

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Virtexco Corporation) ASBCA No. 51084
)
Under Contract No. F41689-96-C-0254)

APPEARANCES FOR THE APPELLANT: Neil S. Lowenstein, Esq.
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Norfolk, VA

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
MAJ Randall G. Bundy, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE SCHEPERS

This timely appeal is from a contracting officer's decision denying appellant's claim for an increase in the contract price of \$278,271 premised on an alleged mistake in bid when appellant inadvertently omitted from its bid, a portion of the bid from one of its building equipment subcontractors. The dispute arose under appellant's contract to construct an addition and perform other alterations to the existing commissary facility at a Marine Corps Air Station. Entitlement is before us. We find the Government did not know, and reasonably should not have known, that appellant's total bid was low due to a mistake in bid. Further, even if the Government had suspected appellant's total bid was low due to a mistake in bid, the Government's routine requests for bid verification and appellant's access to copies of both bids and the Government estimate (although not a copy of the architect and engineers' estimate), were adequate to give appellant notice of a possible mistake. Additionally appellant's two definite confirmations of its bid, in one of which appellant specifically confirmed its bid for the disputed CLIN was correct, were sufficient to relieve the Government of obligation for further inquiries. We deny the appeal.

FINDINGS OF FACT

1. On 21 May 1996 the Air Education and Training Command Contracting Squadron solicited bids to alter the existing commissary facility at the Marine Corps Air Station, Cherry Point, North Carolina and construct a 14,444 square foot addition (R4, tabs 1, 25).

2. Appellant submitted a bid in response to the solicitation and sent a representative to bid opening held 20 June 1996 (tr. 1/70-71). At bid opening

Mr. David S. Hooker, the Government's contract specialist, read out loud the Government estimate and the bids from the two conforming bidders, Reliable Mechanical (Reliable) and appellant, by CLIN and in total, while a Government representative from the Cherry Point contracting office wrote the amounts on the Abstract of Offers-Construction (tr. 1/245-54) as follows (R4, tab 22):

CLIN	Description	Government Estimate	Reliable Bid	Virtexco Bid
0001	Bldg construction to 5 FT line	\$2,697,079	\$3,920,000	\$4,050,000
0002	Site Improvement Outside 5 FT	\$317,776	\$380,000	\$400,000
0003	All Building Equipment	\$1,464,592	\$2,050,000	\$1,400,000
0004	All Bonds	\$68,214	\$35,000	\$50,000
TOTALS		\$4,547,662*	\$6,385,000	\$5,900,000

3. As shown above, appellant's total bid was \$485,000 lower than the bid received from Reliable, and \$1,352,338 higher than the Government's estimate. As to equipment CLIN 3, appellant's bid was \$650,000 lower than Reliable, and \$64,592 (or 4 percent) lower than the Government's estimate. Mr. Hooker did not suspect that appellant had made a mistake in its total bid, although in his analysis after bid opening Mr. Hooker did note the difference in CLINs 1 and 3 in the bids and the estimate (tr. 1/228).

4. Generally the abstract also includes the architect and engineers' (A&E) estimate for the project; there is no explanation why the A&E estimate was not included on the abstract presented 20 June 1996 (tr. 1/171-73). The A&E estimate was prepared for the contract by Cromwell Architects Engineers (Cromwell) (SR4, tab 2A). Cromwell's estimate for the total cost, without cost of bonds but including the overhead and profit, was \$4,992,209, an amount \$512,761 greater than the Government estimate without cost of bonds, but approximately \$858,000 less than appellant's bid without cost of bonds. Cromwell's estimate was not broken down by CLINs, but rather was broken down in accordance with the specifications. Cromwell's estimate, plus a ten percent profit mark up, for the equipment required in CLIN 3 was approximately \$1,661,180, an amount \$196,588 greater than the Government estimate and \$261,180 greater than appellant's bid for the equipment CLIN.

5. The abstract, appellant's and Reliable's bids, and the Government estimate were placed on a table for inspection by the representatives of the two bidders. Neither of the bidders' representatives looked at the abstract, the bids, or the estimate, and the only

* The Government Estimate actually totals \$4,547,661.

question was from the Reliable's representative who asked Mr. Hooker to repeat appellant's total bid. (Tr. 1/254)

6. Construction CLIN 1 and equipment CLIN 3 for the contract were funded from separate sources (tr. 1/186-89). The funds for the construction CLIN 1 were from appropriated funds, involved congressional oversight, and had a ceiling amount which could not be exceeded (tr. 1/175, 226). The items included within the construction CLIN 1 became part of the real property at the military base (tr. 1/186-89). The funds for the equipment CLIN 3 were from a surcharge paid by the commissary customers (tr. 1/175). Ownership of the equipment remained in the Defense Commissary Agency and if the base were closed, the equipment could be transferred to another commissary (tr. 1/186-89).

7. Very often bidders in error put some equipment costs in their construction CLIN (tr. 1/175, 2/32). The Government prefers to have some of the limited authorized construction dollars remaining after subtracting the bid amount, because often additional costs in construction arise during performance (tr. 1/179-81, 234).

8. In response to a telephone request made by Alice Allen, a contracting officer in the Cherry Point office (tr. 1/141-44, 2/14, 31), on 30 July 1996 appellant wrote the Government (R4, tab 11):

Having examined our worksheets carefully, VIRTEXCO Corporation confirms their bid in the amount of FIVE MILLION NINE HUNDRED THOUSAND AND NO/100 DOLLARS (\$5,900,000.00) for the above referenced project. Our bid is in accordance with the plans and specifications.

If you require further information, please do not hesitate to call.

9. One step in the award process is to call the apparent successful bidder and request a confirmation of bid (tr. 1/229). This practice is a routine effort (tr. 1/231, 261, 2/82) to "hedge against any type of problem later on" and to avoid "the contractor coming back after award and [saying] my bid is no longer good . . ." (tr. 1/231, *see also* at tr. 2/59). However, in requesting this verification, Ms. Allen thought appellant "most likely" had included some equipment costs in the construction CLIN 1 (tr. 2/21).

10. On 1 August 1996 appellant was awarded Contract No. F41689-96-C-0254 in the amount of \$5,900,000 to be completed 25 October 1997 (R4, tab 1).

11. On 8 August 1996 the Chief of Design & Construction Division wrote Mr. Hooker (supp. R4, tab 1):

We request the contractor reevaluate his CLIN requirements and realign his CLIN totals as required. Attached is a copy of the equipment items the contractor should properly classify for correct CLIN totals.

Also, we request you inform the contractor to have available at the Pre-Construction meeting, his mechanical subcontractor to accomplish a survey of the mechanical equipment that will be maintained during the construction project per Section 15995.

12. The above request was made because representatives from the Design & Construction Division had noted that appellant's quote for construction CLIN 1 was approximately 150% of the Government's estimate for CLIN 1, and were concerned that: (1) there be sufficient construction funds through completion of the project; and (2) equipment items be properly identified due to the ultimate ownership of equipment and items considered realty (tr. 1/175-76, 187-89, 212).

13. On 9 August 1996, Mr. Hooker wrote appellant (R4, tab 13):

1. Using the attached 'SAMPLE OF ITEMS THAT TYPICALLY ARE INCLUDED UNDER EQUIPMENT,' please reevaluate the Contract Line Item Numbers to ensure that all of the items on the list were properly allocated to line item 0003 (Equipment CLIN). If they were not properly allocated, please provide me an updated bid schedule showing how the \$5,900,000 contract should have been allocated among the line items.

2. Please provide to me the updated bid schedule, or an assertion that all equipment items on the list were included in the cost of line item 0003, by close of business on August 15, 1996. I recognize that this is short notice, but I do appreciate your prompt attention to this matter.

3. If you have any questions, please feel free to contact me at (210) 652-3838/3839 and fax (210) 652-2737.

14. On 15 August 1996 appellant responded to the above request (tr. 1/146) and stated (R4, tab 14):

VIRTEXCO Corporation has re-evaluated their bid for the above referenced project. We want to re-assure [sic] that all

bid items are accurate and that all equipment items were included in Line Item 0003.

15. Mr. David Mangus, appellant's vice president in charge of procurement (tr. 1/127), testified that appellant would have checked its bid more thoroughly if it had thought the Government suspected a mistake (tr. 1/143).

16. Just as the Government's telephone call prior to 30 July 1996 (finding 8), the Government's 9 August 1996 letter (finding 13) was a routine request for bid verification and was not made because the Government representatives suspected that appellant made a mistake in its bid so that its total bid price was too low (tr. 1/186, 255, 265-67, 2/22-27, 32, 51, 76-77). The Government representatives involved with the contract hoped appellant had costs in the construction CLIN 1 that could be placed in the equipment CLIN 3 (tr. 1/236, 263).

17. Based upon the entire record, and specifically findings 2, 5, 8, 9, 11-14, 16, we find the Government did not know and reasonably should not have known, that appellant made a mistake in appellant's bid so that its total bid price was too low.

18. On 20 August 1996 a pre-construction conference was held (R4, tab 15).

19. On 25 November 1996 appellant wrote the contracting officer alleging that it had discovered a mistake in its total bid for the contract. It asserted that it had omitted price proposals from Tyler Refrigeration Corporation (Tyler), one of appellant's subcontractors, for Sections 13060 and 08391 of the equipment CLIN 3 from appellant's summary cost analysis sheets. (R4, tab 16)

20. On 18 March 1997 the Government issued unilateral Modification No. P00005, the stated purpose of which was "to reflect the dollar amounts for each CLIN as approved in the contractor's schedule of values." In Modification No. P00005, CLIN 1 was decreased by \$629,000; CLIN 2 increased by \$194,375; CLIN 3 increased by \$446,269; and CLIN 4 decreased by \$11,500. The basic contract price of \$5,900,000 remained unchanged. (R4, tab 6. The numbers do not balance; this discrepancy is not explained.)

21. On 8 April 1997 appellant certified its claim for a price increase of \$278,271.00 due to a mistake in bid and requested a decision by the contracting officer (R4, tab 18).

22. On 29 July 1997 the contracting officer issued her decision denying appellant's claim in its entirety (R4, tab 20).

23. On 23 October 1997 appellant filed a notice of appeal (R4, tab 21).

DECISION

The appellant contends the Government: (1) knew or should have known that there was a mistake in appellant's bid and should have so advised appellant; and (2) should have disclosed the architect and engineers' (A&E) estimate. The Government contends that: (1) appellant's mistake was a judgment error rather than a clerical or mathematical error because appellant did not intend to use the subcontractor whose bid was allegedly deleted from appellant's bid; and (2) the Government had no knowledge that appellant had made a mistake in its bid.

In *Giesler v. United States*, 232 F.3d 864, 869 (Fed. Cir. 2000) the Court addressed the question of allowing reformation of a contract due a contractor's mistake in bid and stated:

Parties to a contract are generally bound by its terms. However, we have recognized in limited circumstances that if the government has knowledge, or constructive knowledge, that a contractor's bid is based on a mistake, and the government accepts the bid and awards the contract despite knowledge of this mistake, then a trial court may reform or rescind the contract.

In *McClure Electrical Constructors, Inc. v. Dalton*, 132 F.3d 709, 711 (Fed. Cir. 1997), quoting in part from *Solar Foam Insulation*, ASBCA No. 46,921, 94-2 BCA ¶ 26,901, the court stated that to prevail in a claim of mistake in bid:

The contractor must show by clear and convincing evidence that:

- (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 failed to include an amount of \$16,530 in its bid. The contracting officer had no access to the contractor's bid worksheets, but requested a bid verification because she noticed McClure's bid was \$145,000 and the Government's estimate was \$282,869. The

letter did not state that the contracting officer suspected an error, but enclosed the abstract showing the amounts of all bids and of the Government estimate. McClure confirmed its bid, but after completion of the work, determined that an amount was deleted. In affirming the Board's decision, the Court found the bid verification request adequate when the Government "disclosed" and "revealed" to the contractor all information which the Government possessed and on which it based the suspicion of a mistake.

Even though the abstract of bids is not enclosed in the Government's request for bid verification, that request is adequate when appellant's representative was present at bid opening and had actual knowledge of any disparities. *GOECO*, ASBCA No. 46573, 96-2 BCA ¶ 28,412 at 141,897.

In this appeal we found that the Government did not know and reasonably should not have known, that appellant made a mistake bid so that its total bid price was too low (finding 17). This finding was premised in major part on the facts that appellant's total bid of \$5,900,000 was greater than the Government estimate and the Government's A&E estimate and was only \$485,000 less than the only other conforming bidder (findings 2, 4). However the Government did make two routine requests for appellant to confirm its bid, suspecting and hoping that appellant had included in the construction CLIN, some bid costs which should properly be included in the equipment CLIN (findings 8, 13). In response, appellant twice confirmed its bid, the second time specifically referring to the equipment CLIN which appellant now asserts failed to include some equipment costs (findings 8,14). Further in this appeal the abstract of offers, the two conforming bids, and the Government's estimate were read aloud as available for inspection at bid opening (findings 2, 5).

Under the facts of this appeal and the controlling case law, the Government's request for bid verification was adequate, and appellant's confirmation was such that the Government had no further obligation to request confirmation of appellant's bid.

We are mindful that appellant also asserts it should have received a copy of the Government's A&E estimate for the contract. That A&E estimate for the total contract price was \$512,761 greater than the Government estimate, and approximately \$858,000 less than appellant's bid. The A&E estimate was not set out by CLINs, but rather was set out in accordance with the specifications. The A&E estimate, plus a ten percent profit mark up, for the equipment required in CLIN 3 was approximately \$196,588 greater than the Government estimate and \$261,180 greater than appellant's bid for CLIN 3. (Finding 4) No explanation is given why the A&E estimate was not available to the bidders and why a copy was never given to appellant in the request for bid verification. However, we do not understand how the A&E estimate would have better alerted appellant to a possible mistake in its total bid than did the information on the abstract of offers and the Government's requests for confirmation.

In light of these determinations, we will not discuss the Government's additional defense that appellant's mistake was a judgment error.

Accordingly, the appeal is denied.

Dated: 23 May 2001

JEAN SCHEPERS
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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 51084, Appeal of Virtexco Corporation, rendered in conformance with the Board's Charter.

Dated:

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