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United States Government Accountability Office
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Decision

Matter of: Odyssey International, Inc.

File: B-296855.2

Date: November 16, 2005

Patrick S. Hendrickson, Esq., for the protester.

Timothy A. Sullivan, Esq., and Michael H. Payne, Esq., Payne Hackenbracht and Sullivan, for Allied Contractors and Engineers, Inc., an intervenor.

Carrie E. Kamler, Esq., Department of Labor, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly failed to allow correction of claimed mistake in bid, where the bidder established its mistake and its intended bid (which was still low) by clear and convincing evidence and the agency denied the requested correction because of other suspected mistakes which were unrelated to the one claimed and which the agency did not bring to the bidder's attention, as required by Federal Acquisition Regulation §§ 14.407-1, 14.407-3(g)(1)(iv), and where the evidence in the record, including hearing testimony and worksheets, does not evidence that the bidder made additional mistakes (as suspected by the agency) or that the worksheets were not in good order.

DECISION

Odyssey International, Inc. protests the Department of Labor's (DOL) decision to deny its request for correction of a mistake in its low bid under invitation for bids (IFB) No. 051RB20036, for construction services, and the consequent rejection of its bid.

We sustain the protest.

The IFB, issued on April 1, 2005, sought bids for the construction of a new 178-bed, 43,788 square foot, three-story dormitory building at the Red Rock Job Corps Center, Lopez, Pennsylvania. At the bid opening on May 10, DOL received eight bids. Odyssey submitted the low bid at \$6,246,616 (a base bid of \$6,034,000 plus two solicited and evaluated alternates totaling \$212,616) and Allied Contractors and Engineers, Inc. submitted the next low bid at \$7,319,800. Agency Report, Tab 31, Bid

Tabulation Form. The government estimate for the project was \$7,352,357. Agency Report, Tab 21, Architect's Bid Analysis, at 2.

After the agency requested the three lowest bidders to verify their bid prices, Odyssey, on May 11, requested correction of an alleged mistake in its bid attributed to "a dramatic posting error" in its bid tabulation sheet. Agency Report, Tab 25, Letter from Odyssey to DOL, May 11, 2005, at 1. Odyssey claimed that it mistakenly recorded a \$1,275,000 quote for structural steel from a subcontractor as \$275,000 in its electronic spreadsheet, and as evidence of the mistake and the intended bid it furnished the subcontractor's proposal of \$1,275,000, as well as printed copies of the original bid tabulation spreadsheet and the corrected spreadsheet, both dated May 11.¹ Id. DOL requested that Odyssey provide all pertinent evidence "establishing the existence of the error, and the manner in which it occurred, and the bid actually intended." Agency Report, Tab 22, Letter from DOL to Odyssey, May 16, 2005.

On May 19, Odyssey furnished additional evidence related to the mistake, including a compact disc (CD) containing the electronic version of the previously printed spreadsheets. Odyssey requested that it be allowed to correct its base-bid price to \$7,104,600 to account for the mistake. This figure included not only the \$1,000,000 shortfall on the bid tabulation sheet in recording the subcontractor's quote, but also, consistent with the methodology employed on the original bid tabulation spreadsheet, a [DELETED] markup for profit and overhead on the increased price, an additional 1-percent markup for bond premium, and a \$54 bid reduction to round off the bid.² Agency Report, Tab 25, Odyssey's Request for Correction, May 11, 2005; Tab 29, Odyssey's Supplement to Request for Correction, May 19, 2005. This would make Odyssey's corrected bid, including the two alternates, total \$7,317,216,³ which is only \$2,584 less than Allied's \$7,319,800 bid.

¹ The spreadsheets were prepared on a Microsoft Excel spreadsheet program. Because it is a feature of this program, the dates appearing on the spreadsheets are the dates they were printed for submission to the agency. See Hearing Video Transcript (VT) at 11:22-11:30. (A hearing was conducted by our Office to take testimony from Odyssey's representative regarding the mistake.)

² The preparer of the spreadsheets testified that the original bid price was rounded downward by \$54 from \$6,034,054—the base bid as indicated on Odyssey's bid calculation spreadsheet—to \$6,034,000 to make submitting the bid easier for the bid handler. See VT at 10:43-10:43:30. The spreadsheets for the bid as corrected show a total base bid of \$7,104,654 from which Odyssey subtracted \$54 to be consistent with the way its original base bid was submitted.

³ \$7,104,600 + \$212,616 = \$7,317,216.

Upon learning that Odyssey had requested correction of its mistake in bid, on May 12, Allied protested to the agency the propriety of permitting Odyssey to correct its bid. On June 21, after reviewing Odyssey's documentation, DOL accepted Odyssey's corrected bid, finding that there was clear and convincing evidence of the mistake and the intended bid. Thus, on June 28, DOL denied Allied's protest. Allied then filed a protest at our Office on July 8, challenging DOL's decision. Allied based this protest on its review of the printed bid tabulation spreadsheets provided by Odyssey in support of its mistake claim that Allied had obtained from DOL. We dismissed this protest as academic on August 3 after DOL reversed its prior position and advised that it would now not accept Odyssey's corrected bid because of "a number of other serious errors, unrelated to [the] initial mistake in bid claimed by Odyssey," which were found in Odyssey's spreadsheets and which prevented the agency from determining Odyssey's intended bid price. See Agency Corrective Action Letter, August 3, 2005.

As indicated above, as a result of Allied's protest to our Office, DOL found, upon further review, that Odyssey's spreadsheets did not establish clear and convincing evidence of the mistake and intended bid. This change in position was based on factors not related to the particular mistake claimed by Odyssey. Specifically, DOL now found an apparent computational error in the "General Conditions" section of the spreadsheets because the total for this section when added was \$316,293, instead of \$422,043, which was the total that appeared on both the original and the corrected spreadsheets. DOL next points to section 5500, "Metal Fabrications," in the original and the corrected spreadsheets where, instead of prices, the original worksheet said "in" and the corrected worksheet said "in 05120." DOL found that these changed notations reflected a potential error because it indicated that the metal fabrications, including the stairs, were a part of Odyssey's structural steel subcontractor's quote, but that subcontractor's quote did not include stairs, an item for which DOL estimated the cost to be between \$60,000 and \$70,000. With respect to sections 8310, "Access Doors and Panels"; 10400, "Signage"; 10520, "Fire Protection Specialties"; and 10810, "Toilet Accessories" on the spreadsheets, DOL found that Odyssey had a supplier's quote for the materials, but had not included the cost of labor in the spreadsheets, which the government estimated to be \$17,205. Finally, DOL found that in section 2821, "Chain Link Fences and Gates," the original spreadsheet contained the notation "in 03300," but the corrected spreadsheet changed the notation to "in 02980." Since DOL had estimated the item at \$18,000, it found that whether Odyssey had included a price for this item could not be determined from the changes to this notation. DOL found that the foregoing problems indicated that Odyssey's spreadsheets were not in good order and did not reasonably support by clear and convincing evidence Odyssey's claimed intended bid price. See Agency Report, Tab 7, Letter from DOL to Odyssey, Aug. 2, 2005 at 1-2. On August 2, DOL notified Odyssey that its request for correction was denied but that it could withdraw its bid because of the mistake. This protest followed.

Odyssey maintains that DOL improperly reversed its decision to permit correction of the mistake, based on Allied's and DOL's misunderstanding of Odyssey's spreadsheets.⁴ Odyssey argues that DOL mistakenly concluded that the subtotal in its General Conditions section was not properly calculated because it accepted Allied's reading of the printed spreadsheets, which did not include two rows that had been hidden to protect the confidentiality of the information, but were accessible to the agency on the CD by unhiding these rows, which would have confirmed the accuracy of the subtotal for this section reflected in the printed spreadsheets.⁵ Odyssey further contends that the various revised notations on the spreadsheets did not evidence any mistakes in its bid and did not affect its bid amount. Odyssey complains that the agency improperly denied correction for reasons not related to the mistake that was claimed without providing Odyssey with an opportunity to respond to these issues.

A bidder who seeks upward correction of its bid price prior to award must submit clear and convincing evidence that a mistake was made, the manner in which the mistake occurred, and the intended price. Federal Acquisition Regulation (FAR) § 14.407-3(a). Workpapers, including records of computer generated software spreadsheets/workpapers (hardcopy printouts, computer disks, tapes or other software media), may constitute clear and convincing evidence if they are in good order, and indicate the intended bid price, and there is no contravening evidence. Holmes Mech., Inc., B-281417, Jan. 13, 1999, 99-1 CPD ¶ 6 at 2. Whether the evidence is sufficient to meet this standard is a question of fact that an agency must decide. Our Office only questions this decision where it lacks a reasonable basis. H.A. Sack Co., Inc., B-278359, Jan. 20, 1998, 98-1 CPD ¶ 27 at 3. Correction of the bid is not precluded merely because the corrected bid price is close to the next lowest bid price; while such a case requires a higher degree of scrutiny to ascertain the amount of the intended bid, the bid still can be corrected if the intended price is clearly established and the bid remains low. Pacific Components, Inc., B-252585, June 21, 1993, 93-1 CPD ¶ 478 at 7.

⁴ Odyssey argues that DOL should not have released the spreadsheets to Allied because the information was proprietary/confidential information, and that we should find that the agency's improper release of the information precludes the agency from using the information to reverse its decision allowing correction of its bid. Since we sustain the protest and recommend award based on Odyssey's corrected price, we need not resolve whether these spreadsheets should have been provided to Allied. However, we do note that the protester did not mark the submitted spreadsheets as confidential or proprietary as should generally be done where a firm believes that information should not be disclosed by the agency. See Litton Applied Tech., B-227090, 227156, Sept. 3, 1987, 87-2 CPD ¶ 219 at 4.

⁵ The Microsoft Excel software permits columns and rows on spreadsheets to be hidden and "unhidden."

Here, the agency acknowledges, and we agree, that Odyssey's documentation establishes by clear and convincing evidence that Odyssey made a \$1,000,000 error in transcribing its structural steel subcontractor's quote in section 5120 of its spreadsheets. There is also no dispute that when this error is corrected and the markups and rounding are taken into account that Odyssey's corrected bid would be \$7,317,216.⁶ The only dispute concerns the sufficiency of the spreadsheets as evidence of the intended bid because of additional alleged mistakes, other than those claimed by Odyssey, that DOL suspected were made in the other areas of the spreadsheets, which in DOL's view meant that Odyssey's spreadsheets were not in good order so as to establish by clear and convincing evidence its intended bid price.

In our view, DOL did not act reasonably in determining that Odyssey's spreadsheets were not in good order and did not provide clear and convincing evidence of Odyssey's intended bid. DOL's reversal of its initial decision permitting Odyssey to upwardly correct the bid was based upon what DOL regarded as possible additional mistakes in the spreadsheets beyond the one Odyssey claimed. Under FAR § 14.407-1, in cases of apparent mistakes and in cases where the contracting officer has reason to believe that a mistake may have been made, the contracting officer is required to request from the bidder a verification of the bid, calling attention to the suspected mistakes. Since DOL suspected other mistakes in Odyssey's bid than the one Odyssey was requesting to correct, consistent with FAR § 14.407-1, it should have requested further verification of Odyssey's bid price, and called Odyssey's attention to the suspected mistakes in its spreadsheets. In this regard, FAR § 14.407-3(g)(1)(iv) provides that to ensure that the bidder will be put on notice of mistakes suspected by the contracting officer, the bidder should be advised as appropriate "of any other information, proper for disclosure, that leads the contracting officer to believe that there is a mistake in bid." See Enco Dredging, B-284107, Feb. 22, 2000, 2000 CPD ¶ 44 at 6. Here, the agency did not advise Odyssey of these additional suspected mistakes prior to rejecting Odyssey's request for correction (which effectively served as a rejection of Odyssey's bid).

⁶ The computer-generated spreadsheets here contained the same markups that can be easily used to calculate the effect of the mistake and determine the intended bid but for the mistake. Where such spreadsheets are in good order they can constitute clear and convincing evidence of the intended bid. Roy Anderson Corp., B-292555, B-292555.2, Oct. 10, 2003, 2003 CPD ¶ 179 at 2. The only modification to the price calculated by the computer-generated spreadsheets was the \$54 rounding down to both the original base bid and the recalculated base bid. However, even assuming this rounding introduces some level of uncertainty as to the intended bid, correction of the bid may be allowed where there is clear and convincing evidence that the amount of the intended bid would fall into a narrow range of uncertainty and remain low after correction, such as those situations where minor rounding of bid figures is done. Id.; H.A. Sack Co., Inc., supra, at 4 n.1.

Based on our review of the record, including the spreadsheets, the CD, and the hearing testimony from the individual responsible for preparing Odyssey's bid, we find that none of the items referenced by DOL (or all these items in total) as indicating a possible mistake beyond that claimed by Odyssey provides a valid basis for denying Odyssey's correction request.

Specifically, the record confirms that Odyssey's spreadsheets on the CD contained hidden rows that included prices of [DELETED] for a contract administrator and [DELETED] for a safety officer that, when added to the other rows in the General Conditions section, equal the \$422,043 subtotal in the spreadsheets. Although Odyssey printed the spreadsheets that it provided to DOL in support of the mistake correction claim without these rows being visible, it furnished DOL the CD that contained the complete spreadsheet, which was completely accessible to the agency by manipulating certain commands in the spreadsheet program.⁷

While DOL does not dispute, and we have confirmed, that the correct total of the General Conditions section can be discerned from the spreadsheet on the CD once the rows are unhidden, it contends that the protester's spreadsheets still should not be accepted as reliable proof of its intended bid because the spreadsheets were printed on May 11 (after bid opening) and the spreadsheet on the CD reflects that it was created on May 19.

However, the fact that bid worksheets were generated by a computer does not preclude them from constituting valid evidence to support a request for bid correction, even where a worksheet on a computer was not printed until after bid opening. See Holmes Mech., Inc., supra, at 2 n.1, 4. The key consideration is whether or not the submissions are clear and convincing evidence of the mistake and intended bid; the manipulation of the mistake in bid rules may occur just as easily when a bidder has prepared its worksheets without the use of a computer. Id. at 4. There is no evidence of such manipulation here.

Instead, the spreadsheet preparer testified that the spreadsheets, including the complete spreadsheet with unhidden columns, were printed on the day after bid opening, and that these spreadsheets were what Odyssey utilized prior to bid opening to calculate the bid, and that the printed date of May 11 appearing on the spreadsheets is controlled by the computer's software programs, and not the user. He further testified that although a printed copy of the complete spreadsheet was not

⁷ The preparer of the spreadsheet indicated that he hid the safety officer and contract administration rows to protect the confidentiality of the information, given that the General Conditions section was not the basis for the mistake that it was requesting to correct and that the missing rows were included on the CD. See VT at 10:55:28-10:57:39.

furnished to the agency with its request for correction on May 11 because he did not believe this hidden information was necessary to support the claimed error, he printed a complete copy for his files on this date. See VT at 11:22-11:30. Odyssey has provided a copy of this spreadsheet, also dated May 11 (evidencing that it was in fact printed on that date), with the columns unhidden, which confirms his explanation. We have also confirmed that the May 19 date on the spreadsheet on the CD is the date that it was copied from the computer and submitted to the agency, and was not the date the spreadsheet on the computer was actually created.

Given the preparer's unrebutted and credible testimony that the spreadsheet, as represented on the CD that had been provided to the agency in support of its mistake claim, was what Odyssey utilized prior to opening to calculate its bid on his computer, we find the spreadsheets and CD are reliable and constitute clear and convincing evidence of Odyssey's intended bid.⁸ See Cooper Constr., Inc., B-285880, Sept. 18, 2000, 2000 CPD ¶ 153 at 5 (sworn statement from protester attesting to authenticity of undated worksheets is sufficient evidence to demonstrate the authenticity of worksheets in the absence of contravening evidence). Because the agency failed to bring this additional suspected mistake to Odyssey's attention as required by FAR §§ 14.207-1, 14.407-3(g)(1)(iv), it failed to obtain the supported explanation from Odyssey that has been obtained during the development of this protest record that demonstrated that the spreadsheets were in good order and did not evidence additional mistakes. As a result, we find that DOL improperly concluded that Odyssey's spreadsheet's contained a computational error with regard to "General Conditions."

The other alleged mistakes in the spreadsheets that the agency now references also were not brought to Odyssey's attention as required. In each of these cases, Odyssey has provided credible and unrebutted explanations as to why they did not evidence mistakes. Moreover, none of these alleged mistakes involved apparent errors in the computation of the bid as discerned from the spreadsheets.

Specifically, the notation changes Odyssey made to the corrected spreadsheet did not involve changes in bid price. Indeed, the preparer testified that the typed inscriptions that appear in the various notes were his personal notes denoting where unpriced work items were covered in the bid and did not have any impact on the scope of work to be provided under the contract or the price to be charged the government. The preparer testified that the notation "in" was made to denote that a particular line item was included in the contract in terms of cost and scope. He

⁸ Although Allied questions the electronic version of the spreadsheet on the submitted CD because the [DELETED] for the Safety Officer figure is in a blank row above the row for the Safety Officer, we are not troubled by this because the complete sheet was printed in the proper form on May 11 when Odyssey initially requested to correct its bid.

testified that he continued to complete the notes after bid opening because time constraints prior to bid opening did not permit him to fully complete the notes. With respect to the change from "in" to "in section 5120," the preparer indicated that this note was completed merely to remind himself and the project manager to further negotiate metal fabrication costs with the structural steel contractor. With respect to section 3300, the preparer testified that the area where the change was made was simply to recognize that prior to submitting the bid a change had occurred in terms of where these costs were being covered. See VT at 10:47-10:55:07, 11:08:44-11:09:12. Based on our review, none of these notation changes from the original spreadsheet to the corrected spreadsheet indicated that the spreadsheets were not in good order or evidenced unclaimed mistakes. In any case, the agency's decision that the workpapers were not in good order because of these notations is not sustainable because the corrected bid total for Odyssey's bid can be unambiguously ascertained by a mechanical mathematical calculation of the spreadsheets. See Cooper Constr. Inc., supra, at 6.

Moreover, the concern that Odyssey may not have included certain labor costs because its costs did not match the government estimate is not the type of mistake for which correction would be permitted under the FAR mistake-in-bid procedures.⁹ The FAR permits correction of a mistake only where it can be demonstrated that the bidder intended a bid other than the one submitted--that is, where the mistake is attributable to something other than the bidder's exercise of its business judgment. Reynosa Constr., Inc., B-278364, Dec. 15, 1997, 97-2 CPD ¶ 165 at 4, recon. denied, B-278364.2, Apr. 28, 1998, 98-1 CPD ¶ 124 at 2. While the agency might have concluded from a review of Odyssey's spreadsheets that Odyssey may have underpriced or underestimated certain cost elements unrelated to the mistake claim, this is not an appropriate basis for DOL to deny Odyssey permission to correct the mistake that it claimed. Id. This is so because a bidder's pricing of the different elements of its bid is dependent upon the bidder's business judgment and bidding strategy. There is no basis to assume that omitted or understated prices reflect a mistake, where there is no apparent mistake in the workpapers. M. A. Mortenson Co., B-254152, Nov. 19, 1993, 93-2 CPD ¶ 296 at 5.

In sum, close scrutiny of the evidence in the record establishes by clear and convincing evidence both that Odyssey made a mistake as well as its intended bid, which will remain low after correction of the mistake. Consequently, we find that DOL should not have denied Odyssey's request for correction.

⁹ With respect to the agency's concern that certain labor costs were not included for sections 8310, 10400, 10520, and 10810, the bid preparer testified that these labor costs were in fact included in section 8110, where \$14,000 in labor costs were included, and that Odyssey's bidding strategy often requires including labor cost in other sections, where, as was the case here, installation prices for all material items from subcontractors are not generally available. See VT at 10:54:14-10:53:19.

We recommend that DOL permit Odyssey to correct its mistake in bid, and award the contract to that firm, if otherwise appropriate. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including attorney's fees. 4 C.F.R. § 21.8(d)(1) (2005). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel