ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Orion Technology, Inc.	)	ASBCA No. 54608
	)	
Under Contract No. FA3022-04-P-0011	)	

APPEARANCE FOR THE APPELLANT: Johnathan M. Bailey, Esq.
Bailey & Bailey, P.C.
San Antonio, TX

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
MAJ Kenneth W. Sachs, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TODD

This appeal involves a mistake in bid issue in a commercial services, negotiated procurement using simplified acquisition procedures. Appellant has alleged that it made a unilateral clerical mistake in its offer which the contracting officer had reason to suspect, but did not request verification. The government disputes that a mistake was made and maintains that no bid verification was required by the Federal Acquisition Regulation (FAR). The government maintains that it is sufficient that the contracting officer's actions were reasonable and not an abuse of discretion. Only entitlement is before us for decision.

FINDINGS OF FACT

1. On 28 August 2003, Contract No. FA3022-04-P-0011 was awarded to appellant Orion Technology, Inc. (Orion) for fuels management services at Columbus Air Force Base, Mississippi for the period 1 October 2003 through 30 September 2004, with options to extend the term of the contract for two additional years. The amount of the award was $964,776 for the base year. (R4, tab 6) Appellant's offer was prepared in cooperation with Phoenix Management, Inc. (PMI), as appellant's proposed subcontractor (R4, tab 3 at 5, 20, 22; tr. 1/229).

2. The Statement of Work (SOW) in the contract required that the contractor provide all personnel, equipment, and other items and services to manage the requisition, receipt, storage, issue, quality, and accounting of petroleum fuels and liquid oxygen at Columbus AFB (R4, tab 7 at 36, ¶ 4.1). The contractor was to "ensure the work force is

maintained at a level that will consistently provide mission support" (R4, tab 1a at 2, ¶ 1.1.2). The hours of operation were indicated in workload estimates for normal duty hours and night shifts that covered 0700-1600, 1600-2400, 2400-0700, or "24/7" (*id.* at 5, 66; tr. 1/147). The SOW provided that contractor personnel were required to present a neat appearance and be easily recognized and specified that "[t]his shall be accomplished by wearing distinctive clothing bearing the name of the company" (R4, tab 7 at 36, ¶ 4.3.1.).

3. Teximara Corporation was the incumbent contractor at the time the contract was solicited with knowledge of what it should cost to perform the contract. The services provided were subject to a collective bargaining agreement (CBA) with its employees. Article XII, "Safety Requirements," in the CBA provided that the contractor would supply certain safety equipment and stated with respect to safety shoes only that the contractor was required to:

> Pay each employee who is required to wear safety shoes $150.00 dollars [sic] per year. Employees must turn in worn safety shoes when receiving replacements.

(R4, tab 8 at 9) Teximara had 22-1/2 full time equivalent positions (FTEs), which included 15 full time employees and 15 part time employees. The contract was undermanned, and the contractor was performing less than satisfactory service. The government acknowledged its current problem with the incumbent contractor as follows:

> We have an under-manned, under-experienced management team and work force. Current ownership refuses to accept responsibility for this operation and continuously works to provide less than satisfactory service.

(R4, tab 10k at 6) According to government testimony at the hearing, undermanning was just the result of not scheduling sufficient part time work and the frequent absences of employees. As Ms. Deanna Cox, the contracting officer, stated, "[i]t was a performance problem of being under-manned" (tr. 1/219). Teximara employees were not experienced or well-trained, and Teximara did not have a good project manager. The pricing structure of the incumbent contract was completely different than the subject contract. Teximara was paid per plane refueled. The successful offeror would be paid a fixed monthly price. (R4, tab 10k at 6; tr. 1/98, 193, 212, 214-15, 218-19, 2/21-22, 24-29)

4. On 1 July 2003, Columbus AFB issued the Request for Quotations (RFQ), Solicitation No. F22608-03-Q-0003, for the contract pursuant to FAR 13.5, TEST PROGRAM FOR CERTAIN COMMERCIAL ITEMS (R4, tab 1). FAR 13.106-2 provides for the evaluation of offers. The contracting officer is required to evaluate offers on the basis

established in the solicitation. FAR 13.106-2(a)(2). The solicitation provided the basis for award, in pertinent part, as follows:

> This is a competitive best value acquisition utilizing simplified procedures authorized by FAR 13.5, "Test Program for Certain Commercial Items." For quotations determined technically acceptable, a trade-off between price and past performance will be conducted.
>
> An offeror will be determined technically acceptable if that offeror demonstrates a clear understanding of the Statement of Work requirements and takes no exception to the requirements of the Request for Quotation . . . . Award will be based on both price and past performance with past performance being more important than price. Each offeror's quoted price will be evaluated for reasonableness. . . . To even be considered for award an offeror must have a satisfactory or better past performance record based upon information available to the contracting officer . . . and offer a reasonable price. . . . Award will be made to the technically acceptable offeror who will provide the best value to the Government in terms of the past/present performance and price. Subjective judgment on the part of the Government is inherent in the evaluation procedures.

(R4, tab 2b at 3) The FAR further provides:

> The contracting officer has broad discretion in fashioning suitable evaluation procedures. The procedures prescribed in parts 14 and 15 are not mandatory. At the contracting officer's discretion, one or more, but not necessarily all, of the evaluation procedures in part 14 or 15 may be used.

FAR 13.106-2(b)(1). The contracting officer thus had discretionary authority under the FAR to simplify the acquisition process. Ms. Cox believed that she had "broad discretion" and could choose whether or not to use parts 13, 14, and 15 of the FAR (tr. 1/173).

5. The RFQ incorporated the standard clause FAR 52.212-1, INSTRUCTIONS TO OFFERORS – COMMERCIAL ITEMS (OCT 2000) and addenda. Section (b)(4) required that offers include a manpower matrix in accordance with attachment 4 of Standard Form (SF) 1449 (R4, tab 1 at 5). Attachment 4 required the offeror to include detailed job

descriptions, the grade element for each skill classification, the number of personnel who would perform the contract requirements, and whether full, part time, or on call employees would be used (R4, tab 1d). Employees were to be paid wage rates and fringe benefits as provided by the CBA covering the period 1 October 2001 through 30 September 2004 (R4, tabs 1b, 8).

6. The RFQ was issued as a Section 8(a) set-aside through the Small Business Administration (SBA) and incorporated by reference FAR 52.219-3, NOTICE OF TOTAL HUBZONE SET-ASIDE (JAN 1999) (R4, tab 1 at 1, 4). Orion, which was started by Mr. Earl Hubbard in 2000, was certified as a Section 8(a) small business and HUBZone small business concern by SBA, but PMI was not (R4, tab 3 at 3; tr. 1/24, 27, 73). Orion entered into a teaming agreement, dated 7 July 2003, with PMI, an experienced fuels management government contractor, to seek award of the contract. The teaming agreement provided that Orion would subcontract 49 percent of the work to PMI and Orion would be responsible for 51 percent of the necessary labor. PMI was responsible for preparation of the proposal, technical direction, and pricing of the contract. Orion had no prior experience in government contracts and did not have a role in the preparation of the offer. (Supp. R4, tab 15; tr. 1/26, 28-29, 62, 74)

7. Mr. Leonard Strickland, PMI's executive vice-president, prepared the manning estimates for the proposal based on his experience with 15 prior fuels management contracts, five of which were PMI's. PMI held the fuels management contract at Columbus AFB from 1993 through 1998, and it was substantially the same as the instant contract. (Tr. 1/70-74) Mr. Strickland worked on the staffing on a Saturday before leaving for a trip on Sunday. On 19 July 2003, he prepared three unnumbered sheets of handwritten work papers and left them in his outbox for his secretary to transfer to the marketing department on Monday. He estimated the hours for 26 positions that would be needed for the shifts to be covered in the contract hours of operation. He estimated other direct costs (ODCs) would include uniforms for 19 employees who belonged to the union and safety shoes for 16 employees who should wear safety shoes because of the risk of things dropping on their feet.[1] Mr. Strickland considers himself a conscientious worker and places importance on detail and the accuracy of numbers. (R4, tab 10c; tr. 1/74-75, 86-90, 91, 114, 117-19, 2/27, 59, 84)

8. A copy of Mr. Strickland's work papers shows positions for Manager, Laboratory Technician, Accountant, FCC Dispatcher, Lead Fuels Distribution Specialist (Expeditor), Fuels Distribution Specialist, Refueling Check Point Specialist, Lead Fuels Storage Operator, Fuels Storage Operator, and Hydrant Operator/Fill Stand (hydrant

[1] Mr. Strickland thought all the incumbent contractor employees were given safety shoes. Appellant did not give any employees safety shoes at the start of the contract since they already had them from the prior contractor. (Tr. 2/84-85)

operator) (R4, tab 10c). The personnel in these positions would perform vehicle check point inspections before vehicles go from the parking lot to the flight line to perform refueling operations, operate the refueling vehicles and refuel the aircraft, operate the hydrant systems and fuel stands where the distribution specialists have their vehicles refueled, receive fuels for storage and transfer them to the hydrant system, and provide all the other contractually required services. The lead fuels distribution specialist is a distribution specialist that is the expeditor with responsibility for all of the refueling operations on the shift. (Tr. 1/76-78, 82, 127-29)

9. Mr. Strickland proposed some cross-utilization in developing the manning estimates for the Orion/PMI offer. The accountant and lab technician functions would be filled by persons trained to perform the other's function in the event of illness or vacation. This cross-utilization did not reduce the proposed manning. No other cross-utilization was proposed. (R4, tab 3 at 37; tr. 1/83-84, 2/67-68)

10. Ms. Leah Alexander, PMI's then vice president in marketing, created spreadsheets to compile the pricing for the proposal based on the work papers she received from Mr. Strickland's office. She received only two of the three pages of manning estimates. She reviewed the CBA and hourly rates for the scheduled shifts to calculate pricing, but did not change the number of personnel. She calculated an offer of 20.6 FTEs. Her spreadsheet numbers match the numbers on the first and third pages of the work papers and the contract line item price offered.[2] She sent the completed proposal to Mr. Hubbard at Orion. (R4, tabs 10d, 10e; tr. 1/106, 120, 144-47)

11. Appellant's offer included a Staffing Plan and Personnel Cross Reference Matrix (R4, tab 3 at 33-44). The plan proposed an organization of 20.2 FTEs and discussed appellant's staffing approach (*id.* at 35-42). The manning matrix required by attachment 4 to the SF 1449 was two fold-out pages at the end of the plan. Five positions on the second page of the work papers were not included. By mistake the matrix did not provide a lead fuels distribution specialist (expeditor) for the second shift, omitted two fuel distribution specialists, and did not provide any hydrant operators. (*Id.* at 43-44) The omission was a clerical error made by Ms. Alexander when she copied the positions from incomplete work papers. These were positions for the evening shift from 1600 through 2400 hours and one of the two hydrant operators for 0800 to 1600. (R4, tab 10c; tr. 1/79, 106-07) Included in appellant's staffing approach was a method of covering employee absences. Appellant proposed to hire people qualified in more than one position. Others would be trained to fill key positions. The staffing plan listed so-called "one-deep" positions and the individuals who would fill the positions when employees were absent. (R4, tab 3 at 41-42; tr. 1/135, 2/68-71)

[2] Mr. Strickland attributed any minor discrepancies in such a spreadsheet to her review of the CBA requirements and correction of his estimates (tr. 1/108).

12. On 7 August 2003, the government received appellant's offer in response to the RFQ (R4, tab 3; tr. 1/176). The contracting officer separated out the technical portions of the four offers received and then removed all markings which would reveal an offeror's identity. Each package, numbered one through four, along with technical rating sheets, was given to Mr. Michael Whipp, the government's Quality Assurance Evaluator (QAE) for fuels management, for performance of the evaluation of the manning and quality control plan in the different offers. Mr. Whipp did not know the identification of the offerors. (Tr. 1/177-78, 2/5, 12)

13. Mr. Whipp had prepared a manpower estimate, dated 23 December 2002, of the minimum number of personnel he considered necessary to staff the contract based on his extensive experience in fuels management. He estimated a manning level of 25 FTEs. Since Mr. Whipp does not have expertise in manpower studies, he qualified this estimate as an estimate that was not computed using any manpower formulas. (App. supp. R4, tab 2; tr. 2/7-8) Since he had only made an estimate, he stated that he would not be surprised if bidders arrived at different estimates (tr. 2/11).

14. Mr. Whipp referenced the offerors one through four in his evaluation. Although he did not have his manpower estimate at hand when he analyzed the Orion/PMI manning proposal, he wrote in his evaluation notes that four fewer positions were included in the offer than Mr. Whipp had estimated. He noticed that several positions were missing. He testified that he thought the omitted positions of assistant project manager and quality control manager would be covered by one person in another position and the hydrant stand function would be performed by fuels distribution specialists or fuels storage operators. (Supp. R4, tab 20-P at 7; tr. 1/178, 2/16-18, 20, 31-34)

15. Mr. Whipp found appellant's offer "acceptable contingent on clarification" (supp. R4, tab P-20 at 7). He provided the following comments to the contracting officer:

> Ensure adequate number personnel. PM [project manager] and QC [quality control] person person [sic] 1 position. How to support flightline w/o [without] expeditor – Additional refueling unit operators.

(*Id.*) Mr. Whipp discussed his concerns with these questions with Ms. Cox. Mr. Whipp recalled that he did not have a "concern" about appellant's proposed manning because of language in the offer regarding appellant's approach to staffing the work: there would be an active recruitment program to obtain qualified candidates who would be the best personnel dedicated to the contract, the project manager would be qualified to perform the duties of the other positions, the lead fuels storage operator would be able to fill in for

the project manager, and personnel would be qualified for more than one position and could fill in for employee absences (R4, tab 3 at 39, 41; tr. 1/183, 2/20-35). Mr. Whipp was particularly impressed by appellant's discussion of recruiting the best personnel because of the undermanning by the incumbent contractor. He was also impressed by the qualifications of the project manager. (Tr. 2/21-22, 24-29) He understood that appellant would be using employees for more than one function. He considered this "cross-utilization" was a "creative" approach to meeting the manpower needs of the contract (tr. 2/21). According to Mr. Whipp, the absence of hydrant operators in the manning matrix did not need to be a concern if personnel in other positions would perform their duties (tr. 2/34).

16. The documentation, as opposed to Mr. Whipp's explanations, indicates that he recognized in his evaluation that there was no expeditor for the second shift, which he acknowledged was not prudent, and there were insufficient fuels distribution specialists to man the contract during all the operational hours (supp. R4, tab 20-P at 7; tr. 2/60-62). He considered it necessary to ensure that the offeror have sufficient personnel to staff the contract and recommended that the contracting officer obtain clarification of the offer (tr. 2/35).

17. The contracting officer requested clarification not from appellant, but from PMI. There was no indication in the government's request that it suspected a mistake in appellant's proposal. On 12 August 2003, Ms. Cox sent an email request to Ms. Alexander[3] without notifying Orion of her inquiry (R4, tab 4 at 5; tr. 1/230). The request began:

> After the technical review of your Fuels quotation was completed we have discovered that *there are a few clarifications* that we will require in this area.

(R4, tab 4 at 1; emphasis added.) The pertinent question asked and PMI's response were as follows:

> How are you proposing to support the flightline without an expeditor *or* additional unit operators?

[3] Ms. Alexander was in contact with Ms. Cox regarding past performance data and offered to provide assistance if the contracting officer needed anything. Ms. Alexander had submitted the requested data for both Orion and PMI and offered to provide any additional information required for either Orion or PMI. (R4, tab 10i at 3; tr. 1/153-54, 176, 187) Ms. Cox considered Orion and PMI one and the same (tr. 1/180).

> We do have an expeditor proposed but inadvertently omitted "Expeditor" from our Staffing Matrix. Our Lead Refueling Distribution Specialist is our Expeditor and will perform expeditor duties to include evaluating fueling operations, initiating action to correct deficiencies, terminating unsafe operations and taking corrective actions, assisting operators with problems they are unable to resolve, providing assistance for hydrant servicing operations, maintaining close liaison with the FCC to report progress of operations and coordinating changes in scheduled work plans.
>
> Should the Government have a concern in these areas, please feel free to let us know your concerns, although *we are confident with our proposed staffing* we are open to reviewing our proposed approach to meet the Government's staffing expectations.

(R4, tab 4 at 2; emphasis added.) Ms. Alexander, after conferring by telephone with Mr. Strickland, who was out of the office, did not respond regarding additional unit operators because PMI did not understand that it was a two-part question. Ms. Cox's intention was to ask "where's the expediter *and* the additional unit operators" (tr. 1/188; emphasis added). Ms. Alexander's email confirmed in response to another question that the project manager and the quality control person were the same person (*id.* at 1; tr. 1/92, 94-95, 136, 154-57, 163-64). The term "expeditor" was added to the staffing matrix in appellant's proposal (R4, tab 10h at 68).

18. Ms. Cox conveyed PMI's reply to Mr. Whipp and, based on his technical advice and the confidence and expertise of PMI, she prepared the appropriate documentation of her award determination. She did not suspect that appellant had made a mistake in its offer because PMI expressed confidence in appellant's offer. (Tr. 1/183-84, 189-90, 193-96, 208-09, 230, 245) If Ms. Cox had suspected a mistake, she would have told appellant "I think you made a mistake" and if a mistake in fact had been made, she would have had a revised proposal submitted (tr. 1/244).

19. The Abstract of Quotations for the subject solicitation, dated 13 August 2003, provided the pricing, price ranking, number of full and part time employees, past performance rating, technical rating, and noted offerors' acknowledgment of amendments for the government estimate and each of the four offerors. The pertinent data was as follows:

Offeror	Total price	Employees		Past Performance	Technical Rating	
		Full	Part	Rating	Accept	Unaccept
Government estimate	$3,725,925	23	2			
#1 Teximara	4,837,585	31	3	Marginal	x	
#2 HSG Inc.	3,787,720	24	0	NA		x
#3 ECATS Inc.	3,364,722	21	0	NA		x
#4 Orion/PMI	2,899,020	18	5	Exceptional	x	

(R4, tab 5)

20. The Technical Assessments, dated 14 August 2003, that Ms. Cox signed, show that of the four offerors evaluated by Mr. Whipp, only # 4 Orion/PMI and # 1Teximara were deemed technically acceptable with minor clarifications (supp. R4, tab 20-P; tr. 1/182, 191-92). Ms. Cox discussed with Mr. Whipp the meaning of his comment "[e]nsure adequate number of personnel" (supp. R4, tab 20-P at 7; tr. 1/183-84). The rating of Orion/TMI stated:

> All information was supplied and the offeror showed a clear understanding of the requirements in the Statement of Work. *One minor clarification* was required to clarify the duties of the QC manager and Program Manager if they were one in [sic] the same. The clarification was provided and the responses found to be fully acceptable by the evaluator.

(*Id.* at 2; emphasis added.)

21. The Price Competition Memorandum (PCM), dated 15 August 2003, evaluated how appellant's prices were determined to be fair and reasonable. The firm-fixed price contract had a total value of $2,899,020 for three years. Price was determined fair and reasonable based on adequate price competition, previous price paid, and the government estimate. The quantities and unit prices of each of the four offerors were listed. Teximara quoted a price of $4,837,585 and was not mentioned in the PCM as 66.870 percent higher than the contractor's quoted price. Ms. Cox was not alerted by this difference to a mistake because manning differences explained most of the cost difference and she was not, based on current performance, "at all confident in their [the Teximara] price to begin with" (tr. 1/192). The previous acquisition, a contract for five years, was priced at $2,784,679 for three years and found lower by $114,341 comparing the same number of years. The contractor's quoted price was only 4.106 percent higher

than the previous price paid, which did not include the contractor supplying its own materials and reflected lower wages. The contracting officer found a difference of "almost 28%/$826,904" between the government estimate and the contractor's quoted price (R4, tab 21-P at 3).[4] Although a 20 percent difference is sufficient to need justification for the difference, Ms. Cox was not alerted by the difference to a mistake because government estimates are historically inaccurate, this estimate was inflated, and the difference was explained by the difference in manning (tr. 1/196). By decreasing the government estimate in direct labor and removing labor inflation which the contractor did not propose, there was only a 1.03 percent difference between the contractor's quoted price and the government estimate. The PCM stated:

> The reduced manning quoted was deemed acceptable in the technical evaluations. Though lower than estimated by the government the offeror's proposed manning was acceptable based upon their proposed plan outlining how they intend to manage these services and utilize the employees.

(Supp. R4, tab 21-P at 3)

22. The Award Decision Document, dated 18 August 2003, recorded Ms. Cox's decision that the offer submitted by appellant represented the best overall value to the government on the basis of the technical evaluation, past performance factor, and fair and reasonable price determination. The document stated that to be considered for award an offeror must have a satisfactory or better past performance record. The overall ratings were marginal for Teximara and exceptional for Orion/PMI. Appellant's price was considered very acceptable after review of the manning against the government estimate. The only other technically acceptable offeror, Teximara, had only marginal past performance, and its price was too high to deem fair and reasonable. (R4, tab 22-P; tr. 1/197-99) Past performance was significantly more important than price for the contracting officer, and the "exception[al] past performance played a very large role" (tr. 198-99).

23. Mr. Hubbard from Orion, Mr. Strickland from PMI, Ms. Cox, Mr. Whipp, and others attended a pre-performance meeting on 9 September 2003 (R4, tab 10k). A summary of the conference prepared by the government included the following:

> 10. Ms. Cox stated their response to the RFQ was technically acceptable, but was worried that the amount of manning is lower than that of the incumbent. If the contractor utilized

[4] We find the contractor's quoted price was 22 percent lower than the government estimate.

> cross manning they bid and can make it work, she feels comfortable. She explained as a commercial contract the government will not mandate number of personnel, but an outcome. Mr. Strickland stated he has used this cross manning in other locations and it has worked well. Mr. Hubbard stated that [if] they feel changes need to be made they will work with the contracting office.

(*Id.* at 3) Thus, Ms. Cox told appellant she was "worried" that the manning was lower than that of the incumbent, but the "cross-manning" that appellant bid was acceptable to the government (*id.*). At that time appellant had not developed a staffing plan that would identify specific employees for specific positions. (Tr. 1/35-37, 56-57, 63-65, 100-04, 200-03) Mr. Strickland testified that he did not recall making the statement attributed to him and the term "cross-manning" is not a term that he uses (tr. 1/103).

24. Mr. Strickland discovered the error made in the offer after the pre-performance conference when he began preparing a budget for the work using the plan that was in appellant's proposal. He noticed that there were no hydrant operators in the offer submitted to the government. He brought the mistake to the attention of Mr. Hubbard. PMI later found the missing page. (Tr. 1/54, 105-06)

25. By letter dated 22 September 2003 to the contracting officer, after contract award, appellant declared a mistake in bid and requested corrections. The mistake was loss of the middle page of Mr. Strickland's handwritten manning estimates in the PMI work papers before the offer was prepared. The letter explained how the mistake occurred and enclosed supporting documentation, including PMI's work papers, which the government had not previously seen. Appellant argued that the proposed staffing was less than the incumbent contractor was using and the incumbent was not performing to the government's satisfaction. Accordingly, the government should have suspected a mistake and requested that appellant verify its bid. Appellant asserted its entitlement to correction of its offer. Appellant claimed an increase in contract price of $247,031 annually. Messrs. Hubbard and Strickland provided the claim to Ms. Cox in a meeting in which appellant received the impression that she was disappointed and would be unlikely to grant relief on the claim. (R4, tab 10; tr. 1/38-39, 58-61, 109, 203-05, 2/37)

26. By letter dated 27 October 2003, Mr. Hubbard certified appellant's claim (R4, tab 10a; tr. 1/67, 109).

27. On or about 5 November 2003, PMI submitted affidavits of Messrs. Strickland and Frank Alexander, PMI's vice president of marketing, and Ms. Alexander to the government concerning how the mistake occurred (R4, tab 10b; tr. 1/159).

28. The contracting officer issued her final decision on 9 February 2004, denying the claim in its entirety on the ground that the mistake was not so apparent as to have charged her with notice of the probability that a mistake had been made (R4, tab 12; tr. 1/206-07, 209-10). Appellant filed this timely appeal.

29. Orion and PMI performed the contract for the first year according to appellant's originally proposed staffing with personnel in five additional positions for which the government has not made payment. On 1 October 2004, the subcontract between Orion and PMI was terminated by mutual agreement. Orion continued performance of the contract alone for a four-month extension through the end of December 2004. (Ex. A-1; tr. 1/31, 40-42, 61, 80, 111)

30. Appellant's intended offer is claimed to have been $247,031 more than its mistaken offer based on calculations of an additional 5.4 FTEs that were omitted. The additional positions were one lead fuels distribution specialist, two fuels distribution specialists, and two hydrant operators (R4, tab 10l; tr. 1/107-09). Ms. Alexander's calculations in a spreadsheet prepared after discovery of the mistake to price the claim show the effect of the missing classifications that were on page two of PMI's work papers.

31. In April 2005, Mr. Whipp and Ms. Cox discussed the mistake they had thought that PMI made. Mr. Whipp looked at the numbers estimated for ODCs for the numbers of uniforms for 19 employees and safety shoes for 16 employees needed and found that they corresponded to appellant's pages one and three of the PMI work papers. According to Mr. Whipp and Ms. Cox, appellant could not have met contract or CBA requirements for the greater number of positions appellant claims was in the work papers. Mr. Strickland explained the basis for his estimates. The numbers were not required by the SOW (finding 2) or the CBA (finding 3), but a matter of judgment on which there could be differing opinions. (Tr. 1/88-89, 207-08, 232-42, 250-53, 2/38, 45, 86-89) We find that the numbers of uniforms and safety shoes in Mr. Strickland's estimates were consistent with appellant's intended offer.

DECISION

Appellant argues that its failure to incorporate a page of its work papers in preparation of the staffing matrix in its offer was a clerical mistake that entitles it to correction of the mistake. Appellant maintains that the doctrine of unilateral mistake applies without regard to the FAR provisions governing commercial procurements. According to appellant, the government should have suspected, from the disparity in appellant's price compared with other offers and the government's estimate, that appellant's offer contained a mistake. Appellant asserts that the government's pre-award communication with its subcontractor was with an improper party, did not disclose the

reasons that led to the suspicion of a mistake, and was not an adequate bid verification. Appellant argues that its subsequent calculations of its bid constitute the required evidence of its intended bid.

The government maintains that the bid verification requirements of FAR 14.407-1 do not apply to this procurement because the contract was awarded under FAR subpart 13.5 which only imposed an obligation on the contracting officer to be reasonable and the mistake was disclosed after award. The government disputes that appellant made a mistake in its proposal and argues that the contracting officer did not abuse her discretion. According to the government, she did not know or have reason to know of appellant's alleged mistaken offer. The government states that the pre-award communications between the parties did not constitute a bid verification (gov't br. at iii).

FAR subpart 13.5 provides the special authority for purchase of commercial services using simplified acquisition procedures that the contracting officer applied in this procurement (finding 4). The FAR requirements in Part 15, which were not mandatory, do not specifically provide for verification of a bid for a suspected mistake.[5] FAR 15.306(b)(3)(i), however, in discussing communications with offerors to address proposal concerns, including mistakes, refers generally to FAR 14.407. FAR 14.407-4 concerning mistakes after award requires that a unilateral mistake be "so apparent as to have charged the contracting officer with notice of the probability of the mistake." FAR 14.407(c)(2). While FAR 13.106-2(b)(1) gives the contracting officer flexibility as to evaluation procedures, it does not affect the principles applicable to remedies for mistakes disclosed after award. Indeed, the contracting officer acknowledged that if she had suspected a mistake, she would have told the contractor and received a revised proposal if in fact a mistake had been made (finding 18). The government has not persuaded us with authority that the contracting officer is relieved of the duty to seek clarifications that would amount to a request for adequate verification of the bid where [she] knows of or has reason to suspect a mistake in bid.

The elements that a contractor must prove to obtain relief based on a unilateral mistake have been stated as follows:

> In order to merit application of the equitable remedy of contract reformation for a unilateral mistake, clear and convincing evidence must show, as appropriate, that: (1) the mistake in fact occurred prior to contract award; (2) the mistake was a clear-cut clerical or mathematical error or a

[5] FAR Part 15 applicable to negotiated procurements such as this one refers to the procedures at FAR 14.407-4 for processing mistakes disclosed after award. FAR 15.508.

> 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; (4) the government's request for bid verification was inadequate; and (5) proof of the intended proposal was established.

Kato Corporation, ASBCA No. 47601, 97-2 BCA ¶ 29,130 at 144,932, citing *Transco Contracting Company,* ASBCA No. 47289, 96-1 BCA ¶ 28,090. Omission of a cost item is an example of a clerical or arithmetical error for which relief may be granted. No contractor can recover for an error in judgment. *See Bromley Contracting Co., Inc. v. United States,* 794 F.2d 669, 672 (Fed. Cir. 1986). We have found that a clerical mistake in fact occurred prior to contract award (finding 11).

The test of whether the government should have known of the mistake is whether a reasonable person, knowing all the facts and circumstances, would have suspected a mistake. *Chernick v. United States,* 178 Ct. Cl. 498, 504, 372 F.2d 492, 496 (1967). A significant disparity between a favorable bid and the bids of others or the government estimate may be a factor which reasonably should raise the presumption of error in the mind of the contracting officer. *BCM Corp. v. United States,* 2 Cl. Ct. 602, 610 (1983); *Figgie International, Inc.,* ASBCA No. 27541, 83-1 BCA ¶ 16,421 at 81,696. Here there was a significant disparity of more than 66 percent between appellant's bid and the next lowest technically acceptable offer, as well as a disparity of over 20 percent between appellant's bid and the government estimate, which should have alerted the contracting officer to suspect a mistake (finding 19).

Price disparity alone does not necessarily mean there has been constructive notice of a mistake where other factors tend to negate the inference of error. *Uniflite, Inc.,* ASBCA No. 27818, 85-1 BCA ¶ 17,813 at 89,034. Where "circumstances exist at the time of bid evaluation which offer *reasonable* explanations for the disparity between bids," the government will not be charged with notice of a mistake. *Aydin Corp. v. United States,* 229 Ct. Cl. 309, 317, 669 F.2d 681, 687 (Ct. Cl. 1982) (emphasis added). The government argues that the disparity between appellant's bid and the government estimate was explained by appellant's creative approach to staffing the contract through cross-utilization of employees. Both Mr. Whipp and Mr. Strickland were fully qualified to estimate the manning required to provide the fuels management services, and both estimated approximately 25 employees were required. Mr. Whipp's review of appellant's bid proposing only 20 employees, knowing the expertise and experience of PMI, was sufficient to alert the contracting officer to a mistake. The staffing level determination was the responsibility of the contractor under the SOW, but the government was unreasonable in interpreting appellant's staffing plan as it did. The reference to cross-training in appellant's staffing plan to enable the contractor to cover employee absences did not reduce the manning required for the contract services. The

government has not offered an explanation of the known disparities that we can find reasonable.

In requesting clarifications from PMI, the contracting officer was attempting a verification of the proposal appellant submitted. The adequacy of a verification request turns on an assessment of the reasonableness of the contracting officer's disclosure. *Klinger Constructors, Inc.*, ASBCA No. 41006, 91-3 BCA ¶ 24,218 at 121,125. The contracting officer is required to, if not call attention to the suspected mistake, advise the offeror of the reasons why there may have been a mistake. The request should be as informative as possible concerning the pertinent factors indicating to the contracting officer that an error may exist. *United States v. Hamilton Enterprises, Inc.*, 711 F.2d 1038, 1046 (Fed. Cir. 1983); *Rex Systems Inc.*, ASBCA No. 45297, 93-3 BCA ¶ 26,155 at 130,025. At a minimum the contracting officer must specifically advise the bidder of the purpose of the request for verification, namely, that the contracting officer suspects the possibility of a mistake and the basis for that suspicion. *Rex Systems, Inc., supra.*

The contracting officer here did not advise appellant, the proper party, of the clarifications it was seeking (finding 17). Proper direction of the inquiry would not, however, have affected the adequacy of the notice of a possible mistake. Appellant did not prepare the offer and had no knowledge of the manning estimates on which it was based. Orion would merely have referred the inquiry to PMI. The contracting officer did not provide all the information that led the government to request the clarifications and thus did not put either Orion or PMI on notice of the circumstances that had raised questions. Ms. Cox did not communicate the government's real concern that appellant's proposed manning was four positions short of the government's estimate (findings 14, 16). Her inquiry was not clear and was not helpful in identifying the source of the mistake. It was apparent from PMI's response to the request for clarifications that it did not understand the intent of Ms. Cox's principal question (finding 17). The response did not explain why appellant was proposing four fewer positions, did not refer to cross-utilization, and did not discuss unit operators. Appellant was not alerted to the possibility of a mistake and the basis for the suspicion. Under the circumstances it was unreasonable for the contracting officer to assume that the offer as confirmed was without error and proceed with contract award.

The evidence of appellant's intended bid price is required to be clear and convincing. *United States v. Hamilton Enterprises, Inc., supra*; *Bromley Contracting Co., Inc. v. United States*, 219 Ct. Cl. 517, 536, 596 F.2d 448, 458 (1979)*(per curiam).* Appellant has presented the amount of its intended bid as an additional $247,031 in its claim on the basis of calculations in the spreadsheet included in the claim after discovery of the mistake. The government's presentation of three different numbers of appellant's allegedly intended FTEs as 24.5, 25.2, or 25.6 to deny appellant's claim for lack of the required evidence of appellant's intended bid is not persuasive (gov't br. at 17).

Appellant maintains that the government has confused a statement of FTEs in the technical portion of its proposal (finding 11) with appellant's pricing calculations of FTEs (findings 10, 30) and correctly calculated in its reply that the intended FTEs were 26 (app. reply at 4). Appellant's differing statements of the number of FTEs have not affected appellant's statement of its intended bid price which has consistently been the same additional amount. Assuming *arguendo* they were relevant, they are "an uncertainty within a relatively narrow range" that does not constitute a bar to recovery for unilateral mistake in bid. *See Bromley Contracting Co. v. United States, supra*, 219 Ct. Cl. at 537, 596 F.2d at 461. We have concluded that it will be possible to determine appellant's intended bid absent the mistake in determining the quantum of appellant's recovery.

For the reasons stated, the appeal is sustained. Appellant is entitled to reformation of the contract price, plus interest on the additional amount due from the date the contracting officer received appellant's certification of the claim, dated 27 October 2003, in accordance with the Contract Disputes Act, 41 U.S.C. § 611. The matter is remanded to the parties for negotiation of quantum.

Dated: 28 March 2006

LISA ANDERSON TODD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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. 54608, Appeal of Orion Technology, Inc., rendered in conformance with the Board's Charter.

Dated:

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