UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: February 9, 2009

CBCA 1110

B & M CILLESSEN CONSTRUCTION CO., INC.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Seth V. Bingham of Miller Stratvert P.A., Farmington, NM, counsel for Appellant.

Nigel F. Gant, Office of the General Counsel, Department of Health and Human Services, Dallas, TX, counsel for Respondent.

Before Board Judges **HYATT**, **DRUMMOND**, and **SHERIDAN**.

SHERIDAN, Board Judge.

This appeal arises out of contract HHSI161200700014C, for the renovation and construction of an expansion to the Chinle Comprehensive Health Care Center (Chinle Center) in Chinle, Arizona, which was awarded to B & M Cillessen Construction Co., Inc. (Cillessen) by the Indian Health Service (IHS), Department of Health and Human Services. Cillessen seeks $131,481 in increased taxes. Based on the findings and application of the law set forth below, we deny the appeal.

The appeal was submitted on the written record pursuant to Board Rule 19. The record considered by the Board in issuing this decision consists of the pleadings, the appeal file (exhibits 1 through 44) , appellant's Rule 19 submission; respondent's Rule 19 submission, and appellant's Rule 19 reply.

Background

On December 7, 2006, IHS issued a notice that they would be soliciting offers for the expansion and renovation of the Chinle Center. Appeal File, Exhibit 1. The notice informed potential offerors that IHS intended to award a firm fixed-price construction typ contract. *Id*. Solicitation HHSI161200700014C was issued on January 11, 2007, informing prospective offerors this was to be a negotiated procurement in which IHS was using a "competitive formal best value source selection process" in accordance with Federal Acquisition Regulation (FAR) part 15 "to ensure selection of the source evidencing the best overall capability to perform the work in a manner most advantageous to the Government, as determined by evaluation of proposals in accordance with the established criteria." *Id*., Exhibit 5 at 1, 61.[1] The solicitation also notified prospective offerors that IHS intended to award a firm fixed-price construction type contract. *Id*. at 55.

Prospective offerors were warned in section H-5 of the solicitation that, prior to submitting prices, they should check with the Tribal Tax Office to determine the appropriate taxes to include in their proposals:

> The Tribal Organization within the area of this contract may levy taxes. The contractor must contact the Tribal Tax Office to determine the appropriate taxes to be included in the proposed price.

Appeal File, Exhibit 5 at 29. Contractors were cautioned to inquire and seek clarification concerning possible ambiguities in the solicitation. *Id*. The solicitation also noted that several FAR clauses would be incorporated by reference into the contract. Among the clauses to be incorporated by reference was FAR 52.229-3. *Id*. at 36.[2]

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[1] Prospective offerors were provided instructions on this procurement through FAR 52.215-1, Instructions to Offerors-Competitive Acquisition (Jan. 2004), which was incorporated by reference into the solicitation. Appeal File, Exhibit 5 at 55. In this type of competitive procurement, the Government first ranks the responsible offerors. After a pool of qualified offerors is determined, the Government considers the price proposals from that pool of offerors. This type of competitive procurement is sometimes referred to as a "two-step procurement."

[2] FAR 52.229-3 is required to be inserted in solicitations and contracts except "(b) In a noncompetitive contract . . . the contracting officer may insert the clause at 52.229-4 Federal, State, and Local Taxes (State and Local Adjustments), instead of the clause at 52.229-3, if the price would otherwise include an inappropriate contingency for potential

FAR 52.229-3 Federal, State, and Local Taxes (April 2006) provides, *inter alia*, that:

(a) As used in this clause--

All applicable Federal, State, and local taxes and duties, means all taxes and duties, in effect on the contract date, that the taxing authority is imposing and collecting on the transactions or property covered by this contract.

Contract date, means the date set for bid opening or, if this is a negotiated contract or a modification, the effective date of this contract or modification.

. . . .

(b) The contract price includes all applicable Federal, State, and local taxes and duties.

48 CFR 52.229-3 (2006) (emphasis added).

Mr. William Obershaw, the chief of the contracting office at IHS Division of Engineering Services in Dallas, Texas, was the senior contracting officer responsible for administering the Chinle Center project. Appeal File, Exhibit 19. On February 1, 2007, a pre-proposal conference was held to, among other things, "improve the understanding of Government requirements and industry capabilities." *Id*., Exhibit 8. Written materials for the conference informed prospective offerors that they "ha[d] a duty to inquire and seek clarification concerning possible ambiguities and/or discrepancies." *Id*. at 7. Contractors were also warned that "[u]nless otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties." *Id*. at 16. Price proposals were to be submitted in a separate sealed envelope, and were to include "the cost of new materials, labor and equipment, as well as taxes (State, Tribal and TERO [Tribal Employment Rights Office]), insurance & bonds, overhead and profit." *Id*. at 28. Again, the potential offerors were told that IHS "intend[ed] to award a firm fixed-price construction type contract to the responsive and responsible offeror whose proposal conforms to the requirements of the solicitation and will provide the best value to the Government." *Id*. at 29.

Believing that a tribal tax would be levied on the construction associated with the Chinle Center, on February 7, 2007, Ms. Rose Coburn, Cillessen's Corporate Secretary,

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post-award changes(s) in State or local taxes." 49 CFR 29.401-3 (2003).

contacted Ms. Mary Etsitty, the Executive Director of the Navajo Tax Commission, to ask about taxes. The Chinle Center is within the Navajo Nation, and Ms. Coburn was informed that a Navajo Business Activities Tax (NBAT) was required to be paid on the gross receipts received from the construction of the center. Appeal File, Exhibit 30; Complaint ¶ 14. Ms. Etsitty told Ms. Coburn that as of February 7 the applicable NBAT rate was three percent. Appeal File, Exhibit 40. However, at that time she also told Ms. Coburn that an increase to a four percent NBAT, to be effective July 1, 2007, was currently being considered. *Id*.; *see also id*., Exhibit 38.[3]

The pre-solicitation notice was modified several times to extend the original deadline for proposals from February 22 to March 14, 2007. Appeal File, Exhibits 2-4. Cillessen submitted its proposal for the Chinle Center project on March 14, 2007. *Id*., Exhibit 10.

On March 28, 2007, the Navajo Tax Commission approved an increase in the NBAT, from three percent to four percent, to be effective July 1, 2007. Appeal File, Exhibit 25. A news release to that effect was issued by the Navajo Nation on March 30, 2007. *Id*.

A source selection board was appointed, and the members individually reviewed and ranked the five firms which had submitted proposals on the Chinle Center project. Appeal File, Exhibits 13, 14. As Cillessen was rated as the most qualified responsive and responsible offeror, and also had proposed a significantly lower price for the project than the second most qualified firm, the selection board elected to not conduct further negotiations with the offerors. Appeal File, Exhibit 14. They recommended award of the contract to Cillessen. *Id*.

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[3] In a letter dated March 20, 2008, to Ms. Amy Alderman at the Navajo Tax Commission, Ms. Coburn remembered her conversation with Ms. Etsitty as:

> [Ms. Etsitty] stated [the tax increase from three to four percent] had not been voted on as yet, but there could be a tax increase to [four percent] if the tax commission did approve it. She also stated we would receive written notification one to two months prior to the increase. When I asked about contracts that would be existing, if and when the tax was increased, she stated there would have to be provisions made [for the NBAT] to remain at the [three percent].

Appeal File, Exhibit 40.

Cillessen was notified that it was being considered for the award of the Chinle Center project on April 4, 2007, and asked to confirm its offer. Appeal File, Exhibit 15. Cillessen confirmed its offer that same day. Appeal File, Exhibit 16. Via letter dated April 10, 2007, Cillessen was informed that it was awarded contract HHSI161200700014C, in the amount of $12,298,000, for the expansion and renovation of the Chinle Center. *Id*. Exhibit, 17. The Standard Form 33 shows the effective date of award as April 11, 2007. *Id*., Exhibit 18. A pre-construction conference was held on May 16, 2007, where the notice to proceed was issued and Cillessen was authorized to begin work on May 17, 2007. *Id.,* Exhibit 21. The project was required to be completed within 459 calendar days, and a completion date was established as August 17, 2008. *Id*.

On July 27, 2007, Cillessen forwarded to the contracting officer a request for an equitable adjustment (REA) seeking an increase of $131,481 to the contract amount due to the increase in the NBAT. Appeal File, Exhibit 24. Cillessen informed the contracting officer that the one percent increase applied to the gross receipts on the contract after July 1, 2007. *Id*. Appellant's Vice President, Mr. Jeffrey Cillessen, wrote Mr. Obershaw on July 30, 2007, representing "we were unaware of the tax increase or potential increase at the time of our proposal. Had we been aware we would have asked for clarification prior to our submission of bid." *Id*., Exhibit 28.

Mr. Obershaw responded on July 30, 2007, denying an equitable adjustment for the NBAT increase. Appeal File, Exhibit 26. Further correspondence culminated in Mr. Obershaw writing Cillessen on July 31, 2007, suggesting that if Cillessen was still in disagreement with the Government's decision to deny the REA, it should proceed under the disputes procedures set forth in FAR 52.233-1 (Alt. 1). *Id*., Exhibit 29. The claim was resubmitted with proper certification, and on February 21, 2008, the contracting officer issued a final decision denying the claim. *Id*., Exhibits 36, 37.

Discussion

The issue before us is whether appellant should be able to pass on to the Government a one percent Navajo Nation tax increase that occurred after appellant had submitted its proposal, but before the contract was awarded.

Appellant asserts that it properly bid the project and is entitled to "an automatic increase" or "an equitable adjustment" in the contract price to cover a $131,481 increase in the NBAT. Appellant argues that FAR regulations support an adjustment to the contract price. Alternatively, appellant posits the contract price should be reformed based on mutual or unilateral mistake.

Respondent replies that this was a competitive procurement properly conducted pursuant to FAR 52.215-1 that resulted in a firm fixed-price contract. Respondent argues that appellant is not entitled to an equitable adjustment to compensate it for the increase in the tax rate under the terms of the contract, under applicable FAR provisions, or based on mistake.

In this fixed-price contract the risk of applicable increased state, local, and tribal taxes fell on the contractor. It is well-settled that in a firm fixed-price contract, the contractor assumes the risk of all increased costs except as specifically provided for in the contract. *HLI Lordship Industries, Inc.*, VABCA 1785, 86-3 BCA ¶ 19,182, at 97,026 (1985) (citing *ITT Arctic Services, Inc. v. United States*, 524 F.2d 680 (Ct. Cl. 1975); *McNamara Construction of Manitoba, Ltd. v. United States*, 509 F.2d 1166 (Ct. Cl. 1975); *Sperry Rand Corp. v. United States*, 475 F.2d 1168 (Ct. Cl. 1973). FAR 52.229-3 clearly and unequivocally places responsibility squarely on prospective contractors to include all applicable taxes in their bids or proposals. *Hunt Construction Corp. v. United States*, 281 F.3d 1369, 1372-73 (Fed. Cir. 2002) (cited for authority in *Robertson & Penn, Inc.*, ASBCA 55622, 08-2 BCA ¶ 33,921, at 167,859); *see also Fields Roof Service, Inc.*, VABCA 3147, 90-3 BCA ¶ 23,232.

FAR 52.229-3 was properly incorporated by reference into the contract.[4] The clause specified that the "contract price includes all applicable Federal, State, and local taxes and duties." 48 CFR 52.229-3(b). "All applicable Federal, State, and local taxes" referred to "all taxes and duties, in effect on the contract date," with "contract date" defined as "the date set for bid opening or, *if this is a negotiated contract . . . the effective date of this contract.*" 48 CFR 52.229-3(a) (emphasis added).

Under FAR 52.229-3, a contractor is responsible for making sure it includes the appropriate taxes in its bid or proposal. *Gibson Motor & Machine Service, Inc.*, ASBCA 24363, 80-1 BCA ¶ 14,442, at 71,202 ("the duty of determining tax applicability is on the bidder"); *see also Turner Construction Co. v. General Services v. General Services Administration,* 92-3 BCA ¶ 25, 115. To fulfill this responsibility, prospective contractors are responsible for conducting a sufficient investigation to ascertain the existence or nonexistence of taxes. *GarCom, Inc.*, ASBCA 55034, 06-1 BCA ¶ 33,146 (2005). Based on the terms of the contract and the facts before us, appellant assumed the risk for paying all taxes that were applicable to the contract as of the contract's effective date, which for this procurement was the date of award, April 10, 2007. Appellant may not pass on to the Government the consequences of its own failure to raise the fact of the tax rate increase prior

[4] FAR 52.229-3 was required to be used in the contract pursuant to the prescription contained at FAR 29.401-3(a).

to award.[5]

Appellant also asserts it is entitled the $131,481 increase because FAR 52.229-3(c) provides that "the contract price shall be increased by the amount of any *after-imposed Federal tax* that was not included in the contract price," provided certain conditions are met.[6] This argument fails for two reasons: the increase was neither an after-imposed tax nor a federal tax. The tax rate increase was not after-imposed since it was made known to the public on March 30, 2007. Also, FAR 52.229-3 has been consistently interpreted to deny contractors recovery for after-imposed state, local, and tribal taxes. *Cannon Structures, Inc.*, IBCA 3968-98, 99-1 BCA ¶ 30,236; *Professional Services Unified, Inc.*, ASBCA 48883, 96-1 BCA ¶ 28,073 (1995); *Walker Equipment v. International Boundary and Water Commission*, GSBCA 11572-IBWC, 93-3 BCA ¶ 25,954; *MIDCON of New Mexico, Inc.*, ASBCA 37249, 90-1 BCA ¶ 22,621; *Northwest Piping, Inc.*, IBCA 2611-A, 89-2 BCA ¶ 21,794; *Humphrey Construction, Inc.*, IBCA 2266, et al., 87-2 BCA ¶ 19,923.

We also find no merit in appellant's argument that the clause contained at FAR 52-229-4 should apply to this contract. FAR 52-229-4 may be used for noncompetitive contracts at the discretion of a contracting officer. 48 CFR 29.401-3(b). Unlike FAR 52.229-3, which only provides relief from after-imposed *federal* taxes, FAR 52-229-4 allows contractors to recoup after-imposed federal, state, and local taxes that it is required to pay. 48 CFR 52.229-4. As we noted earlier, FAR 52.229-3 was the appropriate clause to use in this contract. Appellant has provided no facts or justification to apply FAR 52.229-4 to this contract.

Finally, appellant has provided no compelling facts supporting its argument alleging unilateral or mutual mistake. We conclude that any failure on the part of appellant to

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[5] Here, appellant began the process of ascertaining the applicable taxes, but its investigation fell short. Being fully aware it was responsible for paying the applicable NBAT, and that a rate increase was under active consideration, appellant apparently failed to check back to see whether there had been a rate increase or verify that the rate increase would not apply to receipts from the contract. The tax rate was increased, and a press release issued giving notice of the increase, prior to appellant confirming its proposal. However, whether or not appellant acted prudently when it failed to follow-up on the proposed increase is not dispositive to this decision because under the terms of the contract appellant still had the responsibility for paying the applicable taxes.

[6] To obtain relief from after-imposed *federal* taxes, a contractor must warrant in writing that "no amount for such newly imposed Federal . . . tax . . . or rate increase was included in the contract price, as a contingency reserve or otherwise." 48 CFR 52.229-3(c).

ascertain the appropriate amount of NBAT for which it was responsible under the contract was a mistake in judgment. When appellant elected not to raise the tax increase with the Government prior to award it compounded its error in judgment. Contractual relief is not available for errors in judgment. *Satyadev Duggirala v. General Services Administration*, CBCA 463, 07-1 BCA ¶ 33,489, at 165,999 (citing *McClure Electrical Constructors v. Dalton*, 132 F.3d 709 (Fed. Cir. 1997)).

After considering the facts and each of the arguments propounded by appellant, we are not persuaded that the costs it incurred as a result of the NBAT rate increase should be passed on to the Government.

Decision

The appeal is **DENIED**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

JEROME M. DRUMMOND
Board Judge