

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF FLIPPO)
CONSTRUCTION COMPANY, INC.)
) Docket No. MSBCA 2320
Under SHA Contract No.)
BA 7795180)
)

February 5, 2003

Mistake in Bids - Discovered Before Award - Reading GP-2.14 and GP-2.19 together in harmony permits correction of a mistake in a bid where the mistake and intended correction are clearly evident on the face of the bid notwithstanding that such correction results in a contradiction of the order of precedence set forth in GP-2.19.

APPEARANCE FOR APPELLANT: Paul H. Teague, Esq.
Kasimer & Annino, P.C.
Falls Church, VA

APPEARANCE FOR RESPONDENT: Scot D. Morrell
Assistant Attorney General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: None
(J.D. Eckman, Inc.)

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals the denial of Appellant's protest that the bid of the Interested Party, J.D. Eckman, Inc. (Eckman), should be rejected as not responsive.

Findings of Fact

1. On September 12, 2002, the Maryland State Highway Administration (SHA) opened six (6) competitive sealed bids for the Contract, which is for the repairs of SHA Bridges Number 0322903 and Number 0322904 on I-70 over the Patapsco River in Baltimore and Howard Counties. At the bid opening, the bid results were announced as follows:

Rank	Name	Total Bid
#1	Joseph B. Fay Co.	\$1,937,725.00
#2	J.D. Eckman, Inc.	\$2,346,700.00
#3	Flippo Construction Company, Inc.	\$3,136,430.00
#4	McLean Contracting Company	\$3,305,000.00
#5	Beka Industries, Inc.	\$3,346,550.00
#6	Covington Machine & Welding, Inc.	\$3,356,317.20

2. At issue in the protest leading to this appeal is an obvious mistake in Eckman's bid concerning two (2) lump sum bid Items (Item 4021-492586 for the cleaning and painting portions of Bridge No. 0322903, and Item 4022-492586 for the cleaning and painting of portions of Bridge No. 0322904) and their relationship to Eckman's total bid price. Specifically, Eckman listed the prices for each of these lump sum Items as \$1,675,000.00 and listed its total price as \$2,346,700.00.
3. Such pricing reflects a mistake because added together the bids for the two (2) cleaning and painting lump sum Items total \$3,350,000.00 while the total bid for all thirty-four (34) bid Items is only \$2,346,700.00.
4. On September 17, 2002, the SHA Contractor's Information Center used Eckman's \$1,675,000.00 figure for Items 4021 and 4022 and published the Tabulation of Bids. By doing so, Appellant became the apparent second lowest bidder and Eckman moved from the second lowest bid to last place. All of the bidders' total bid prices were reflected at that time as follows:

Rank	Name	Total Bid
#1	Joseph B. Fay Co.	\$1,937,725.00
#2	Flippo Construction Company, Inc. (Appellant)	\$3,136,430.00
#3	McLean Contracting Company	\$3,305,000.00
#4	Beka Industries, Inc.	\$3,346,550.00
#5	Covington Machine & Welding, Inc.	\$3,356,317.20
#6	J.D. Eckman, Inc.	\$5,361,700.00

5. On the same day, September 17, 2002, the apparent low bidder, Joseph B. Fay Co., contacted SHA and indicated that it had made a mistake in its bid and requested that its bid be withdrawn pursuant to General Provision 2.14 (GP-2.14). SHA granted Fay's request and that decision is not at issue in this bid protest appeal.
6. By facsimile dated September 18, 2002, Eckman contacted SHA's Procurement Officer and advised that there was an "obvious error" in the bid documents it submitted to SHA with respect to Item 4021-492586 (cleaning and painting portions of existing bridge No. 0322903) and Item 4022-492586 (cleaning and painting portions of existing bridge No. 0322904). Specifically, Eckman indicated that it incorrectly listed the prices for these lump sum Items as \$1,675,000.00 as opposed the correct amount of \$167,500.00. Eckman requested that SHA "repair the flaw in our bid based on this obvious error" pursuant to GP 2.14(b).

7. GP 2.14(b) states in pertinent part:
 - (b) **Confirmation of Bid.** If 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 bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn upon written approval of the Office of the Attorney General 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 arithmetical errors.
8. Upon reviewing Eckman's bid, SHA's Procurement Officer, who is also the Director of SHA's Office of Construction, discovered that Eckman's bid contained an obvious discrepancy between the extended prices and its total. It was also apparent that by correcting the asserted error from \$1,675,000.00 to \$167,500.00 in bid Items 4021 and 4022, the aggregate of the unit prices submitted by Eckman on its Schedule of Prices conformed to the bid total of \$2,346,700.00. The Procurement Officer also compared the other bidders' pricing for these two (2) Items, the engineer's estimate and the relative costs for such items in similar procurements. The Procurement Officer determined that a price of \$167,500.00 was consistent with the range of prices from the other bidders, the engineer's estimate and the relative cost for cleaning and painting bridges under similar items in the past. He also determined that a cost of \$1,675,000.00 for each of these Items would be outside the realm of reasonableness for such work.
9. Based on his review and his personal experience in the highway construction field, the Procurement Officer determined that a cost of \$167,500.00 for these Items was consistent with the aforementioned factors and that a price of \$1,675,000.00 was patently unreasonable. He also determined that the mistake and the intended correction were apparent from the face of the bid.
10. Based on the above and pursuant to GP 2.14, SHA's Procurement Officer allowed this mistake to be corrected. By correcting this error, the total of the extended pricing submitted by Eckman on its Schedule of Prices conformed to its total bid price of \$2,346,700.00. Thus, SHA determined that Eckman submitted the lowest responsive bid.
11. Appellant timely protested that decision.
12. In its protest, Appellant alleges that SHA did not properly follow the Contract requirements, namely GP-2.14 (Mistakes in Bid) and GP-2.19 (Bid Evaluation and Award), the procurement regulations or this Board's case law in concluding that Eckman's bid mistakes could be corrected. Appellant argues that there is "no way that

- Eckman's intended bid price is clear from the face of the bid" and that Eckman's bid is "ambiguous." Finally, Appellant asserts that allowing a correction of this mistake would allow Eckman the proverbial "two bites at the apple" in this procurement.
13. On December 12, 2002, SHA issued its final decision denying Appellant's protest.
 14. Appellant filed a Notice of Appeal with the Board on December 20, 2002.
 15. All parties have requested that the appeal be decided on the written record. The material facts as set forth above do not appear to be in dispute.

Decision

We find that SHA's decision to correct Eckman's bid is correct as a matter of fact and law. This decision is supported by the Contract provisions, procurement regulations and case law, as applied to the written record herein.

Appellant relies on GP-2.14 and GP-2.19¹ for its assertion that SHA did not properly

¹GP-2.14 and GP-2.19 provide:

GP-2.14 MISTAKES IN BIDS

(a) **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.

(b) **Confirmation of Bid.** If 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 bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn upon written approval of the Office of the Attorney General 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 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.

(c) **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 Office of the

follow its own Contract requirements. A review of the language of these Contract requirements, the corresponding procurement regulations and case law leads to the conclusion that Appellant is incorrect in such assertion.

Appellant argues that SHA did not follow the four (4) "rules" set forth in GP-2.19(b) for evaluating bids. Appellant is correct when it notes that this General Provision states that bids are to be evaluated based on the sum of the extended prices in the event of a discrepancy between the lump sum total and the extended pricing. However, Appellant's conclusion, based on this General Provision, that SHA is required to use the \$1,675,000.00 extended price for Items 4021 and 4022 is not correct. Prior to setting forth the rules for evaluation, GP-2.19 specifically states, "Except as provided under GP-2.14, Mistakes in Bids." Moreover, this Board has previously ruled that this particular General Provision (GP-2.19) should not be applied with "blindness" so as to enforce an inequitable or unconscionable result where the bidder alleges error. Richard F.

Attorney General.

GP-2.19 BID EVALUATION AND AWARD

(a) **General.** The Contract is to be awarded to the responsible and responsive bidder whose bid meets the requirements and evaluation criteria set forth in the Invitation for Bids, and is either the lowest bid price or lowest evaluated price.

(b) **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:

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

(2) The sum of the extended prices will govern in the event of a discrepancy between the total lump sum bid and the extended prices.

(3) The written words will govern in the event of a discrepancy between the prices written in words and the prices written in figures.

(4) If a unit price has been omitted, the unit price will be determined by dividing the extended price by the quantity.

The Administration reserves the right to make the award by item, or groups of items, or total bid if it is in the best interest of the State to do so unless the bidder specifies in his bid that a particular or progressive award is not acceptable.

(c) **Award.** Upon determination of the lowest bidder, review of the bid for responsiveness, and satisfaction that the bidder is responsible, the Contract may be awarded to that bidder. A Contract may be awarded to a bidder offering a higher quality item than that designated in the Invitation for Bids if that bidder is also the lowest responsive bidder.

Kline, Inc., MSBCA 1116, 1 MSBCA ¶39 (1983). See also Denison Landscaping, Inc., MSBCA 1538, 3 MSBCA ¶258 (1990); Techlawn International, Inc., MSBCA 1848, 3 MSBCA ¶374 (1995).

The *Kline* decision involved a discrepancy between the unit price written in words and the corresponding unit price written in figures. In that case, the SHA Procurement Officer noted a discrepancy in the Kline bid between the unit price written in words, “twenty dollars”, and the unit price written in figures “\$.20”. Applying Contract language setting forth an order of precedence for discrepancies, similar to GP-2.19(b), the Procurement Officer concluded that the price written in words governed and recalculated the Kline bid using twenty dollars. Under this recalculation Kline’s bid was no longer the low bid and the Contract was awarded to the next lowest bidder. Kline protested and appealed asserting it intended to bid twenty cents, not twenty dollars. The Board noted that the range of the other bidders’ unit prices for the item in question reflected a unit price close to \$.20. The Board observed that there was a similarity between twenty (20) dollars and twenty (20) cents stating that: “All that would be required to transform one into the other is a clerical error in filling out the bid document.” Further noting that the Procurement Officer failed to apply COMAR 21.05.02.12, the Board sustained Kline’s appeal.

The situation in the present case is similar to the *Kline* case in that the “corrected” figure of \$167,500.00 is in line with the other bidders pricing for the Items. The similarity between the correct figure of \$167,500.00 and the incorrect figure of \$1,675,000.00 is apparent and could occur from a clerical error in filling out the bid document.

In this case, however, unlike in *Kline*, the Procurement Officer did apply the provisions of COMAR 21.05.02.12, as set forth substantially in GP-2.14, because when such a discrepancy exists between the extended prices and the total bid price there obviously must be a mistake. COMAR 21.05.02.12C states in pertinent part:

C. Confirmation of Bid. If 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 bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn upon the written approval of the Office of the Attorney General 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.

COMAR 21.05.02.12C and GP-2.14(b) permit correction if “the mistake and intended correction are clearly evident on the face of the bid document.” The regulation and the General Provision also provide examples of such mistakes including typographical errors, errors in extending unit prices, transposition errors and arithmetical errors. Since the mistake and the intended correction must be evident from the face of the bid documents, Appellant is correct that extrinsic evidence (such as bid worksheets or quotes received by a bidder or testimony describing a bidder’s particular circumstances) concerning what the particular bidder intended may not be considered by the procurement officer. Denison Landscaping, Inc., supra.

However, in this case, no such extrinsic evidence is needed to make the correction to Eckman’s bid. Obviously, there is an arithmetical mistake because the inclusion of pricing of \$1,675,000.00 for the two (2) bridge cleaning Items would lead to a total far in excess of the \$2,346,700.00 total listed in Eckman’s bid. It is SHA’s position that the inclusion of the “extra zero” on each of these two (2) lump sum Items is an obvious and apparent mistake, and within the ambit of correctable mistakes. We agree and find that the correction of the “extra zero” Items in Eckman’s bid is equivalent to correcting a typographical, arithmetical or transposition error.

In such mistake situations, the procurement officer may consider prices from the other bids submitted and rely on his experience and common sense. 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. Denison Landscaping, Inc., supra.

There is no doubt that there is a conflict between the sums of the pricing columns and the total price in Eckman’s bid. By correcting the price of the two (2) “extra zero” Items from \$1,675,000.00 to \$167,500.00, the aggregate of the lump sum and extended prices submitted by Eckman on the pricing columns of its Schedule of Prices conform to its bid total of \$2,346,700.00.

It is, as noted, appropriate to focus on prices submitted by other bidders as the Procurement Officer did herein. The prices from the other bidders for Item 4021 were \$150,000.00, \$220,000.00, \$190,000.00, \$260,000.00 and \$248,500.00. The prices by other bidders for Item 4022 were \$150,000.00, \$220,000.00, \$190,000.00, \$521,000.00 and \$278,500.00. In comparison to the other bidders’ pricing for these Items, a price of \$167,500.00 would be consistent with the range of the prices for these Items from the five (5) other bids received, while a price of \$1,675,000.00 for each of these Items would be unreasonable.

Furthermore, the engineer’s estimate for this work was \$92,500.00 for each Item, and the July, 2002, Price Index indicates a range for similar items of work from \$20,000 to \$250,000.00. Again, the \$167,500.00 price for each of these work Items is consistent with the engineer’s estimate and the historical pricing for such work, while a price of \$1,675,000.00 is clearly outside these parameters.

The record reflects that the SHA Procurement Officer, based on his experience, the engineer’s estimate, pricing on similar items in other procurements and others bidder’s pricing

for these two (2) Items logically concluded that the intended cost of \$167,500.00 for these two (2) Items is apparent from the face of the bid documents. A cost of \$1,675,000.00 for these Items, on the other hand, would be unreasonable.

Appellant also argues that the Eckman bid is ambiguous. For an ambiguity to exist there must be two (2) reasonable interpretations of the purported ambiguity. Appellant's claim that "there is no way that SHA can ascertain whether the price truly intended was \$167,500.00 or \$1,675,000.00" flies in the face of this principle. In this case, the discrepancy admits to only one (1) reasonable interpretation ascertainable from the face of the bid or from reference to the engineer estimate, the range of other bids or the Procurement Officer's logic and experience. It would defy common sense to believe that Eckman's bid price for the cleaning and painting portions of these two (2) bridges would total \$3,350,000.00. Appellant's argument would necessarily conclude that the price offered by Eckman for these two (2) Items of work in this thirty-four (34) Item procurement is greater than every other bidder's total price for all work (with the exception of Covington's bid, with the difference being that Covington's total bid is \$6,317.20 higher than the two (2) bid Items.) The interpretation of Eckman's bid proffered by Appellant is not reasonable and does not support its claim that Eckman's bid is ambiguous.

Finally, Appellant argues that SHA's allowance of the correction of the mistake provides Eckman with "two bites of the apple" because it may wait until its competitors' prices are exposed and then determine whether to allege a mistake and seek correction. The Board recognizes that SHA's Contractor's Information Center, five (5) days after bid opening on September 17, 2002, used Eckman's \$1,675,000.00 figure for Items 4021 and 4022 reflecting Eckman's bid in the Tabulation of Bids as \$5,361,700.00. The Board also recognizes that Eckman contacted the Procurement Officer the next day, September 18, 2002, and advised of error. However, the procurement regulations compel the correction of Appellant's mistake and do not permit a withdrawal of the bid unless the intended correction is not evident on the face of the bid and "the bidder submits proof of evidential value which clearly and convincingly demonstrates that a mistake was made." COMAR 21.05.02.12C(2)(b). Indeed, under COMAR 21.05.02.12C, Eckman's bid could have been corrected and considered for award as corrected even if there had been no initial communication from Eckman. To the extent a withdrawal of a bid under the regulations might conceptually be viewed as a second bite of the apple, Appellant, in fact, gets no second bite for two (2) reasons: 1) the mistake and the intended correct bid are apparent on the face of the bid document; and 2) there is no evidence of record that Appellant intended anything other than a bid price of \$167,500.00 for Items 4021 and 4022.

For the reasons set forth above, the appeal is denied.

Wherefore it is Ordered this 5th day of February, 2003 that the appeal is denied.

Dated: February 5, 2003

Robert B. Harrison III
Board Member

I Concur:

Michael J. Collins
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (a) the date of the order or action of which review is sought;
- (b) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (c) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2320, appeal of Flippo Construction Company, Inc. under SHA Contract No. BA 7795180.

Dated: February 5, 2003

Loni Howe
Recorder