

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of P. FLANIGAN AND)
SONS, INC.)
)
Under SHA Contract)
No. AA-216-501-577) Docket No. MSBCA 1068

June 17, 1983

Mistakes in Bids - Execution of Contract - A contractor who accepts a contract award with full knowledge of a mistake in its bid impliedly agrees to absorb the error unless there is evidence of coercion or duress, an appeal, or some other reservation of rights.

Mistakes in Bids - Discovered Before Award - Where the contract general provisions provide that the unit bid price governs discrepancies between the unit bid price and its extension, the procurement officer cannot rely solely on that provision so as to enforce an unconscionable result. If the bidder alleges mistake, the procurement officer must apply COMAR 21.05.02.12 or similar language in the general provisions permitting correction if both the mistake and intended bid price are clearly evident on the bid document.

Mistakes in Bids - Discovered Before Award - A procurement officer should rely on his common sense and experience and consider prices submitted by other bidders in determining whether an error in a unit bid price and the intended correction are clearly evident on the face of the bid document permitting correction pursuant to COMAR 21.05.02.12C(1).

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OPINION BY MR. LEVY

This timely appeal is from a Maryland State Highway Administration (SHA) procurement officer's final decision denying Appellant the right to correct its bid. After this appeal was entered, Appellant accepted award of the contract at its bid price. The issues before us involve (1) whether Appellant

impliedly agreed to absorb its error by entering into a contract, and (2) whether the SHA procurement officer unreasonably refused to permit correction of Appellant's alleged bid error.

Findings of Fact

1. Bids for SHA Contract No. AA-216-501-577, for the resurfacing of three sections of Md. Route No. 2 and U.S. 50/301 in the Annapolis area, were opened on February 23, 1982. Appellant's bid, in the amount of \$3,094,659.72, was identified as the lowest of the seven bids received. The next lowest bid, in the amount of \$3,160,590.77, was submitted by Arundel Asphalt Products, Inc.

2. The proposal form, pages 369-429 of the project specification book, required bidders to price 164 individual line items. A total of 154 line items required the bidder to specify a unit price, both in writing and in numbers, and extend that price by multiplying it by the estimated quantity. The balance of the line items required lump sum prices. While the award was to be based on the lowest total bid for all items, payment for work performed under the contract was to be based on the actual unit quantities of work performed.

3. SHA audited Appellant's bid for mathematical accuracy, pursuant to contract General Provision GP-3.01, and determined that a discrepancy existed between the unit price and the extended price for item number 105. This item, as bid by Appellant, appears 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>twent Two dollars</u> per unit week | <u>2 00</u> | <u>20,000 00</u> |

As is apparent, the properly extended unit price should have been \$200 instead of \$20,000.

4. Contract General Provision GP-3.01 provides, in pertinent part, that ". . . [i]n the event of a discrepancy between the unit bid prices and the extensions (product of quantity and unit price), the unit price will govern." Accordingly, SHA accepted the \$2.00 unit price as the intended bid price and corrected the extension to \$200. This reduced Appellant's bid price by \$19,800 to \$3,074,859.72.

5. The six other bids submitted on this project reflect unit prices for item no. 105 of \$65, \$100, \$133, \$200, \$240, and \$250.

6. By letter dated March 1, 1982, Bernard M. Melsage, Chief of the SHA Construction Contracts Section, apprised Appellant that its ". . . proposed bid of \$3,074,859.72 for the subject contract . . . [was] apparently the lowest responsive and responsible bid."

7. On March 4, 1982, Appellant's Chairman, Pierce J. Flanigan, wrote to Mr. Melsage advising him that a mistake had been made with regard to item no. 105 and that \$200.00 per week was the intended unit price. He explained how the alleged error was made and requested that the mistake be corrected pursuant to contract General Provision GP 2.14C(1).¹ He maintained in this regard, that both the mistake and the intended correction clearly were evident on the face of the bid document.

8. By letter dated March 16, 1982, Mr. Melsage advised Appellant that the requested correction was not permitted by law. Mr. Melsage's decision was based upon a memorandum from the SHA Law Department wherein it was concluded that the intended bid correction was not evident on the face of the bid documents.

9. On March 30, 1982, SHA sent a "Notice of Award" to Appellant and, one day later, forwarded for signature the contract documents in the corrected amount of \$3,074,859.72. The cover letter requested that the executed contract be returned within ten days for SHA's signature.

¹C. 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 evidentiary value which clearly and convincingly demonstrates that a mistake was made. (Underscoring added.)

10. On March 31, 1982, Appellant filed a timely appeal with this Board. Thereafter, on April 12, 1982, Appellant also signed and returned the contract documents to SHA. SHA then signed the contract on April 19, 1982.

Decision

SHA initially contends that this appeal should be dismissed because Appellant signed a contract without reservation and with full knowledge of its mistake. Appellant, however, maintains that by filing an appeal with this Board, prior to signing the contract, it properly reserved its right to have SHA's determination concerning reformation reviewed.

In the absence of evidence of coercion or duress, a protest, or some other reservation of rights, a contractor who accepts a contract award with full knowledge of a mistake in its bid impliedly agrees to absorb the error. Sherkade Construction Corp., B-180681, October 30, 1974, 74-2 CPD ¶231. Compare Massman Construction Co. v. United States, 102 Ct.Cl. 699, 60 F. Supp. 635 (1945). cert. den. 325 U.S. 866 (1946). We conclude, under the facts present here, that Appellant properly reserved its right to seek review of SHA's determination not to permit correction of the low bid.

Where a mistake is evident on the face of a bid, Maryland's procurement regulations permit the procurement officer either to correct the bid if the intended correction also is apparent on the face of the bid, or allow the contractor to withdraw where the intended bid is not evident. See COMAR 21.05.02.12 C(1) and (2). A contractor also may be permitted to absorb its error, if it confirms the bid and the error is not so great as to affect its ability to perform. Here, Appellant appealed the SHA decision concerning bid correction to this Board and then elected to accept contract award. In essence, it was agreeing to perform at the price bid while reserving its right to seek the requested correction through the administrative and judicial remedies prescribed by law. Compare Guy F. Atkinson, et. al., B-183842, December 9, 1975, 75-2 CPD ¶378; Fortec, B-179204, May 24, 1974, 74-1 CPD ¶285. While Appellant certainly forfeited any right it may have had to withdraw its bid by accepting award, its action could not be construed as evidencing an agreement to absorb its bid mistake.

We now turn to the SHA procurement officer's decision not to permit correction of Appellant's bid. The SHA procurement officer, applying contract General Provision GP-3.01, properly read Appellant's bid for unit item no. 105 as \$2.00 per week. However, the \$2.00 unit price bid was approximately 80 times less than the average of the six other bids received for this item.² This, we conclude, was sufficient to have apprised the SHA procurement officer that a mistake had been made.

The standard for bid correction is set forth in contract General Provision GP-2.14 (C)(1) as follows:

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

²As we previously found, the six other bid for item 105 were \$65, \$100, \$250, \$133, \$240, and \$200. The average is \$165.

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.

See also, COMAR 21.05.02.12C.(1). The remaining issue thus involves whether the SHA procurement officer reasonably determined that the intended correct bid was not clearly evident on the face of the bid document.

In Richard F. Kline, Inc., MSBCA 1116, February 24, 1983, at p.5, this Board stated as follows:

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. Compare Edward E. Davis, Contracting, Inc. Comp. Gen. B-187132, November 17, 1976, 76-2 CPD ¶429; Comp. Gen. B-173492, November 29, 1971; 46 Comp. Gen. 77, 82 (1966). 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 other bidders relative to the procurement at hand. Compare 45 Comp. Gen. 682 (1966); Schweigert Construction; Bob Bak Construction, Comp. Gen. B-208144; B-208880, October 20, 1982, 82-2 CPD ¶349.

Here the SHA procurement officer did not make such a review. Instead he relied solely upon the following advice of legal counsel:

The circumstance in which a bidder will be permitted to correct a bid is "[i]f the mistake and the intended correction are clearly evident on the face of the bid document . . ." GP 2.14 (c)(1). In the opinion of this office of counsel, this case does not meet this standard.

We conclude that had the SHA procurement officer made such a review of the other bids submitted, the only reasonable conclusion possible would have been that the \$20,000 bid by Appellant for item no. 105 was the amount actually intended. When this total is divided by the estimated 100 weeks of arrow board usage, a \$200 per week unit cost is obtained. This unit cost is within the range of the other bids submitted. Compare Engle Acoustic & Tile, Inc., B-190467, January 27, 1978, 78-1 CPD ¶72; R&J Construction Inc., B-191708, March 1, 1979, 79-1 CPD ¶ 140.

Accordingly, for the foregoing reasons, we conclude that the final decision of the SHA procurement officer was arbitrary and that the requested correction to the unit price bid should be made. The appeal, therefore, is sustained.

