

7482

DECISION



J. Cohen
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-191272

DATE: August 30, 1978

MATTER OF: Sunland Refining Corporation

DIGEST:

1. Bidder whose claim of mistake before award was rejected by contracting agency accepted award at allegedly erroneous bid prices but reserved right to pursue matter at further levels. Contract is subject to reformation where bidder shows by clear and convincing evidence existence and nature of mistake and amounts of intended bids.
2. Contractor seeking contract reformation on basis of alleged mistake in bids--use of cents sign instead of dollar sign--has presented as evidence industry and general custom and usage; form of other bids; contracting agency's interpretation of bids that did not include any signs as expressions of dollars; and worksheets. Upon review, GAO concludes that mistake and intended bids have been shown clearly and convincingly. Contract may therefore be reformed to extent not to affect relative standing of bidders at bid opening.

Background

Invitation for bids (IFB) No. EL-78-B-01-7108 was issued by the Department of Energy (DOE) to sell 98,795 barrels of oil per day (BOPD) produced at the Elk Hills, California, petroleum reserve. The amount included 25,000 BOPD set aside for small business refiners. The sale was authorized under section 201(11)(b) of the Naval Petroleum Reserves Production Act of 1976, 10 U.S.C. § 7430(b) (1976), which directs the public sale of the United States' share of crude oil production to the highest qualified bidder for a period of not more than 1 year.

The IFB listed six items covering crude oil from different locations in the reserve. A bidder could submit bids on all or any portion of the total quantity of crude oil offered. The only limitation on the number of BOPD that could be awarded to a bidder, other than the small business set-aside, was a provision at 10 U.S.C. § 7430(c) (1976) that no person may obtain control "over more than a 20 percentum of the estimated annual United States share of petroleum produced from Naval Petroleum Reserve Numbered 1."

Bids on each item in the IFB were to be stated as plus a bonus or minus a discount from the "crude base price" in effect at date of delivery. The "crude base price" was defined as the highest posted stripper well oil price per barrel of all the prices regularly provided or published by the principal purchasers of crude oil from the area.

Thirteen companies submitted 59 bids in response to the IFB. The submission of Sunland Refining Corporation (Sunland) was the 12th of the 13 opened. Sunland submitted four bids on item 4, consisting of four separate increments at four separate negative discounts from the crude base price, as follows:

<u>"Item No.</u>	<u>Location</u>	<u>Quantity Nominated BOPD</u>	<u>Bonus Per Barrel</u>
4	18G	4,000 (1st increment)	-.188 ¢
4	18G	2,000 (2nd increment)	-.288 ¢
4	18G	2,000 (3rd increment)	-.358 ¢
4	18G	2,000 (4th increment)	-.458 ¢"

Sunland's first increment bid was read as written, minus 188 thousandths of a cent. A Sunland representative immediately alleged that Sunland had erroneously used a cents sign (¢) in its bid rather than a dollar sign (\$), and that it had intended to bid "\$.188," which is a discount of 18.8 cents from the crude base price. However, the contracting officer proceeded to read Sunland's other incremental bids as written, in mills.

DOE Position

Sunland pursued its allegation of mistake and request for correction at DOE. The request was denied on the basis of DOE's view that Sunland failed to meet the requirements for bid correction before award set out in Federal Procurement Regulations (FPR) § 1-2.406-2 and 3 (circ. 1, 1964 ed.). FPR § 1-2.406-2 authorizes the contracting officer to correct, prior to award, a "clerical mistake, apparent on the face of a bid," and gives as an example of such a mistake the obvious misplacement of a decimal point. FPR § 1-2.406-3(a)(2) provides in pertinent part:

"A determination may be made permitting the bidder to correct his bid where the bidder requests permission to do so and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended. However, if such correction would result in displacing one or more lower acceptable bids, the determination shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself. If the evidence is clear and convincing only as to the mistake, but not as to the intended bid, a determination permitting the bidder to withdraw his bid may be made."

DOE first considered whether FPR § 1-2.406-2 applied to the situation. DOE concluded that a "clerical mistake" was not apparent from Sunland's bids themselves since, although the bids were not "normal" crude oil bids, other companies used the cents sign, and there were bids both above and below Sunland's. DOE further asserted that notwithstanding the nature of the error as alleged, the error could be viewed as involving misplaced decimal points, the above-cited example in FPR § 2.406-2. On that basis, DOE considered that the bid was at best susceptible to a number of interpretations (-.188¢, -1.88¢, or -18.8¢), and relied on decisions of our Office for the proposition that FPR § 1-2.406-2 authorizes correction only where the contracting officer can ascertain the intended bid without the benefit of advice from the bidder, i.e., under that regulation, a bidder does not have the opportunity to explain the bid's meaning.

In addition, DOE noted that since Sunland's submission was the 12th of 13 opened, the firm knew almost all the other bids. DOE believed that the integrity of the formal advertising system would therefore be substantially undermined if Sunland were allowed to clarify its bids.

DOE next considered the applicability of FPR § 1-2.406-3 to the situation. As indicated above, DOE was not in the first instance convinced that a mistake even existed, and that even if a mistake was in fact made, Sunland had not shown by clear and convincing evidence the bids actually intended, since the intended bids could be "-1.88 ¢," etc., as well as the bids alleged by Sunland. In this connection, DOE argued that evidence of the intended bids must also under this regulation be present on the bid document itself, since the requested correction would "displace" other bidders. Displacement would occur in DOE's view because if correction were allowed, although Sunland would still receive 10,000 BOPD (at a lower price), one bidder would lose 1,000 BOPD, and another bidder would gain 1,000 BOPD. In

addition, DOE believed that even if Sunland's worksheets were considered, they did not establish the intended bids, since the worksheets did not contain any dollar or cents signs.

Although Sunland was not permitted to correct its bids, it agreed to accept a contract at its literal bid prices, reserving the right to pursue correction at other levels. The matter has now been presented to our Office for consideration.

General Principles

Although the matter before DOE involved only the correction of bids before award under the requirements of FPR § 1-2.406-2 and 3, since Sunland accepted the contract award the issue before our Office is whether the contract may be reformed. Generally, acceptance of a bid by the Government with actual or constructive knowledge of an error in the bid does not result in a binding contract. 52 Comp. Gen. 837 (1973); 45 Comp. Gen. 700 (1966). Where the possibility of a mistake is brought to the attention of a contracting officer prior to award, we have held that the contract may be subject to reformation so as to reflect the actual intent of the parties. 49 Comp. Gen. 446 (1970). Where there is notice of an alleged error prior to award, and where as here award of the contract was subject to reservation by the contractor of the right to seek an adjustment in the contract price on the basis of the alleged error, two conditions must be satisfied for reformation to be proper. The conditions are similar to those in FPR § 1-2.406-3: (1) the contractor must be able to show by clear and convincing evidence the existence and nature of the mistake and (2) the amount of the intended bid. B-161024, July 3, 1967. We have denied reformation where one of those conditions is lacking. See Sherkade Construction Corp., B-180631, October 30, 1974, 74-2 CPD 231; B-162543, November 27, 1967.

Conversely, reformation has been granted where both requirements have been met. Alden Construction Company, B-186130, May 12, 1976, 76-1 CPD 318; Pittsfield Construction, Inc., B-184753, September 25, 1975, 75-2 CPD 190.

In this connection, the issue of displacement as it concerns the use of worksheets is not relevant, since worksheets clearly may be used in considering requests for contract reformation. See Advanced Equipment Company, Inc., B-190598, January 18, 1978, 78-1 CPD 47; C.L. Fogle, Inc., B-188823, May 10, 1977, 77-1 CPD 332; William M. Young & Company, B-188374, April 18, 1977, 77-1 CPD 271. However, as indicated below, displacement is relevant to the issue of the extent of correction allowable.

Sunland's Position

Sunland contends that both the existence of a mistake and the bids actually intended are clear from the bids themselves. In addition, Sunland argues that its worksheets serve as conclusive evidence of these factors. Sunland further argues that logic and experience in the area dictate the requested correction.

Concerning the existence of a mistake, Sunland contends that bids to the thousandth of a penny are inconsistent with logic and experience, since only one of the other 55 bids under the IFB, and none of the 55 bids in the 1977 sale of the reserve's production, even went to the hundredth of a cent. In addition, Sunland states that the use of a cents sign is inconsistent with normal bidding practice since only two other bidders used the cents sign in 1978, and none used it in 1977. Sunland further notes that at least one 1978 bidder did not use any monetary sign in its bid of ".06," and the contracting officer interpreted the bid as \$.06, or 6 cents; a 1977 bid of "-.485" was considered -\$.485; and the DOE abstract of bids under the IFB in question expresses all bids with dollar signs.

Sunland contends that the most definitive evidence on this issue, however, is the range of its incremental bids. Sunland's bids as written ranged from $-.188\text{¢}$ to $-.458\text{¢}$, slightly in excess of one quarter of a cent ($-.270\text{¢}$). The average high to low range of other bidders submitting more than one bid for an item in the IFB was 39.31 cents, or 146 times the Sunland range; the smallest range, other than Sunland's, was 6 cents; in 1977, the average range was 51.25 cents, or 190 times the Sunland range; and the smallest 1977 range was 10 cents. Sunland thus argues:

"A $.270\text{¢}$ range is nonsensical in light of the purpose of the incremental bidding process, which is to enable the bidder to obtain a certain minimum amount of crude oil while attempting to lower its weighted average acquisition costs. The first increment is always bid at a higher price than the remaining increments which are bid at lower prices with meaningful differentials between increments so that if a company is fortunate enough to obtain its entire bid, then the weighted average acquisition cost is reduced substantially. * * *

"Should Sunland's bid remain uncorrected, the differential between the price of the first 4,000 barrels and the next 2,000 barrels translated into dollars becomes \$2 per day. The additional savings is \$1.40 per day in the third incremental purchase, and \$2 per day in the fourth incremental purchase. Over 360 days Sunland would save \$1,944 by bidding in increments rather than bidding its highest bid price for the full 10,000 barrels. This compares with a total contract

price of \$46,782,197. Clearly, no one can reasonably argue that Sunland would calculate its bids on an incremental basis in order to save \$1,944 (.00004 of the contract price)."

Concerning the bids intended, Sunland incorporates the arguments set out above, and further contends that there are no plausible alternatives to the bids it alleges were intended. Sunland argues that bids of -1.88¢, -2.88¢, -3.58¢, and -4.58¢, which DOE cites as possible alternatives if the alleged mistake is viewed as misplaced decimal points, would be as unreasonable as the literal bids submitted by Sunland, since bids extending to the hundredth of a cent are inconsistent with normal bidding practice; the total savings to Sunland by its incremental bidding over the course of the entire year's contract would be only \$19,440, which is .04 percent of the total price of Sunland's contract; and the total range of Sunland's bids would still be only 2.7 cents. Sunland also emphasizes that its claimed mistake is the use of the cents sign rather than the dollar sign, not misplaced decimals.

In addition, regarding the range of bids, Sunland contends that by the way the IFB and the award process were structured, it was inevitable that there would be bids both above and below all but two successful bids (the highest and lowest). Sunland states that, in any case, such factor is not germane to the correction of its bid in view of its arguments concerning bid extensions to the thousandth of a cent and the ranges of incremental bids.

Finally, Sunland argues that the fact that its submission was the 12th of the 13 read is irrelevant to correction, on the following basis:

"* * * First, the bids were read in random order--Sunland could not have known in advance that its bid

would be read near the end. Second, each bidding company specified a variety of quantities and prices in its bid for the item in question; and, the quantity a successful bidder could receive on this item depended upon its individual receipts of oil from other bid items. * * * it [is] clear that the computations used to determine the final allocation of oil among the bidders are too complex to be done simultaneously with the bid announcements. Further, as the Contracting Officer notes, there were bids above and below both Sunland's literal bid and its intended bid--further complicating any such effort. Finally, the remaining bidder, Howell, could have outbid Sunland's corrected price in any event. There was no opportunity for fraud in this situation. No person with the remotest awareness of how these crude oil bids are evaluated could reasonably question the integrity of the system if Sunland's request for correction is granted."

Discussion

As stated above, DOE denied the existence of a mistake primarily because some other bidders used the cents sign, and there were bids both above and below Sunland's. Concerning the first reason, DOE's dependence thereon is clearly inconsistent with its interpretation of bids which did not indicate any signs at all as expressions in dollars, rather than cents. In addition, it is not disputed that, as Sunland points out, the general industry practice when figures of any magnitude are involved is the use of a dollar sign, and certainly that is the practice when figures as small as those entered by Sunland are considered.

In regard to the range of the other bids, bid range is generally a factor in considering whether a contracting officer was on constructive notice of a mistake. See King Brothers, Inc., B-183717, June 2, 1975, 75-1 CPD 332. The present situation involves actual notice. Moreover, by the way the solicitation was structured and the award process defined almost every bidder would be successful to some extent, as long as there was sufficient oil available. Thus, on each of the six items for which bids were involved, all bids but the one with the highest bonus and the one with the greatest discount would have bids both above and below them. On item 4, 57 bids were in that situation. DOE's position would essentially foreclose a claim of mistake in any of those 57 bids, which we believe would be unreasonable.

Accordingly, the factors cited by DOE should not be conclusive against Sunland's claim of mistake without consideration of the entries themselves.

There is indication in DOE's report on the protest that Sunland's literal bids were not only abnormal bids in crude oil sales, but were in fact "ridiculous" at least with regard to the incremental ranges, and but for the two factors noted, would have been viewed as obvious mistakes. Thus, absent consideration of those factors it appears that even DOE would not deny the existence of a mistake. In view of our conclusion above, we consider that Sunland's bids themselves clearly show the existence of mistakes.

The remaining issue is whether Sunland has shown by clear and convincing evidence the bids actually intended. We first note that since the actual mistake alleged was the use of the cents sign rather than the dollar sign, we do not believe it appropriate to consider the alleged mistake as misplaced decimal points merely because that would have been a possible situation with a similar effect.

As stated above, it is appropriate to consider Sunland's worksheets on this issue. The worksheets contain a number of calculations to arrive at the desired incremental bids. They indicate neither dollar nor cents signs. Although decimal points are not used in every calculation, and although in one calculation they are used incorrectly, they generally appear to the left of the first numerical figure, as was the case in the actual bids. We believe that consistent with industry practice, general usage, and DOE's interpretation of bids without any sign at all as being expressions of a dollar, the figures on the worksheets can only reasonably be viewed as proposed by Sunland.

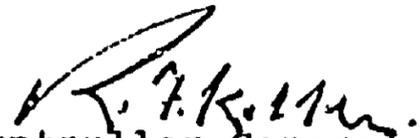
Conclusion

Where, as here, the existence of a mistake and the intended bid have been clearly and convincingly shown so that a contract is subject to reformation, we have limited correction to an amount that would not displace a bidder that would have received the contract award had the mistake not been made. See Business Machine Traders, B-190425, December 23, 1977, 77-1 CPD 501. Correction is so limited both to avoid prejudice to the other bidders and to ensure that the United States receives the most advantageous cost benefit. Cf. 53 Comp. Gen. 230, 236 (1971). The situation in which the above principle is generally applicable is where a mistake is alleged and proven after the contract award, and rescission of the contract is not feasible. See, for example, Advanced Equipment Company, Inc., supra.

Here, if Sunland were allowed correction to its intended prices, one bidder would lose 1,000 BOPD, and another would gain 1,000 BOPD. Sunland argues that this is not "displacement" since Sunland would be entitled to the award of 10,000 BOPD in any case. In addition, the affected bidders have notified our Office that they support correction of Sunland's bids.

However, and notwithstanding the positions of the other bidders on the matter, correction of Sunland's bids to its intended bid prices would clearly, as the word "displace" is defined, "remove from the usual or proper place" a number of bidders. See Webster's New Collegiate Dictionary, 1975 ed. We also note that it would cause a loss of revenue to the United States from the sale of the Elk Hills petroleum reserve oil of \$1,015,942.

We therefore believe that the general reformation principle set out above must be applied here, and Sunland's contract may be reformed so as not to affect the relative standing of bidders. Cf. Colonial Oil Industries, Inc., B-189514, December 7, 1977, 77-2 CPD 437.


Deputy Comptroller General
of the United States