



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Cal-City Construction, Inc.

File: B-278796

Date: March 16, 1998

Timothy A. Sullivan, Esq., Starfield & Payne, for the protester.
George N. Brezna, Esq., Charles Chambers, Esq., and Vicki E. O'Keefe, Esq.,
Department of the Navy, for the agency.
Linda C. Glass, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Agency improperly permitted low bidder to correct an alleged mistake in its bid consisting of the noninclusion of topsoil import cost, where the evidence of the omission consists of a subcontractor's quotation which notes an "additive" amount encompassing excluded topsoil import, but does not establish that the bidder intended to include the cost of this item in its bid, under a solicitation which specifically provided that topsoil import would not be necessary if the work was performed in compliance with specifications.

DECISION

Cal-City Construction, Inc. protests the award of a contract to I.E. Pacific, Inc. under invitation for bids (IFB) No. N68711-96-B-3744, issued by the Department of the Navy for the repair of certain firing ranges and the addition of an irrigation system at the Edson Ranges, Marine Corps Base, Camp Pendleton, California. Cal-City contends that the Navy improperly permitted Pacific to correct an alleged mistake in its low bid, that Pacific should only be permitted to withdraw its bid, and that award should be made to Cal-City, the next low bidder.

We sustain the protest.

The solicitation, issued on July 17, 1997, required the submission of a fixed-price bid for two base items with associated bond costs and an additive item, also with bond costs. Base bid item 0001A included all of the effort required to repair and upgrade four firing ranges including repairs and rehabilitation of ancillary structures. It also included, among other things, correction of drainage problems including regrading for positive drainage; installation of culverts and drainage structures when required; patching and sealing existing paving and any incidental related work. Base bid item 0001B included the addition of an irrigation system at Edson Ranges, lighting at the 500-yard firing line, and incidental related work. Additive bid item 0001AA was for

the addition of the firing surface on the firing lines and incidental related work. Subsection 3.8.2 of section 02315 of the IFB (addressing the specifications for excavation and fill) required that 4 inches of topsoil be provided for newly graded finish earth surfaces and areas disturbed by the contractor. The subsection stated that additional topsoil would not be required if work was performed in compliance with the IFB stripping and stockpiling requirements, but that if there was insufficient on-site topsoil meeting specified requirements for topsoil, the contractor was to provide topsoil required in excess of that available.

Nine bids were received and opened on September 4, 1997. Pacific was the apparent low bidder at \$2,671,400 and Cal-City was next low at \$3,154,600. The government estimate for the project was \$3,726,000. Because Pacific's bid was substantially lower than the government estimate and the other bids, by letter dated September 5, the contracting officer requested Pacific to verify its bid. By letter dated September 12, Pacific responded that it had made a "clerical error" in its bid. Pacific stated that it used a \$407,878 quote from a subcontractor for all work contained under the general excavation, filling, and backfilling requirement and, in the process of reviewing its bid, Pacific discovered that the subcontractor's quote consisted of two pages, not just the one page received and relied upon by Pacific. The second page contained an additive of \$350,000 for topsoil import that Pacific's letter stated was "required by the project documents." Pacific requested upward correction of its bid in the amount of \$350,000 plus its general markup of 10 percent, plus a concordant \$3,000 increase in Pacific's bond costs, for a total increase of \$388,000. Pacific's corrected total bid of \$3,059,400 would remain low. If not allowed to correct, Pacific requested that it be permitted to withdraw its bid.

In support of its correction request, Pacific submitted its original worksheets, the subcontractor quote sheets, and an explanation that its mistake resulted from having received only the first page of the two-page subcontractor quote. The agency, after reviewing documents and Pacific's subsequent response to additional questions concerning the alleged mistake, found that the evidence clearly and convincingly proved the existence of both the mistake and the intended bid. The agency therefore concluded that Pacific should be allowed to correct its bid, and on November 25, awarded to Pacific at the corrected price of \$3,059,400. This protest from Cal-City followed; performance has been stayed pending resolution.

A bidder's request for correction of a low bid before award may be granted only where there is clear and convincing evidence establishing both the existence of the mistake and the intended bid. Federal Acquisition Regulation § 14.407-3(a). Whether the evidence meets this standard is a question of fact, and our Office will

not question an agency's decision based on this evidence unless it lacks a reasonable basis. Maple Constr. Co., Inc., B-270073, Feb. 6, 1996, 96-1 CPD ¶ 43 at 2. Workpapers, including computer generated spreadsheets, may constitute clear and convincing evidence if they are in good order and indicate the intended bid price, and there is no contravening evidence. Id.

The protester maintains that since the subcontractor's quote treats topsoil import as an excluded additive item, it was not part of the quote, and the determination of whether to include the item was completely within Pacific's discretion. The protester contends that Pacific did not provide any pre-bid evidence to demonstrate that it intended to use imported topsoil in this project, or include it as part of its bid. We agree.

The evidence submitted by Pacific shows that its excavation subcontractor provided a two-page quote, the first page of which appears to be a complete quote which sets forth a "base bid amount" of \$407,878 for "section 02315: general excavation, filling and backfilling" to be performed "per plans and specifications." The second page consists of a list of five specified "exclusions," the fourth of which is topsoil import, and at the bottom of the list is noted, "additive bid to provide import soils based on 75,000 cy [cubic yards] +, - for; Total Cost \$350,000." While Pacific states that it did not have this second page in hand when it prepared its bid, we fail to see how the page establishes that Pacific actually intended to include topsoil import in its bid. The first page of the subcontractor's quote consists of a list of specific functions it proposed to perform for \$407,878, and the list does not include topsoil import. Thus, even if Pacific did not have the second page of this quote when preparing its bid, Pacific had reason to know that the cost of topsoil import was not included in the subcontractor's quote.

Pacific's computer generated worksheets include this subcontractor's quote under an item entitled "CLEAR & GRUB," and does not list topsoil import as a line item. In seeking upward adjustment of its bid, Pacific advised the agency that its bid was low because it rejected higher subcontractor quotes for certain work, deciding instead to use its own work force to perform some of the demolition, landscaping, irrigation, underground utilities, drywall, framing, and concrete. In this regard, the additional questions asked of Pacific by the agency during the correction process pertained to the other items listed as exclusions on page 2 of the subcontractor quote. Pacific explained that two of the excluded items were already included in Pacific's general condition costs and that two others did not affect Pacific's price (the agency viewed these items as unlikely contingencies). The fifth exclusion was topsoil import. In our view, the differing treatment of these various page 2 exclusions by Pacific establishes that this missing page of the subcontractor quote cannot reasonably be viewed as establishing Pacific's intent. See Bush Painting, Inc., B-239904, Aug. 30, 1990, 90-2 CPD ¶ 188 at 3.

This record contains no probative evidence that even if Pacific had had the complete subcontractor's quote at the time it prepared its bid, it intended to include, or would have included, in its bid the quoted amount for topsoil import. This is particularly true in light of the above-noted solicitation provision that no topsoil importation would be required if the existing topsoil was stripped and stockpiled for reuse as specified in the IFB. In this regard, the agency states that it "rechecked" the topsoil requirements after the correction request was made and "determined that import fill would be required " (in the amount of 65,000 cubic yards); however, the agency also states that in preparing the IFB, the "Architect/Engineer design team estimated that there was balanced amount of cut and fill, so no importing of soil would be required."

On this record, it is at best uncertain whether, at the time Pacific prepared its bid, there was any reason for it to have included topsoil import, much less any reliable evidence of how much topsoil import it might have included, or whether it would have subcontracted for the topsoil import. Consequently, particularly in view of the closeness of the proposed corrected bid to the next low bid, it was not reasonable for the agency to find that the subcontractor quote provided clear and convincing evidence of Pacific's intended bid. Id. Accordingly, the Navy improperly permitted Pacific to correct the bid.

We recommend that Pacific's contract be terminated for the convenience of the government. In view of the agency's reevaluation of the solicitation drawings and requirements after the correction request and its conclusion that 65,000 cubic yards of import topsoil would be necessary, despite the solicitation's contrary advice, the agency should consider whether the solicitation was so materially defective as to warrant cancellation and resolicitation under amended specifications. Otherwise, the contract should be awarded to Cal-City, if it is eligible for award. We also recommend that Cal-City be reimbursed its costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1997). Cal-City should submit its certified claim for costs to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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