UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: January 13, 2012

CBCA 1981

SINGLETON ENTERPRISES,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Wayne Singleton, Owner of Singleton Enterprises, Luthersville, GA, appearing for Appellant.

Marilyn J. Brown, Office of General Counsel, Department of Agriculture, Little Rock, AK, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **DRUMMOND**.

BORWICK, Board Judge.

Appellant, Singleton Enterprises, appeals from the decision of a contracting officer of the Department of Agriculture, through the National Resource Conservation Service (NRCS), denying appellant's request for correction of a bid mistake after award. For the reasons below, we sustain the decision of the contracting officer and deny the appeal.

Findings of Fact

Solicitation provisions

On February 6, 2009, respondent issued a solicitation for the Hanson Marsh Hydrologic Restoration (Hanson Marsh) project. The Hanson Marsh is located in Terrebonne Parish, Louisiana, at the intersection of Shell Road and U.S. Highway 90, and approximately 720 feet north of the Gulf Intracoastal Waterway.

The solicitation contained five bid items: (1) construction surveys; (2) mobilization and demobilization; (3) excavation, marsh creation, and dredging, with an estimated 50,000 cubic yards of fill needed to complete the project; (4) earthfill, containment dike and open marsh area, with an estimated 5646 linear feet of dike to be created; and (5) staff gauge units. One award was to be made from an aggregate of all bid items; thus, the solicitation required bidders to complete all items.

Bid items one and two are self-explanatory. For bid item three, the solicitation explained that the contractor was to excavate dredge material and place the material in the marsh creation area to the lines and grades depicted on attached construction drawings. The solicitation required, among other items, use of a hydraulic dredge not exceeding a diameter of twelve inches, with the dredge material to be taken from a designated borrow area shown on the drawings. The contractor was to have on site the required length of dredge discharge pipe to reach from the farthest point within the borrow area to the farthest point in the marsh creation placement area. The estimated length of the pipe was between 4500 and 5000 linear feet.

Bid item four consisted of all work necessary to place and shape earth fill needed to complete earthen containment dikes to be placed along the perimeter of the marsh creation areas as shown on the drawings. All material for the earthen containment dikes was to be taken from the marsh creation area shown on the drawings. Bid item five required the contractor to provide and install staff gauge units in the marsh creation area for determining the fill elevation of the dredge fill material.

The project work was limited to ten hours per day, six days per week.

The Government's estimate

Respondent's engineer estimated a lump sum $5000 for bid item one; a lump sum of $50,000 for bid item two; $250,000 for bid item three, based upon 50,000 cubic yards of dredging material at $5 per cubic yard; $141,150 for bid item four, based upon constructing 5646 linear feet of containment dike at $25 per linear foot; and $6250 for bid item five, based upon twenty-five staff gauges at $250 each.

The process of developing the Government's estimate[1]

The Government started its estimating efforts by developing a preliminary estimate dated January 24, 2008, for the Hanson Marsh project. The dredging estimate is of primary importance in this matter. The preliminary dredging estimate for the project was $4 per cubic yard of fill. Respondent's civil engineer, Mr. Loland Broussard, who was responsible for the preliminary estimate, testified at the hearing that he used a template (called project priority list seventeen or PPL-17) for typical construction costs of Coastal Wetlands Planning, Protection and Restoration Act (CWPPRA) projects.[2] The template is updated annually.

The template was developed by an engineering work group of agency officials responsible for administering the CWPPRA. As of February to May 2007, the estimated dredging cost for the PPL was $3.75 per cubic yard.

Mr. Broussard testified that the $3.75 per cubic yard preliminary estimate was based upon a combination of large and small CWPPRA dredging project estimates. He adjusted the preliminary estimate to $4 per cubic yard, taking into account the specific variables of the Hanson Marsh project. The Hanson Marsh project was then estimated to need 72,000 cubic yards of fill to complete the project. The two variables that caused the $.25 upward adjustment, rather than a greater figure, were the low volume of the fill in the Hanson March project as compared to larger projects and the short distance between the borrow area and the marsh creation site as compared to other projects.

In furtherance of his preliminary estimate, Mr. Broussard tested that estimate against the low bid of a similarly sized project, called the Portage project, which was

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[1] The parties filed cross-motions for summary relief in this matter, but were in sharp disagreement concerning a material fact, the reasonableness of the Government's estimate. Cross-motions for summary relief are denied when there are disputed material facts present in each motion. *Cf. Serco, Inc. v. Pension Benefit Guaranty Corp.*, CBCA 1695, 11-1 BCA ¶ 34,662. We reserved ruling on the parties' motions in order to take testimony on the reasonableness of that estimate. Given the presence of disputed material facts, we deny the cross-motions. We use the evidence in the record, including the appeal file and supplemental appeal file submitted by appellant, as well as the hearing transcript, as the basis for our findings.

[2] Mr. Broussard has estimated over one dozen CWPPRA projects and has served full-time since 1994 at the engineering work group as a project manager and planning engineer.

completed in 2003. The low bid on that project was $7.50 per cubic yard. He reduced that figure by $3.50 for a variety of reasons. First, the Portage project contract combined into the dredging line items bid items that were separately broken out into items four and five in the Hanson Marsh project solicitation. Second, although the Hanson Marsh project was a similar size to the Portage project, the Portage project required a different type of dike construction and the project lay near a high pressure gas line. Mr. Broussard factored in what he assumed to be extra dredging costs of the Portage project associated with dredging near a hazardous utility line. Third, the pumping distance for the Portage project was 11,000 feet, while the pumping distance for the Hanson Marsh was less than half that, which might also reduce the dredging cost if a contractor included pumping expenses in a per cubic yard dredging cost. In developing his preliminary dredging estimate of $4 per cubic yard, Mr. Broussard did not take into account any increase in unit cost based upon a limitation of dredging hours to ten hours per day; his estimate was based upon dredging twenty-four hours per day. He stated that all conditions of two projects being equal, a limitation on dredging hours for one project might increase the unit dredging costs for that project.

After Mr. Broussard prepared his preliminary estimate, that estimate was provided to the design engineers for the project, Mr. Faulkner and Mr. Slocum, to produce a final estimate for the solicitation. The design engineers used Mr. Broussard's $4 per cubic yard dredging estimate as a starting point, but they conducted their own analysis. The first step in their analysis was an on-site survey of the work area, using global positioning system devices and computer-aided design software to estimate the size of the work area and the amount of fill necessary to both build the containment dikes and to fill in the marsh area. The engineers estimated 50,000 cubic yards of fill would be needed, which was a reduction from Mr. Broussard's preliminary estimate of 72,000 cubic yards.

The design engineers examined the Portage project and compared the Portage project to the Hanson Marsh project. The design engineers considered the same differences between the Hanson Marsh project and the Portage project as those identified by Mr. Broussard.

In addition, the design engineers considered other cost factors that would increase the Portage project's dredging unit cost per cubic yard over the Hanson Marsh project. Those factors were the requirement that the dredging pipe for the Portage project had to cross a lake using floats, while that was not the case with the Hanson Marsh property. Also the length of the Portage project dredging pipe required use of a booster pump, which was not necessary for the Hanson Marsh project. The design engineers also considered that the Portage project was six years older than the Hanson Marsh project.

Considering those factors, the design engineers deducted $2.50 per cubic yard to estimate a $5 per cubic yard for dredging the Hanson Marsh project.

The design engineers examined the estimated production rate for the Hanson Marsh project of 1800 cubic yards of dredge fill material per day in determining the performance time of the project. The daily production rate did not figure prominently in Mr. Slocum's unit price calculations; rather, he used it to calculate the estimated time of performance. Mr. Slocum saw little effect of the unit production rate on unit costs, save for a slight increase in a contractor's equipment costs if the performance time were extended.

The bids as compared to the Government's estimate

The Government total estimate for the project was $452,400, and, as noted above, the Government estimated excavation and marsh creation to take 50,000 cubic yards at $5 per cubic yard or a total of $250,000 for that line item. The Government estimated $50,000 for mobilization and demobilization. Appellant's total bid was $486,200, with appellant bidding the excavation and marsh creation line item at $280,000, or $5.60 per cubic yard for the estimated 50,000 cubic yards of fill required. Appellant bid $63,350 for mobilization and demobilization. The next lowest bid was $788,962, with the firm bidding the excavation and marsh creation line item at $400,000 or $8 per cubic yard for the estimated 50,000 cubic yards and $235,000 for the mobilization and demobilization line item. The other bids were $979,164.12 and $3,063,828.20.

On March 10, 2009, the bids were opened, without bidders being present. Respondent's contract specialist determined that other than the mobilization and demobilization line items, there was no significant variation in the low and second lowest bids for the other line items as against the Government's estimate or in relationship to each other. She thought the variation in the mobilization and demobilization bids could be attributed to the variables between different types of equipment to be used and to the distances from which the equipment was to be mobilized. The contract specialist determined that there was no need for bid verification before award because the face of the bids did not show evidence of a mistake in bids.

The contract specialist notified appellant of its apparent low bid status on March 16, 2009, and the contract was awarded to the appellant on April 9, 2009, for a lump sum price of $486,200.

Contract performance and notification of mistake in bid

Respondent issued its notice to proceed on June 22, 2009. The contract required appellant to commence work within twenty calendar days after receipt of the notice to proceed, with work to be completed within 211 calendar days. The contract required appellant to construct containment dikes to specifications, then to let the land surrounded by the containment dikes settle before commencing with placement of fill in the marsh restoration area.

Appellant hired Tri-Native Contractors as subcontractors to perform the work on-site. Appellant had not obtained subcontractor quotes from Tri-Native when bidding. Appellant's bid was based upon quotes from another dredging firm--Kenny Sloan--which appellant did not use to perform the work. According to appellant's owner, he obtained the quotes when Kenny Sloan was dredging in the Turks and Caicos Island, as well as in South Florida.

Appellant terminated Tri-Native's contract for non-performance at the end of November 2009. One or two days after appellant terminated Tri-Native, on December 2, 2009, almost seven months after contract award, appellant notified the contracting officer of the alleged mistake in bid.

In its notification of mistake-in-bid, appellant stated that in developing the bid for line item 3--excavation, marsh creation, and dredging--it calculated a daily cost of $8748 per day for the dredging line item. Using a production rate of 105 cubic yards per hour and applying that figure to the estimated quantity of 50,000 cubic yards, appellant calculated that it would take 477 hours to complete the dredging required by the solicitation and resulting contract. Dividing that figure by the ten hour workday allowed under the contract resulted in forty-eight days calculated to perform the dredging line item. Further dividing the estimated 50,000 cubic yards of fill by forty-eight days resulted in a production rate of 1042 cubic yards per day, or a unit price of $8.14 (dividing the daily cost of $8478 by 1042). Appellant then explained that its actual bid should have been $545,000 for line item three, increasing its bid to $751,200, instead of the $486,200 bid that was the basis for the contract award.

These calculations were presented to the contracting officer in a fourteen page submission. In that submission, appellant attached six pages of hand-written, undated notes purporting to be the costs upon which appellant based its bid. The only independent verification of subcontractor costs contained in the submission was an invoice from the contemplated staff gauge supplier, C.C. Lynch & Associates. Appellant did not submit to the contracting officer documentation or other evidence from Kenny Sloan as to its quote to appellant for line item three, the dredging and excavation work that comprised the principal task under the contract. Appellant did attach a paper accounting sheet with the

notation "BOD 3-10-09." In its notification, appellant's owner certified that the calculations were the original of appellant's bid estimate. The record of this appeal, moreover, contains no independent information from Kenny Sloan as to its quote to appellant for the dredging work on the Hanson Marsh project.[3]

Decision of the contracting officer

The contracting officer reviewed appellant's claim under the procedures established by Federal Acquisition Regulation (FAR) provision 14.407-4. As to line item three, she concluded that there was not clear and convincing evidence of a mistake because she could not substantiate the claimed amount with the subcontractor from which appellant obtained the information because appellant did not provide the contracting officer with the subcontractor's address or telephone numbers. Consequently, she concluded that "the Government can not satisfy itself as to the validity of these contractors or the information received without substantiating evidence."

The contracting officer noted that documentation was lacking to substantiate costs relative to labor, overhead, and profit to determine what costs were utilized in the preparation of the bid. She noted that the only item for which a bid estimate was received was from C.C. Lynch & Associates for the staff gauges. She could not accept appellant's statement of equipment costs in the bid, because in its equipment submittals appellant indicated that all of its equipment was owned, but the equipment costs in appellant's cost estimating worksheets submitted in support of its corrected bid did not correlate to use of appellant's own equipment. There were no job estimation sheets provided by contractors to verify equipment pricing in its corrected bid, if appellant was to subcontract use of equipment, or any depreciation schedules, equipment repair costs, or other data to substantiate the true cost of appellant's use of its own equipment in the corrected bid.

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[3] Appellant's representative stated at the hearing that he subcontracted the dredging work to Tri-Native for $2.69 per cubic yard. Adding appellant's standard mark-up, profit, and bond to that price, appellant's fully loaded price to the Government for line item three would have been $3.60 per cubic yard. Since appellant had bid $5.60 per cubic yard, appellant's additional profit on that item over and above his fully-loaded bid would have been $2 per cubic yard or $100,000 for dredging 50,000 cubic yards of fill had appellant's subcontractor successfully performed the contract. Before respondent terminated the contract for default, Tri-Native had performed the majority of the work on the contract; the only work appellant performed was installation of the staff gauges. Another subcontractor performed construction surveys. Appellant's owner and representative never visited the site for preparation of the bid, or, for that matter, during Tri-Native's performance of the contract.

The contracting officer compared the Government's estimate with the two lowest bids. She did not use higher bids of the two contractors who were well over the estimate. The contracting officer also found no significant disparity between the Government's estimate and the two lowest line item bids, save for the mobilization and de-mobilization line item. As to line item three, she stated:

> When reviewing the unit pricing for the excavation, there didn't appear to be an apparent disparity between the government estimate and the low bidder and only a slight difference in unit pricing between the low bidder [appellant at $5.60 per cubic yard] and the second low bidder [at $8 per cubic yard]. In my opinion, these were realistic based on excavation the NRCS had seen on other contracts for this type of work.

She did not consider the bid disparity between the mobilization and de-mobilization line items significant because of the differences in the types of equipment to be used and the distances from where the equipment would be brought. For the above reasons, the contracting officer denied correction of the bid.

Discussion

FAR 14.407-4 provides:

> Mistakes after award.
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> If a contractor's discovery and request for correction of a mistake in bid is not made until after the award, it shall be processed under the procedures of Subpart 33.2 and the following:
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> (a) When a mistake in a contractor's bid is not discovered until after award, the mistake may be corrected by contract modification if correcting the mistake would be favorable to the Government without changing the essential requirements of the specifications.
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> (b) In addition to the cases contemplated in paragraph (a) above or as otherwise authorized by law, agencies are authorized to make a determination--
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> . . . .

> (2) To reform a contract (i) to delete the items involved in the mistake or (ii) to increase the price if the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original invitation for bids; or
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> (3) That no change shall be made in the contract as awarded, if the evidence does not warrant a determination under subparagraphs (1) or (2) above.
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> (c) Determinations under subparagraphs (b)(1) and (2) above may be made only on the basis of clear and convincing evidence that a mistake in bid was made. In addition, it must be clear that the mistake was (1) mutual, or (2) if unilaterally made by the contractor, so apparent as to have charged the contracting officer with notice of the probability of the mistake.
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> (e) Mistakes alleged or disclosed after award shall be processed as follows:
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> (1) The contracting officer shall request the contractor to support the alleged mistake by submission of written statements and pertinent evidence, such as (i) the contractor's file copy of the bid, (ii) the contractor's original worksheets and other data used in preparing the bid, (iii) subcontractors' and suppliers' quotations, if any, (iv) published price lists, and (v) any other evidence that will serve to establish the mistake, the manner in which the mistake occurred, and the bid actually intended.

48 CFR 14.407-4 (2009).

When, as is the case here, a contractor seeks reformation of its contract for a unilateral mistake-in-bid, the contractor must establish by clear and convincing evidence each of the following elements: (1) a mistake in fact occurred prior to the contract award; (2) the mistake was a clear-cut clerical or mathematic error or a misreading of the specifications and not a judgment error; (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 is established. *McClure Electrical Constructors, Inc. v. Dalton*, 132 F.3d 709, 711 (Fed. Cir. 1997) (citing with approval

Solar Foam Insulation, ASBCA 46921, 94-2 BCA ¶ 26,901); *see also Liebherr Crane Corp. v. United States*, 810 F.2d 1153, 1157 (Fed. Cir. 1987).

Clear and convincing evidence is a higher standard than a preponderance of the evidence. In a case of mutual mistake arising out of the Philippine Islands, Justice Brandeis held that proof of mistake must be of the "clearest and most satisfactory character," i.e., a "stringent requirement." *Philippine Sugar Estates Development Co. v. Government of the Philippine Islands*, 247 U.S. 385, 391 (1918). More recently, the General Services Board of Contract Appeals held that "clear and convincing evidence" is "evidence sufficient to set the tribunal's mind at ease. It must engender a feeling of believability. It must be complete as to all material points and it may not be conflicting, confusing or unreliable." *All American Poly Corp*., GSBCA 7104, 84-3 BCA ¶ 17,682, at 88,187. In that case, the board refused to accept the contractor's explanation as clear and convincing evidence without objective evidence as to what the bid would have been. *Id*. at 88,188; *see also Wheeled Coach Industries v. General Services Administration*, GSBCA 10314, 93-1 BCA ¶ 25,245, at 125,741 (1992) (worksheets alone not sufficient to qualify as clear and convincing evidence).

In this matter, appellant argues that it has met the requirements of FAR 14.407-4 for establishing a mistake in its bid and for reformation. Even if, for the purposes of argument, we grant the existence of a mistake (element one) and that the mistake was a clear-cut clerical error, an unintended switching of digits from $8.14 to $4.18 (element two), appellant did not present to the contracting officer or to the Board clear and convincing evidence that the Government should have known of the mistake before award (element three) or of its intended bid (element five).

As to element three, appellant argues that the disparity between the Government's estimate and the third highest bidder should have put the contracting officer on notice of the mistake before award. We disagree. Disparity of bids alone is not sufficient to put the contracting officer on notice of a pre-award mistake, when the contracting officer in analyzing bids relied on a reasonable government estimate. *Bromley Contracting Co. v. United States*, 794 F.2d 669, 672 (Fed. Cir. 1986); *Aydin Corp. v. United States*, 669 F.2d 681, 687 (Ct. Cl. 1982). Here, appellant's bid was within about seven per cent of the Government's estimate. Despite appellant's argument to the contrary, we find that the Government's estimate was reasonable. The estimate was based upon a two-step analysis, one by the Government's multi-agency engineering working group and a subsequent analysis by respondent's design engineers. Both groups took as a basis for comparison the lowest bid on a similar-sized project, the Portage project, making adjustments to account for the differences between the Portage project and the Hanson Marsh project.

In her analysis, moreover, the contracting officer went further than simply relying on the Government's estimate. She also analyzed the second-low bid and concluded that there was no meaningful disparity between line items in appellant's bid and the second low bid, save for the mobilization and de-mobilization line item. For the essential line item three, she found a difference of 30% between appellant's bid and the second low bid, which is not a significant disparity in light of the range of bids. *Cf. Wender Presses, Inc. v. United States*, 343 F.2d 961, 964 (Ct. Cl. 1965) (125% disparity between line item bids did not put contracting officer on notice of mistake in light of the range of bids). In light of the Government's estimate and the similarity in bids between appellant's bid and the second low bid, the contracting officer properly concluded that pre-award verification of bids was not necessary.

Appellant did not present to the contracting officer or to the Board clear and convincing evidence of what its intended bid would have been absent the mistake, particularly as to line item three. Appellant failed to present to the contracting officer third-party verification of Kenny Sloan's bid to appellant. There were inconsistencies between appellant's equipment submittals showing contractor owned equipment and its estimating worksheets which were based on equipment owned by others.

Decision

The appeal is **DENIED**.

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ANTHONY S. BORWICK
Board Judge

We concur:

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STEPHEN M. DANIELS
Board Judge

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JEROME M. DRUMMOND
Board Judge