OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of	)	PCH-2003-12
	)	
SITE ENGINEERING, INC.,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND DECISION
vs.	)	
	)	
STATE OF HAWAI'I, DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
JAS. W. GLOVER, LTD.,	)	
	)	
Intervenor-Respondent.	)	
	)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

I. INTRODUCTION

On or about April 28, 2003, Site Engineering, Inc. ("Petitioner"), filed a request for hearing to contest Respondent Department of Transportation, State of Hawai'i's ("Respondent") denial of Petitioner's protest in connection with a project known as the Hawaii Belt Road Intersection Improvements at Police Station Road and Hualalai Road, Project No. 11A-01-02 ("Project"). The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties. On May 2, 2003, the parties requested that the hearing be continued to a later date. As such, the hearing was rescheduled to July 11, 2003.

On May 14, 2003, the parties stipulated to allow Jas. W. Glover, Ltd. ("Intervenor") to intervene in the proceedings as an additional Respondent.

The matter came on for hearing before the undersigned Hearings Officer on July 11, 2003 in accordance with the provisions of Hawaii Revised Statutes ("HRS") Chapter 103D. Petitioner was represented by Kale Feldman, Esq.; Respondent was represented by Wayne A. Matsuura, Esq. and Intervenor was represented by Marc E. Rosseau, Esq.

At the conclusion of the hearing, the Hearings Officer directed the parties to submit written closing arguments. Accordingly, on August 1, 2003, Petitioner filed its closing arguments and on August 8, 2003, Respondent and Intervenor filed their closing arguments. A reply memorandum was filed by Petitioner on August 14, 2003.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. On January 17, 2003, Respondent advertised the solicitation of the Project.

2. Pursuant to the solicitation, bids for the Project were due on February 20, 2003.

3. On February 20, 2003, Petitioner submitted the apparent low bid in the amount of $743,300.00. Intervenor submitted the apparent second low bid in the amount of $866,400.00. The only other bidder, Isemoto Contracting Company, Ltd. ("Isemoto") submitted a bid of $897,905.00.

4. Upon examination of Petitioner's bid, Respondent discovered that the bid contained two errors[1].

5. For item no. 401.0400B (Asphalt Concrete Pavement, Mix No. IV), Petitioner inserted a unit price of "$25700.00" and a total amount of "$31868.00".

6. Respondent construed the unit price for item no. 401.0400B in Petitioner's bid as $25,700.00 and multiplied that price by the number of required units (124). Respondent replaced the "$31868.00" extension price stated in Petitioner's bid for item no. 401.0400B with the resulting product, $3,186,800.00.

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[1] For item no. 621.5300B (Regulatory and Warning Sign, (Greater than 10 square feet), with post), Petitioner's bid reflected a unit price of "$3559.90" and a total amount of "$7198.0". Respondent corrected the total amount to $7,119.80 by multiplying the required number of units (2) by $3,559.90. This correction is not the subject of the protest involved here.

7. As a result of Respondent's correction of item no. 401.0400B in Petitioner's bid, Petitioner lost its position as the low bidder.

8. By letter dated February 27, 2003 to Respondent, Petitioner protested the correction of the total amount for item no. 401.0400B:

> The obvious unit price for the item #401-0400 should have read $257.00 thereby equaling the amount bid of $31,868.00 (124 tons X $257.00 = $31,868.00). However, our clerk inadvertently and mistakenly wrote it as $25700.00, which would make the amount bid a ridiculous $3,186,800.00 (124 tons X $25700.00).

9. By letter dated April 22, 2003, Respondent denied Petitioner's protest.

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review the determinations of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§103D-310, 103D-701 or 103D-702, *de novo.* In doing so, the Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS §103D-701. *Carl Corp. v. State Dept. of Educ., 85 Hawaii 431 (1997).* And in reviewing the contracting officer's determinations, the Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS §103D-709(f).

Petitioner charges that it inserted an erroneous unit price for item no. 401.0400B, that the error was an obvious one and as such, may be corrected pursuant to Hawaii Administrative Rules ("HAR") §3-122-31(c)(3). Respondent, on the other hand, points out that according to the terms of the solicitation as well as HAR §3-122-31(c)(1), in "the case of an error in extension of bid price, unit price shall govern."

HAR §3-122-31(c) states in relevant part:

> (c) Corrections to bids after opening but prior to award may be made under the following conditions:

> (1) If the mistake is attributable to an arithmetical error, the procurement officer shall so correct the mistake. *In case of error in extension of bid price, unit price shall govern.*
>
> (2) If the mistake is a minor informality which shall not affect price, quantity, quality, delivery, or contractual conditions, the procurement officer may waive the informalities or allow the bidder to request correction by submitting proof of evidentiary value which demonstrates that a mistake was made. The procurement officer shall prepare a written approval or denial in response to this request. Examples of mistakes include:
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> (A) Typographical errors;
> (B) Transposition errors;
> (C) Failure of a bidder to sign the bid or provide an original signature, but only if the unsigned bid or photocopy is accompanied by other material indicating the bidder's intent to be bound.
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> (3) If the mistake is not allowable under paragraphs (1) and (2), but is an obvious mistake that if allowed to be corrected or waived is in the best interest of the government agency or for the fair treatment of other bidders, and the chief procurement officer or the head of the purchasing agency concurs with this determination, the procurement officer shall correct or waive the mistake.

This Office has previously addressed the application of HAR §§3-122-31(c)(1) and (c)(3) to correct a discrepancy between a unit price and its extension. In *Jas. W. Glover, Ltd. v. Board of Water Supply (August 7, 2001)*, Jas. W. Glover, Ltd. ("Glover"), the apparent second lowest bidder protested the Board of Water Supply's decision to permit the apparent low bidder to correct the unit price for an item in its bid to conform to its extension amount. On appeal to this Office, Glover argued that where there is a discrepancy between a unit price and the extended price, both the bid documents and HAR §3-122-31(c)(1) set the intended price as the unit price. The City took the position that correction of the unit price was permissible under HAR §3-122-31(c)(3) as an "obvious mistake."

After observing that neither HRS Chapter 103D nor its implementing rules defined "obvious mistake," the Hearings Officer noted that:

> The commentary to the American Bar Association's Model Procurement Code for State and Local Governments, however, is insightful:

> To maintain the integrity of the competitive sealed bidding system, a bidder should not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid *unless the mistake is clearly evident from examining the bid documents*; for example, extension of unit prices or errors in addition.
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> ABA Model Procurement Code §3-202(6), Commentary (2)(1979)(Emphasis added).

The Hearings Officer also cited with approval, the Maryland State Board of Contract Appeals' ("MSBCA") decision in *Appeal of Dick Corporation, No. 1321 (MSBCA June 10, 1987)*. There the MSBCA said:

> In prior cases involving mistakes in bid, we have held that a procurement officer must exercise reasonable discretion in applying COMAR 21.05.02.12 and the IFB provisions that define the process required to correct an alleged bid mistake. These requirements are designed to prevent a bidder from having a second opportunity to bid, contrary to the fairness standards of competitive bidding, although they also protect a bidder from inadvertent bid errors by giving relief under circumstances where it would be unconscionable not to do so. Thus, the procurement officer from an examination of the bid documents may be able to reasonably determine the intended correct bid from the nature of a clear mistake on the face of the bid, e.g., from examination of typographical errors, unit price extension errors, transposition errors, and arithmetical errors, as well as from examination of other bids. Where the intended correct bid is clear, it would be unconscionable not to permit correction.

Id. at 12. See also, Appeal of P. Flanagan and Sons, Inc., No. 1068 (MSBCA Jan. 17, 1983).

The Hearings Officer found "these sound principles to be consistent with the underlying intent of the Procurement Code (footnote omitted) and its implementing rules and accordingly, concluded that these principles are applicable here":

> Thus, where a discrepancy exists between the a stated unit price and the stated extended price in a bid, correction pursuant to a provision in the IFB giving precedence to unit prices over extended prices is permitted *provided* that the application of the provision leads to a reasonable result that is not in conflict with the Code or its implementing rules,

> including HAR §3-122-31(c)(3) (footnote omitted). Moreover, since the mistake and the intended bid must be evident on the face of the bid documents, extrinsic evidence may not be considered. However, the procurement officer may consider the other bids submitted and rely on his or her own experience and common sense (footnote omitted). By contrast, where the intended bid cannot be determined from the bid documents alone, a mistake is not correctable as an obvious mistake. (emphasis in original).
>
> Here, the stated unit price of $400.00 is substantially higher than the other bid prices for this item. In fact, extending the bid on the basis of the unit price bid would result in an extended bid about six times greater than the second highest bid for the item (footnote omitted). Additionally, the extended total for this item of $30,000.00, when added to the other extended totals in the bid equaled the price RCI bid as its total bid price. On the other hand, the intended unit price of $40.00 is consistent with RCI's and the other bidders' prices which range from $1.00 to $65.50, and can easily be determined by dividing the extended total price of $30,000.00 for the line item by 750. Furthermore, a logical explanation for the discrepancy-that RCI had inadvertently inserted an extra zero in its unit price could be discerned from the face of the bid. Based on these considerations, the Hearings Officer concludes that the mistake in the unit price for Item No. 23 and its intended bid were obvious from the face of the bid (footnote omitted) and susceptible to only one reasonable interpretation. (footnote omitted).

Thus, *Glover* made clear that even if precedence is given to unit prices by a provision in the solicitation or HAR §3-122-31(c)(1), an obviously erroneous unit price can nevertheless be corrected to correspond to its extended total price where the corrected unit price is the only reasonable interpretation of the bid. That is, the correction of an obvious mistake is permitted if the mistake involves either an apparent clerical mistake such as the obvious misplacement of a decimal point, or the existence of the mistake and the intended price are apparent from the face of the bid.

Here, Respondent construed the unit price in Petitioner's bid for item no. 401.0400B as $25,700.00, which is substantially higher than the other bid prices for this item (Intervenor's bid of $202.00 and Isemoto's bid of $280.00) and 257 times greater than Respondent's estimate for that item ($100.00). As a result, extending the bid on the basis of that unit price results in an extended bid almost 92 times greater than the second highest bid for the

item (Isemoto's bid of $34,720.00). On the other hand, the extended total of $31,868.00, when added to the other extended totals in the bid, equals Petitioner's total bid price[2]. Moreover, the unit price of $257.00 can easily be determined by dividing the extended total price of $31,868.00 by 124 units. Furthermore, a logical explanation for the discrepancy - that Petitioner had inadvertently placed the decimal two places too far to the right - could be discerned from the face of the bid. Moreover, the correction involved here would result in a savings of over $100,000.00 to Respondent. Based on all of these considerations, the Hearings Officer concludes that the mistake in the unit price for item no. 401.0400B[3] and its intended bid were obvious from the face of the bid and susceptible to only one reasonable interpretation.

Notwithstanding the *Glover* decision, Respondent contends that where a discrepancy exists between a stated unit price and its extended price, the provisions of HAR §3-122-31(c)(3) should *not* be applied to change the unit price. Rather, according to Respondent, the unit price should prevail in all such cases[4]. In support of this argument, Respondent contends that its practice of recognizing unit price over extended price when there is a discrepancy between the two promotes consistency and fairness in the bidding process. According to Respondent, the application of HAR §3-122-31(c)(3) to the type of mistake involved here would create a perception of unfairness and require Respondent to undertake the difficult task of attempting to determine whether a genuine mistake had been made, effectively forcing Respondent to second guess bidders. Indeed, the application of a "policy" of uniformly giving precedence to unit prices over extended prices in all cases would be a simple matter. Nevertheless, "[i]n promulgating the mistake in bid rules in HAR §3-122-31, the Procurement Policy Board ("Board"), presumably desired to permit relief for certain mistakes made in the calculation and submission of bids to allow the government to take advantage of what it knows or should know is an error by the bidder and to avoid depriving the government of an advantageous offer solely because the bidder made a mistake":

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[2] Petitioner's total bid amount of $743,300.00 includes the sum of $31,868.00 for item no. 401.0400B and $719.80 for item no. 621.5300B.

[3] It is worth noting that Petitioner was notified of the discrepancy in its bid as to item no. 401.0400B through a phone conversation by Holly Yuen (formerly known as Holly Yamauchi) of the Department of Transportation. According to the evidence, on February 27, 2003, Ms. Yuen faxed to Petitioner a copy of the page from Petitioner's bid (P-9) that contained the discrepancy after circling the stated unit price of "$25700.00."

[4] The evidence established that Respondent has an established policy of recognizing the unit price as controlling in all cases where there is a discrepancy between unit price and its extended total.

> Because the discovery of bid mistakes may occur in the period after bid opening, however, when bid prices have been exposed and market conditions may have changed, the rule also reflects a concern with protecting the integrity of the competitive bidding system by strictly limiting the ability to make bid corrections. If, as a matter of policy, the Board or the Legislature prefers a rule that sets the unit price as the intended price in all cases involving a discrepancy between unit price and extension price, they can so provide. They have not done so and the Hearings Officer has no authority, nor inclination to establish a policy contrary to that previously established by the Board and the Legislature.

Jas. W. Glover, Ltd. v. Board of Water Supply (August 7, 2001)(footnote 13).

Respondent's blanket refusal to apply HAR §3-122-31(c)(3) violates both the Board's rule and its underlying policy. Moreover, contrary to Respondent's claim, HAR §3-122-31(c)(3) does not require Respondent to "second guess" bidders. Rather, the proper application of the rule would allow the correction of an erroneous unit price only where that error was obvious and apparent, as established by the presence of certain objective evidence.[5] *See, Jas. W. Glover, Ltd. v. Board of Water Supply (August 7, 2001).*

Respondent also asserts that before an obvious mistake can be corrected, HAR §3-122-32(c)(3) requires, among other things, that the chief procurement officer or the head of the purchasing agency concur with the determination that the mistake was an obvious one and that its correction would be in the best interest of the agency. And since no such determination was made in this case, Respondent is of the position that this requirement has not been met.[6] The obvious intent of this requirement, however, was to provide an additional layer of assurance that the requirements of HAR §3-122-31(c)(3) had been met *before* a bidder was allowed to correct its bid. *It was not intended to prevent a bidder from protesting an agency's decision not to allow a correction under HAR §3-122-31(c)(3).* Respondent's argument is therefore without merit.

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[5] Among other things, Respondent points out that bidders, in practice, may decide to increase unit prices for a number of reasons. Thus, Respondent argues that reliance upon other bidders' unit prices to determine whether a mistake is "obvious" is inappropriate. Nevertheless, the unit prices of other bidders *may* be considered as one factor in determining whether an alleged mistake is "obvious." Of course, unit prices that differ significantly from an alleged erroneous unit price would not support a claim that the mistake was "obvious."

[6] According to the evidence, it was Respondent's practice to resolve any discrepancy between unit prices and the extended price in favor of the unit price. As such, Respondent never considered whether to allow the correction of Petitioner's bid pursuant to HAR §16-122-31(c)(3).

IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders as follows:

1. That Respondent's April 22, 2003 denial of Petitioner's protest is hereby vacated;

2. That Petitioner's unit price for item no. 401.0400B shall be corrected to reflect a unit price of $257.00 and an extension price of $31,868.00; and

3. That this matter is remanded to Respondent for reevaluation of Petitioner's bid consistent with this decision.

Dated at Honolulu, Hawaii: SEP 15 2003.

CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs