



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: December 15, 2011

CBCA 2335

JANSSEN CONTRACTING, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Gerard H. Rock, President of Janssen Contracting, Inc., Anchorage, AK, appearing for Appellant.

F. Christopher Bockmon, Office of the Solicitor, Department of the Interior, Anchorage, AK, counsel for Respondent.

Before Board Judges **GOODMAN** and **STEEL**.

STEEL, Board Judge.

This appeal is from a contracting officer's decision denying appellant's claim for reformation of the contract due to a mistake in bid. Appellant, Janssen Contracting, Inc. (Janssen), elected to proceed under the accelerated procedure pursuant to 41 U.S.C.A. § 7106(a) (West Supp. 2011) and Board Rule 53 (48 CFR 6101.53 (2010)). This procedure permits issuance of a decision by two judges rather than three, and requires that a decision be issued, whenever possible, within 180 days from the date the contractor elects to use the procedure.

Findings of Fact

On April 19, 2010, Janssen was determined to be the low bidder and was awarded a contract by the National Park Service (NPS) to construct the Teklanika rest stop replacement in Denali National Park and Preserve, Alaska. Janssen's bid was in the amount of \$1,340,890. The next lowest bid was \$1,404,200 -- \$63,310 or 4.7% more than Janssen's bid. Janssen's base bid incorporated a bid for some portion of the work from its subcontractor, Star Electric (Star), in the amount of \$47,170. Janssen has reported that the next lowest subcontractor bid it received for this work was \$170,500. Despite this large discrepancy, it elected to utilize Star's numbers in preparing its bid to the NPS. As appellant acknowledges, the Government had no reason to know of this discrepancy.

On August 4, 2010, as it commenced work, Star told Janssen that it had made a mistake on its bid to Janssen; it had not included the \$88,650 bid from its own subcontractor, ABS Alaskan, Inc. (ABS), to perform the solar panels/photovoltaic portion of Star's work. After negotiating down ABS's price to \$67,870, Star threatened to default if Janssen did not help pay some of the remaining expense. In the interest of completing the contract, Janssen agreed to split with Star the \$67,870 so that work could be completed. Janssen asserts that as soon as it was aware of the mistake, it told the Government of the problem. However, its request for additional compensation in the amount of \$30,000 was submitted only after appellant received from respondent a letter acknowledging substantial completion of the entire project. The contracting officer denied Janssen's claim.

Janssen is now seeking from the Board an increase in contract payments in the amount of \$30,000. Appellant cites Federal Acquisition Regulation (FAR) 14.407-4, 48 CFR 14.407-4, Mistakes after Award, in support of its request. That section states, *inter alia*,

If a contractor's discovery and request for correction of a mistake in bid is not discovered until after award, . . .

- (b) . . . agencies are authorized to make a determination--
 - (1) To rescind a contract;
 - (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.

(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 . . . if unilaterally made by the contractor, so apparent as to have charged the contracting officer with notice of the probability of the mistake.

Discussion

As enunciated in FAR 14.407-4, a contractor may obtain a remedy from the Government for a unilateral mistake in bid after the contract has been awarded only if the contracting officer knew or should have known of the contractor's mistake at the time the bid was accepted. *Aydin Corp. v. United States*, 669 F.2d 681 (Ct. Cl. 1982). No contractor can recover from a mistake in judgment, but if the contracting officer knew or should have known of a clerical or arithmetical error (which under some circumstances might even include complete omission of a cost item from a bid calculation) the error might be compensable. *Bromley Contracting Co. v. United States*, 794 F.2d 669, 672 (Fed. Cir. 1986). Thus, a contractor must prove two elements to recover for a unilateral bid mistake raised after contract award. The contractor must prove that the error is of the type that may be compensable, and that the contracting officer knew or should have known of the mistake at the time the bid was accepted. *Id.*

In this case, appellant fails to prove both elements. First, the error is not of the type that may be compensable because the error in question was that of the subcontractor, not appellant. Second, appellant concedes that the Government had no reason to suspect that there was a mistake in Janssen's bid. This is particularly true since there was only 4.7% separating the bid of the two lowest bidders. Since at issue was the subcontractor's error, and the contracting officer did not have actual or constructive knowledge of the unilateral mistake at the time of bid, appellant is not entitled to reformation of the contract based on unilateral mistake on the part of the contractor.

Decision

Appellant has failed to prove that the error in question was compensable or that the contracting officer knew or should have known of the error at the time of bid. Therefore, the appeal is **DENIED**.

CANDIDA S. STEEL
Board Judge

I concur:

ALLAN H. GOODMAN
Board Judge