

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DENISON LANDSCAPING,
INC.)

Under SHA Contract No.)
P909-501-324)

Docket No. MSBCA 1538

October 29, 1990

Mistake in Bids - Discovered Before Award - Where the invitation for bids (IFB) provides that the unit price governs discrepancies between a unit price and its extension, such provision must be read in harmony with COMAR 21.05.02.12 (and its counterpart in the IFB) permitting correction only if both the mistake and the intended bid price are clearly evident on the face of the bid document. The procurement officer properly permitted correction pursuant to such direction even though correction resulted in displacement of an otherwise low bidder.

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APPEARANCE FOR RESPONDENT:

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OPINION BY CHAIRMAN HARRISON*

Appellant timely appeals from the final decision of the State Highway Administration (SHA) awarding the captioned contract to Ruppert Landscaping, Inc. (Ruppert) on the basis of application of GP-2.19B to the bid of Ruppert.

Findings of Facts

1. On July 10, 1990, SHA opened bids under the Invitation for Bids (IFB) for the captioned contract. The IFB solicited bids for the reforestation of the interchange at I-95, Maryland routes 210 and I-295 in Prince George's County.
2. SHA received eight bids in response to the IFB. As announced at the bid opening, on the basis of the lump sum totals contained on each individual bid, the apparent low bid was received from the Appellant in the amount of \$292,262.01. The apparent second lowest bid was received from Ruppert in the amount of \$293,850.77.

*The opinion was originally issued as a bench opinion on October 1, 1990.

3. The bid sheets contained a number of estimated quantity bid items for which a bidder was to insert a unit price and an extended price. Bid Item No. 7031¹ in the Ruppert bid appeared as follows:

<u>Quantity</u>	<u>Unit Price</u>	<u>Extended Price</u>
315	\$25.42	\$11,157.30

When the bids, according to SHA standard procedure, were audited following bid opening, the error in extended price in the Ruppert bid for Bid Item No. 7031 was discovered. The actual extended price derived from multiplying 315, the estimated quantity of shrubs, times \$25.42, the unit price per shrub appearing on the Ruppert bid sheet, is \$8,007.30, a reduction of \$3,150.00 from the amount that actually appeared on the Ruppert bid.

This reduction changed the Ruppert total bid from \$293,850.77 to \$290,777.77. Appellant's bid following the audit was determined to be \$292,262.01, as had been announced at bid opening.

4. The unit prices bid for Bid Item No. 7031 by Appellant and the other bidders were as follows:

Appellant	\$27.00
Neboosa	23.50
Landscaster	30.00
Oak Lawn	35.00
Boyer	33.58
Wentworth	26.91
Botts	38.50

The engineer's estimate for Bid Item No. 7031 was \$30.00.

5. By letter dated July 25, 1990, SHA requested Ruppert to confirm its bid for Bid item No. 7031. Ruppert received this letter on July 25, 1990 and responded in writing on July 25, 1990 stating that its intended unit price was \$25.42 and its intended extended price was \$8,007.30.

¹Bid Item No. 7031 was for an approximate quantity, i.e. estimated quantity of 315 *Mirica Pennsylvanica* shrubs.

6. On July 26, 1990, SHIA wrote to Appellant and advised that as a result of the verification process, it had been determined that Ruppert's bid was the lowest bid received in response to the IFB. On July 30, 1990, Appellant protested SHA's determination that Ruppert was the low bidder who would thus be awarded the contract.

On August 8, 1990, SHIA issued an agency final decision on Appellant's protest and advised Appellant in relevant part that:

Upon verification of all bids received, it was found that Ruppert Landscaping, Inc. had made a mathematical error on their bid. When this error was corrected, pursuant to GP-2.14C1 [GP-2.14B] of the standard specifications for construction and materials, it was determined that Ruppert Landscaping, Inc. was now the confirmed low bidder.

It has also been determined that the error in question has been corrected pursuant to GP-3.01 [GP-2.19] which states that "in the event of a discrepancy between the unit bid prices and the extension (such as the case in this instance), the unit price will govern. In the event of a discrepancy between the bid total shown on the bid form and the total determined by mathematical audit of the amounts, lump sum and extensions that are bid for each item in the price schedule, the amount determined by mathematical audit shall govern."

7. On August 9, 1990, Appellant noted an appeal from the agency final decision to this Board.

8. The general provisions referred to in the agency final decision, GP-2.14 and GP-2.19², which the procurement officer applied to correct the error in the extended price in Ruppert's bid for Bid Item No. 7031, provide in relevant part as follows:

GP-2.19B, Determination of Lowest Bidder. Bids shall be evaluated to determine which bidder offers the lowest cost to the State in accordance with the evaluation criteria set forth in the invitation for bids. Except as otherwise provided under GP-2.14 Mistakes in Bids:

²GP-2.19 is set forth in the January 1988 supplement to SHA's Standard Specifications for Construction and Materials Handbook, January 1982. Similar language was contained in GP-3.01 in the 1982 edition. The procurement officer's final decision refers to GP-3.01. GP-2.19 is obviously intended.

1) The unit price will govern in the event of a discrepancy between the unit price bid and the extended price (product of the unit price multiplied by the quantity)....

GP-2.14B³, Confirmation of Bid When the procurement officer knows or has reason to conclude that a mistake may have been made, the bidder may be required to confirm the bid. Situations in which confirmation may be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn if any of the following conditions are met:

1) If the mistake and intended correction are clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors and mathematical errors....

Decision

This Board has previously considered the application of GP-2.19B, formerly GP-3.01, and GP-2.14 (COMAR 21.05.02.12) in Richard F. Kline, Inc., MSBCA 1116, 1 MICPEL ¶ 39, (1983) (Kline); P. Flanigan and Sons, Inc., MSBCA 1068, 1 MICPEL ¶ 54 (1983) (Flanigan); and The Driggs Corporation, MSBCA 1243, 1 MICPEL ¶ 106 (1985) (Driggs).

The common thread running through all three decisions is that correction of a bid pursuant to the order of precedence (unit price prevails over extended price, sum of extended prices prevails over lump sum total, etc.) set forth in GP-2.19 for resolving a discrepancy in a bid item for a bid is permitted when literal application of such provision leads to a reasonable result that is not in conflict with the requirement of GP-2.14 that a mistake and intended correction be clearly evident on the face of the bid documents. Since the mistake and intended correction must be evident from the face of the bid documents, extrinsic evidence (such as bid worksheets for quotes from sub-contractors compiled prior to submitting a bid) concerning what the

³GP-2.14 is essentially the same as COMAR 21.05.02.12.

particular bidder intended may not be considered by the procurement officer. However, the procurement officer may consider the other bids submitted and rely on his experience and common sense.⁴

There does not appear to be a dispute between the parties concerning the application of these principles when the Kline and Flanigan decisions are viewed in isolation. However, consideration of the Driggs decision which contains analysis of Kline and Flanigan has apparently led to some confusion.

The Kline decision involved a discrepancy between the unit price written in words and the extended price. This Board, in interpreting application of GP-3.01⁵, noted that while the provision properly may be utilized to resolve certain discrepancies in bids, it should not be applied with "blindness" so as to produce an inequitable or unconscionable result where the bidder alleges error.

When bids were opened, Kline's bid appeared as \$297,757.65 compared to the next lowest bid of \$319,043.49. However, in reviewing the bid submitted by Kline, the SIA procurement officer noted a discrepancy between the unit price written in words, "Twenty Dollars", and the unit price written in figures, "0.20", for an item in its bid. The bid for the item appeared as follows:

Item No.	Approximate Quantities	Description of Items and Prices Bid (In Written Words)	Unit Price Dollars/Cts.	Amounts Dollars/Cts.
108	1,665	Linear feet of Removal of Temporary Striping Tape at <u>Twenty Dollars</u> Per Lin. Ft.	0.20	333.00

⁴Resort to a procurement officer's common sense and experience may include consideration of such things as the engineer's estimate for a bid item in question, historical costs for such an item and the relative cost of such an item in similar procurements.

⁵GP-3.01 provided that in the case of discrepancy between prices written in words and those written in figures, the written words will govern.

In compliance with a request by SHA, Kline confirmed its total bid price of \$297,757.65, alleging that it had made a clerical error in writing the unit price for the item as twenty dollars instead of twenty cents. The procurement officer however advised Kline that its bid was governed by GP-3.01, which provided that in the event of a discrepancy between prices written in words and in figures, prices written in words would govern.

By making the recalculation under GP-3.01, using the twenty dollar unit price on the item in question (1,665 linear feet of removal of temporary striping tape), Kline's bid for the item was increased from \$333.00 (20 cents times 1,665) to \$33,300.00 (\$20.00 times 1,665). Thereby its total bid increased to \$330,724.65 and was displaced by the second low bid.

This Board noting that Kline's numerical bid of 20 cents was compatible with what the three other bidders quoted for the item, that Kline multiplied the 20 cent price by a total quantity of 1,665 to arrive correctly at a total price of 333.00, i.e., that it utilized the 20 cent figure in extending its unit price, that its total bid of \$297,757.65 reconciled with the unit price of 20 cents and the extended price of \$333.00 for the item in question, and that there is a similarity between the terms twenty dollars and twenty cents concluded that literal application of GP-3.01 would work an unconscionable result.

To resolve the matter, the Board turned to the mistake in bid provisions of COMAR 21.05.02.12 (GP-2.14). In our analysis we stated:

Where correction of a bid mistake is requested, both the mistake and the intended bid price must be evident on the face of the bid documents. In determining whether the intended bid price is evident on the face of the bid documents, the procurement officer necessarily must rely on his experience and common sense. (Citations omitted.)

While the procurement officer, in deciding whether or not to permit correction, may not examine any bid estimates, backup data or quotes received by the bidder, he may review the prices submitted by the other bidders relative to the procurement at hand. (Citations omitted.)

Kline at p. 5.

We concluded that COMAR 21.05.02.12 governed the matter and that pursuant to its provisions the correction should have been permitted.

In Flanigan, where the SHA procurement officer refused to permit correction of an alleged mistake, the discrepancy existed between an item unit price and its extension. SHA audited Flanigan's bid for mathematical accuracy pursuant to GP-3.01 and determined that a discrepancy existed between the unit price and the extended price for Bid Item No. 105. This item, as bid by Flanigan, appeared as follows:

Item No.	Approximate Quantities	Description of Items and Prices Bid (in written words)	Unit Price Dollars/Cts.	Amounts Dollars/Cts.
105	100	Per unit week Arrow Board at <u>Two Dollars</u> per unit week	2.00	20,000.00

As is apparent, the properly extended unit price should have been \$200.00 instead of \$20,000.00. We first noted that the SHA procurement officer, in applying GP-3.01 properly read Flanigan's bid for Unit Item No. 105 as \$2.00 per week. However, the unit price involved in the discrepancy was 80 times less than the average unit price (\$165.00) computed from the other six bids received for the same item. As a result, we concluded that this gross difference in unit prices was sufficient to put the procurement officer on notice that a mistake had been made. We then noted that the standard for bid correction is set forth in GP-2.14 and its genesis

COMAR 21.05.02.12 and turned to the guidance set forth in the Kline opinion to determine whether the procurement officer reasonably found that the intended correct bid was not clearly evident on the face of the bid document. Based on the Kline analysis, this Board held that the only reasonable conclusion was that the \$20,000.00 extended price appearing in the bid (which compared favorably to the other bids) was the actual, intended bid.

Driggs (which Appellant argues is dispositive of its appeal) likewise presented a discrepancy between unit and extended prices in an estimated (approximate) quantity item. In Driggs, there were only two bidders, the Driggs Corporation (Driggs) and F.C. Wagman, Inc. (Wagman), who responded to an SHA invitation for bids involving the reconstruction of the I-95/I-495 interchange near Washington, D.C. The 53 page IFB "Schedule of Prices" contemplated unit prices and their extensions for 287 items to be filled in by the bidder as part of the requirements of the bid. Wagman's bid was \$19,133,674.00, while the bid submitted by Driggs was \$19,316,366.50. Included in Driggs' Schedule of Prices for Bid Item Nos. 205 and 207 were the following unit and extended prices:

Item Nos.	Approximate Quantities	Descriptions of items	Unit Price Dollars/Cents	Amount Dollars/Cents
205	412,100	Cubic yards of borrow excavation Type I	0.04	\$1,648,400.00
207	1,000	Cubic yards of contingent borrow excavation Type I	0.04	4,000.00

An audit of the bids conducted by SHA pursuant to GP-3.01 revealed two discrepancies with Driggs' bid on items 205 and 207. The unit price for borrow and contingent borrow was stated as 4 cents. However, when the

extended prices for these items were divided by the stated approximate quantities, a unit price of \$4.00 was indicated. This latter unit price of \$4.00 was \$1.00 lower than Wagman's unit price on item 205 (\$5.00) and identical to the SHA's projected unit price. Wagman's unit price for item 207 was \$1.00. Appellant's extended price for item 205 (\$1,648,400.00) was identical to the SHA estimate for the item and compatible with Wagman's extended price of \$2,060,500.00.

Driggs desired that SHA apply GP-3.01 to its bid, because under GP-3.01 the unit price of 4 cents would prevail over the extended price appearing on the face of its bid, thus yielding a recalculated extended price based on 4 cents (rather than \$4.00) times the estimated quantities that would reduce its total bid to an amount lower than Wagman's.

However, based on the four corners of the Driggs and Wagman bids and historical data for bids on Type I borrow, the procurement officer determined that reduction of the extended prices appearing in Driggs bid on bid items 205 and 207 through application of GP-3.01 would not be permitted because the intended correct bid was not evident on the face of the bid documents.

The Board agreed with the procurement officer that GP-3.01 should not be literally applied. The Board unfortunately did not base its holding exclusively on a finding that a 4 cent bid for the quantity of Type I borrow involved would have defied reason as a realistic bid for such an item of work, but considered extrinsic evidence that suggested that Driggs may have actually intended a 4 cent bid because of availability of borrow at neighboring sites, although ordinarily a 4 cent bid would have been unreasonable and a \$4.00 bid would represent a reasonable price for such work. Based on such extrinsic evidence, the Board therefore determined that either 4 cents or \$4.00 could have actually been intended; \$4.00 because it represented what

one would expect to see as a price for such work and 4 cents due to that bidder's particular circumstances. Accordingly, since either could have been intended, per force, the intended correct bid could not be ascertained from the face of the bid and the Board denied the appeal. However, the Board erred in considering such extrinsic evidence as presented by Driggs. Extrinsic evidence may not be considered. All that a procurement officer or this Board may consider in determining whether a bid should be corrected pursuant to GP-2.19 is, consistent with Flanigan and Kline, common sense and experience (to include historical prices for the item in question), the prices submitted by other bidders for the particular procurement at issue and the engineer's estimate for such prices.


We now turn to consideration of such principles in the instant procurement. Here the procurement officer noted in the agency final decision that the Ruppert bid was corrected pursuant to GP-2.14. Accordingly, the procurement officer found on the basis of what was revealed on the face of the bid documents themselves, i.e., the relationship or compatibility between Appellant's unit price and the unit prices of other bidders for Item 7031, that both the mistake and its intended correction were evident and that application of GP-2.19 thus yielded an appropriate result⁶.

We concur that application of GP-2.19 leads to a result that is not inconsistent with GP-2.14 and therefore, deny the appeal. In so doing, we are mindful that application of GP-2.19 in the instant procurement results in displacement of an otherwise low bidder. However, displacement is permitted ✓

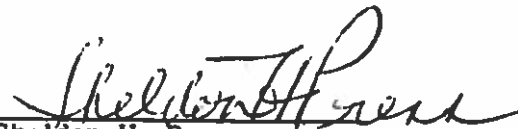
⁶The record reflects that the engineer's estimate for Bid Item No. 7031 was \$30.00. We cannot tell, however, from the record whether the procurement officer considered this estimate (which is consistent with all bids submitted for Item No. 7031) in reaching his determination. We likewise do not know if the procurement officer considered historical data for the price of such items. We have observed, however, that a procurement officer may appropriately consider such matter in making a determination of whether to literally apply GP-2.19.

so long as the literal application of GP-2.19 does not lead to a result that would be inconsistent with the overriding principle, as set forth in GP-2.14, that the intended correct bid be ascertainable from the face of the bid documents.

Dated: *October 29, 1990*


Robert B. Harrison III
Chairman

I concur:


Sheldon H. Press
Board Member


Neal E. Malone
Board Member

