ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Office Automation & Training Consultants	)	ASBCA Nos. 56779, 56838
	)	
Under Contract No. W912P4-05-P-0019	)	

APPEARANCE FOR THE APPELLANT: Ms. Silvia E. Morales-Fakler
CEO

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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OPINION BY ADMINISTRATIVE JUDGE DICKINSON
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

In these appeals Office Automation & Training Consultants ("OATC" or "appellant") seeks contract reformation due to an alleged unilateral mistake in its quote as the result of an alleged incomplete solicitation. The government has moved for summary judgment in its favor as a matter of law. OATC opposes the motion. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 18 November 2004 the U.S. Army Corps of Engineers, Buffalo District, issued Solicitation No. W912P4-05-T-0001 directly to OATC under the United States Small Business Administration's (SBA) 8(a) set-aside program and FAR Part 19.800 *et seq.* (R4, tab 16 at 164; gov't mot. at 2). The solicitation requested quotes for a "contractor [to] provide all forms of administration, management, technical support, and end-user help on all relational database management systems, Unix systems, Corps AIS [Automated Information Systems], and Windows-based PCs and servers" for two base years and three option years (R4, tab 16 at 170).

2. The solicitation and subsequent contract both expressly provided:

> (c) The Contractor shall comply with the FAR clauses in this paragraph (c), applicable to commercial services, that the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or

> Executive orders applicable to acquisitions of commercial items: [Contracting Officer check as appropriate.]
>
> X (1) 52.222-41, Service Contract Act of 1965, as Amended (MAY 1989) (41 U.S.C. 351, et seq.).
>
> ….
>
> X (4) 52.222-44, Fair Labor Standards Act and Service Contract Act—Price Adjustment (February 2002) (29 U.S.C. 206 and 41 U.S.C. 351, et seq.).
>
> X (5) 52.222-47, SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreements (CBA) (May 1989) (41 U.S.C. 351, et seq.).

(R4, tab 4 at 100, tab 16 at 219-20) Pertinent portions of the referenced FAR clauses provide:

> FAR 52.222-41, SERVICE CONTRACT ACT OF 1965, AS AMENDED (MAY 1989)
>
> (c) *Compensation.* (1) Each service employee employed in the performance of this contract by the Contractor or any subcontractor shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor, or authorized representative, as specified in any wage determination attached to this contract.
>
> ….
>
> (3) Adjustment of Compensation. If the term of this contract is more than 1 year, the minimum monetary wages and fringe benefits required to be paid or furnished thereunder to service employees under this contract shall be subject to adjustment after 1 year and not less often than once every 2 years, under wage determinations issued by the Wage and Hour Division.
>
> ….

(g) *Notification to employees*. The Contractor and any subcontractor under this contract shall notify each service employee commencing work on this contract of the minimum monetary wage and any fringe benefits required to be paid pursuant to this contract, or shall post the wage determination attached to this contract. The poster provided by the Department of Labor [DoL] (Publication WH 1313) shall be posted in a prominent and accessible place at the worksite. Failure to comply with this requirement is a violation of section 2(a)(4) of the Act and of this contract.

FAR 52.222-44, FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT—PRICE ADJUSTMENT (FEB 2002)

(b) The Contractor warrants that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

(c) The contract price or contract unit price labor rates will be adjusted to reflect increases or decreases by the Contractor in wages and fringe benefits to the extent that these increases or decreases are made to comply with—

(1) An increased or decreased wage determination applied to this contract by operation of law;

….

(d) Any such adjustment will be limited to increases or decreases in wages and fringe benefits as described in paragraph (c) of this clause, and to the accompanying increases or decreases in social security and unemployment taxes and workers' compensation insurance; it shall not otherwise include any amount for general and administrative costs, overhead or profit.

(e) The Contractor shall notify the Contracting Officer of any increase claimed under this clause within 30 days after the effective date of the wage change, unless this period is extended by the Contracting Officer in writing…. The notice shall contain a statement of the amount claimed and any relevant supporting data that the Contracting Officer may

> reasonably require. Upon agreement of the parties, the contract price or contract unit price labor rates shall be modified in writing. The Contractor shall continue performance pending agreement on or determination of any such adjustment and its effective date.

FAR 52.222-47, SERVICE CONTRACT ACT (SCA) MINIMUM WAGES AND FRINGE BENEFITS (MAY 1989)

> An SCA wage determination applicable to this work has been requested from the U.S. Department of Labor. If an SCA wage determination is not incorporated herein, the bidders/offerors shall consider the economic terms of the collective bargaining agreement (CBA) between the incumbent Contractor _____ and the _____ (union).

3. It is undisputed that a hard copy of the DoL wage rates was not attached to the solicitation. However, on the last page of the document, under the heading "WAGE RATES," there was an Internet Web address that provided a direct link to the applicable wage determination. (R4, tab 4 at 102, tab 16 at 222) The two headings that followed "WAGE RATES" and the Web address ("SF 86 FORM" and "PARC LETTER") both specifically stated "Hard copy is attached to the contract," but there was no such statement with regard to "WAGE RATES." The government has asserted (gov't mot. at 4; R4, tab 2, ¶ 11), and OATC has not disputed, that the then-current DoL wage rates were available at the referenced website.

4. On 1 December 2004, in response to the solicitation,[1] OATC submitted its quote for both base and overtime hourly unit prices for each of the four job categories to be provided under the contract for each of the first two base years of the contract, as well as each of the three option years (R4, tab 4 at 64-86).

5. The Contracting Officer (CO), Shelia Lewis, responded to OATC's quote by contacting OATC's CEO by telephone in December 2004. At that time the CO expressed concern that the overtime unit prices quoted by OATC were unreasonably high when compared to rates for similar services in the government estimate and in previous contracts. CO Lewis asked if OATC was willing to reduce its overtime unit prices to more closely conform to the prices under previous contracts for similar services and the government's estimate. (R4, tabs 2, 5, ¶¶ 3, 4) On 7 December 2004 OATC provided a revised quote that reduced the overtime unit prices and left the base unit prices unadjusted. (Compl. and answer ¶¶ 10, 11; R4, tabs 2, 4, 5, 16)

[1] Appellant has submitted the sworn affidavit of its CEO, Silvia Morales-Fakler, that she read the solicitation (app. opp'n, ex. 1).

6. It is undisputed for purposes of the motion that the DoL wage determination (WD) applicable to the contract at the time of the solicitation and award was WD No. 94-2371, Rev. No. 24, dated 21 July 2004 (R4, tabs 8, 9; app. opp'n at 4).

7. For purposes of comparison, the following table includes the various unit prices (base and overtime) originally and subsequently quoted by OATC, as well as the DoL wage rates for each job category for the first base year of the contract.

	Database Administrator	System Administrator	Help Desk Administrator	Library Administrator[2]
Original quote	$61.00/$91.50	$52.00/$78.00	$36.00/$54.00	$26.00/$39.00
Revised quote	$61.00/$72.03	$52.00/$56.02	$36.00/$40.02	$26.00/$28.81
DoL wage rates	$30.21[3]/$41.43	$30.21[3]/$41.43	$25.26[4]/$34.05	$16.91[5]/$21.48

(Gov't mot. at 6-8; R4, tab 2 at 4, tab 4 at 64-86, tabs 6, 8, 9) OATC's unit prices included the hourly wage rate OATC intended to pay its employees, an hourly amount for fringe benefits, overhead, G&A and profit (R4, tab 2 at 8, tab 3 at 18-20). However, OATC did not provide to the government, either prior to or after award, a breakdown of the dollar amounts included in the unit prices for each of these components (R4, tab 2, ¶ 13; gov't reply at 4-5). The following partial breakdown was provided for the first time in OATC's 21 January 2010 opposition to the government's motion for summary

[2] The original quote included a Library Technician. During the contract performance period, additional duties were added to this position and the job was reclassified to a full librarian position with a corresponding increase in employee compensation and the total contract price was increased accordingly (R4, tabs 12, 22 at 249; gov't mot. at 7-8). However, this change is immaterial to our decision which addresses an alleged unilateral mistake in bid and involves events which occurred prior to award, whereas the change in the librarian position occurred after award.

[3] This is the DoL base hourly rate of $27.62 plus required fringe benefits of $2.59 per hour (R4, tab 8 at 110, 114). The DoL overtime hourly rate is calculated at one and a half times the base hourly rate exclusive of fringe benefits (gov't mot. at 6, ¶ 14).

[4] This is the DoL base hourly rate of $22.67 plus required fringe benefits of $2.59 per hour (R4, tab 8 at 110, 114). The DoL overtime hourly rate is calculated at one and a half times the base hourly rate exclusive of fringe benefits (gov't mot. at 6, ¶ 14).

[5] This is the DoL base hourly rate of $14.32 plus required fringe benefits of $2.59 per hour (R4, tab 8 at 111, 114). The DoL overtime hourly rate is calculated at one and a half times the base hourly rate exclusive of fringe benefits (gov't mot. at 6, ¶ 14).

judgment in which it listed the hourly base wage rates that it both allegedly included in its base unit price and that it actually paid its employees during contract performance:

	Database Administrator	System Administrator	Help Desk Administrator	Library Administrator
Base hourly wage rate in original quoted unit prices	$24.00	$33.00	$20.00	$16.00

(App. opp'n at 5) OATC did not provide its bid papers or any other breakdown of the other component parts in support of its quoted hourly base and overtime rates.

8. CO Lewis and Contract Specialist Sabrina Brinkman reviewed OATC's revised quote and determined that each of the quoted base and overtime unit prices was more than the total of DoL-required minimum wage rates and any associated fringe benefits for each job classification (R4, tab 2 at 5). Both CO Lewis and Contract Specialist Brinkman stated under oath that they "did not see any clerical or arithmetic errors and nothing indicated OATC may have misread the specifications." CO Lewis then determined that the rates were fair and reasonable. (R4, tabs 5, 7) OATC does not dispute that there were no competing bids with which the government could compare OATC's proposal (*see* gov't mot. at 18).

9. The government awarded Contract No. W912P4-05-P-0019 to OATC on 14 January 2005 (R4, tab 16 at 164).

10. By letter dated 13 February 2006, the government provided OATC with a copy of the DoL wage rates applicable to the contract as of 14 June 2005. The cover letter sent with the wage rates noted that the rates had not changed from the previous year and OATC has not disputed this. (R4, tab 10) However, our comparison of the 14 June 2005 wage determination with the previous one (SOF ¶ 6) showed that the base hourly rate for the Help Desk Administrator increased from $22.67 to $23.94 and the fringe benefits rate for all job categories increased from $2.59 per hour to $2.87 per hour; all other applicable rates remained the same. OATC acknowledges that it received this wage determination and "did not feel [sic] to ask for clarification before and after February 13, 2006, letter from Sabrina Brinkman with wages information" (app. opp'n at 8). OATC further believed that "[t]o the best of OATC['s] understanding and knowledge…, OATC was in compliance with the classification and rates" (app. opp'n at 6). There is no evidence that OATC requested an increase in its unit prices within the time period provided in FAR 52.222-44(e) (SOF ¶ 2).

11. In September 2006 the government sent to OATC by certified mail the DoL wage determination effective 1 September 2006 in which the wage rates for all job categories were higher, as was the hourly fringe benefit rate (then $3.01) (R4, tab 11).

The record before us on the motion is again devoid of any request by OATC for a commensurate increase in the contract unit prices within the time period provided in FAR 52.222-44(e) (SOF ¶ 2).

12. Later that year, by letter of 18 December 2006, the DoL notified the government that it had preliminary findings that OATC owed its employees in excess of $60,000 (R4, tab 13). By letter dated 21 December, the DoL informed the government that it was conducting an investigation of OATC under the Service Contract Act (SCA). The notification informed the government that there were currently "substantial monetary violations in the amount of $107,205.91." The DoL requested that this same amount of money be withheld from funds due OATC. (R4, tabs 14, 15) In response to the DOL's request, the government withheld a total of $66,005.44 from funds due OATC (R4, tab 17).

13. The contract ended by its own terms on 31 December 2006 (R4, tab 16 at 176).

14. Over a year later, by letter dated 14 January 2008, OATC submitted a request for equitable adjustment (REA) in the amount of $146,347.31 in which it asserted for the first time that it had made a unilateral mistake in its bid three years earlier. OATC arrived at the amount of its REA by adding overhead, G&A and profit to the $98,709.04 assessed against it by DoL. (R4, tab 3 at 17, 19, 23, 26; compl. ¶ 22) By letter dated 9 January 2009, the contracting officer issued a final decision denying the REA (R4, tab 2). OATC filed a protective appeal of the decision on 30 March 2009.

> [T]he document submitted by OATC was … a Request for Equitable Adjustment, not a claim.…
>
> However, now that a final decision has been rendered, OATC has no choice but to preserve its rights, and took an appeal within the time prescribed.

(R4, tab 21) The notice of appeal was docketed as ASBCA No. 56779 (R4, tab 1).

15. On 15 April 2009, OATC converted its REA into an identical certified claim in the amount of $146,347.31 (R4, tab 21). The contracting officer issued a second final decision dated 6 May 2009 denying the claim and identical to the 9 January 2009 decision (R4, tab 22). The contractor timely appealed the contracting officer's 6 May 2009 decision and the appeal was docketed as ASBCA No. 56838 (R4, tabs 24, 25). The Board's 22 May 2009 notice of docketing included an order to consolidate the two appeals, ASBCA Nos. 56779 and 56838.

DECISION

In this appeal OATC seeks reformation of the contract on the basis of a unilateral mistake allegedly made by it when, as a result of the government's alleged failure to include the then-current wage determination in the solicitation, OATC failed to include Service Contract Act wages in its proposal. As a result of the alleged unilateral mistake, OATC seeks $146,347.31 of additional compensation under the contract (SOF ¶¶ 14-15).

The government has moved for summary judgment asserting that appellant has failed to allege material facts necessary to prevail on a claim for contract reformation based on a unilateral mistake in bid (gov't mot. at 12-15). OATC opposes the government's motion. Specifically, appellant claims that it received a hard copy of the solicitation on 18 November 2004, but that a hard copy of the DoL wage determination was not attached and it misread the direction to search on the Internet for the DoL wage determination (app. opp'n at 2-3). Appellant defines "misread" as "[t]o read or interpret wrongly" (app. opp'n at 2).

We evaluate the government's motion for summary judgment under the well-settled standard that:

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

Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987). In the course of our evaluation, the Board's role is not "'to weigh the evidence and determine the truth of the matter,' but rather to ascertain whether material facts are disputed and whether there exists any genuine issue for trial." *Holmes & Narver Constructors, Inc.*, ASBCA Nos. 52429, 52551, 02-1 BCA ¶ 31,849 at 157,393 *quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) *aff'd*, 57 Fed. Appx. 870 (Fed. Cir. 2003). A material fact is one which may make a difference in the outcome of the case. *Liberty Lobby*, 477 U.S. at 248.

The moving party bears the burden of establishing the absence of any genuine issue of material fact. *Mingus Constructors*, 812 F.2d at 1390. The non-moving party must then set forth specific facts showing the existence of a genuine issue of material fact for trial; conclusory statements and bare assertions are insufficient. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984); *Mingus Constructors*, 812 F.2d at 1390-91; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

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

Holmes & Narver, 02-1 BCA ¶ 31,849 at 157,392; *see also Schnider's of OKC,* ASBCA No. 54327, 04-2 BCA ¶ 32,776 at 162,074.

In *PGDC/Teng Joint Venture,* ASBCA No. 56573, 10-1 BCA ¶ 34,423, we laid out the long-established elements of proof necessary for a contractor to prevail on a claim for contract reformation based on a unilateral mistake:

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

Id. at 169,925, *citing McClure Electrical Constructors, Inc. v. Dalton,* 132 F.3d 709, 711 (Fed. Cir. 1997). If, on the record before us on the motion, OATC has failed to come forward with evidence sufficient to place into dispute material facts as to any one or more of these elements, the government's motion for summary judgment may appropriately be granted. Disputed facts are to be resolved in favor of the non-moving party for purposes of the motion.

A. Did a clear-cut, clerical or mathematical error or a misreading of the specifications in fact occur prior to contract award (elements 1 and 2)?

"[A] contract will be reformed based upon a unilateral mistake in a bid only upon a 'clear and convincing showing' that a mistake actually occurred prior to award." *Minority Enterprises, Inc.*, ASBCA No. 45549 *et al.*, 95-1 BCA ¶ 27,461 at 136,826; *see also Goldberger Foods, Inc. v. United States*, 23 Cl. Ct. 295 (1991). OATC must come forward with evidence that, prior to award, it made a clear-cut, clerical or mathematical error in its quote or that it misread the specifications resulting in an error in its quote. If the alleged error in OATC's quote was due to its own business judgment, it cannot be entitled to reformation of its contract. *Logistics Data Research Corp.*, ASBCA No. 43737, 94-3 BCA ¶ 27,240.

OATC does not allege that it made a clear-cut clerical or mathematical error, but instead that it misread an incomplete solicitation package.

> This was OATC's first government contract and [it] was unfamiliar with specific requirements, and was unaware of any requirement that statutory wages were to be paid. The only reference in the contract that related to the wage issue is the vague reference in the boilerplate section of the Solicitation, which stated that the Service Contract Act was incorporated. However, the Solicitation failed to include or make any reference [to] the required wage rates. Therefore, OATC's cost proposal was based upon a misreading of the incomplete solicitation package and was not based upon a judgment error.

(R4, tab 2 at 21) (emphasis in original) To support its opposition to the government's motion for summary judgment, OATC must submit, by affidavit or otherwise, specific evidence that could be offered at trial to show that there was, in fact, an error in its quoted unit prices and that the error was the result of a misreading of the specifications.

OATC acknowledges that it read the solicitation (SOF ¶ 4). Contrary to OATC's allegation that the solicitation "failed to include or make any reference [to] the required wage rates," the solicitation incorporated by reference FAR clause 52.222-41 which expressly stated that OATC was obligated to pay its employees performing work under the contract "not less than … the wages and fringe benefits determined by the Secretary of Labor, or authorized representative, as specified in any wage determination attached to this contract" (SOF ¶ 2). In addition, the last page of the solicitation contained an express reference to "WAGE RATES" and provided the Internet Web address where they were available (SOF ¶ 3).

The incorporated FAR clauses and referenced statutes placed the affirmative obligation upon OATC to ensure that its employees were paid no less than the required DoL wage and fringe benefit rates during performance of the contract (SOF ¶ 2). OATC alleges that, merely because a hard copy of the wage determination was not attached, the solicitation was incomplete and that it "misread" or misinterpreted the incomplete solicitation package. However, OATC was obligated to read the solicitation as a whole so as not to render any part of it meaningless. It is undisputed that a hard copy of the wage determination was not attached to the contract but the contract did include a direct Web link to the applicable wage determination (SOF ¶ 3). Even if, for purposes of the motion, we accept OATC's allegation that the solicitation did not include the required wage determination, its omission presented an obvious and patent ambiguity when read in conjunction with the clauses requiring OATC to comply with the "attached" or "incorporated" wage determination (SOF ¶ 2). This obvious inconsistency made it incumbent upon OATC to inquire about the allegedly missing wage determination. OATC's failure to inquire and its apparent subsequent business decision to remain silent and to ignore the requirement for the wage determination renders recovery unavailable to it. "It is well settled that a prospective bidder is under a duty to inquire if a patent discrepancy or omission is found on the face of the solicitation." *Murson Constructors, Inc.*, ASBCA No. 34538, 88-3 BCA ¶ 20,992 at 106,069, *citing Newsom v. United States*, 676 F.2d 647 (Ct. Cl. 1982) (seeking clarification materially aids the administration of contracts by requiring that ambiguities be raised, thus avoiding costly litigation after the fact); *Beacon Constr. Co. of Mass. v. United States*, 314 F.2d 501 (Ct. Cl. 1963); *J.A. Jones Constr. Co. v. United States*, 395 F.2d 783, 790 (Ct. Cl. 1968) (holding that failure to recognize an obvious ambiguity does not excuse the contractor from its duty to seek clarification). If a contractor fails to seek clarification, it assumes the risk for its incorrect interpretation. *Western States Management Services, Inc.*, ASBCA No. 37504 *et al.*, 92-1 BCA ¶ 24,663; *Dante's Construction, Inc.*, ASBCA No. 36099, 90-2 BCA ¶ 22,720.

OATC's silence on the subject of wage rates and fringe benefit rates continued after award when the CO provided OATC with the updated wage determination in February 2006 (SOF ¶ 10). And its silence continued further after it was provided with the 1 September 2006 wage determination in which both the wage rates and fringe benefit rates increased (SOF ¶ 11). OATC's continued decision over several years to ignore its contract and statutory obligations as to wage rates belies its current argument that it made a pre-award error in its quote entitling it to contract reformation.

OATC has failed to come forward with evidence sufficient to place into dispute material facts showing that it misread or misinterpreted the solicitation package prior to award of the contract. Rather, the evidence presented upon the motion demonstrates its business decision to ignore the wage requirement clauses in the solicitation and resulting contract. OATC has failed to raise a triable issue that there was an actual mistake in its quote. *See Logistics Data Research Corp.*, ASBCA No. 43737, 94-3 BCA ¶ 27,240 at 135,736-37 (and cases cited therein).

B. The government had no reason to suspect that OATC's unit prices did not contain the required wage and fringe benefit rates (elements 3 and 4).

OATC argues that the government knew or should have known that OATC's quoted unit prices were in error. "This wasn't a matter where it may have appeared that OATC bid it closely, but it was a matter of the proposed price was not even high enough to cover the required Service Contract Act wages.… This would be especially true given that OATC was an inexperienced small disadvantaged business that perhaps would have needed added guidance." (Comp. ¶¶ 18-19) The record does not support OATC's allegation. OATC's quoted hourly unit prices for both base hours and overtime were significantly more than the required wage rates and fringe benefits (*see* SOF ¶ 7). The only way someone looking at the comparison of DoL wage rates with OATC's quoted unit prices could determine the possibility of an error was if that person also knew the various dollar amounts in each quoted unit price for each of the components parts of the price to include OATC's actual wages rates to be paid to the employees, fringe benefits, overhead, G&A and profit. OATC never provided that information to the government either before or after award. The first time it provided even a partial breakdown was in its 21 January 2010 opposition to the government's motion for summary judgment. *Id*. In addition, the government did not have the benefit of other bids for comparison. There was therefore nothing to indicate to the government any sort of error in the quoted prices.

As we have found appellant's alleged errors were not so apparent that the government was placed on notice that OATC had made a mistake in its quote, the government was under no obligation to request a verification.

C. OATC has not provided evidence that its intended quote was different from its actual quote (element 5).

OATC has not provided its bid papers or any other pre-award documentation prepared by it. OATC's claim argued that "[t]he intended bid could easily be determined by the very fact that the [required SCA] wage rates dictated the exact amount to be paid" (R4, tab 3 at 22). However, OATC's own submission indicates that the wage rates it intended in its two quotes, as well as the rates it actually paid its employees, were less than the applicable DoL wage determination (SOF ¶ 7). Further, the assessment of back wages by DoL based upon the actual wages OATC paid its employees over the contract performance period (SOF ¶ 12) is overwhelming evidence that OATC did not intend to include higher wages in its quote than it actually paid its employees. *See Logistics Data Research*, 94-3 BCA ¶ 27,240 at 135,736-37.

CONCLUSION

As appellant has failed to demonstrate material facts in dispute as to the essential elements necessary to succeed on the theory of unilateral mistake, the government's motion for summary judgment is granted. The protective appeal in ASBCA No. 56779 is dismissed for lack of jurisdiction and ASBCA No. 56838 is denied.

Dated: 19 January 2011

DIANA S. DICKINSON
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 Nos. 56779, 56838, Appeals of Office Automation & Training Consultants, rendered in conformance with the Board's Charter.

Dated:

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