UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: July 6, 2012

CBCA 2639

RED GOLD, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Anson M. Keller and Gary H. Baise of Olsson Frank Weeda Terman Matz PC, Washington, DC, counsel for Appellant.

Michael Gurwitz, Office of the General Counsel, Department of Agriculture, Washington, DC, counsel for Respondent.

Before Judges **DANIELS** (Chairman), **GOODMAN**, and **SHERIDAN**.

SHERIDAN, Board Judge.

Red Gold, Inc. (Red Gold or appellant) has appealed a contracting officer's (CO's) final decision which was issued by the Department of Agriculture (USDA or respondent). Red Gold asserts that it made a mistake when bidding on a contract to provide salsa to the USDA and that it is entitled to recover $253,608.96, which is the difference between its bid prices and the bid prices of the next low bidders. The USDA asserts that while a mistake may have been made by Red Gold, it was a unilateral mistake that was not sufficiently apparent to require the CO to verify the bids. Respondent posits that, because appellant made a unilateral mistake in bid, contract reformation is not merited. The appeal has been submitted for decision on the written record pursuant to Board Rule 19 (48 CFR 6101.19 (2011)). The record consists of the complaint and accompanying exhibits, the answer, the

appeal file, affidavits, and the briefs of the parties. For the reasons stated below, we grant the appeal.

Findings of Fact

On March 3, 2010, the USDA issued an invitation for bids (IFB) to supply canned goods to be used for federal school lunches and other food assistance programs. The IFB sought bids on a variety of tomato products, including tomato sauces, tomato pastes, and salsa. Six companies responded to the IFB for salsa: 1) Red Gold, located in Indiana; 2) Olam Tomato Processors, Inc., located in California; 3) Del Monte Corporation, located in California; 4) Neil Jones Food Co., located in California; 5) Giovanni Food Company, Inc., located in New York; and 6) Hirzel Canning Company, located in Ohio. The first four companies listed, Red Gold, Olam, Del Monte, and Neil Jones, are all large businesses that grow their own tomatoes and process, pack, and ship tomato products directly from their facilities. The last two companies listed, Giovanni Foods and Hirzel Canning, are small businesses that do not grow tomatoes, but instead must purchase tomatoes to make their products. A company's cost of obtaining its ingredients is a factor in its overall bid price.

Line items 114 through 224 in the IFB were designated for salsa. The line items were organized by delivery date, starting with the earliest. Each line item represented a different delivery location and listed the quantity of salsa cases to be delivered to that location. The bidder was to submit its price per case for each line item on which it chose to bid, and to include its delivery costs as part of its bid price. The CO only saw one price that represented both the product and delivery costs. As the six companies that responded to the IFB were located in different places, the shipping costs varied with the company's location.[1] The bids for salsa had an overall price range of $11.02 to $18.05 per case.

The CO compared the submitted bids for salsa and determined that Red Gold's bids were lowest on all line items except 119, 131, 141, 181, 183, 191, 214, and 215. She awarded Red Gold 92% of the salsa orders, which was approximately 95,760 cases of salsa.[2] She did not hold a post-award conference or request verification of any bid pricing, and she affirmed that she had "no reason to believe that the prices offered by Red Gold were not their intended bid price." She stated that she reviewed the bids for responsiveness and to determine if they were "fair and reasonable." Her review process "typically includes, but is

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[1] Typically, the further a bidder's plant was from the location where the product was needed, the greater the shipping cost.

[2] The same CO evaluated the bids, awarded the line items, and issued the final decisions in this matter.

not limited to, looking at the destinations for the product, relative to the production facilities."

The CO explained that "the information gleaned from bid histories does not impact my determination on what is a fair and reasonable price for the current invitation," so she did not analyze individual bidders' historical bid submissions. She did not compare Red Gold's bids for the solicitation against its past years' bids for salsa. She said, however:

> I do look at the overall historical awarded price [3] for the product being procured because it plays a role, but not the only role in helping me determine what is a fair and reasonable price. In the case of salsa, the historical record indicated that Red Gold's bid price was fair and reasonable.

The CO noted that in all bids there are several cost factors that make up a bid price, but she also realized that gaining the highest profit is not necessarily always a motive. She stated that vendors sometimes have their own motives for bidding low, including getting the contract so that their business keeps operating. The CO opined that "[i]t is not my responsibility to second-guess an offeror's motives as relates to its bid."

> In my 25 years of contracting experience, I have found mistakes in bids submitted by offerors. The mistakes I found were always apparent and obvious, such as when the bid price received was at $1.15 when the vendor obviously meant to bid $11.50, or $0.90 as opposed to $9.00. On each such occasion, I immediately contacted the offeror to verify their bid submission.
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> In the case of Red Gold's bid . . . I saw no apparent and obvious mistakes in its bid. Neither was there any clear and convincing evidence to suggest that Red Gold had bid anything other than what it intended to bid; there certainly were no obvious or gross mistakes present. Instead, I considered their offered prices to be fair and reasonable. [Red Gold's] prices offered on many of the line items were consistent with other bidders and at no time seemed obviously out of line.

The CO noted that she has analyzed past bid submissions with significant price differentials and learned during post-award conversations about a variety of decision points

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[3] For purposes of this decision the overall historical awarded price range is composed of the highest and lowest prices that were bid on salsa solicitations from September 2008 to the solicitation in issue.

that resulted in the bid price. "[T]his situation was not unusual to me, and did not require any post-award conversations. It remains my professional opinion that all thing considered, Red Gold's offered prices were fair and reasonable."

The historical prices of salsa for 2008, 2009, and 2010, referred to by the CO, showed:

Date of Solicitation	Price Range
06/27/08	$12.84 - $18.26
08/21/08	$15.15 - $20.97
09/23/08	$16.38 - $21.05
11/19/08	$16.85 - $20.68
06/23/09	$15.51 - $20.89
08/12/09	$15.46 - $21.54
04/14/10	$11.02 - $18.05

The CO was also able to compare Red Gold's prices to the prices of other bidders through a report that was processed on April 12, 2010, just two days before she awarded the contract. The report, referred to as the "Destination Price Bid Array," was a listing of all of the line items in the IFB and their respective locations, along with the bid prices for each item. The report showed, for each line item, the names and bids of the respective offerors, from the lowest to the highest price. Samples of the report showing the bid arrays for line items 114 through 121 (East Coast) and 199 through 202 (West Coast) is as follows:

Line Item No.	Destination State	Price Per Case (awarded)	Price Per Case	Price Per Case	Price Per Case
114	NY	Red Gold 12.39	Olam 17.69	Neil Jones 18.12	Del Monte 18.89
115	VT	Red Gold 13.38	Olam 17.42	Del Monte 18.87	Neil Jones 19.08
116	MD	Red Gold 12.16	Del Monte 18.24	Neil Jones 18.41	Olam 18.43
117	NJ	Red Gold 13.15	Olam 17.62	Neil Jones 19.02	SML 19.88
118	VA	Red Gold 12.59	Olam 13.50	Neil Jones 18.93	SML 20.24
119	VA	Olam 17.75	Neil Jones 18.60	Del Monte 19.32	SML 20.16
120	WV	Red Gold 11.69	Olam 17.50	Del Monte 18.19	Neil Jones 18.25
121	FL	Red Gold 13.09	Olam 17.56	Neil Jones 18.72	Del Monte 19.26
. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
199	AZ	Red Gold 13.34	Olam 14.87	Neil Jones 15.82	Del Monte 15.83
200	CA	Red Gold 12.22	Olam 14.20	Neil Jones 14.77	Del Monte 15.07
201	CA	Red Gold 12.35	Olam 14.19	Neil Jones 14.79	Del Monte 15.03
202	CA	Red Gold 12.72	Olam 13.83	Neil Jones 14.62	Del Monte 14.94

(SML is the designation for either of the two smaller businesses, Giovanni Food Company or Hirzel Canning Company.)

During her evaluation of the bids, the CO also considered the destinations of the salsa relative to the locations from which the cases were shipped. For example, the CO noted in her affidavit that, because Red Gold is located in Indiana, it has lower transportation costs for goods sent to the East Coast than do its three competitors that are located in California. The CO used this difference in transportation costs to explain why Red Gold's price (with shipment from Indiana) was $12.39 per case of salsa for contract line item 114 to be delivered to New York, while the second lowest bid was priced at $17.69 per case with shipment from California.

Red Gold began shipping some of the 95,760 cases of salsa by August 16, 2010, the first delivery date listed in the contract. USDA provided receipts for the salsa it received, and Red Gold used these receipts to prepare invoices to the USDA for payment. On September 14, 2010, a Red Gold accountant, conducting a monthly profitability analysis, noticed that Red Gold had sustained business losses instead of gains on the USDA account. Further investigation by the financing and auditing department showed that the losses were the result of an error made by Red Gold in pricing the USDA salsa bids. Red Gold had inadvertently used the price for low sodium tomato sauce in some of its USDA salsa bids.

According to Red Gold, its base price per case was $16.90 for salsa and $10.80 for low sodium tomato sauce.[4] Red Gold had mistakenly used the $10.80 per case price for low sodium tomato sauce instead of the $16.90 per case price for salsa for line items 114 through 224 of the IFB. The correct shipping charges were used in the bids, but they were added to the wrong base prices. This error, Red Gold says, resulted in it bidding $6.10 less per case of salsa than it intended.

Red Gold notified the USDA about its pricing error on September 24, 2010, and requested to speak with the CO concerning possible remedies. The USDA responded the same day and stated that it would need documentation of the error before determining whether a remedy, if any, would be available. Red Gold subsequently provided the USDA with additional information concerning its error and stated that it "certainly [doesn't] expect to recover the full amount, but requests some relief to invoice at a higher price that would at least cover our variable costs." Red Gold identified these variable costs as being $3.63 per case of salsa.[5] On October 4, 2010, the CO sent an email message to Red Gold requesting additional documentation, which Red Gold provided on October 6. The CO sent back an

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[4] The base prices do not include shipping charges.

[5] Red Gold initially requested compensation for 64,752 cases of salsa, but subsequently modified this number to 58,368 cases. This change in the number of cases of salsa was undisputed by the USDA, and the use of the number 58,368 served as the basis of this appeal.

email message on October 8 acknowledging that a mistake in salsa bids had been made but stating that "USDA cannot accept the intended or corrected price for line items 114 through 224 [as the] prices were higher [than those of the next low bidder] and would not have been awarded to Red Gold, Inc."[6] The CO told Red Gold that the USDA would not pay Red Gold more than the contract prices for the cases of salsa that were already shipped, but that it was willing to cancel the orders for the remaining cases. Red Gold responded the same day, explaining that it was not asking to recover its "intended price," and stating that "it is our hope to settle at a price that at least covers our material costs, if not our total variable costs." While Red Gold did not state precisely the amount it sought, it asked to meet with the CO to discuss a possible remedy. On October 13, 2010, the CO responded to the email message by issuing a final decision.

The final decision stated that:

> USDA is not authorized by law to adjust the bid price upward to a "remedy price," or otherwise to cover Red Gold's "variables" and other costs; USDA is only authorized by law to adjust the price if your intended or corrected price is lower than that of the second bidder. That is not the case here.

The CO also requested Red Gold to provide the "notice to deliver numbers" for the cases that had not yet been shipped so that the unshipped salsa orders could be canceled.

Red Gold appealed the CO's final decision not to reform the contract price to this Board, which docketed the matter as CBCA 2259. The appeal was dismissed for lack of jurisdiction because a properly certified claim had not been submitted to the CO for final decision. *Red Gold, Inc. v. Department of Agriculture*, CBCA 2259, 12-1 BCA ¶ 34,921 (2011).

Red Gold subsequently submitted a properly certified claim on July 15, 2011, seeking damages in the amount of $253,608.96. To calculate its damages, Red Gold looked at each contract line item it had been awarded and subtracted the next lowest bidder's price from Red Gold's award price, reaching the dollar difference between the two. It then multiplied that dollar difference by the number of cases Red Gold shipped under that particular line item. This product is the dollar difference between what Red Gold was paid and what the next low bidder would have been paid for a single line item. After it calculated subtotals for each line item, it added all the subtotals together to reach the total amount of $235,608.96. For example, for line item 114, Red Gold's award price was $12.39 per case of salsa. Red Gold subtracted the $12.39 price from $17.69, which was the next lowest bidder's price, to reach

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[6] The CO notes that while Red Gold received 92% of the salsa awards at its mistaken base price of $10.80 per case, Red Gold would not have been awarded any salsa contracts had its intended base price been $16.90 per case.

$5.30, which was the difference between the two amounts. It then multiplied the $5.30 price difference by the 912 cases that were shipped to reach a subtotal of $4633.60, which represents what USDA would have paid additionally, had the next low bidder been awarded the line item. Adding the subtotals, Red Gold calculated a sum of $253,608.96. This, it proffers, represents the total difference between what it was paid for the salsa it delivered versus the total of the additional amount that the USDA would have paid using the prices of the next low bidders.

The CO's final decision was issued on September 15, 2011, denying the claim in total. As reasons for her denial, the CO found that the mistake was not sufficiently apparent to charge her with notice of the mistake at the time of the bid. She again noted her opinion that she could only adjust the price if Red Gold's "intended or corrected price is lower than that of the second low bidder." Red Gold appealed the CO's final decision.

The parties agreed to submit the case for a decision on the record pursuant to Board Rule 19. Exhibits, affidavits, a joint stipulation of facts (with supplements and corrections), and briefs were submitted by the parties in support of their respective positions.

Discussion

A contractor may obtain a remedy for a unilateral mistake after the award of a contract after establishing five elements by clear and convincing evidence. The contractor must show (1) a mistake in fact occurred prior to the contract award; (2) the mistake was a clear-cut clerical or mathematical error or a misreading of the specifications; (3) prior to the award, the Government knew or should have known that a mistake had been made; (4) the Government did not request bid verification; and (5) proof of the intended bid. *Singleton Enterprises v. Department of Agriculture*, CBCA 1981, 12-1 BCA ¶ 34,924, at 171,734 (citing *McClure Electrical Constructors, Inc. v. Dalton*, 132 F.3d 709, 711 (Fed. Cir. 1997)); *see also* 48 CFR 14.407-4.

There is no dispute as to elements 1, 2, 4, and 5. The parties agree that a mistake in bid occurred when Red Gold used the $10.80 base price for a case of low sodium tomato sauce instead of the higher, $16.90 base price for a case of salsa. They also agree that the mistake was made prior to contract award and was the result of a clerical error. The CO did not request bid verification. Red Gold supplied adequate documentation, and the CO accepted that documentation as sufficient proof of its intended bids. The issue that remains to be resolved is element 3 - whether the CO knew or should have known of Red Gold's possible mistake, and, therefore, should have requested verification of the bid. The Board must determine "the degree of the contracting officer's knowledge, whether actual or imputed, based on all the evidence presented on that issue." *Bromley Contracting Co. v. United States*, 794 F.2d 669, 672 (Fed. Cir. 1986).

In the instant case, the CO stated in her affidavit that there was nothing that alerted her to a bid mistake by the contractor. "The test of what an official in charge of accepting bids 'should' have known must be that of reasonableness, i.e., whether under the facts and circumstances of the case there were any factors which reasonably should have raised the presumption of error in the mind of the contracting officer." *Chernick v. United States*, 372 F.2d 492, 496 (Ct. Cl. 1967). Such factors include, among other things, an obviously wide range of bids or gross disparity between the price bid and the value of the article which was the subject of the bid. *Id*. However, price disparity alone does not necessarily mean that there has been constructive notice of a mistake where other factors tend to negate the inference of error. *Uniflite, Inc.*, ASBCA 27818, 85-1 BCA ¶ 17,813, at 89,034. Where "circumstances exist at the time of bid evaluation which offer reasonable explanations for disparity between bids," the Government will not be charged with a mistake. *Aydin Corp. v. United States*, 669 F.2d 681, 687 (Ct. Cl. 1982).

In the instant case, we find that the CO should have been alerted to a possible mistake in the bid when she reviewed the historical pricing data and the Destination Price Bid Array report. The historical pricing data indicated a sharp drop in price from most of the previous salsa procurements. The solicitations for 2009 yielded price ranges of $15.46 to $21.54, while the disputed 2010 solicitation only yielded price ranges from $11.02 to $18.05. This represents an approximately forty percent difference between Red Gold's bid prices and the lowest bid prices in the prior year's solicitations. That difference should have caused a reasonable CO to question Red Gold's bid prices. The CO is correct in her conclusion that there may be various reasons why an offeror might intentionally submit a low bid. Nevertheless, that does not obviate the duty of a CO to consider the possibility of a mistake when he or she encounters facts that raise the question of mistake, and to take appropriate steps to resolve that question. In this case, the CO did not note any specific circumstances that would explain the pricing disparities, and her reference to general circumstances that might cause a contractor to intentionally submit a low bid are not compelling. If we accept the CO's logic, bid verification would never be required except for instances of obviously misplaced decimals or numbers.

Similarly, the Destination Price Bid Array report indicated that Red Gold consistently bid significantly less than its competitors on most of the contract line items in the solicitation. The CO attested that she attributed the large differences in product prices to differences in shipping costs to the various destinations. For example, Red Gold's location in Indiana allowed it to have significantly lower delivery costs to New York than did its major competitors in California. The difference in shipping costs, the CO posited, might have enabled Red Gold to maintain a thirty percent price advantage over its more distant competitors. However, this reasoning does not explain why Red Gold's prices for goods to be shipped to California were approximately fifteen to twenty percent lower than the bids of its three major competitors who had plants in California and therefore should have had lower

bid prices because of lower shipping costs. *See Connelly Containers, Inc. v. United States*, 7 Cl. Ct. 423, 426 (1985) (where a CO was charged with noticing discrepancies in shipping costs based on proximity to contractor location).

Either the historical prices for salsa or the Destination Price Bid Array report should have put a CO on notice of a possible mistake in bid. With the information she had before her, the CO clearly should have requested verification of Red Gold's bids prior to award. We have found that the CO should have been alerted to a possible mistake and requested bid verification, so appellant has proved the last of the elements necessary for remedying a unilateral mistake. We now turn to whether Red Gold has proved that it is entitled to the $253,608.96 it seeks.

A contractor may receive compensation for its unilateral mistake in bid, but recovery may not exceed that of the next lowest acceptable bid under the original invitation for bids. 48 CFR 14.407-4(b)(2). A contractor is not precluded from recovery if its intended bid was higher than other acceptable bids and would not have received a contract award. *Shepard v. United States*, 95 Ct. Cl. 407, 411 (1942). In *Shepard*, the contractor intended to bid $3.75 per ton of coal, but mistakenly bid $2.75 per ton. The next low bidder's price was $3.50 per ton. The contractor was not barred from recovery because its intended bid was $0.25 per ton greater than the second lowest bid. The court found that the contractor was entitled to recover $0.75 per ton more, the difference between the contractor's bid and the next lowest bid. *Id*.

Similarly, in *Walter Straga*, ASBCA 26134, 83-2 BCA ¶ 16,611, although the intended bid was $46,222 higher than the awarded contract price, recovery was limited to the $23,680 difference between the mistaken bid and the next low bid.

The CO was not correct in her supposition that a contractor can *only* recover on a mistake in bid if its "intended or corrected price is lower than that of the second low bidder." The principles associated with mistake in bid are not intended to bar recovery when a contractor's intended price is higher than the next lowest bidder's price. Rather, they are designed to place the Government in "essentially the same position as it would have been in had it recognized the error in appellant's bid and allowed withdrawal of the bid." *Walter Straga*, 83-2 BCA at 82,618.

Red Gold seeks $253,608.96, the difference between its contract price and the next lowest bidders' prices for the 58,368 cases of salsa that were shipped. We find that Red Gold's methodology for calculating this amount is reasonable. The USDA has not disputed the bid prices that Red Gold used or its methodology, nor has it offered any alternative calculations.

Decision

The appeal is **GRANTED**. We award Red Gold, Inc. $253,608.96, plus interest, at rates prescribed pursuant to the Contract Disputes Act, 41 U.S.C.A. § 7109 (West 2011), from July 15, 2011, until the date of payment.

PATRICIA J. SHERIDAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ALLAN H. GOODMAN
Board Judge