

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Macro-Z Technology) ASBCA No. 56711
)
Under Contract No. N44255-04-D-9122)

APPEARANCES FOR THE APPELLANT: James F. Nagle, Esq.
Adam K. Lasky, Esq.
Oles Morrison Rinker & Baker LLP
Seattle, WA

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.
Navy Chief Trial Attorney
Anthony K. Hicks, Esq.
Robyn M. McNish, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Appellant Macro-Z Technology (MZT) moves for partial summary judgment on entitlement on grounds of unilateral mistake, unconscionability and/or superior knowledge/misrepresentation on a contract relating to the Whidbey Island Fire Station (WIFS). Additionally, MZT asks us to rescind the contract and grant it restitution on a quantum meruit basis. The Navy opposes the motion. We deny the motion for the reasons that follow.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

Background

The contract at issue in this appeal involves the WIFS Aircraft Fire and Crash Building 2526 and additional space in Building 121 used to store equipment and to house the Fire Prevention Division at the Naval Air Station, Whidbey Island (NASWI), Oak Harbor, Washington (R4, tab 1 at 4-5; ex. A-11 at 25670-71). In 2000, the Engineering Field Activity Northwest Division (EFANW) of the Naval Engineering Facility Command (NAVFAC) began preparation of a Military Construction (MCON) Project Data DD Form 1391 for a "FIRE STATION ADDITION" identified as Project No. P-041 for Fiscal Year (FY) 2004 (ex. A-5). The DD 1391 was revised a number of times (exs. A-6, -8, -10, -11, -13, -14, -17).

The 14 March 2003 version of the DD 1391 described Project No. P-041 as a "FIRE STATION ADDITION" with specified renovations to Building 2526, construction of two-story additions totaling 582 square meters (6,267 square feet) on the north and west sides of Building 2526, and demolition of Building 121 (ex. A-11 at 25676). Box 6 and the "GUIDANCE UNIT COST ANALYSIS" used the NAVFAC/DOD Cost Guidance Category Code 141-25 for a "Combined Structural/Aircraft Fire/Rescue Station," which was a combination of codes 141-20 (Aircraft Fire & Rescue Station) and 730-10 (Community Fire Station). The project cost estimate for the addition/renovation work was \$5.060 million. (*Id.* at 25675-76)

By an e-mail dated 28 April 2003, NAVFACHQ (Headquarters) was informed by its legislative advisor that an addition to the FY 2004 MCON budget which would include Project No. P-041 was "in play." On 29 April 2003, he inquired as to whether Project No. P-041 could be accomplished for \$4.6M. The inquiry raised concerns that the project would not be funded unless it was under \$5M. (Ex. A-78 at 42821-23) EFANW's 30 April 2003 response was that its current estimate was \$4.924M, which met with the following reply: "\$4.9 was not the request. This is not a negotiation with Congress. Can we do it at \$4.6M or not?" EFANW's further response on 1 May 2003 was that the "\$4.6M budget has been confirmed." (*Id.* at 42819-20)

It appears from the record that, in order to respond to these inquiries, EFANW prepared two additional DD 1391s that changed the scope and price of Project No. P-041 (exs. A-14, -17). The revisions (1) eliminated demolition of Building 121, converting it instead to other uses, (2) increased the addition to Building 2526 to 974 square meters (10,478 square feet), and (3) reduced the project cost (ex. A-14 at 20795-96, ex. A-17 at 28616-17). The first DD 1391 is dated 28 April 2003; the cost estimate is \$4.924M. It again used Category Code 141-25. (Ex. A-14 at 20794) The second DD 1391 is dated 1 May 2003 and describes the project as: "FIRE STATION ADDITION & RENOVATION." The cost estimate is \$4.635M. It also shows that Category Code 141-25 was used, but comments that "Community Fire Station Cat. Code 730-10 was the most appropriate building type used for cost guidance." (Ex. A-17 at 28615) The March, April and May 2003 DD 1391s all state that renovation and expansion of the existing building is less costly than new construction (ex. A-11 at 28691, ex. A-14 at 20800, ex. A-17 at 28621).

Meanwhile, Mr. Joseph L. Bonaparte, a NAVFAC senior cost engineer, apparently had estimated the cost of addition/renovation work to be \$6.035M. In an e-mail dated 7 May 2003, he expressed his view that the difference between the estimates was due to a "scope issue." According to his e-mail, Mr. Bonaparte thought that \$4.6M was "fine" if the project was to be "a community fire station," but not "if it is really an air crash rescue station." (Ex. A-78 at 42818-19) On 14 May 2003, the EFANW project team advised

that it supported an updated cost estimate of \$4.635M, but further stated that it was also comfortable if a “strict \$4.60M budget number has to be used” for reasons it provided (ex. A-18).

On 15 May 2003, EFANW learned that the Project No. P-041 would not be included as part of the FY 2004 MCON funding (ex. A-20). Nevertheless, on 10 June 2003, a rather lengthy report entitled “FIRE STATION ADDITION FINAL OF 10 JUNE 03 ECONOMIC ANALYSIS” was issued (ex. A-21). Mr. Stephen R. Rothboeck is identified as the action officer for NASWI, but there is no evidence explaining why the report was prepared, who prepared it, or what data was used (*id.* at 14399). The report reflects the cost of addition/renovation of the fire station to be \$4,670,000 and the cost of new construction to be \$8,150,000 (*id.* at 14404-05). The record does not reflect to whom the report may have been sent or how, if at all, the report was used.

On 11 November 2003, however, through the efforts of Congressman Rick Larsen, funding for Project No. P-041 was included in the MILCON Authorization Act for FY 2004, Pub. L. No. 108-136 (R4, tab 1; app. mot. at 8-9). As reflected in the final DD 1391 dated 2 December 2003, the appropriated funding for Project No. P-041 was \$4.650M for a “FIRE STATION ADDITION & RENOVATION.” Box 6 and the “Guidance Unit Cost Analysis” of the DD 1391 again identified the “Category Code” as 141-25 and again comments that “Community Fire Station Cat-Code 730-10 was the most appropriate building type used for cost guidance.” The record does not explain the differences among the three cost guidance Category Codes referenced for Project No. P-041 on the various DD 1391s or how they may relate to Mr. Bonaparte’s e-mail comment about the scope of the project. (R4, tab 1 at 1)

Paragraph 11.d., “New Construction,” of the 2 December 2003 DD 1391 states:

The construction of a new fire station that will replace the current main fire station and the space within Building 121 is a feasible option but the life cycle costs exceeds [sic] the renovation alternative.

(*Id.* at 6)

The Navy began implementation of Project No. P-041 in January 2004 with the assignment of Mr. Gale Schaeffer, EFANW, as the project lead, who held a “scoping meeting & site visit” on 2 February 2004 for which copies of the 2 December 2003 DD 1391 were distributed by e-mail to the invitees. Mr. Wally Fraser of Fogle & Fraser Architects was on the e-mail invitee list and attended the meeting. (Ex. A-28) After the February 2004 meeting, the Navy began negotiations with Fogle & Fraser to provide architect-engineer services to prepare a request for proposal (RFP) package for design

and construction of Project No. P-041, but ultimately cancelled the task order it had issued (exs. A-30, -33, -35, -84).

Sometime in mid-April 2004, EFANW decided to prepare the RFP in-house (exs. A-36, -83). Among other things, EFANW was considering using Project No. P-041 as part of a multiple award construction contract (MACC) small disadvantaged business set aside under Section 8(a) of the Small Business Act (ex. A-82). In a 15 April 2004 e-mail, "Subject: P-041 Scope," Mr. Schaeffer expressed the view that the project was "[a]bout \$2M under budgeted" in order to "make the [MCON] FY04 program as a late add" (ex. A-19). After the project was completed, he made the following statement in his response to a "PROJECT SCOPE VERIFICATION SURVEY" on 11 May 2008: "SOMEONE MADE THE ASSUMPTION YOU CAN TAKE A \$6M MCON & MAKE IT A \$4M CONGRESSIONAL ADD" (ex. A-79). The record does not explain the reason for his views or how they may relate to the project scope.

Mr. Mark Snell, a contract specialist, was charged with preparing an 8(a) MACC Source Selection Plan (R4, tab 7 at 1099). By an e-mail dated 25 May 2004, Mr. Schaeffer responded to a request from Mr. Snell for information for the Plan, providing among other things, a cost estimate of \$3,705,000. The record copy of the e-mail shows that this estimate was crossed-out by some unknown person and replaced with the handwritten figure "\$3.825M." Mr. Schaeffer did not provide Mr. Snell with a cost estimate for new construction and did not make any comment about the level of the project funding. (Ex. A-45) A "MEMORANDUM FOR FUNDING REQUIREMENTS" dated 15 June 2004 indicates the \$3.825M figure may have been estimated to be the "Construction Cont[r]act Award" using what appears to be a standard form for deductions to the \$4.650M appropriation (exs. A-38, -44). There is another such memorandum, also dated 15 June 2004, that estimates the "Construction Cont[r]act Award" to be \$4.125M (ex. A-39). The record does not establish who prepared these memoranda, how they were prepared, or how they may have been used.

The RFP

On 15 July 2004, EFANW issued its RFP for a competitive "LARGE 8(a) [MACC]" and identified "MCON P-041 FIRE STATION ADDITION AND RENOVATION" at NASWI as the seed project task order (R4, tab 2 at 14). The RFP advised that three to five offerors would be awarded indefinite-delivery, indefinite-quantity (IDIQ) contracts from the MACC solicitation, that the seed project would be used as a component of the criteria to select the awardees, and that the most highly qualified offeror would be awarded the fire station seed project task order (*id.* at 14-23). The IDIQ task orders could cumulatively total \$99M, with all task orders to be awarded at firm fixed-prices ranging between \$1M and \$6M. All of the task orders were to be construction/design projects at locations serviced by EFANW. (R4, tab 5 at 992)

The RFP stated that the "Project Budget" was "Not to Exceed [NTE] \$3.825M" and the "Period of Performance" was "NTE 545 calendar days." (R4, tab 2 at 92) The "PROJECT SCOPE AND DESIGN CRITERIA" of the RFP stated in subparagraph 2. of paragraph A. "PROJECT SCOPE:"

The Contractor will design and construct a 10,475 SF addition and renovate the existing 11,473 SF building to provide adequate space for all fire and rescue vehicle, [sic] required operations, and fire personnel. Maximum total allowable gross square footage is 21,948 sf.

(*Id.* at 102)

The award was to be made on a best value-tradeoff basis which permits tradeoffs among cost and no-cost factors and allows the government to accept other than the lowest priced proposal (R4, tab 2 at 22). The regulatory TRADEOFF PROCESS requirements provide that evaluation factors and significant subfactors be clearly stated in the solicitation, that the relationship between the evaluation factors and price be stated, and that the tradeoff benefits and rationale be documented in the file. FAR 15.101-1.

The solicitation advised that technical merit and price were to be "approximately equal" factors, with the additional requirement that the offeror had to be "*rated at least acceptable in each technical factor to be considered for award*" (R4, tab 2 at 25). There were three technical factors: (1) past performance and experience; (2) management capabilities; and (3) seed project submission (*id.* at 25-31). The seed project price was to be evaluated to determine the reasonableness of the proposal, including analysis of the offeror's comprehension of the requirements and assessment of the degree to which the price accurately reflected the proposed performance. Prices that were too high or too low could have a negative impact on the offeror's rating. (*Id.* at 31)

Proposals were due on 19 August 2004 (R4, tab 5 at 983). The proposals were to be evaluated under an Amended 8(a) MACC Source Selection Plan that provided for a team that included a Technical Evaluation Board (TEB), a Source Selection Board (SSB) and the Awarding Contracting Officer/Source Selection Authority (SSA) (R4, tab 7 at 1103-09).

The TEB was comprised of four men: Messrs. Dennis Copp, Chairman; Matthew Bonus and Jason Kubischta, Members; and Mark Hurst, Safety Advisor (R4, tab 7 at 1106). The SSB was comprised of: Ms. Wanda Edwards, Chairperson; Mr. Snell, Member; Mr. William Galloway, Technical; and Mr. Jeff M. Denson, Legal

Advisor (*id.* at 1104). CAPT Robert F. Parker, USN, was designated the SSA, Chief Contracting Officer (*id.* at 1098, 1104).

A pre-proposal conference with a site visit was held at NASWI on 29 July 2004. It was attended by Mr. David Boyington, MZT's construction manager, and Messrs. Scott Harm and Gregory G. Benton of Krei Architecture, MZT's design consultant, then ranked the 10th largest architectural firm in the Puget Sound area. (R4, tab 6 at 1004; ex. A-47) Messrs. Harm and Benton subsequently left Krei and became Belay Architecture, which is the name we use when referring to MZT's design consultant (ex. A-47).

The PowerPoint presentation made by EFANW at the conference included a reference to "Funding Profile - NTE \$3,825,000" as part of the discussion of the price evaluation factor (R4, tab 3 at 920). Mr. Boyington understood the NTE \$3.825M figure to be the Navy's independent estimate for the design and construction of an addition/renovation to the existing fire station (Boyington decl. ¶ 3, dep. at 270, 289).

By 6 August 2004, written pre-proposal inquiries (PPIs) had been submitted to EFANW (R4, tab 2 at 21) and responses provided on 9 August 2004 (ex. A-46). In response to PPI #23, regarding replacement of Building 2526, the Navy confirmed that replacement instead of the addition/renovation approach had been discussed and that a proposal for replacement would be evaluated if it "were under the construction cost limitation" (R4, tab 4 at 957). In response to PPI #24, the Navy confirmed that "complete demolition and replacement" was an option "if affordable" (*id.* at 958).

The Proposals

Belay recommended new construction as an option to MZT (Benton dep. at 22-24). MZT relied upon Belay's recommendation and the Navy's responses to PPIs #23 and #24 regarding new construction (Boyington decl. ¶ 5). Its proposal states: "[a]fter reviewing the proposed scope of work and inspecting the jobsite, our recommendation is to demolish the existing building and construct a new facility" (R4, tab 6 at 1065). According to both Mr. Bryan J. Zatica, MZT's president, and Mr. Boyington, the proposal reflected MZT's belief that the cost of constructing a new facility "would be no more than renovating and adding on to the existing building" (R4, tab 6 at 1065). MZT believed it had to offer a price as close as possible to the \$3.825M NTE to be competitive for the MACC seed project award and even shaved its profit percentage in order to reduce its price (Zatica Dep. at 33-34, 105, 128-29; Boyington decl. ¶¶ 5-7). Although MZT's design used the existing foundation of Building 2526 (ex. G-3 at 147-48, ex. G-12 at 98-99, 104), MZT's proposal was one for construction of a new fire station building (R4, tab 6 at 1062-72).

The introduction to MZT's proposal states that it has been in business for over 15 years and has completed over 135 construction projects, with revenues of approximately \$167,000,000. It claimed that its "expertise using the Design-Build acquisition methodology" had been "particularly successful." (R4, tab 6 at 1003) It described other design/build projects it had performed for the government and concluded: "The members of the MZT Team have longevity in the construction industry, relevant past performance experience, and highly qualified and dedicated personnel" (*id.* at 1004-06).

A total of twelve lump sum offers for Project No. P-041 were received by EFANW. MZT proposed the lowest price at \$3,999,872. Three, including MZT, proposed demolishing the existing facility and constructing a new fire station in its place. The other two proposing new construction were TESORO Corporation (TESORO) at \$4,996,669 and PRI/DJI at \$4,932,000. (R4, tab 27 at 2175)

The highest offer was from Pacific-Perrow Company JV (Pacific-Perrow) with its proposal of \$7,492,856 for addition/renovation (R4, tab 27 at 2175). Proposals for addition/renovation designs were also made by MARPAC Construction, LLC (MARPAC), which had enlisted Fraser & Fogle as its design consultant (ex. A-51), at \$4,298,000, and P&L General Constructors, Inc. (P&L) at \$4,590,000 (R4, tab 27 at 2175).

In a report dated 31 August 2004, the TEB concluded that only one offeror, JKT/PCL, had achieved the highest overall technical rating of "Exceptional (E)" (ex. A-56 at 15456-59). All of the other offerors were rated "Marginal (M)" (*id.* at 15456, 15459-99). A marginal rating was not high enough for these offerors to be considered for award (R4, tab 2 at 25). However, the TEB had determined that "design deficiencies were capable of being remedied through discussions" (ex. A-57 at 15377) and provided written questions to be propounded to each of the offerors as Enclosure 2 to its report (ex. A-56 at 15521-36).

In a report dated 13 September 2004, the SSB, in turn, found that the TEB had "conducted a reasonable evaluation of the offerors" and did not disagree with any of the TEB ratings (ex. A-57 at 15376-77). The SSB further found that the JKT/PCL's proposed price of \$5,741,000 was "excessive in comparison to the Government Estimate, the majority of the other offerors' prices, and the project budget" (*id.* at 15377). It concluded that all of the offerors "can improve their standing through discussions either in the technical area, the price area, or both" and recommended such discussions because there was no "viable best value offer for award of the Seed Project" and because "a range of potential MACC awardees cannot be determined based on the current ratings assigned and the current price proposals" (*id.* at 15381). CAPT Parker, the SSA, concurred with the SSB (ex. A-57 at 15382). Both the SSB and the SSA considered the government estimate to be the NTE \$3.825M figure (R4, tab 27 at 2023; exs. A-41, -42, -43 at 15286).

The preliminary Business Clearance Memorandum, unconditionally approved on 15 September 2004, recommended “pursuing discussions with all offerors in order to obtain the best value to the Government.” Ms. Edwards had reviewed and signed the memorandum as a contracting officer the previous day. (Ex. A-57 at 15369)

Section II, “COMPLIANCES,” of the supporting documentation stated: “The reasonableness of all prices is established on the basis of price analysis (See FAR 15.404-1(b))” and that a “Certificate of Current Cost or Pricing is not required as this is a competitive procurement” (ex. A-57 at 15370, ¶¶ 9, 18(b)). Section V, “EVALUATION/RECOMMENDATION,” reflects the SSA’s conclusion that adequate price competition had been established by proposals ranging from \$3,999,872 to \$7,492,856, even though all exceeded the government estimate, and that “[a]ll offerors have the potential to become technically acceptable” and his concurrence with the SSB’s recommendation that no offeror should be excluded from the competition at that time and that discussions should be conducted in order to obtain revised proposals that could “significantly impact price.” Both the SSB and the SSA were of the view that:

Revised proposals should result in a cadre of technically acceptable offers that will enable the SSB/SSA to narrow the competitive range or proceed directly to award. With revised proposals, a trade-off analysis can be conducted that will generate a true best value selection for the government on the seed project and will show the most favorable candidates for award of the additional MACCs.

(Ex. A-57 at 15373)

Proposal Discussion Letters

The TEB had determined that the primary strength in MZT’s design for the seed project was that Building 2526 would be destroyed and a new fire station constructed on the same spot. It noted three design weaknesses (one of which—substitution of laminated countertops—was suspected to be a misunderstanding of the requirement) and one design deficiency resulting from what was perceived to be MZT’s failure to meet the Unified Facility Criteria (UFC) guidance with regard to anti-terrorism force protection (ATFP). (Ex. A-56 at 15462-63) The TEB stated:

Specifically, an inhabited building must maintain a 10-meter (33 feet) standoff distance between parking, roads, fences, and other features. This design locates the new Fire Station

within the standoff distance from the proposed perimeter fence and new parking lot.

(*Id.* at 15463) This deficiency resulted in the TEB's rating of MZT's design as Marginal and an overall rating of Marginal (M) for the Factor III, Seed Project Submission Requirements (*id.*).

On 15 September 2004, Ms. Edwards issued letters to each of the offerors with discussion questions, including those prepared by the TEB, relating to proposal "weaknesses, deficiencies, and/or the need for clarification." She advised that the responses were to be in writing and would be incorporated into their proposals. (R4, tab 8; ex. A-59 at 15284) EFANW had determined that the average price of the 12 proposals was \$5,007,715.58, but if the highest price proposal (Pacific-Perrow at \$7,492,856) was excluded, the average price dropped to \$4,781,793.73 (ex. A-58). To each of the three offerors that were 15% or more above the average without the Pacific-Perrow price, the Navy propounded the following discussion question: "Based on price analysis your proposed price appears high. Please reevaluate." (R4, tab 8 at 1134-35, 1144, 1159; ex. A-58) All other offerors, including the three that were 15% or more below the average, were simply asked to "[r]eview your price and confirm or adjust it accordingly" (R4, tab 8 at 1138, 1141, 1147, 1150, 1153, 1156, 1162-63, 1166, 1169).

The discussion questions asked of MZT were as follows:

QUESTIONS

***Questions deemed technically critical to respond to.**

- *Verify that your design will maintain a clear zone of 10 meters between buildings and security fences as per Unified Facility Criteria 4-010-01.
- *Verify that the clearance dimensions around emergency response vehicles in the apparatus bay(s) meet the requirements of the Request for Proposal. The response to Pre-Proposal Inquiry #40 provided clarification.
- Please submit EMR [Experience Modification Rate] data for past 5 years, in accordance with the RFP.
- Verify EMR calculation....

- Substitute stainless steel counter tops for the proposed laminated counter tops.
- In the schedule account for the activities of personnel movement out of the facility prior to demolition.
- Elaborate on MACC Program Manager roles and responsibilities.
- Review your price and confirm or adjust it accordingly.

(R4, tab 8 at 1150)

MZT's 17 September 2004 written response acknowledged that stainless steel, not laminated, counter tops were required (R4, tab 9 at 1175). Its response to the question regarding the design deficiency relating to the UFC guidance was as follows:

The design as proposed is contained within the allowable building footprint as stipulated in the RFP and meets the required setbacks from other structures and security fencing per Unified Facility Criteria 4-010-01.

(*Id.* at 1172)

MZT did not make any "materially substantive changes to its design" (Boyington decl. ¶ 10) and it did not change its \$3,999,872 proposal price (R4, tab 9 at 1177). Mr. Boyington expressed his view that the discussion question regarding MZT's price was a negotiation tactic to get MZT to lower its price and he assumed that the other offerors had been asked to do the same. He did not think the question was meant to verify a mistake in bid. (Boyington decl. ¶ 8)

Mr. Boyington's declaration states that had he known that the government's estimate for new construction was double that of renovation/addition, MZT would never have considered pursuing new construction (Boyington decl. ¶ 6). In his deposition, however, he testified that he had more confidence in his ability to estimate the cost of a new fire station than in the Navy's ability, but that such knowledge would have made him look at the details again, wonder if the estimates were "apples to apples," and ask Mr. John Britt, MZT's chief estimator and lead proposal writer resident in MZT's California office, to check the bid (Boyington dep. at 34-35, 283-86).

Final Evaluations and Awards

The TEB evaluated the revised technical proposals, including the responses to the written discussion questions, in a report dated 20 September 2004. JKT/PCL's overall technical rating was "Exceptional" and the overall technical ratings of seven other offerors were either "Acceptable" or "Highly Acceptable." Thus, the TEB concluded that eight offerors were technically qualified and four were not. (Ex. A-59 at 15299)

With respect to MZT's response to the discussion question regarding the UFC deficiency, the TEB report states:

[MZT] verified that they had met all of the ATFP stand off and clearance requirements of the RFP. They indicated that a minimum of 12 meters was provided, where only 10 meters was required.

(Ex. A-59 at 15300) MZT's overall rating was upgraded to "Highly Acceptable." The TEB final factor ratings for MZT were as follows:

Factor I rating increased to an E [Exceptional], as a result of their providing the additional Safety data and correcting the initial EMR calculation error.

Factor II remained HA [Highly Acceptable], as final proposal revisions did not include new strengths to appreciably raise the rating to a higher level.

Factor III increased from M to HA as a result of corrections of deficiencies and clarifications of weaknesses in the proposal in the areas of design and schedule subfactors.

(Ex. A-59 at 15301)

The TEB summarized its recommendations as follows:

[I]t is apparent to the TEB that JKT/PCL has the superior technical proposal for both the seed project and the overall MACC Contract. Their proposal was the only one rated Exceptional (E) overall. They were therefore ranked number 1 by the TEB.

Macro Z Technology and MARPAC were ranked 2nd and 3rd respectively by the TEB, with Macro Z Technology receiving the higher ranking by virtue of their Exceptional (E) rating in

Factor 1 (highest weighted technical Factor). In the opinion of the TEB, there is a clear break between the ratings for the first three (3) ranked offerors and the 4th and 5th ranked offerors. Should the SSB decide to award MACC contracts to three offerors, the TEB recommends JKT/PCL, Macro Z Technology and MARPAC.

Tesoro Corporation and Colville Tribal Services Corporation [CTSC] were ranked 4th and 5th respectively by the TEB.... Another clear break exists between the 5th ranked offeror and the 6th through 10th ranked offerors.

Chugach McKinley Incorporated, Pacific-Perrow Company JV and P&L were rated 6th, 7th and 8th. The overall Acceptable rating for these firms shows that there is some technical risk in awarding to these offerors; however, this risk of technical performance would be minimal.

(Ex. A-59 at 15312)

The remaining four offerors, PRI/DJI, SAYBR/KENNEDY JV, IFCM-ACI JV and Nana Pacific retained overall "Marginal" technical ratings and thus were not qualified for contract awards under the MACC (*id.* at 15313). Of the eight offerors determined to be technically qualified, two reduced their prices (JKT/PCL to \$5,666,132 and Chugach McKinley Incorporated to \$5,626,856) and two increased their prices (MARPAC to \$4,446,500 and TESORO to \$5,660,347). The remaining four kept their prices the same: MZT at \$3,999,872, CTSC at \$4,796,000, P&L at \$4,590,000 and Pacific-Perrow at \$7,492,856. (Ex. A-59 at 15289)

MZT's proposal for new construction was about five percent higher than the government's NTE/estimate of \$3,825,000. TESORO also bid new construction, with a final bid that was 42 percent higher than MZT's proposal and 48 percent higher than the government's NTE/estimate. The other new construction offeror was PRI/DJI, which did not change its bid price of \$4,932,000, about 23% higher than MZT, but did not qualify technically for award. The second and third lowest qualifying bids, MARPAC and P&L were both for addition/renovation work and were 11 and 15 percent higher, respectively, than MZT's bid and 16 and 20 percent higher than the government's NTE/estimate. (Ex. A-59 at 15289; gov't reply br. at 3-4) Stated otherwise, MZT's bid was 71 percent of TESORO's, 90 percent of MARPAC's and 87 percent of P&L's bids. MZT has also compared its price to the Navy estimate of \$8,150,000 for new construction contained in the 10 June 2003 Economic Analysis (ex. A-21 at 14405). The result of this comparison

is that the new construction estimate is 104% higher than MZT's bid (app. reply br. at 66).

Also on 20 September 2004, EFANW sent an e-mail request to NAVFAC for \$4,436,400 for the Project No. P-041 Fire Station. The request commented that EFANW was "ready to award" the contract, which was a year-end MCON award that required receipt of funds by 23 September 2004. (Ex. A-60)

The SSB report is dated 23 September 2004. It discusses the overall ratings and the technical and price proposals of each of the offerors (ex. A-59 at 15288-94). Paragraph 5, "TRADEOFF ANALYSIS," confirms that eight offerors had been determined technically eligible for award and that four were not (*id.* at 15294-95). In selecting MZT for the seed project, the SSB's tradeoff analysis states in relevant part:

Macro-Z-Technology has proposed the lowest price for the seed project and is rated Highly Acceptable. The only proposal technically superior to MZT is JKT/PCL with a technical rating of Exceptional. JKT's rating for Factor II, Experience is higher than that for MZT primarily because JKT has demonstrated a substantial amount of experience on design build projects similar to those anticipated for this MACC. However, MZT also has experience in this area, just not of the quantity demonstrated by JKT. JKT's proposed price is the second highest received and is 20% higher than the average of all offerors rated Highly Acceptable. The SSB finds that the added benefit in the quantity of experience offered by JKT does not offset the additional expense associated with their offer. Further, this higher pricing strategy is indicative of what would be expected in competitions for the resulting task orders on the MACC. Because there are several offers in the Highly Acceptable and Acceptable range that offer more advantageous pricing, JKT will not be considered further. MZT will be awarded the seed project since their offer is the second highest rated technically, with the lowest price and presents the best value to the government.

The next three offerors rated Highly Acceptable are Marpac, Tesoro, and CTSC. Marpac has proposed the second lowest price and CTSC has proposed the fourth lowest price. While the past performance of CTSC was only determined to be acceptable, the SSB considers this to pose little to no

performance risk for this contract. Upon further research, CTSC's past performance issues are chiefly attributed to a specific project & QC manager. Therefore, Marpac and CTSC will both be awarded contracts under the MACC with minimum guarantees. Their [t]echnical rating and reasonable price for the seed project indicates that they will provide adequate skill and competitive pricing on future task orders and good value to the government.

Tesoro's price for the seed project is significantly higher (more than 20%) than the other three offerors with HA ratings and over \$1 million more than P&L. P&L, [sic] with an Acceptable rating has presented the third highest price for the seed project. The primary technical difference between the two offerors is that Tesoro has a firmly established organization for supporting MACC contracts, whereas P&L does not have an established management system for overseeing a MACC contract. However, Tesoro's operations have mainly been on the East Coast and they intend to manage this contract from there. Tesoro's technical benefits of an established organization are not offset by the pricing demonstrated for the seed project. This higher pricing is indicative of what would be expected in competitions for the resulting task orders on the MACC. P&L has presented a strong management team and has very good past performance demonstrated by the offeror and his designer to manage multiple projects. P&Ls [sic] technical rating when coupled with the proposed price leads the SSB to determine that P&L presents a better value to the government than is offered by Tesoro. P&L will be awarded the third minimum guarantee contract under the MACC.

(Ex. A-59 at 15295-96)

Thus, the SSB concluded that awarding the seed project to MZT, with an overall Highly Acceptable (HA) rating and the lowest price, represented the best value to the government and that the award of minimum guarantee contracts to MARPAC, P&L, and CTSC represented "the next most favorable levels of best value" (*id.* at 15296). MARPAC and CTSC had overall Highly Acceptable (HA) ratings and the second and fourth lowest prices; P&L had an overall Acceptable (A) rating and the third lowest price (*id.* at 15295). The SSA, CAPT Parker, concurred with and approved the findings and recommendations (*id.* at 15297).

The final Business Clearance Memorandum dated 23 September 2004 “[r]ecommen[ed] awarding the seed project and three minimum guarantee contracts to the four offerors providing the highest level of best value.” It was reviewed and signed by Ms. Edwards as a contracting officer. (Ex. A-59 at 15284) “SECTION XII – POST NEGOTIATION SUMMARY” states: “The SSA concurred with the trade-off analysis and recommendation of the SSB” (*id.* at 15285-86). Ms. Pearl R. McGill executed the 23 September 2004 final Business Clearance Memorandum as Chief of Contracting Office. The recommendation was given “Unconditional Approval” on 24 September 2004. (*Id.* at 15284)

There is record evidence indicating that the Navy referred to the \$3.825M and \$4.125M figures reflected in the 15 June 2004 Memoranda for Funding Requirements estimates as the “Budget RFP” and the “Budget Maximum,” respectively, when comparing the proposal costs to the \$3.825 “GE [government estimate]” (exs. A-40, -41).

Contract Award and Performance

IDIQ MACC No. N44255-04-D-9122 was awarded to MZT by NAVFAC EFANW on 29 September 2004 under Section 8(a) of the Small Business Act by Ms. McGill (R4, tab 10 at 1192-94). That same day she also issued Task Order No. 0001 to MZT in the amount of \$3,999,872.00 for “Fire Station Addition & Renovation” pursuant to which MZT was to “Provide Design and Construction for MCON P-041, Fire Station Addition and Renovation, Naval Air Station Whidbey Island, Oak Harbor, Washington. All work shall be complete and in accordance with the drawings and specifications.” Work was to be completed by 6 March 2006. (R4, tab 28(1) at 4778-4801)

Shortly after award, consensus was reached within EFANW to document the decision “to pursue full demolition and new construction on P-041” and EFANW obtained confirmation from NAVFAC that the contract awarded to MZT did not violate the MCON DD 1391 (exs. A-64, -66).

MZT submitted its conceptual design to the Navy on 17 November 2004 (R4, tab 27 at 2369-71; ex. A-67). The design was reviewed by Mr. Rothboeck and other Navy personnel (ex. A-67). The final design was not approved by the Navy until 12 August 2005 (R4, tab 28 at 4745).

On 13 December 2004, EFANW issued the first of 13 letters to MZT advising that work was behind schedule and corrective actions were required (R4, tab 28(8) through (20)). Beginning with Invoice #10, dated 18 November 2004, EFANW began a retainage of 10% of the invoiced amounts under FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE

CONTRACTS (SEP 2002), because MZT was behind schedule. Effective 1 May 2006, EFANW began withholding \$1,850 a day as liquidated damages under FAR 52.211-2, LIQUIDATED DAMAGES – CONSTRUCTION (SEP 2002). (R4, tab 2 at 72, 74, tab 28 at 4736)

The completion date for Task Order No. 0001 was revised several times during contract performance to a final date of 27 June 2006. The price was also revised several times to a final price of \$4,183,443.57. (R4 tab 28 at 4735-36) EFANW accepted all work as complete on 26 April 2007 (R4, tab 28(7)). Using the 27 June 2006 and 26 April 2007 dates, the contracting officer calculated that there were 303 days for which liquidated damages could be assessed, a total of \$560,550 (R4, tab 28 at 4736).

MZT's Request for Equitable Adjustment (REA)

According to Mr. Zatica, preparation of MZT's REA began in late 2006 (Zatica dep. at 233-34, 242). The final version of the REA is dated 10 March 2008. It requested \$4,823,797 in direct and indirect costs associated with 85 separate issues, including \$3,442,579 in project impact costs, \$628,657 in project delay costs, and \$752,560 in REA preparation costs. Additionally, the REA demanded release of \$610,500 it asserted had been withheld as retention and for potential liquidated damages. (R4, tab 28 at 4735)

The REA summarized the basis for its requested recovery as follows:

MZT's REA relies on three bases of recovery: 1) the failure of the government to exercise its regulatory and case law duty to disclose its superior knowledge that MZT's price was far lower than it should have been to construct the facilities as it had envisioned. Instead, the Navy overreached to grab a good deal while it could; 2) the impossibility of achieving the indeterminate and wrongfully-required noise attenuation standard; and 3) the constructive, even cardinal, change nature of all of the changes demanded by the Navy beyond the scope of the RFP. The second and third bases are connected to the first basis because the Navy's changes illustrate its objective to force this 8(a) contractor to build a far more elaborate facility than its bid price, and the RFP, would justify. The three bases of recovery combined to seriously violate the fundamental government procurement requirement of fair and reasonable price.

(R4, tab 27 at 1882)

The REA makes a limited allegation regarding the government's duty not to take advantage of a contractor that makes a mistake in its proposal and the contracting officer's obligation to request a verification of an apparent mistake in bid (R4, tab 27 at 1885-86, 1974-78).

Mr. Paul Anishanslin, the contracting officer, responded to the REA in a letter dated 21 August 2008. He found merit to impact issues B.1.13, relating to the Navy's Base electrical problems that affected transformer hook-up, and B.1.40, relating to locating and making connection to an existing water main. He advised that the costs associated with these two items were the subject of negotiations, but that time was not. He otherwise "determined that [MZT had] not presented sufficient justification or data to warrant the contract adjustments" requested. (R4, tab 28 at 4735, 4755, 4769-70, 4776) The letter specifically stated that it was not a contracting officer's final decision and advised MZT of its right to submit a claim under the Contract Disputes Act (CDA) in accordance with the DISPUTES (JUL 2002) clause of the contract, FAR 52.233-1 (R4, tab 2 at 72, tab 28 at 4776).

MZT certified the REA as a CDA claim on 2 September 2008 (R4, tab 29 at 4874-75). This appeal from a deemed denial followed on 16 January 2009, after which a contracting officer's final decision was issued on 26 February 2009, denying the appeal in its entirety, with the exception of two items that had been negotiated (B.1.13 and B.1.40) (R4, tab 31). MZT's complaint alleges, among other things, that "MZT misconstrued the scope of the work" and made a mistake in bid about which the Navy knew or should have known (compl. ¶¶ 10-11).

MZT's motion for partial summary judgment advances three entitlement theories: unilateral mistakes prior to award about which the Navy knew or should have known; unconscionability associated with the alleged unilateral mistakes and acceptance of MZT's proposal for new construction at an "unrealistically low price;" and superior knowledge/misrepresentation associated with alleged misrepresentations and non-disclosures which induced MZT to bid at an "unrealistically low price" and alleged failure to disclose superior knowledge that the price was "unrealistically low" (app. mot. at 2).

Alleged Mistakes Prior to Award

Mr. Benton was Belay's lead designer on the project (Benton dep. at 18-19). Mr. Boyington was "one of the persons at MZT charged with putting together MZT's proposal for the project," in particular "preparing cost estimates for MZT's price proposal" (Boyington decl. ¶ 2). Mr. Boyington explained that, after Mr. Benton drafted the design concept drawings for MZT's proposal, he prepared cost estimates based upon takeoffs from the Belay drawings (Boyington dep. at 158). Mr. Boyington then provided

these cost estimates to Mr. Britt, who in turn assembled MZT's proposal for final review by Mr. Zatica (Boyington decl. ¶ 2, dep. at 34-40). Messrs. Britt and Zatica made the final proposal and pricing decisions (Boyington dep. at 34-35).

MZT alleges that it made eight unilateral mistakes in its proposal. MZT relies extensively upon the declaration of Mr. Boyington, dated 5 March 2010, to support its allegations. The Navy offers excerpts of Mr. Boyington's testimony from a deposition taken 13 April 2010 and other evidence to dispute statements made by Mr. Boyington in his declaration. The Navy points out that Mr. Boyington sent his estimates to Mr. Britt, who "control[led] the bid" and performed the "final closeout," and that Mr. Boyington did not see the final estimates used with the proposal (Boyington dep. at 35, 40).

What are described as Mr. Boyington's bid sheet estimates are provided in appellant's exhibit 76 (not exhibit 75, as cited by appellant) (app. reply br. at 32). They are also part of appellant's exhibit 96. These documents are neither authenticated nor explained. Thus, we decline to speculate about what costs may have been omitted from the activities listed, in particular with respect to the "Setup & Maintain Temp Facilities" activity and the entries relating to the second and third story flooring systems. We are not able to determine from the record whether the cited bid sheet estimates are those that were actually incorporated into MZT's final proposal.

1. Misreading of Specification
New Construction vs. Renovation/Addition

With respect to its first alleged mistake, MZT asserts that "the RFP did not allow new construction" (app. mot. at 37). Its answer to the government's interrogatory 1(a), MZT identifies the alleged mistakes with respect to new construction as:

- Misreading of RFP by Belay in the formulation of their design, and then MZT incorporated Belay's mistaken design into their proposal.
- Mistaken belief of MZT and/or Belay that new construction could be done at a similar cost to renovation/addition.

(Ex. G-10 at 2) There is a substantial difference between these allegations of mistake: one relates to an issue of contract interpretation regarding whether new construction was allowed, whereas the other seemingly assumes new construction was allowed and raises matters relating to cost.

We found above that Mr. Benton/Belay recommended new construction as an option to MZT and that MZT relied upon this recommendation and the Navy's responses

to PPI s #23 and #24. Mr. Benton's recommendation was based in part upon his visit to the existing building which he thought would be difficult to renovate to the Navy's need (Benton dep. at 22-24). He read the RFP and the Navy's PPI responses before developing the drawings for MZT's proposal for new construction (Benton dep. at 67).

Mr. Boyington also understood the RFP and the responses to the PPIs to allow either new construction or renovation/addition (Boyington decl. ¶ 11, dep. at 101-03, 150). Neither Mr. Benton nor Mr. Boyington specifies any particular section or sections of the specification they claim to have misread in interpreting the RFP as allowing new construction and they do not explain why their respective interpretations were incorrect.

2. Misreading of Specification – Sound Attenuation

MZT concedes in its reply to the Navy's response to its motion for partial summary judgment that there are genuine issues of material fact as to whether MZT made a unilateral mistake relating to the sound attenuation requirements (app. reply br. at 28). The amount at issue with regard to sound attenuation is alleged to be "in excess of \$600,000" (app. mot. at 41).

3. Clerical Mistake – Omission of Exhaust System

MZT alleges that it mistakenly omitted the exhaust system for the apparatus bay of the new fire station from its proposal (app. mot. at 41). Its answer to the government's interrogatory 1(a) as to clerical mistakes states generally that Mr. Boyington "failed to incorporate numerous aspects of the drawing into his estimate/bid" and then includes "exhaust extraction costs" in a wrap-up summary of its alleged mistakes (ex. G-10).

By a letter dated 19 August 2004, Mr. Boyington received a subcontractor quote from Blythe Plumbing & Heating, Inc. (Blythe) in the amount of \$561,081.00 for "Total Mechanical (HVAC, Plumbing, & Controls, & Engineering)." The letter stated:

Our standard Blythe exclusions and clarifications, as we have provided on previous Macro-Z proposals apply.

If further information is provided, including a description of design criteria and preliminary architectural drawings, we will refine our budget price further, and provide potential cost saving options.

(Ex. A-73)

Mr. Boyington incorporated Blythe's \$561,081.00 quote into the MZT estimate he was preparing (Boyington decl. ¶ 15, dep. at 181-82). He assumed that the Blythe quote included the vehicle exhaust system because it was a bid for "total mechanical" (Boyington dep. at 183). Mr. Zatica confirmed in his deposition, however, that the drawings at the time were not sufficiently complete for a vehicle exhaust system quote (Zatica dep. at 98-100).

At some point during post-award design work, Mr. Boyington learned from Blythe that the exhaust system had not been included in its proposal (Boyington decl. ¶ 16, dep. at 183-84). Blythe provided a quote to remove the existing vehicle exhaust equipment in June 2005 and a quote to design and install an exhaust system using Nederman equipment for \$106,572.00 in September 2006 (R4, tab 27 at 3194-95, 3319). MZT seeks costs that "exceed \$100,000" for this alleged mistake (app. mot. at 42).

4. Misreading of Specifications – Temporary Facility for Fire Trucks

MZT asserts it did not interpret the specification to require a temporary enclosure for fire trucks (app. mot. at 42). It did not identify this alleged mistake in its interrogatory answers (ex. G-10), but claims costs that "exceed \$60,000" (app. mot. at 44).

Mr. Boyington's declaration states that during his pre-bid visit to the site, he noticed that the fire equipment vehicles were parked outside (Boyington decl. ¶ 18). He further states that he did not understand the RFP to require a temporary enclosure for the fire trucks during construction and did not include the cost of a temporary indoor facility in his estimate (Boyington decl. ¶¶ 18-20, dep. at 225-27).

Mr. Boyington does not identify the specifications he claims to have misunderstood, but MZT cites to two specification provisions in its motion. The first is from the "PROJECT SCOPE AND DESIGN CRITERIA" of the RFP which provided as follows in paragraph A "PROJECT SCOPE:"

5. Provide temporary facilities as necessary for crew living quarters and second floor personnel support area in close proximity of the firefighting equipment during construction.
6. Maintain operational status of fire station throughout construction.

(R4, tab 2 at 102)

The second is paragraph 2.3.1, "Maintain Operational Status," of section 2, "PROJECT OBJECTIVES," of part 3 "PROJECT PROGRAM," which provided that vital equipment and personal would remain at Building 2526 and that "project phasing and/or use of adequate temporary berthing accommodations on or off site" were contractor considerations. The paragraph further stated: "Temporary quarters would need to be located near the building and two [vehicle] bays should be kept operational as long as possible. During the summer, bays are not required because vehicles can park outside." (R4, tab 2 at 413)

With respect to maintaining operational status, MZT's proposal stated that it would "setup an emergency temporary compound consisting of office areas, living, sleeping and kitchen area that will be utilized during the construction phase of this project. The compound will be located in an area near the existing fire station with the fire equipment parked near the flight line." (R4, tab 6 at 1067) As part of its 17 November 2004 conceptual design submittal, MZT advised that it intended to set-up a temporary fire station compound at two sites. Of relevance are the plans for the flight response crew, which would be "located in a compound near the new control tower, presently occupied by the tower contractor's job trailer. The equipment will be housed in tent like structures adjacent to the trailers." (Ex. A-67 at 12579)

MZT's 15 September 2006 "Request for Project Time Extensions" submitted by Mr. Zatica states that "MZT originally planned to erect tents in accordance with the language in the RFP" (ex. G-16 at 34278). MZT's 10 March 2008 REA for impact item B.1.3 similarly states that based upon items 5 and 6 of the Project Scope and Design Criteria and paragraph 2.3.1 of part 3, Project Program, "MZT was to provide a protective enclosure for the fire fighting vehicles," that it "was prepared to provide a temporary tent to protect the vehicles during the winter months as specified," and that its "intent was to provide heavy duty tents to meet this need" (R4, tab 27 at 2634).

5. Misreading of Specification – Omission of Blast Proof Windows

Mr. Boyington avers in his declaration that he did not think the RFP specified blast protected windows and did not include AFTP blast protection in MZT's proposal (Boyington decl. ¶ 14). MZT did not identify this alleged mistake in its interrogatory answers (ex. G-10).

Mr. Boyington's declaration does not identify any RFP provisions he allegedly misread. In his deposition he identified paragraph 3.2, "Site Development Requirements," of section 3, "SITE ANALYSIS," of part 3, "PROJECT PROGRAM," of the RFP which states in relevant part:

Portions of the project facility may be considered an Inhabited Building depending on the proposed project configuration. All site development shall comply with AT/FP [sic] requirements outlined in the current edition of the Unified Facilities Criteria (UFC 4-010-01). Standoff distances from existing roads, fences, vehicular parking, and vehicular traffic shall adhere to this document.

(R4, tab 2 at 415)

He testified that he did not understand how the second sentence applied to the fire station, but did not get a copy of the UFC 4-010-01 requirements referred to and instead asked Mr. Britt about them (Boyington dep. at 246-50). He included standard exterior windows in his estimate (*id.* at 250). When the Navy advised that laminated windows were required, Mr. Boyington looked up the UFC 4-010-01 requirements and agreed with the Navy that “laminated, or some blast proofing of the windows was necessary” (*id.* at 249). UFC 4-010-01 at paragraph B-3.1.1 “Glazing” requires use of “6-mm (1/4-in) nominal laminated glass for all exterior windows, skylights, and glazed doors” (ex. G-17 at B-9).

6. Misreading of Specifications – Omission of Canopy and Roll-Up Door

The sixth mistake is again based upon Mr. Boyington’s declaration in which he states that he did not understand the RFP to require a canopy or roll-up door on the west side of the building and did not recall anything about such a requirement when he reviewed the specifications. He further states that “the issue did not even cross my mind” and that he did not include the cost of these items in his estimate. (Boyington decl. ¶ 21) MZT’s interrogatory answers do not identify this alleged mistake (ex. G-10), but MZT quantifies costs that “exceed \$16,000” (app. mot. at 45).

The Puget Sound Federal Fire Department Requirements for Project No. P-041 were provided as item vi. in part 6 “ATTACHMENTS” of the RFP. At his deposition, Mr. Boyington testified that he recalled reading the requirements for “Fire Extinguisher Maintenance and Storage,” but not whether he included them in MZT’s bid (Boyington dep. at 244-46). The provision reads as follows:

- Provide an outside covered storage area to store fire extinguishers awaiting repair or pick up. Size to be determined by local requirements.

....

- Provide a double-leaf or roll-up door for delivery of extinguishers.

(R4, tab 2 at 774) Both were identified as omissions from MZT's technical proposal in the post-award kickoff meeting held 10 December 2004 (ex. A-77).

MZT's 10 March 2008 REA for impact item B.1.12 acknowledges that a canopy and roll-up door were required, but seeks an equitable adjustment for the canopy because it "was designed and built larger than it needed to be" at the direction of the Navy (R4, tab 27 at 3022; Zatica dep. at 237-38).

7. Clerical Error – Omission of Second/Third Floor Elements

Mr. Boyington's declaration states broadly that key elements consisting of components required to install the second and third story flooring systems as designed by Belay were mistakenly omitted from MZT's proposal either because he failed to price "certain aspects" or "various elements" of the Belay design drawings or because he never received the "complete/final set of the design drawings" (Boyington decl. ¶ 22). His declaration does not identify the design drawings to which he refers. Rather, he attempts to identify the items he did not price, concluding that he failed to price "nearly the entire [third] floor plate" and the second floor composite deck flooring system (Boyington decl. ¶¶ 22-25). The alleged mistake is not identified as such in MZT's interrogatory answers, although the following clerical error is described:

- Clerical error by Boyington in preparing estimate, where after being provided with design drawing from Belay, he failed to incorporate numerous aspects of the drawing into his estimate/bid.

(Ex. G-10 at 2)

In his deposition, Mr. Boyington identified the Belay drawings he used in preparing his estimate (Boyington dep. at 152-54, 158). A second set of drawings that he thought might have been prepared by a structural engineer reflect differences in the second floor and show a third floor. He testified that he did not have this set of drawings when he prepared his cost estimates. (*Id.* at 162-68) We are unable to determine from the record presented which set of drawings was the final set included in MZT's proposal or how they relate to the "certain aspects" or "various elements" Mr. Boyington claims he did not price. We also cannot determine the significance, if any, of these items.

8. Misreading of Specifications – Omission of Design Costs for Fire Protection and Low Voltage Wiring and Controls

MZT asserts that it omitted the “design costs for fire protection and low voltage wiring and controls system” (app. mot. at 47). Its answer to the government’s interrogatory 1(a) refers to this error as one relating to the “costs for low voltage design” (ex. G-10).

Mr. Boyington states that he omitted “the design costs of fire protection and low voltage wiring and controls system” from his estimate and MZT’s proposal because he misread the RFP specification which provided that these items could not be designed by the fire protection construction contractor (Boyington decl. ¶ 26). His declaration does not identify the specifications he allegedly misread.

MZT cites to part 4 “PERFORMANCE SPECIFICATIONS,” paragraph 4.1 of “D40 FIRE PROTECTION,” and Mr. Boyington confirmed in his deposition that this was the provision to which he was referring (app. mot. at 47; app. reply br. at 37; Boyington dep. at 257-58). Paragraph 4.1 states:

One U.S. registered CQC [contractor’s quality control] FPE [fire protection engineer] shall be an integral part of the Contractor’s Quality Control organization to ensure all life safety and fire protection requirements of the contract and the criteria referenced in the contract are met. This CQC FPE shall have no business relationships (owner, partner, operating officer, distributor, salesman, or technical representative) with any construction subcontractors or equipment manufacturers involved with this contract.

(R4, tab 2 at 426)

This provision relates to a fire protection CQC. Mr. Boyington testified that the requirement is contrary to commercial common practice and that he did not read it carefully because MZT was going to subcontract the fire sprinkler design and installation, which he assumed would include the costs of the fire protection engineer (Boyington dep. at 251-55, 259-64). After contract award, Belay hired an independent CQC fire protection engineer and passed the cost on to MZT (Boyington decl. ¶ 26).

The specification provisions relating to the requirements for the design of the fire protection and low voltage wiring and controls system are neither identified nor explained. Apart from Mr. Boyington’s declaration statement, which we find to be no help whatsoever on this issue, the only record evidence is an unexplained Belay change

order that includes an item for "Low Voltage" in the amount of \$6,925.00 (Boyington decl. ¶ 26; ex. G-18).

Notice or Knowledge of MZT's Alleged Mistakes

Ms. Edwards was an EFANW contracting officer and the SSB Chairperson during the relevant time period and states in a brief declaration that she "was involved with the award" of the MZT contract (ex. G-15, Edwards decl. ¶¶ 1, 2). She issued the 15 September 2004 discussion letters to the offerors (R4, tab 8). She reviewed and signed the Business Clearance Memoranda on 14 and 23 September 2004 as a contracting officer (exs. A-57, -59). She states in her declaration that she was not aware at any time prior to reading MZT's motion for partial summary judgment that MZT made any of the mistakes alleged (Edwards decl. ¶¶ 3, 4).

CAPT Parker was the awarding contracting officer/SSA and states in another brief declaration that he was also "involved with the award" of the MZT contract, working with Ms. McGill and other Navy personnel (gov't resp, attach. 1, Parker decl. ¶¶ 1-3). He states in his declaration that he was not aware at any time prior to reading MZT's motion for partial summary judgment that MZT made any of the mistakes alleged nor was he aware that it made any other mistakes in its bid (Parker decl. ¶ 5). He further states that he does not know of any other Navy personnel who were aware of any mistakes in MZT's bid (*id.* ¶ 6).

There is no evidence that MZT alleged that it made any mistake in its bid during contract performance.

DISCUSSION

We consider MZT's motion for summary judgment under familiar legal standards. Summary judgment is properly granted only where the moving party has demonstrated the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). MZT's showing must be such that no reasonable trier of fact could find other than in its favor. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986).

The applicable substantive law identifies which facts are material and disputes that might affect the outcome of the appeal and preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). As the non-moving party, the Navy must set forth specific facts showing the existence of a genuine factual dispute; conclusory statements and bare assertions are not sufficient. *Mingus*, 812 F.2d at 1390-91; *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626 (Fed. Cir. 1984). We are to view such facts in the light most favorable to the Navy as the non-moving party,

accepting its version of them as true and drawing all reasonable factual inferences in its favor. *Liberty Lobby*, 477 U.S. at 252; *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993). Our job is not to resolve factual disputes, but rather to ascertain whether genuine issues of material fact are present. *Liberty Lobby*, 477 U.S. at 248; *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851 at 109,932.

Unilateral Mistakes

MZT's first entitlement contention is based upon unilateral mistakes. To prevail upon an allegation of unilateral mistake where reformation is sought, the contractor must show 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 Electrical Constructors, Inc. v. Dalton, 132 F.3d 709, 711 (Fed. Cir. 1997); *Office Automation & Training Consultants*, ASBCA No. 56779, 11-1 BCA ¶ 34,666 at 170,768, *aff'd in relevant part on recon.*, slip op., 21 Nov. 2011; *Solar Foam Insulation*, ASBCA No. 46921, 94-2 BCA ¶ 26,091 at 133,954.

According to MZT, the last element, proof of the intended bid, is not required where, as here, rescission of the contract and restitution on a quantum meruit basis, rather than reformation, are sought (app. mot. at 49-50, 70-72). The Navy responds that rescission is no longer a remedy once a contract has been fully performed and that, in this case, reformation is the remedy for MZT's alleged unilateral bid mistakes (gov't reply br. at 59-60).

A unilateral mistake in bid must be a clear-cut clerical or mathematical error or a misreading of the specifications; an error in judgment is not one for which relief is available. *Ruggiero v. United States*, 420 F.2d 709, 713 (Ct. Cl. 1970); *Rockwell International Corp.*, ASBCA No. 41095, 95-1 BCA ¶ 27,459 at 136,808. The evidence of a mistake must be "clear and convincing." See *McClure*, 132 F.3d at 711. "Clear and convincing evidence" is "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is 'highly probable.'" *Am-Pro*

Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002), quoting *Price v. Symesek*, 988 F.2d 1187, 1191 (Fed. Cir. 1993).

We begin our discussion of MZT's allegations of unilateral mistake with several concerns about the overall factual evidence proffered by MZT which by themselves would seemingly be sufficient to derail MZT's motion for summary judgment. Specifically, MZT relies extensively upon Mr. Boyington's declaration, which is very general in nature and largely lacking in necessary factual details. There are also a number of conflicts between statements contained in Mr. Boyington's declaration and his deposition testimony. Further, the record does not establish whether Mr. Boyington's interpretation of the specifications and his cost estimates were those actually forming the basis of MZT's final proposal inasmuch as Messrs. Britt and Zatica made the final proposal and pricing decisions. On this point, there is evidence relating to mistakes 3, 4, and 6 that Mr. Zatica and others may have read the specifications differently than did Mr. Boyington. We are also perplexed about why MZT did not allege any of these mistakes during contract performance and why not all were identified in its answer to the government's interrogatory 1(a). In any event, in addition to these common concerns about the evidence, the following discussion of the specific evidence relating to the eight alleged mistakes reflects the reasons why MZT's allegations of unilateral mistake are not amenable to disposition by summary judgment.

Clerical Errors – Mistakes 3 and 7

MZT alleges it made two clerical errors that resulted in omission of bid costs. One relates to the vehicle exhaust system (mistake 3) and the other to the second and third story flooring systems (mistake 7).

As to the mistake relating to the vehicle exhaust system, we are not persuaded that Mr. Boyington made a clear-cut clerical-type mistake, *i.e.*, an error which is "evident" or "plain." *Rockwell*, 95-1 BCA ¶ 27,459 at 136,808. This is not a case in which the prime contractor was not aware that a subcontractor's quote omitted a contractually required item or that there was a misunderstanding between them as MZT asserts (app. mot. at 53). On the contrary, Blythe's 19 August 2004 bid and Mr. Zatica's deposition testimony confirm that the drawings were not sufficiently complete to price a vehicle exhaust system.

Thus, the evidence suggests that Mr. Boyington made improper assumptions or faulty assessment of the facts available to him. To the extent the evidence supports a finding of a mistake, we consider it to be one in the nature of an error of judgment, not a clear-cut clerical error. *See Liebherr Crane Corp. v. United States*, 810 F.2d 1153, 1157 (Fed. Cir. 1987).

As to the mistake relating to the second and third story flooring systems, the record does not establish which drawings Mr. Boyington should have used. It does not identify the “certain aspects” or “various elements” of the drawings he failed to price. Nor is there any indication as to why these items may have been of significance. In short, there is not “clear and convincing” evidence that Mr. Boyington made a clear-cut clerical error relating to the flooring systems. *McClure*, 132 F.3d at 711.

Misreading of the Specifications
Mistakes 1, 2, 4-6, 8

A misreading of the specifications occurs when a contractor fails to correctly interpret various elements of the specifications. *See Liebherr Crane*, 810 F.2d at 1157.

MZT asserts that it mistakenly read the specifications as permitting new construction (mistake 1). It has not, however, identified any particular provisions of the RFP specifications it claims to have misread that led to its mistake, focusing instead upon the description of Project No. P-041 as one for a fire station addition and renovation. We consider MZT’s view to be at odds with other evidence in the record. As part of the RFP process, the Navy confirmed in PPIs #23 and #24 that replacement of Building 2526 was an option if it “were under the construction cost limitation” and “if affordable.” Three of 12 bidders, MZT, TESORO and PRI/DJI, proposed new construction. In evaluating MZT’s proposal, the TEB determined that the primary strength in MZT’s design was the demolition of Building 2526 and construction of a new fire station. And, shortly after award, EFANW obtained confirmation from NAVFAC headquarters that new construction was authorized under the MCON DD 1391 appropriation.

The underlying issue here is one of contract interpretation. We do not think the project’s description is enough to resolve the issue in favor of MZT and for us to conclude that new construction was not permitted when there is credible evidence to the contrary. Rather, on this record, we believe there are genuine issues of material fact which preclude a finding that MZT misread the specifications. If new construction was authorized, MZT did not misinterpret the specifications. If it was not authorized, we may ultimately conclude that MZT’s mistake was an error of business judgment inasmuch as it decided to submit a proposal for new construction, and did just that. *See United States v. Hamilton Enterprises, Inc.*, 711 F.2d 1038, 1047 (Fed. Cir. 1983). Indeed, MZT itself seems to concede this eventuality in its comment that the decision to offer new construction “was in some ways a matter of judgment” (app. mot. at 52).

Finally, we view MZT’s lack of argument and evidence relating to the possible allegation of a mistake in believing that new construction would cost the same as an addition/renovation alternative to mean that it has abandoned the allegation for purposes of its summary judgment motion. *See Craft Cooling, Inc.*, ASBCA Nos. 52494, 54127,

06-1 BCA ¶ 33,268 at 164,876 (ASBCA No. 54124 claim abandoned when not addressed by either party through presentation of evidence or argument).

MZT has conceded there are genuine issues of material fact relating to its alleged misreading of the sound attenuation requirements (mistake 2).

There are also genuine issues of material fact relating to MZT's alleged misunderstanding of the specifications with respect to whether the RFP required a temporary enclosure for the fire vehicles (mistake 4). Mr. Boyington sent his cost estimates to Messrs. Britt and Zatica who prepared the final proposal. While Mr. Boyington may not have included any costs for the temporary enclosures, the 17 November 2004 conceptual design submittal and Mr. Zatica's 15 September 2006 request for time both suggest that MZT did understand that the enclosures were required. Drawing all inferences from this evidence in favor of the Navy, we conclude that there are disputed facts regarding MZT's understanding of the relevant specifications. *See Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847 at 114,759 (inferences must be drawn in favor of the party opposing summary judgment).

With respect to the blast proof window specifications (mistake 5), the evidence established that Mr. Boyington did not read UFC 4-010-01, which was referenced in the RFP and from which he would have learned that "laminated, or some blast proofing of the windows was necessary." A failure to read a specification is not a misreading of it; rather a failure to read and consider a specification is a mistake in judgment. *See Giesler v. United States*, 232 F.3d 864, 870-71 (Fed. Cir. 2000); *Minority Enterprises, Inc.*, ASBCA No. 45549 *et al.*, 95-1 BCA ¶ 27,461 at 136,826.

Next, the evidence relating to the canopy and roll-up door specifications (mistake 6) fails to meet the "clear and convincing" standard. *See McClure*, 132 F.2d at 711. While MZT apparently did not include the costs of the canopy or the roll-up door in its proposal, the present record contains conflicting evidence as to whether Mr. Boyington actually read the specifications. It is also unclear whether MZT's claim is one based upon the mistaken omission of these costs or a request for an equitable adjustment due to an alleged change in the specification. To the extent the claim is one of unilateral mistake, the evidence fails to establish either that this was clerical mistake or a misreading or misunderstanding of the specifications.

Remaining is the alleged mistake relating to the fire protection engineer and design costs for low voltage wiring and controls system (mistake 8). We understand from the Navy's brief that the low voltage wiring and control specifications relate to design of the fire alarm (gov't reply br. at 38). While Mr. Boyington's reading of the specification for the fire protection engineer appears to have been somewhat cursory, he did read it. In plain, clear language, that specification states that the CQC fire protection engineer shall

have no business relationship with subcontractors involved on the contract. Thus, we are curious about how he could have misread the requirement. It seems more probable that he either ignored it or relied instead upon what he believed to be usual commercial practice. As such, this is a mistake in judgment for which there is no relief. *Ruggiero*, 420 F.2d at 713. Finally, as our findings of fact make clear, what little evidence there is relating to the alleged mistake associated with design of the low voltage wiring and controls system is essentially incomprehensible.

In sum, in addition to our overall concerns about the evidentiary record, we consider mistakes 3, 5 and 8 (as it relates to the CQC fire engineer) to be mistakes in judgment. It appears that this may also be true of mistake 1, a conclusion we decline to make on summary judgment. See *General Dynamics*, 89-2 BCA ¶ 21,851 at 109,931-32 (in deciding a motion for summary judgment, we are not to resolve factual disputes, but rather to ascertain whether material disputes of fact are present). We have also concluded that the evidence offered to support alleged mistakes 6, 7 and 8 (as it relates to the design of the fire alarm) fails to satisfy the applicable clear and convincing standard. And, finally, there are genuine issues of material fact associated with mistakes 1, 2, and 4 that preclude the entry of judgment as a matter of law in favor of MZT.

Unconscionability

MZT argues in the alternative that it is entitled to summary judgment under the doctrine of unconscionability (app. mot. at 73). We have described “[u]nconscionability” [as] that which ‘shocks the conscience’ and [which] is associated with such concepts as ‘overreaching,’ ‘taking undue advantage,’ ‘bad faith,’ ‘unfairness,’ and ‘unjust enrichment’” and have stated that it is “indistinguishable from the other party’s knowledge or reason to know of a mistake.” *Uniflite, Inc.*, ASBCA No. 27818, 85-1 BCA ¶ 17,813 at 89,036. An unconscionable contract is “one which no man in his senses, not under a delusion, would make, on the one hand, and which no fair and honest man would accept on the other.” *Glopak Corp. v. United States*, 851 F.2d 334, 337 (Fed. Cir. 1988), quoting *Hume v. United States*, 21 Ct. Cl. 328, 330 (1886), *aff’d*, 132 U.S. 406 (1889); *Rockwell International Corp.*, ASBCA No. 41095, 97-1 BCA ¶ 28,726 at 143,388. A determination of unconscionability depends upon the facts of each case at the time of contract award and is found “only in exceptional circumstances.” *Turner-MAK (JV)*, ASBCA No. 37711, 96-1 BCA ¶ 28,208 at 140,793.

MZT asserts that the Navy “snapped up MZT’s offer of new construction at less than half the estimated cost of the government estimate and significantly less than the other two new construction bids, and in the process, the Navy intentionally sidestepped many of the procedures designed to safeguard against the execution of unconscionable contracts” (app. mot. at 74). The Navy’s response is that it did not have actual knowledge of a mistake and that disparities between MZT’s proposal and the other proposals and the

government estimate are not great enough to warrant a finding that the contracting officer knew the Navy was getting something for nothing (gov't reply br. at 47).

Notwithstanding our conclusions above regarding MZT's allegations of unilateral mistake, there is precedent for us to proceed with consideration of MZT's unconscionability contention that the Navy knew or should have known it was "getting something for nothing." See *Technology Chemical, Inc.*, ASBCA No. 26304, 82-1 BCA ¶ 15,715 at 77,746-47 (addressing unconscionability after finding mistake, if any, was one of judgment). See also *Rockwell*, 97-1 BCA ¶ 28,726 at 143,388 (government's motion for summary judgment on unconscionability granted after finding genuine issues of material fact relating to unilateral mistake); *Uniflite*, 85-1 BCA ¶ 17,813 at 89,036 (viewing unconscionability as distinct from contracting officer's reason to know of alleged mistake, previously decided against appellant).

We begin with the question of the government's knowledge or reason to know of MZT's alleged mistakes. With respect to actual knowledge, the Navy has come forward with declaration evidence from Ms. Edwards, the Chairperson of the SSB, and CAPT Parker, the SSA, that they did not know of any mistake in MZT's proposal. They were contracting officials designated by the Navy's Source Selection Plan to evaluate proposals. CAPT Parker was the awarding contracting officer, the person responsible for the Navy's ultimate decision to award the contract to MZT. Ms. McGill was the contracting officer who executed the contract and Task Order No. 0001. We believe the evidence provided by Ms. Edwards and CAPT Parker is persuasive and are satisfied the Navy had no actual knowledge or notice of any mistake. The lack of actual knowledge or notice renders MZT's reliance upon *Sulzer Bingham Pumps, Inc. v. Lockheed Missiles & Space Co.*, 947 F.2d 1362 (9th Cir. 1991) misplaced. See *Turner-MAK*, 96-1 BCA ¶ 28,208 at 140,793.

MZT asserts that there was a gross disparity between its bid price and the other technically acceptable proposals and the government's estimate for new construction that should have alerted the Navy to a possible mistake. The Navy compares MZT's bid price to all of the proposals, irrespective of whether they were for new construction or for addition/renovation and irrespective of whether they were technically acceptable. It also compares MZT's price to the government's NTE/estimate of \$3.825M and disagrees that the \$8.150M figure used by MZT is the government's estimate for new construction.

The solicitation provided that technical merit and price were to be approximately equal factors and that offerors had to be rated at least acceptable in each technical factor to be considered for award. Thus, we agree with MZT that its proposal price should be compared only to the proposals found to be technically acceptable. We are not inclined to agree, however, that its price should be compared only to the proposal prices for new

construction or to what it asserts is the government's \$8.150 million estimate for new construction for a number of reasons.

First, the Navy advised bidders at the pre-proposal conference that its NTE price was \$3,825,000. Both the SSB and the SSA considered this figure to be the government's estimate, as did MZT. The Navy also advised bidders in its answers to PPIs #23 and #24 that a proposal for replacement of Building 2526 would be evaluated if it was "under the construction cost limitation" and that "complete demolition and replacement" was an option "if affordable."

Next, MZT's assertion that the government's estimate for new construction was \$8.150M is based entirely upon one part of a rather lengthy economic analysis dated 10 June 2003. This was shortly after Project No. P-041 had been eliminated from the FY 2004 MCON funding. There is no explanation about who prepared the estimate, the scope of the project it reflected, or why and how it was prepared. It is but one of many estimates for new construction prepared by the Navy over a period of four years for a project that had scope changes.

Further, there is no evidence that the SSB and the SSA had any knowledge about the \$8.150M estimate. Indeed, all inferences are to the contrary. The estimate provided by Mr. Schaeffer to Mr. Snell, who prepared the Source Selection Plan and was a member of the SSB, was \$3.705M (increased to \$3.825M by an unexplained hand-written change). The 15 June 2004 memoranda for funding requirements reflect estimates of \$3.825M and \$4.125M. While there is no evidence supporting the preparation of these estimates, both were used by the SSB and the SSA as the "Budget RFP" and the "Budget Maximum," respectively, when the proposal prices were compared. Thus, on the record now before us, we conclude the \$8.150M figure should not be used as a new construction estimate against which to compare the construction costs estimated in MZT's proposal.

In short, the facts here establish that MZT and all other bidders were on notice that proposals, irrespective of whether for addition/renovation or for new construction, would have to be technically acceptable and would be compared to the government's \$3.825M NTE/estimate. Applying these same ground rules, the record shows that MZT's \$3,999,872 price was five percent higher than the government estimate. The next lowest technically acceptable bids, MARPAC at \$4,446,500 and P&L at \$4,590,000 (both for renovation/addition), were 11% and 15% higher, respectively, than MZT's bid. We note that if we were to compare the MZT, MARPAC and P&L bids to the Navy's \$4.125M maximum budget estimate, these differences would be less. The only other technically acceptable proposal for new construction was from TESORO at \$5,660,347, some 42% higher than MZT's bid. The differences between the relevant proposal prices can also be compared by considering that MZT's bid was 90 percent of MARPAC's bid, 87 percent of P&L's bid, and 71 percent of TESORO's bid.

We are satisfied that the price difference between MZT's bid and the government estimate was not significant enough to give the government reason to suspect an error. See *AQA Systems, Inc.*, ASBCA No. 45051, 93-3 BCA ¶ 25,996 at 129,239 (contractor's bid eight percent higher than government estimate). Nor do the price comparisons with MARPAC and P&L reflect gross price disparities that would have suggested a possible mistake by MZT. See *Technology Chemical*, 82-1 BCA ¶ 15,715 at 77,747 (appellant's bid 16 percent lower than the next low bid). Moreover, even if we were to conclude that the correct comparison should be between MZT and TESERO, and even if we were to conclude that the difference between the two bids was sufficient to give the government reason to suspect a mistake, we still would not find a gross price disparity. See *Turner-MAK*, 96-1 BCA ¶ 28,208 at 140,784, -791, -794 (although bid that was 65 percent of the next low bid and 53.8 percent of the average of the other offers would lead to inference of a mistake, the price was not grossly inadequate).

To the extent MZT's arguments relating to bid disparity go beyond its alleged mistake relating to whether new construction was permitted, it appears that the Navy is correct in contending that the dollar amounts identified with regard to the remaining mistakes were not large enough individually, or collectively, to have put it on notice of a mistake, much less that they amount to an unconscionable contract. The largest single item, sound attenuation, is valued by MZT at \$600,000. Excluding the first mistake, the amounts identified by MZT for three of the remaining six alleged errors total \$176,000. This is a grand total of \$776,000, or 19 percent of the contract award. More to the point, however, is the fact that the prices bid were lump sum and were evaluated as such on the basis of price analysis under FAR 15.404-1(b) so that even the alleged mistake associated with sound attenuation would not have attracted the attention of the contracting officer. See *D.J. Barclay & Co.*, ASBCA No. 28908 *et al.*, 88-2 BCA ¶ 20,741 at 104,806 (where bids submitted on lump sum basis, government had no reason to suspect an error in cost of surface preparation item).

In any event, as we said in *W.B.&A., Inc.*, ASBCA No. 32524, 89-2 BCA ¶ 21,736 at 109,320:

Unconscionability depends strictly upon the facts of each individual case. Disparity in bid prices alone, or disparity in bid prices in connection with a Government estimate alone does not establish that the contracting officer knew or should have known that the Government was getting something for nothing.

MZT concedes that price disparity alone is not enough to establish unconscionability and that it must come forward with additional evidence of overreaching

and/or bad faith on the part of the Navy in the procurement process prior to award (app. reply br. at 63). It first asserts the bid verification process was inadequate because the Navy simply asked MZT to “[r]eview your price and confirm or adjust it accordingly” as part of its discussion questions and that, at the very least, the Navy was obligated to point out the disparity between the government estimate and MZT’s price. The Navy disputes any such inadequacy because it claims it had no knowledge of any mistake. We concluded above that the Navy did not have actual knowledge of any mistake and that the appropriate price comparisons did not reflect a possible error. Finally, we understand the disparity referred to between MZT’s price and the government estimate to be a comparison to the \$8.150M estimate that we found was factually unsupported. Accordingly, we find no merit in MZT’s contention that the Navy failed to take adequate steps to verify MZT’s proposal.

Likewise, and for many of the reasons discussed above, we are not persuaded that the Navy’s determination that there was adequate price competition was unfounded or that the Navy should have requested cost and pricing data under FAR 36.214, SPECIAL PROCEDURES FOR PRICE NEGOTIATION IN CONSTRUCTION CONTRACTING, and conducted a price and cost analysis under FAR 15.404-1, PROPOSAL ANALYSIS TECHNIQUES.

MZT next provides a summary list of alleged improprieties it believes constitute overreaching on the part of the Navy. We have considered each of these items and cannot reach such a conclusion. Most of the items relate in one way or another to matters we have already addressed, in particular the proposal prices and the government’s purported \$8.150M estimate and its verification process. Two other items relate to sound attenuation, an issue about which MZT concedes there are genuine issues of material fact. Another is that the Navy knew the project was “under-budgeted,” an allegation supported principally by the unexplained opinion of Mr. Schaeffer, who is the same person who provided the information about the project, including an estimate to Mr. Snell for the Source Selection Plan that, at \$3.705M, was lower than the \$3.825M NTE/estimate the government actually used. In any event, other expressions of comfort with the funding level by members of the EFANW project team lead us to conclude that there are genuine issues of fact about whether the project was “under-budgeted.” This is particularly so to the extent there are scope issues and questions about the Category Codes used for pricing Project No. P-041.

The remaining allegations, *i.e.* that the Navy manipulated its evaluation of revised proposals so that MZT would be technically acceptable, an argument that apparently relates to the TEB’s conclusions about compliance with the UFC guidance, that the SSB decided to award the contract to MZT and requested funds before the SSA concurred, and that a best value tradeoff basis was not employed, apparently because the lowest bidder was awarded the contract, are either speculative and/or argumentative in nature.

The Court of Appeals for the Federal Circuit has observed that rescission, which has been requested here, as relief from unconscionability is “an extraordinary remedy usually reserved for the protection of the unsophisticated and the uneducated.” *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1365 (Fed. Cir. 1999). Based upon the foregoing, we are satisfied that MZT has not come forward with undisputed evidence necessary to establish the “exceptional circumstances” needed to prevail as a matter of law on its alternative claim of unconscionability.

Superior Knowledge/Misrepresentation

MZT’s final entitlement argument is that the Navy “actively misled MZT into believing that its \$3.999 million proposal for new construction was reasonably priced [and] misled MZT into targeting its price towards a fictitious \$3.825 million NTE/estimate” (app. mot. at 77). The Navy responds that the evidence does not support MZT’s allegations that it was misled, a response with which we agree.

The Navy disclosed to bidders that the government’s NTE for Project No. P-041 was \$3.825 million. MZT understood this to be the Navy’s estimate for the fire station addition/renovation. There is absolutely no record evidence that this figure was ever represented by the government to be an estimate for new construction. Thus, MZT could not have been misled into relying upon it as such. To the contrary, MZT followed Belay’s recommendation and considered the Navy’s responses to PPIs #23 and #24 in deciding to propose new construction. Its proposal states that the cost of constructing a new facility “would be no more than renovating and adding on to the existing building.” Indeed, the import, if any, of the government’s NTE/estimate on MZT’s bid appears to relate to MZT’s decision to keep its price competitive, even to the extent of reducing its profit percentage, so that it might be selected for one of the MACC awards.

MZT further asserts that the Navy failed to disclose its superior knowledge that its independent estimate for new construction was \$8.150M and that it had ruled out new construction because it was far more expensive than addition/renovation (app. mot. at 79). It contends this information would have given it “clear notice that its proposal was priced unrealistically low” (app. mot. at 77). The Navy responds that there is nothing vital about the \$8M figure and that even if it had been disclosed, MZT has not provided any evidence that the disclosure would have helped it prepare a more accurate estimate.

The doctrine of superior knowledge imposes upon the government an implied duty to disclose information to a contractor that is otherwise unavailable. *Giesler*, 232 F.3d at 867. To satisfy its burden of proof, MZT must produce “specific evidence” showing that:

- (1) [A] contractor under[took] to perform without vital knowledge of a fact that affects performance costs or

duration; (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information; (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire; and (4) the government failed to provide the relevant information.

American Ship Building Co., 654 F.2d 75, 79 (Ct. Cl. 1981). *Accord Hercules, Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir. 1994), *aff'd on other grounds*, 516 U.S. 417 (1996).

When the Navy's \$3.825M NTE is also viewed as the government's estimate, we might have had some agreement in the abstract with MZT's contention that, having disclosed the \$3.825M figure, the Navy was obligated to disclose its estimate of new construction costs once it advised bidders that new construction could be an alternative. This, however, does not take into consideration the full story. Here, the Navy made clear in its answers to PPIs #23 and #24 that the new construction alternative was an option subject to "the construction cost limitation" and MZT did not establish that the \$8.150M figure was the government's estimate of the cost of new construction.

That said, we are otherwise hesitant to categorize a government estimate for a design/build contract as vital knowledge of a fact that would permit a contractor to prepare a more accurate estimate of its own cost of performance. In this regard, the design/build nature of the contract, which allows offerors to pursue different design solutions, is of substantial relevance. The record here does not explain the government's design approach, much less how it might compare to the design concept drawings prepared by Belay, MZT's architect. Nor is there evidence of how the costs estimated by the Navy may relate to the costs MZT would reasonably anticipate it would incur for its design approach. And, while this was the seed contract for a Section 8(a) MACC award, the introduction to MZT's proposal emphasized its 15 years of construction experience and its expertise in design/build contracts. Thus, the Navy would have good reason to believe that MZT knew how to price the design approach taken by Belay.

Finally, Mr. Boyington's testimony with respect to whether the Navy had vital information is equivocal. On the one hand, his declaration states that had he known that the government's estimate for new construction was double that of renovation/addition, MZT would never have considered pursuing new construction. On the other, his deposition testimony was that such knowledge would only have made him look at the details again, wonder if the estimates were "apples to apples" and ask Mr. Britt to check the bid, something we understood from other evidence Mr. Britt was already charged with doing. In any event, Messrs. Zatica and Britt, not Mr. Boyington, made the final decisions regarding MZT's proposal submission.

We conclude that MZT has not come forward with specific evidence showing that the Navy had vital knowledge that it was obligated to share with MZT. Accordingly, it is not entitled to judgment on the merits on grounds of misrepresentation/superior knowledge.

Summary

With respect to MZT's allegations of unilateral mistake, we concluded that summary judgment was foreclosed because there are genuine issues of material fact associated with mistakes 1, 2, and 4, that mistakes 3, 5, 8 (as it relates to the CQC fire engineer) and possibly 1 are mistakes in judgment, and that the evidence did not support alleged mistakes 6, 7, and 8 (as it relates to the design of the fire alarm.) We also concluded that MZT did not demonstrate the exceptional circumstances necessary to prevail as a matter of law on its claim of unconscionability. Likewise, MZT did not show that the Navy made misrepresentations to it or possessed superior knowledge that it did not share. Having concluded that this appeal is not amenable to partial disposition by summary judgment, we have no reason to address MZT's remaining contention, that it is entitled to rescission and restitution in the form of a quantum meruit recovery.

CONCLUSION

MZT's motion for partial summary judgment is denied in its entirety.

Dated: 14 February 2012



CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

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. 56711, Appeal of Macro-Z Technology, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals