

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DICK CORPORATION )  
Under Md. Transportation Authority ) Docket No. MSBCA 1321  
Contract No. TFA-2-9700-50 )

June 10, 1987

Mistake in Bid - Discovered Before Award - The procurement officer reasonably did not permit Appellant to correct its bid pursuant to COMAR 21.05.02.12C(1) from the lower total bid reached by mathematical audit of the bid amounts, lump sums and unit price extensions, to the higher total bid shown on its bid form. The procurement officer reasonably concluded that it was not clearly evident on the face of the bid document that the higher total bid figure shown was the intended correct bid when compared to the other bids and examined on a common sense basis.

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OPINION BY MR. KETCHEN

This appeal is taken from a Maryland Transportation Authority (Authority) procurement officer's decision denying Appellant's protest. Appellant maintains that it made a mistake in its bid such that the Authority's contract award to it should have been at the higher total bid price shown on its bid rather than the total bid price reached by addition of the products of the respective unit prices and quantities for bid items (extensions) and of the lump sum bid price items. The Authority contends that the correction Appellant seeks is not permitted where the intended correct bid was not apparent on the face of Appellant's bid.

Findings of Fact

1. The Authority issued an invitation for bids (IFB) in October 1986 for rehabilitation of the Baltimore Harbor Tunnel.
2. The IFB incorporates by reference, "Standard Specifications for Construction and Materials, Maryland Department of Transportation, State Highway Administration, January 1982."
3. Standard Specifications, General Provision (G.P.) G.P.-2.14, entitled "Mistakes in Bids," provides, in part, as follows:
  - B. Mistakes Discovered Before Opening. A bidder may correct mistakes discovered before the time and date set for bid opening by withdrawing or correcting the bid as provided in GP-2.11.

conclude that a mistake has been made, the bidder may be requested to confirm the bid. Situations in which confirmation should 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 If the bidder alleges mistake, the bid may be corrected or withdrawn if any of the following conditions are met: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 the 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 arithmetical errors.
- (2) A bidder may be permitted to withdraw a low bid if:
  - (a) A mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or
  - (b) The bidder submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made.

D. Mistakes Discovered After Award. Mistakes may not be corrected after award of the contract except when the procurement officer and the head of a procurement agency make a determination that it would be unconscionable not to allow the mistake to be corrected. Changes in price are not permitted. Corrections shall be submitted to and approved by the State Law Department.

4. Standard Specifications, G.P.-3.01 entitled "Consideration of Proposals," provides as follows:

After proposals have been publicly opened and read, they will be audited for mathematical accuracy and reviewed to determine that there are no irregularities as outlined in GP-2.14 and GP-2.26. Upon completion of the aforementioned audit and review, the results will be made available to the public. In the event of a discrepancy between the unit bid prices and the extensions (product of quantity and unit price), 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. In the case of discrepancy between prices written in words and those written in figures, the written words will govern. In the event that the unit price is not included, the unit price shall be the extended price divided by the quantity.

5. Bids were received and opened on November 25, 1986 with the following results:

Appellant	\$30,839,640.00
Perini Corp.	\$35,948,850.00
IA Construction Corp.	\$38,685,810.00
Cianbro Corp.	\$40,253,615.00
Morrison-Knudsen Co., Inc.	\$42,900,000.00

6. A mathematical audit of Appellant's bid conducted by the procurement officer indicated that the sum of line item extensions and lump sum items totaled \$30,377,140, or \$462,500 less than the total amount in written words and written figures on Appellant's bid of \$30,839,640. Under the provisions of G.P.-3.01, for each unit price the procurement officer multiplied the quantity listed for the item by the unit price bid. He then totaled the products extended in this manner and all lump sum items to arrive at the audited, total bid price of \$30,377,140.

7. The Authority advised Appellant of the suspected bid mistake by telephone on November 25, 1986 and asked Appellant to confirm its bid price.

8. At a meeting between Appellant and the Authority held on December 9, 1986, Appellant showed the Authority computer printouts and a typed page explaining the \$462,500 error in the unit price extensions in its bid.

9. At the December 9, 1986 meeting, Appellant also discussed a second bid mistake and asserted that its intended bid price was \$31,936,707. However, Appellant subsequently withdrew this assertion and confirmed its bid price as \$30,839,640, i.e., the extended and totaled price of \$30,377,140 plus the \$462,500 alleged mistake in its bid.
10. The Authority's procurement officer informed Appellant that he intended to make an award to Appellant at the contract price of \$30,377,140 based on the extension of Appellant's bid prices for each bid item and their summation pursuant to G.P.-3.01.
11. Appellant objected to an award to it in the contract amount of \$30,377,140 by protest letter dated December 12, 1986.
12. The Authority's procurement officer advised Appellant by letter dated December 22, 1986 that it could submit additional information providing clear and convincing evidence of a mistake in its bid that would justify bid withdrawal.
13. Appellant and the Authority met again on January 8, 1987 to discuss Appellant's protest and Appellant's response to the procurement officer's request for information that would support Appellant's expressed desire to withdraw its bid. Appellant informed the procurement officer that it elected not to pursue bid withdrawal based on the mistake, although it was offered the opportunity to do so. Appellant stated that it would execute the contract in the amount of \$30,377,140, although it stated that it reserved the right to appeal an unfavorable procurement officer's decision regarding its request for correction to the total figure shown on its bid. (Tr. 11, 55; Agency Report, Tab 5, p. 2). Appellant maintained that it was entitled to award based on its intended correct bid of \$30,839,640 with the \$462,500 deficiency due to its mistake included.
14. The Authority's procurement officer issued his final decision on January 28, 1987 denying Appellant's protest. He concluded that Appellant's bid could not be corrected to \$30,839,640 because the intended correct bid amount was not apparent from examination of the face of Appellant's bid. He applied the provisions of G.P.-3.01 concluding that the correct bid based on the mathematical audit process of extending the unit prices for each bid item and totaling these line item amounts and lump sum items was \$30,377,140.
15. The contract was executed on February 18, 1987 in the amount of \$30,377,140 and work began. The record is silent regarding the Authority's response to Appellant's statement that it reserved a right to have its contract modified to the higher total bid price of \$30,839,640 shown on Appellant's bid, if successful on appeal of its bid protest.
16. Appellant filed a timely appeal with this Board.
17. At the hearing on the appeal Appellant presented evidence of the nature of the mistake in its bid, including a series of computer printouts it made of its proposed bid prior to submitting its final bid by the bid opening deadline of 12:00 noon on November 25, 1986. Appellant demonstrated that when spreading its total bid costs and markups for overhead and profit over its bid line item prices it inadvertently failed first to subtract an amount of \$462,500 from its targeted bid price to spread to the actual bid and then to add this amount into its final bid by way of addition to the remaining open item, Item 412. This occurred, in summary, as follows:
  - a. In preparing its bids, the Appellant uses an iterative process based in part on a proprietary computer program and in part on manual calculations. The process involves listing each line item, determining the actual cost to perform the line item, and, finally, determining the bid amount to be submitted for that line item.
  - b. As information on cost is accumulated, it is entered into the computer program together with the corresponding bid price. Some of the bid prices, however, are left blank to be used as "closing" items. Such closing items are used during the latter stages of the bid's preparation to enable Appellant to "spread" over the bid markups for overhead and profit as well as any last minute adjustments which are made in the total bid amount.
  - c. Just prior to the bid, the costs are totaled and the appropriate markups are added for overhead, profit, bond, and other such costs. The result is the "target" bid price. The individual bid prices already in the computer program are then

totalled and compared with the "target" bid. Since the bid prices listed in the computer program contain some closing items and do not contain all of the markups, the bid price total, at this point, is less than the target bid. This difference must then be spread or distributed among the closing items to arrive at the final bid prices.

d. After distributing the difference, the total of the extended bid prices and the target bid should be the same. As a practical matter, there is often a very small discrepancy which is handled by rounding off some of the items. The result is the final or intended bid price.

e. In this instance, as Appellant finalized its bid prices for individual line items, the final bid prices were relayed by Appellant's estimators stationed in Appellant's hotel room with a computer to a person on a telephone stationed near the location for filing bids. As directed by Appellant's estimators over the telephone, that person entered the final prices for bid line items that had been left open on the bid form.

f. In preparing its bid, Appellant had left six closing items, i.e., open bid items where neither a unit bid price and an extended bid price nor a lump sum price was shown for the item; viz., Nos. 401, 410, 412, 418, 442, and 805. Appellant's normal practice is to leave only large lump sum bid items open in this manner. Each of these items should have had a zero value in the computer as a bid price. Appellant's 10:24 a.m. computer printout shows a zero value for these six items.

g. However, as a result of a clerical error, an amount of \$462,500 was entered as a bid price for Item 442 on the 11:09 a.m. computer printout, thus indicating erroneously that this amount had been distributed to the actual bid. Under Appellant's method for determining its bid this amount should not have been entered until the closing process described below.

h. Based on the cost information in Appellant's computer program, Appellant calculated a target bid of \$30,838,225. In the 11:09 computer printout the bid prices in Appellant's program totalled only \$11,894,020. This meant that Appellant had to spread the difference of \$18,944,205 among the closing items.

i. The target bid total of \$30,838,225 included all of Appellant's anticipated direct costs as well as Appellant's markups for profit and overhead. To recover all of these costs, Appellant had to distribute the difference between the total target bid of \$30,838,225 and the total of extended bid prices for the bid items for which prices had been inserted (i.e. \$18,944,205 = \$30,838,225 - \$11,894,020) among the closing (open) bid items. Failure to distribute all of the difference would result in a final bid price which would be too low to enable Appellant to recover all of its costs, including markups.

j. To accomplish this distribution, Appellant went through three distinct iterations which are summarized as follows:

Total of Bid Extensions (11:09)		\$11,894,020.00
Item 401	Demolition	3,000,000.00
Item 418	Mix #6 Concrete	2,967,000.00
Item 442	Mortar Repair	462,500.00
Item 805	Electrical	<u>4,300,000.00</u>
TOTAL FIRST ITERATION		22,623,520.00
Item 410	Celling Panels	<u>5,026,000.00</u>
TOTAL SECOND ITERATION		27,649,520.00
Item 412	Wall Tiles	<u>3,190,170.00</u>
TOTAL THIRD ITERATION		\$30,839,640.00 (sic)

k. Since the total after the third iteration, \$30,839,640, was within \$1,500 of the target bid of \$30,838,225, Appellant used the higher number as its intended bid price, and this was the total that Appellant told its runner to enter on the bid sheets which were subsequently submitted to the Authority.

l. When added to the bid prices already in the computer program, the above adjustments should have made the total of the unit price extensions \$30,839,640. During the actual mechanics of the spreading process, however, Appellant's estimator failed to make any adjustment for mortar repair, Item 442, because, as a result of the previous error, an amount was already shown for that item. As a result, the actual total for the bid unit price extensions was \$462,500 below Appellant's intended bid. During the subtraction process described in Finding of Fact 17i, above, \$462,500 was erroneously not in fact included in the figure of \$11,894,020 as the amount indicated that had already been distributed to the various bid items. Thus, \$18,944,205, the amount to be spread, was too low by \$462,500, which was never added back into the bid. In short, although Appellant's computer printout and bid showed \$462,500 entered for Item 442, \$462,500 had not been properly included in its actual bid through distribution to the last remaining open item, that is, Item 412. However, \$462,500 was included as part of the total bid price of \$30,839,640 because included in Appellant's overall, general pricing of the job.

m. Appellant made a third computer run at 11:55 a.m. This run showed that the total for the unit price extensions then in the program was only \$30,377,140. Appellant knew immediately that there was a mistake in its bid as submitted. By that time, however, it was too late to make any adjustments since the bid was to be submitted at 12:00 noon.

n. As a result of this mistake, Appellant did not succeed in distributing all of its anticipated costs and markups over the closing items. But for the mistake, the short-fall of \$462,500, as stated above, would have been put in Item 412 which was the last remaining item and the only item used in the third iteration. Item 412 thus was the "catch-all" item designed to absorb any differences between the target bid and the intended bid.

#### Decision

COMAR 21.05.02.12, entitled "Mistakes in Bids," provides, in pertinent part, as follows:

C. Confirmation of Bid. When the procurement officer knows or has reason to conclude that a mistake has been made, the bidder may be requested to confirm the bid. Situations in which confirmation should 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 the 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 arithmetical errors.

(2) A bidder may be permitted to withdraw a low bid if:

(a) A mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or

(b) The bidder submits proof of evidential value which clearly and convincingly demonstrates that a mistake was made.

D. Mistakes Discovered After Award. Mistakes may not be corrected after award of the contract except when the procurement officer and the head of a procurement agency makes a determination that it would be unconscionable not to allow the mistake to be corrected. Changes in price are not permitted. Corrections shall be submitted to and approved by the State Law Department.<sup>1</sup>

COMAR 21.05.02.12 provides two mutually exclusive alternatives each of which is subject to express conditions if a bidder confirms that its bid contains a mistake. First, the procurement officer shall require the bidder to correct its bid and it may not be withdrawn. Second, the bidder may be permitted to withdraw its bid.

Under the first alternative, the conditions necessary to mandate correction of a bid are twofold. The bid mistake must be clear upon examination of the bid document and examination of the bid document must clearly show the intended correct bid. If both conditions are met the bid is not only correctable, the regulations require it. The regulations clearly prohibit use of information extrinsic to the bid documents to make this determination.

Under the second alternative of withdrawal only, the procurement officer in his discretion may give a bidder relief by way of permitting withdrawal of the bid if the bid documents show clearly that a mistake was made but the intended correct bid is not similarly evident. The procurement officer also may permit bid withdrawal under alternative two if by extrinsic evidence, permissible only where withdrawal is considered, the bidder demonstrates that a mistake was made.

Appellant ultimately elected not to seek withdrawal of its bid albeit it initially requested the procurement officer to permit withdrawal and the procurement officer gave it that opportunity. (Findings of Fact No. 14). The parties have entered into the contract and Appellant has begun performance. Therefore, extrinsic evidence regarding the nature of the mistake and how it occurred is neither relevant nor permitted since bid withdrawal is not now a consideration.

The central issue before the Board thus is whether Appellant was entitled to have its bid corrected to the higher bid price indicated by its total bid of \$30,839,640 rather than remain at the lower price of \$30,377,140, which is based on the mathematical audit pursuant to G.P.-3.01 of Appellant's bid prices for each bid item. In other words, was the procurement officer required to correct the bid because the bid mistake was clearly indicated from examination of the bid documents and the intended correction was also clearly evident from examination of the bid documents?

In prior cases involving mistakes in bid, we have held that a procurement officer must exercise reasonable discretion in applying COMAR 21.05.02.12 and the IFB provisions that define the process required to correct an alleged bid mistake. These requirements are designed to prevent a bidder from having a second opportunity to bid, contrary to the fairness standards of competitive bidding, although they also protect a bidder from inadvertent bid errors by giving relief under circumstances where it would be unconscionable not to do so. Thus, the procurement officer from examination of the bid documents may be able to reasonably determine the intended correct bid from the nature of a clear mistake on the face of the bid, e.g., from examination of typographical errors, unit price extension errors, transposition errors, and arithmetical errors, as well as from examination of other bids. Where the intended correct bid is clear it would be unconscionable not to permit correction. In this regard, we held in both Richard F. Kline, Inc., MSBCA 1116, 1 MICPEL ¶39 (February 24, 1983) and P. Flanigan & Sons, Inc., MSBCA 1088, 1 MICPEL ¶54 (June 17, 1983) that language similar to G.P.-3.01 for determining price discrepancies should not be applied with blinders so as to enforce an unconscionable result. The procurement officer should rely on his common sense and experience and consider prices submitted by other bidders, if pertinent, in determining whether an error and a bidder's intended correct bid are clearly evident on the face of the bid documents. Calvert General Contractors Corp., MSBCA 1314, 2 MICPEL ¶140 (December 24, 1986).

We find that the Authority's procurement officer reasonably determined that a mistake was clear on the face of Appellant's bid. He came to this conclusion after applying the mathematical audit process provided for in G.P.-3.01. Appellant does not dispute that the audit process resulted in a figure for its total bid price different from the total bid price

<sup>1</sup>COMAR 21.05.02.12C is similar to G.P.-2.14C. (Findings of Fact 3).

entered on its bid sheet. In this regard, Appellant provided a detailed and rational explanation of its bidding methodology, how the mistake occurred, and how the mistake led to the variation in its bid of \$462,500 below its intended total bid of \$30,839,640. (Findings of Fact No. 17).

Here, however, an error comparable to those errors described in COMAR 21.05.02.12 did not exist and without the detailed explanation provided by Appellant through extrinsic evidence the procurement officer could not reasonably decipher Appellant's intended correct bid from examination of the bid documents alone or from comparison with other bids. Comparison of Appellant's bid with the other bids reasonably did not provide useful information to the procurement officer regarding Appellant's intended correct bid. Under these circumstances, the procurement officer did not act unconscionably and his exercise of reasonable discretion did not permit him to allow Appellant to increase its audited bid from \$30,377,140 to the higher figure of \$30,839,640 contrary to the clear parameters of the mistake in bid regulations. Based on the foregoing, therefore, we deny Appellant's request for correction to the higher figure represented by its total bid. Denial of Appellant's request for bid correction resolves the only issue before us, since Appellant waived any right it may have had to withdraw its bid and elected to enter the contract at the contract price the Authority would accept based on application of the provisions of G.P.-3.01 to Appellant's bid.

For the foregoing reasons, therefore, Appellant's appeal is denied.

