Mississippi sales taxes would not apply to the project. (SOF 8-13) H&N complains in particular that the Government’s response to

Question #50 was misleading because the Air Force addressed only the Mississippi contractor tax, which generally did not apply to the project, but failed to discuss the Mississippi sales tax, which did apply.² In response, the Government maintains that it is entitled to summary judgment because its reply to Question #50 merely alerted prospective offerors of the Mississippi tax on non-residential construction projects over \$10,000, without any comment on the sales tax issue. (SOF 11) Since the Air Force simply was silent concerning the applicability of state sales taxes, the Air Force concludes that no misrepresentation regarding this matter could have occurred. Moreover, assuming *arguendo* some falsity was uttered or was implied, the Air Force urges that appellant still cannot recover because appellant could not reasonably have relied upon any such statement or implication.

To prevail on a claim of misrepresentation, a contractor “must show that the Government made an erroneous representation of a material fact that the contractor honestly and reasonably relied on to the contractor’s detriment.” *T. Brown Constructors, Inc. v. Peña*, 132 F.3d 724, 729 (Fed. Cir. 1997); *see also Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 667 (Fed. Cir. 1992); *McDonnell Douglas Corp.*, ASBCA No. 46266, 99-1 BCA ¶ 30,152 at 149,188. At a minimum, then, a valid misrepresentation claim requires proof of: (1) an erroneous representation of material fact by the Government; and (2) reasonable reliance by the contractor. In our view, appellant has not adduced proof that could conceivably support a finding with respect to either of these elements. As a result, the claim is fatally flawed and cannot survive summary judgment.

With respect to the first element, in order to justify proceeding to trial on this matter, appellant must demonstrate that the Government made an erroneous representation of material fact. H&N has failed to do so. This appeal bears similarity to an earlier appeal also dealing with Mississippi taxes. In *Costello Industries, Inc.*, ASBCA No. 49125, 00-2 BCA ¶ 31,098, the CO issued a notice to bidders advising that the State of Mississippi imposed a 3 1/2% contractor’s tax on all nonresidential construction projects exceeding \$10,000. The notice further admonished that questions regarding state taxes should be directed to the Mississippi State Tax Commission; that advice was consistent with a contract provision which imposed upon the contractor responsibility for compliance with all Federal, state and local taxes.³ Costello made no independent inquiry and failed to include the contractor’s tax in its bid. After the state required the contractor to pay the tax, Costello filed an appeal to recover the amount of taxes paid.

The Board denied the appeal, finding that appellant’s failure to include the necessary taxes in its bid was not the fault of the Government. The Board found the CO’s notice to be a fair representation of the applicability of the contractor’s tax levied by the State of Mississippi, and was not misleading. The contractor bore responsibility for determining what Federal, state and local taxes applied to the contract. “The appellant

simply made a judgmental mistake in its bid. That mistake is not compensable.” *Costello Industries, Inc.*, 00-2 BCA at 153,585.

Here, the Government responded to a question regarding the applicability of sales taxes in a similar fashion. The CO advised offerors that Mississippi imposed a 3.5% contractors tax on all nonresidential construction contracts exceeding \$10,000; while silent regarding sales tax, the Government’s response emphasized it was the “contractor’s responsibility to ensure compliance with all state and local taxes.” (SOF 9) We find this statement was not misleading with respect to the applicability of Mississippi State sales taxes. As in *Costello Industries, Inc.*, 00-2 BCA ¶ 31,098, the failure of H&N to include applicable taxes in its offer was an error in judgment for which the Government is not responsible.

With respect to the second element, as we noted the contract in this case incorporated the FAR’s standardized FEDERAL, STATE, AND LOCAL TAXES clause, which expressly warned that “[t]he contract price includes all applicable Federal, State, and local taxes and duties.” (SOF 15) Such a clause “places upon the contractor the burden of determining which taxes are applicable and of including in his bid price a sufficient amount to cover the payment of those taxes.” *Eller Constr., Inc.*, ASBCA No. 22654, 78-2 BCA ¶ 13,511 at 66,199 (interpreting predecessor clause to FAR 52.229-3). In other words, “a bidder must include the amount of a tax in its bid or assume the risk of paying it without reimbursement since the duty of determining tax applicability is on the bidder.” *Gibson Motor & Machine Serv., Inc.*, ASBCA No. 24363, 80-1 BCA ¶ 14,442 at 71,202. *See also Allied Painting & Decorating Co.*, ASBCA No. 43287, 93-3 BCA ¶ 26,218 at 130,483, *aff’d*, 39 F.3d 1197 (Fed. Cir. 1994) (table). Because the contract clearly required H&N to ascertain for itself which taxes were applicable, we fail to see how passive reliance on Question #50 could be considered a “reasonable” approach under the circumstances.

CONCLUSION

H&N’s motion to withdraw ASBCA No. 52429 is granted, and that appeal is dismissed. The Government’s motion for summary judgment is denied with respect to appellant’s unilateral mistake claim, and the parties are directed to proceed with discovery. With regard to appellant’s misrepresentation allegations, the motion is granted. The appeal is denied insofar as it pertains to the misrepresentation claim.

Dated: 15 May 2002

REBA PAGE

Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

¹ Although case law often refers only to unilateral mistakes in bid, the same principles are applicable in negotiated procurements to mistakes in proposals. *Turner-MAK (JV)*, ASBCA No. 37711, 96-1 BCA ¶ 28,208 at 140,790; *Rex Sys., Inc.*, ASBCA No. 45297, 93-3 BCA ¶ 26,155; FAR 14.407-4 and 15.508.

² In its opposition to the Government’s motion, appellant suggests that the Air Force’s response to Question #50 also was misleading in another respect. According to appellant, the Air Force’s reply was inaccurate because it implied that the project was totally exempt from the Mississippi contractor tax, whereas that tax reportedly does apply to various portions of project. (App. opp. at 21 n.7; Koppi decl. at ¶ 14) Appellant does not raise these allegations in its complaint. Since this issue does not impact our decision on the motion, we do not address it further here.

³ That same contract provision, FAR 52.229-3 FEDERAL, STATE, AND LOCAL TAXES (JAN 1991) was included in the contract between the Government and H&N.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 52429 and 52551, Appeals of Holmes & Narver Constructors, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals