UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: January 10, 2024

CBCA 6891

DANIELS BUILDING COMPANY,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Bret S. Wacker of Clark Hill PLC, Detroit, MI; and Jonathan Christopher White and Brian Lick of Clark Hill PLC, Lansing, MI, counsel for Appellant.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA, counsel for Respondent.

Before Board Judges **RUSSELL**, **GOODMAN**, and **SHERIDAN**.

RUSSELL, Board Judge.

Appellant, Daniels Building Company (DBC), seeks reformation of its contract with the Department of Veterans Affairs (VA) in the amount of $369,990, plus interest. DBC claims that its bid for construction work at a VA facility contained a mistake of which the VA's contracting officer (CO) knew or should have known prior to contract award and that therefore its bid was not appropriately verified prior to contract award. The VA argues that, because there was no apparent mistake in DBC's bid, DBC is not entitled to its requested relief. For the reasons stated below, we deny the appeal.

Background

I. The Procurement

A. The Invitation for Bids

On August 14, 2015, the VA issued an invitation for bids to expand its ambulatory care clinic's exam room at the Ann Arbor VA Medical Center in Ann Arbor, Michigan. Appeal File, Exhibit 1 at 1.[1] The solicitation required bidders to submit a base bid for all work, which was to be completed in 444 calendar days. In addition, they were required to submit ten deductive alternate bids (identified as Bid Items No. II through XI), with decreasing scopes of work and time frames for their completion. *Id*. at 3-5. For example, "Bid Item No. II, Deductive Alternate No. 1" asked bidders for lump sum pricing to complete all work in the base bid but to "[r]emove landscaping from the project scope"; "Bid Item No. III, Deductive Alternate No. 2" asked bidders to provide lump sum pricing to perform work identified in "Bid Item No. II, Alternate No. 1" (which removed landscaping work from the project) and, additionally, to remove the "outdoor event center terrace from the project scope"; "Bid Item No. IV, Deductive Alternate No. 3" asked bidders to provide lump sum pricing to perform work in Bid Item No. III, Deductive Alternate No. 2 (in which landscaping and the outdoor event center terrace were removed from the project) and, additionally, to remove certain offices from the project; and so forth. As such, "Bid Item No. II, Deductive Alternate No. 1" would remove the least amount of work from the base project, while "Bid Item No. XI, Deductive Alternate No. 10" would remove the most. The bid at issue here, Bid Item No. IX, Deductive Alternate No. 8, removed the work in the phlebotomy area from the project scope. *Id*. at 5. Only one other company submitted a bid for the project in addition to appellant.

B. The Bids

When preparing its bid, DBC received price proposals from potential subcontractors and tracked the subcontractor prices on an internal bid summary sheet. The subcontractor proposal at issue here reflected a reduction of $41,110 for the subcontractor work removed by Deductive Alternate No. 8. Exhibit 179, Deposition of Theodore H. Smith (May 19, 2022) at 26-29. However, when DBC entered this quote on its bid summary sheet, it added an additional zero to the amount – i.e., instead of entering $41,110, DBC entered $411,100. *Id*. at 26-31; Exhibit 18, Bid Summary Sheet. Thus, instead of reducing its bid, based on the subcontractor's price proposal, by the smaller amount of $41,110 for Deductive Alternate

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[1] All exhibits referenced in this decision are found in the appeal file, unless otherwise noted.

No. 8, which was DBC's intent, its internal bid summary sheet included the $411,100 number. Exhibit 18. Specifically, for its bid for Deductive Alternate No. 8, DBC started with $8,631,000, the value for Deductive Alternate No. 7, and from this amount it deducted the value of the work being removed for Deductive Alternate No. 8 ($599,000, inclusive of the $411,100 amount) to arrive at a bid of $8,032,000. However, if DBC had used the $41,110 amount, its bid for Deductive Alternate No. 8 would have been $8,401,990 ($8,631,000 minus $229,010, the value of the work removed, inclusive of the $41,110 amount). The difference between the numbers as subsequently bid on Deductive Alternate No. 8 ($8,032,000) and as intended ($8,401,990) is $369,990.

The bid opening took place on September 16, 2015. Mike Daniels, DBC's president, called DBC's representative who attended the bid opening to convey the final, aggregate figures (or lump sums) to enter onto an offer schedule for the base bid and each of the deductive alternates. Exhibit 174, Deposition of Mike Daniels (May 17, 2022) at 26-28. As presented on the offer schedule, DBC's base bid was $8,990,000, its bid for Deductive Alternate No. 7 was $8,631,000, and its bid for Deductive Alternate No. 8 was $8,032,000. Exhibit 4, Offer. At his deposition, DBC's president stated that, on the day that he was providing the numbers to the representative at the bid opening via telephone, he did not notice anything unusual about the $8,032,000 bid for Deductive Alternate No. 8, nor did he notice anything unusual in the change in price from Alternate No. 7 to Alternate No. 8, notwithstanding his familiarity with the project specifications and guidelines.

> Q. [So if you could scroll back down to bid alternate 8.] Your testimony is that the number written in here [presumably, the offer schedule] for bid alternate 8 would match what is on the estimate [presumably, DBC's internal bid summary sheet] for DBC. Is that correct?
>
> A. Yes, it is.
>
> Q. Okay. On the day that you were reading that number to [DBC's representative at the bid opening], did you notice anything unusual about that number?
>
> A. No.
>
> Q. [So you can scroll back to bid Alternate 7.] Okay. And bid alternate 7, you read that number from your estimate to [DBC's representative at the bid opening] on the day of bid opening, as well, correct?
>
> A. Yes.

> Q. Okay. And on the day of bid opening you did not notice anything unusual about the change in price between bid alternate 7 and bid alternate 8. Is that correct?
>
> A. That's correct.
>
> Q. And at that time of bid opening you had already read the project specifications, you reviewed the project guidelines. Is that correct?
>
> A. Yes.
>
> Q. And you can see from the description of bid alternate 8 the work that was being removed from the project. Is that correct?
>
> A. Correct.
>
> Q. And you were familiar with that work having reviewed the project specifications?
>
> A. I was.

Id. at 33-34.

Further, both DBC's vice president (Eileen McCarthy) and its consultant (Theodore Smith, an estimator) also provided testimony that they detected nothing wrong with the $8,032,000 figure at the bid opening. Exhibit 175, Deposition of Eileen McCarthy (May 17, 2022) at 42-43; Exhibit 179, Deposition of Theodore Smith (May 19, 2022) at 37-38.

Pertinent here, it was the offer schedule with the aggregate or lump sum figures for the base and alternates that was submitted to the VA. *Id.* at 83. DBC did not submit its internal bid summary sheet which showed subcontractor bid prices, including the erroneous $411,100 for the removed subcontractor work for Alternate No. 8 nor did DBC submit the subcontractor's price documentation showing the accurate figure of $41,110 to the VA with its offer. Exhibit 175, McCarthy Deposition at 53-54; *see* Exhibits 17, 18. At the bid opening, only base bids were publicly read out loud, Exhibit 12, Letter from Michael Daniels to Contracting Officer (CO) Scott Brennan (May 1, 2019) at 2, and only the base bids and the alternates were recorded on the VA's abstract of offers, which showed the following:

Item No.	Description of Offered Item	DBC's Base Bid	Second Offeror's Bid
I	Base Bid	8,990,000	8,999,000
II	Bid Item II, Deductive Alt 1	8,963,000	8,938,999
III	Bid Item III, Deductive Alt 2	8,954,000	8,913,842
IV	Bid Item IV, Deductive Alt 3	8,925,000	8,896,653
V	Bid Item V, Deductive Alt 4	8,899,000	8,871,149
VI	Bid Item VI, Deductive Alt 5	8,838,000	8,810,484
VII	Bid Item VII, Deductive Alt 6	8,736,000	8,803,978
VIII	Bid Item VIII, Deductive Alt 7	8,631,000	8,686,493
IX	Bid Item IX, Deductive Alt 8	8,032,000	8,563,572
X	Bid Item X, Deductive Alt 9	7,626,000	8,260,828
XI	Bid Item XI, Deductive Alt 10	7,550,000	8,251,028

Exhibit 8, Abstract of Offers – Construction at 2.

On November 10, 2015, the VA contract specialist emailed Mr. Daniels, stating that the VA was considering taking the bid associated with Deductive Alternate No. 8 at $8,032,000 and asking if DBC needed to change its price based on an updated wage determination. Exhibit 9. Mr. Daniels responded that no change was required. *Id*. On November 19, 2015, the VA awarded DBC the contract. Exhibit 10, Notice of Award.

C. DBC's Notification to the VA of the Mistake in Bid

Both the VA's CO and Mr. Daniels provided similar testimony that the VA was initially notified verbally of a potential mistake-in-bid prior to DBC submitting its request for an equitable adjustment (REA). Exhibit 174, Daniels Deposition at 56-58; Deposition of Scott Brennan (June 14, 2022) at 100. In his testimony, the CO stated that his recollection was that, sometime in the fall or winter of 2016, Mr. Daniels came into the CO's office on another matter, but at the time he also informed the CO of the mistake in DBC's bid. Exhibit 177, Brennan Deposition at 100. However, the CO recalled Mr. Daniels saying that DBC did not intend to pursue the matter. *Id*.

Almost two years after the award, DBC sent a letter to the VA summarizing a range of issues on the project, including an assertion that, shortly after contract award, DBC had

discovered a "significant error" in its bid. Exhibit 11, Letter from Mike Daniels and Eileen McCarthy to Scott Brennan (Nov. 3, 2017) at 3. Almost eighteen months later, on May 1, 2019, DBC submitted an uncertified REA to the contract, seeking to increase the contract price by $400,000. Exhibit 12.

In its REA, DBC stated that it did not discover the mistake in its bid until after contract award. Exhibit 12 at 3. DBC explained that the subcontractor "quoted a $41,110 Alternate 8 deduction from its Alternate 7 quote" and that, "[i]n preparing its Bid Preparation Worksheet in anticipation for submitting a bid, DBC in advertently [sic] added an extra '0' when transcribing [the subcontractor] quote." *Id.* In his deposition testimony, DBC's president stated that he only discovered the mistake, post award, after review of DBC's bid summary sheet, a document not provided to the VA pre-award. Exhibit 174, Daniels Deposition at 61-62. Nevertheless, in its REA, DBC argued that the VA's abstract document on which offers were listed, notably the disparity of the Alternate 7 and 8 deducts from the two bidders, provided the contracting officer with notice of the probability of the mistake in DBC's bid. Exhibit 12 at 3. The abstract showed DBC's bid of $8,631,000 for Deductive Alternate No. 7 and the other bidder's price of $8,686,493 for the same. Exhibit 8. The abstract showed DBC's bid of $8,032,000 for Deductive Alternate No. 8 and the other bidder's price of $8,563,572 for the same. *Id.* In its REA, DBC also argued that "[t]he most important indication of the mistake is the size of the Alternate 8 and 9 bid deducts for [the second bidder] and DBC. [The second bidder's] Alternate 8 bid deduct was approximately 20% of DBC's, i.e., DBC's Alternate 8 bid deduct was almost five times (5x) [the second bidder's]." Exhibit 12 at 3. DBC asserted that, based on the differences in its and the competitor's bid for Alternative No. 8,[2] the CO should have contacted DBC, "called attention to the suspected mistake, and requested verification of DBC's bid" under Federal Acquisition Regulation (FAR) 14.407-1 (48 CFR 14.407-1 (2015)).[3] Exhibit 12 at 3. DBC subsequently certified its REA for $400,000 via an email to the VA dated May 21, 2020. Exhibit 13.

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[2] The actual difference between the DBC's and the second bidder's Alternate 8 bids was 6.2 percent (($8,563,527-$8,032,000)/$8,563,527=.062 or 6.2 percent).

[3] FAR 14.407-1 states, "After the opening of bids, contracting officers shall examine all bids for mistakes. 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 shall request from the bidder a verification of the bid, calling attention to the suspected mistake. If the bidder alleges a mistake, the matter shall be processed in accordance with this section 14.407. Such actions shall be taken before award." 48 CFR 14.401-1.

By letter dated June 8, 2020, the VA's CO denied DBC's claim. Exhibit 14. The VA's reasons for denying DBC's claim that the agency should have detected the mistake in DBC's bid prior to award are summarized below:

- The VA's Independent Government Cost Estimate (IGCE) for the entire project was $7,632,000, and the ten deductive alternates combined were estimated at a reduction of $1,744,922. However, both bids for the base ($8,990,000 from DBC and $8,999,000 from the second bidder) came in over the IGCE's estimate. Deductive Alternate No. 8 in the IGCE was the second largest deductive at $255,001. Thus, DBC's deductive of $599,000 for No. 8, in light of the overall bid overages from the IGCE, actually fell in line with what the Government expected to occur.
- The IGCE for Deductive Alternate No. 8 was estimated to be 90.07% of the IGCE base amount, and DBC's bid for No. 8 was 89.34% of its base bid. The difference between the percentage of DBC's price for No. 8 and the IGCE was only 0.73%.
- The other bidder's price for Deductive Alternate No. 8 was 95.16% of its base bid amount, which is comparable to the differentials presented in DBC's bid.
- Because both offers were well in excess of the IGCE, it was more difficult to track how each bidder was estimating the value of the project work.
- The CO did not have superior knowledge about the project since all parties were working from the same design information.

Id. at 1-2.

The VA added that "[t]he sole responsibility of bid preparation lies with the bidder" and that "[r]elief should not be granted in the form of contract reformation where the bidder made a unilateral mistake unless the CO knew or had reason to know of a mistake prior to award." Exhibit 14 at 2. The agency pointed out that DBC's own bid spreadsheet revealed the calculation error – a document to which the VA did not have access prior to award. *Id*.

II. This Appeal

DBC appealed the VA's decision to the Board, and, subsequently, the parties filed briefing for a decision on the written record pursuant to Board Rule 19 (48 CFR 6101.19 (2022)). In its briefing, DBC notes that the CO failed to examine the bids for mistakes as required by FAR 14.407-1. In support, along with other evidence, DBC relies on deposition testimony in which the CO admitted that he did not evaluate the base bid or the alternates

prior to award to determine if there was a mistake-in-bid, Exhibit 177, Brennan Deposition at 45, and on the CO's final decision in which the CO states that there was nothing in the bid submissions that prompted him to verify the bid, Exhibit 14 at 2. DBC also argues that the difference between its Deductive Alterative Bid No. 8 ($8,032,000) and that of the other bidder ($8,563,572) was sufficiently apparent to put the CO on notice of the possibility of a mistake and to require the CO to request that DBC verify its bid. DBC additionally argues that the bid differences from Deductive Alternate Nos. 7 ($8,631,000) and 8 ($8,032,000) should have put the CO on notice of a possible mistake in DBC's bid for Deductive Alternate No. 8. DBC seeks $369,990, the difference between its submitted bid and its bid as intended, plus interest.

In its briefing, the VA does not dispute that a mistake was made, that the mistake was a clerical or mathematical error, and that there is proof of the intended bid. Thus, according to the VA, the only issues to be resolved by the Board are whether the Government knew or should have known of the mistake prior to award and whether any bid verification by the VA was required. The VA takes the position that it had no actual or constructive knowledge of a mistake in DBC's bid and that no verification was required because there was no information in its possession, pre-award, that would have caused it to believe that a mistake had been made. Further, DBC, given its possession of certain documents (its spreadsheet and the subcontractor quote) that were not available to the VA, was in the better position to detect the mistake in its Deductive Alternate No. 8 prior to award but failed to do so.

Discussion

The Government's duty to examine bids, pre-award, is set forth in FAR 14.407. The FAR states the following with regard to a contractor's discovery of a mistake in its bid after contract award:

> 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 [FAR] subpart 33.2 [Disputes and Appeals] and the following:
>
> (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.
>
> (b) In addition to the cases contemplated in paragraph (a) above or as otherwise authorized by law, agencies are authorized to make a determination—

> (1) To rescind a contract;
>
> (2) To reform a contract . . . ; or
>
> (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.
>
> (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.

48 CFR 14.407-4.

To determine if a contract should be reformed after a unilateral mistake-in-bid is discovered, 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 and, therefore, should have requested bid verification; (4) the Government did not request bid verification or did so inadequately; and (5) proof of the intended bid is established. *McClure Electrical Constructors, Inc. v. Dalton*, 132 F.3d 709, 711 (Fed. Cir. 1997) (citing *Solar Foam Insulation*, ASBCA 46921, 94-2 BCA ¶ 26,901); *see also Singleton Enterprises v. Department of Agriculture*, CBCA 1981, 12-1 BCA ¶ 34,924, at 171,734; *Zafer Construction Co.*, ASBCA 56769, 17-1 BCA ¶ 36,776, at 179,230-31. The VA concedes elements 1, 2, and 5. Thus, the heart of this dispute lies with element 3, whether the CO knew or should have known that a mistake had been made, and element 4, the sufficiency of any bid verification. *See Giesler v. United States*, 232 F.3d 864, 869 (Fed. Cir. 2000) ("[I]n limited circumstances . . . if the government has knowledge, or constructive knowledge, that a contractor's bid is based on a mistake, and the government accepts the bid and awards the contract despite knowledge of this mistake, then a trial court may reform or rescind the contract.").

DBC has presented no evidence, and the VA has not asserted, that the CO had actual knowledge of DBC's bid error prior to award, so the focus here is whether the CO constructively knew of the error. *Wender Presses, Inc. v. United States*, 343 F.2d 961, 962-63 (Ct. Cl. 1965). "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). "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." *Red Gold, Inc. v. Department of Agriculture*, CBCA 2639, 12-2 BCA ¶ 35,098, at 172,363. Thus, "[t]he duty to verify does not necessarily arise because of a price disparity among bids." *Dakota Tribal Industries v. United States*, 34 Fed. Cl. 593, 596 (1995) (citing *Aydin Corp. v. United States*, 669 F.2d 681, 686 (Ct. Cl. 1982)).

Notably, as indicated above, a contractor's entitlement to any remedy for its bid mistake, discovered after contract award, rests on proving, by clear and convincing evidence, the CO's knowledge or constructive knowledge of the mistake prior to award. *Bromley Contracting Co. v. United States*, 794 F.2d 669, 671-72 (Fed. Cir. 1986). "Clear and convincing evidence" is "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is '*highly probable*.'" *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002) (quoting *Price v. Symsek*, 988 F.2d 1187, 1191 (Fed. Cir. 1993)). The mistake, unilaterally made by the contractor, must be so apparent as to have charged the contracting officer with notice of the probability, not the possibility (as asserted in DBC's briefing), of the mistake.[4] 48 CFR 14.407-4. Cases refer to the contractor's "clear-cut clerical or mathematic error" as the type of mistake that would be at issue. *See*, *e.g., Singleton Enterprises*, 12-1 BCA at 171,734. The FAR provides, in the context of pre-award discovery of mistakes, examples of clerical mistakes that would be apparent on the face of the bid, which include *obvious* misplacement of a decimal point, *obvious* incorrect discounts, and *obvious* mistakes in the designation of units. 48 CFR 14.407-2 (providing that contracting officers, prior to award, may correct clerical mistakes that are apparent on the face of the bid). To the extent that this FAR provision serves to provide any guidance or is helpful here at all on matters related to post-award discovery of mistakes, it suggests that the mistake at issue, a clerical one, was not apparent because the documents clearly showing the mistake – DBC's bid summary sheet form and the subcontractor's price documentation – were not before the CO prior to award.

DBC does not dispute that the VA's abstract of offers, the pricing documentation available to the CO pre-award, only showed the offerors' lump sum figures for the base bid and each of the deductive alternates. Exhibit 8. DBC asserts that its bid for Alternate No. 8

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[4] *See* https://www.merriam-webster.com/dictionary/possible (defining "possible" as "being something that may or may not be true or actual") and https://www.merriam-webster.com/dictionary/probable (defining "probable" as "supported by evidence strong enough to establish presumption but not proof" or " likely to be or become true or real"); *see also* https://www.merriam-webster.com/dictionary/probably (defining "probably" as "insofar as seems reasonably true, factual, or to be expected : without much doubt").

was "sharply and obviously divergent" from that of the second offeror. Appellant's Opening Brief at 5. However, the price differential between the two bids was only 6.2%, insufficient to raise suspicion of the probability of a "clear cut" or "obvious" clerical error or mistake. *See*, *e.g., McKnight Construction Co. v. Perry*, 888 F. Supp. 1178, 1180, 1185 (S.D. Ga. 1994) (noting that the plaintiff's transposition error was "obvious from a cursory inspection of the bid form, as well as the bid abstract," where the bid abstract reflected plaintiff's bid for line items 1 and 2 was $4,203,500 for each and the next lowest bids were $196,376 for item 1 and $20,000 for item 2; and the plaintiff's bid for items 4 and 5 was $250,000 for each line item with the next lowest bid being $3,334,000 for each of the same line items).[5]

DBC also argues that the CO should have identified the potential error from the two offerors' lump sum bids provided for the base work and each of the deductives. However, these numbers alone would not have allowed the CO to discern the multiple factors – *e.g.*, subcontracting proposals – that could have driven the offerors' decision-making process for pricing. And there is nothing in the record to suggest that the CO would have been so familiar with the offerors' strategies for pricing work removed at each deductive step to have flagged the price differentials involved here as clear indicia of a probable clerical mistake in DBC's bid. *See*, *e.g., Red Gold*, 12-2 BCA at 172,363 (CO had, among other pricing documents, the contractor/appellant's historical pricing data, pre-award).

Further, both offers were substantially over the Government's estimate, which undermines any argument that the Government had a sufficient reference point or knowledge to discern the factors by which the two offerors determined pricing and, thus, the probability of a mistake in DBC's bid. And comparing the Government's estimate with DBC's bid for Deductive Alternate No. 8 as a percentage of the base bid would not have triggered any obvious concerns with DBC's bid. Specifically, as explained in the CO's final decision, the Government's estimate for Deductive Alternate No. 8 was 90.07% of its estimated base amount, and DBC's bid for Deductive Alternate No. 8 was 89.34% of its base bid. The difference between the percentage of DBC's price for Deductive Alternate No. 8 price and the IGCE was only 0.73%. Again, this differential is not so stark as to expect a CO to be on notice of DBC's mistake. Instead, the IGCE comparison suggests that DBC's bid for Deductive Alternate No. 8 was within a reasonable range, i.e., an acceptable bid.

Also, as noted above, on November 10, 2015, almost two months after submission of DBC's bid and the bid opening, but before contract award, the VA asked DBC to confirm its pricing based on an updated wage determination, and DBC did so, requesting no changes

[5] Examples of obvious errors might be if any bid in the abstract were six digits instead of seven ($803,200 instead of $8,032,000) or a number in the abstract was ascending, instead of decreasing, from the previous bid number.

to its prices. Although the VA's confirmation request was not done pursuant to FAR 14.407, DBC's affirmance of its bid pricing, weeks after the bid opening but before contract award, is a fact that is contrary to the notion that the CO should have known of a mistake in DBC's bid prior to award. DBC's confirmation of its bid would have signaled to the CO accuracy, not error.

Finally, as explained in *Ruggiero v. United States*, 420 F.2d 709, 713 (Ct. Cl. 1970), "what we are really concerned with is the overreaching of a contractor by a contracting officer when the latter has the knowledge, actual or imputed as [to] something he ought to know, that the bid is based on or embodies a disastrous mistake and accepts the bid in face of that knowledge." Although "[t[he contracting officer must seek to ensure that [a] bid is fair, . . . it is not required to act as 'nursemaid' for bidders." *Dakota Tribal Industries*, 34 Fed. Cl. at 597 (citing *Aydin Corp.*, 669 F.2d at 687). Thus, looking at the facts and circumstances existing before award, DBC has failed to meet its burden to show that the CO had constructive knowledge of mistake in DBC's bid prior to contract award and that such error was so apparent as to put the CO on notice of the probability of the mistake.[6]

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[6] As an aside, the VA avers that DBC was actually in the better position to have identified the mistake pre-award and missed it. DBC had information not available to the Government – specifically, the subcontractor's price proposal and its internal bid summary sheet form which had the error. Element 3, set forth in *McClure*, 132 F.3d at 711, "pertain[s] to government knowledge or action; [it does] not focus on what [a contractor] must prove about its own actions." *Zafer*, 17-1 BCA at 179,231. Yet, the VA's point is not an illogical one. As for the difference in DBC's bid from Deductive Alternate No. 7 ($8,631,000) to Alternate No. 8 ($8,032,000), DBC's president, vice-president, and estimator, who were obviously in a better position to know about DBC's business practices than the CO, all testified at their depositions that, on the day of the bid opening, they noticed nothing unusual in DBC's bid of $8,032,000 for Deductive Alternate No. 8. DBC's president specifically provided testimony that, when he was providing DBC's bid pricing to the company's representative via telephone, he noticed nothing unusual about this bid, notwithstanding his familiarity at the time with the project's specifications and guidelines. Exhibit 174, Daniels Deposition at 33-34. He failed to notice the bid error until after reviewing DBC's internal bid summary sheet following contract award. VA's argument on these facts in the context of constructive notice, at the very least, raises a fair point – i.e., since the mistake in the bid (from Deductive Alternate No. 7 to No. 8) was not obvious to two of DBC's principals and its estimator/consultant pre-award, it would be unreasonable that the opposite would be true as applied to the CO, i.e., that the bid mistake (from Alternate No. 7 to No. 8) should have been apparent, obvious, or clear cut to the CO pre-award.

Decision

The appeal is **DENIED**.

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

We concur:

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge