Rentorshaw
Part II

DECISION

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

GAO 00046
8777

FILE: B-189756 DATE: December 28, 1978

MATTER OF: Murphy Brothers, Inc.--
Reconsideration

DIGEST: [Entitlement to Relief for Mistake in Bid]

1. Where agency had knowledge of alleged mistake in bid after bid opening but before award, and bidder submitted evidence which could reasonably support its claim of mistake but agency denied bidder's request for withdrawal because under applicable regulation it found that evidence was not "clear and convincing", agency should not have awarded contract at bid price but should have referred doubtful matter to GAO for determination as to whether withdrawal could be allowed under less stringent criteria applied by GAO.

2. Authority under FPR § 1-2.406-3 in executive agencies to determine mistake in bid cases in certain well-defined situations does not divest GAO of authority to review administrative determinations and to decide doubtful cases.

The Federal Highway Administration (FHWA) requests that we reconsider our decision B-189756, March 8, 1978, in which we held that Murphy Brothers, Inc. (Murphy) was entitled to relief for a mistake in its bid on contract DOT-FH-10-3148.

In our prior decision, we held that no contract was consummated at the award price because an error in Murphy's bid had been brought to FHWA's attention after bid opening but before award. FHWA refused to permit withdrawal of the bid. Under the circumstances,

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and because the contract work had been substantially completed so that rescission was not feasible, we held that Murphy was entitled to relief on a quantum valebant or quantum meruit basis.

FHWA contends that our decision was erroneous. The agency argues that its refusal to provide relief was reasonable because Murphy had not presented clear and convincing evidence that an error had been made. FHWA believes its decision should have been upheld by our Office unless we could find that it was unreasonable. As explained below, we believe FHWA has misconstrued this Office's role and standards of review in cases of mistake in bid alleged prior to award.

In our earlier decision we held that Murphy should have been allowed to withdraw its bid because of a mistake in the bid. We did not find that Murphy's bid should have been corrected prior to award, as Murphy had requested. In this respect, FHWA's reliance on our decisions holding that an agency determination concerning correction of a mistake in bid will be questioned only if there is no reasonable basis for the determination, such as 51 Comp. Gen. 1 (1971), is misplaced. Our review is circumscribed by the reasonableness of the agency determination only in cases involving corrections of bids and not where the question, as here, is whether bid withdrawal should have been allowed.

Because procedures among Federal agencies for resolving mistake in bid claims were inconsistent, this Office agreed that the General Services Administration (GSA) should promulgate regulations allowing administrative resolution in certain well-defined cases. 38 Comp. Gen. 177 (1958). We believed this would minimize delays in contract awards by allowing agencies to determine clear-cut cases. Consistency in administrative determinations was to be attained by requiring agencies to find "clear and convincing evidence" of a mistake in bid before allowing a bidder to withdraw its bid, and clear and convincing evidence of a mistake as well as of the bid intended before allowing correction.

Consequently, the Federal Procurement Regulations § 1-2.406-3 (1964 ed.) now provide, in pertinent part:

"(a) Heads of executive agencies are authorized, in order to minimize delay in contract awards, to make the administrative determinations described below, in connection with mistakes in bids alleged after opening of bids and before award * * *.

* * * * *

"(1) A determination may be made permitting the bidder to withdraw his bid where the bidder requests permission to do so and clear and convincing evidence establishes the existence of a mistake * * *.

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"(3) 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 * * *. 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.

"(4) If the evidence does not warrant a determination under paragraphs (a), (1), (2), or (3) of this section, a determination may be made that a bidder may neither withdraw nor correct his bid. * * *

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"(e) Nothing contained in this §1-2-406-3 shall deprive the Comptroller General of his statutory right to question the correctness of any administrative determination made hereunder nor deprive any bidder of his right

> to have the matter determined by the Comptroller General should he so request. All doubtful cases shall be submitted to the Comptroller General for advance decision in accordance with agency procedures * * *."

Implicit in the delegation and in the regulatory provisions is the recognition that agencies have been delegated authority to make determinations in clear-cut cases, subject to our authority to review the administrative determinations. In other words, where there is clear and convincing evidence of a mistake, for example, the agency may act accordingly and permit relief. Similarly, where there is clearly no evidence at all to support an allegation that a mistake has been made, the agency may not permit relief. In other cases, however, where the bidder submits some evidence to the agency which reasonably supports the allegation of error but the evidence is not "clear and convincing", the matter is to be submitted to this Office for determination. See, e.g., B-153639, September 4, 1964.

Moreover, it is also clear that the FPR standard of "clear and convincing evidence" applies only to administrative determinations by executive agencies, such as FHWA--in approving the procedure for executive agencies to determine certain mistake in bid claims in accordance with that standard, we did not adopt that particular standard for our reviews. Rather, in reviewing mistake in bid claims, we have long recognized that the degree of proof required to justify withdrawal of a bid before award is in no way comparable to that necessary to allow correction of an erroneous bid. 36 Comp. Gen. 441, 444 (1956); 52 id. 258, 261 (1972).

Thus, when a bidder requests that it be allowed to correct its bid because of mistake, this Office does require the bidder to show, by "clear and convincing evidence", the intended bid, and when we review an agency determination in this particular area, we sustain the administrative decision unless we find that decision unreasonable. 41 Comp. Gen. 160, 163 (1961); 53 id. 232, 235 (1973).

In contrast, when we consider cases concerning withdrawal of a bid, we apply a different standard, allowing withdrawal whenever it reasonably appears that an error was made. 36 Comp. Gen. 441, 444, supra; 51 id. 1, 3, supra. In this regard, in view of the long-standing general rule that acceptance of a bid with knowledge of an error therein does not consummate a valid and binding contract, 36 Comp. Gen. 441, 444, supra; Ruggiero v. United States, 420 F.2d 709, 713 (Ct. Cl. 1970), we have held that where the Government undertakes to bind a bidder to its bid, after notice of a claim of error by the bidder, the Government "virtually undertakes the burden of proving that there was no error or that the bidder's claim was not made in good faith." 36 Comp. Gen. 441, 444, supra. If that burden is not satisfied, we will find that the bidder cannot be held to the contract purportedly awarded.

In the instant case, Murphy submitted worksheets to FHWA in support of its claim that it had committed an error in its bid. While we agree with FHWA that Murphy's intended bid was not discernible from the face of its worksheets, Murphy would have been allowed by this Office to withdraw its bid since the worksheets provided evidence which could reasonably support Murphy's claim that a mistake was made. Cf. Ruggiero v. United States, supra. While FHWA had authority to determine that the worksheets were not "clear and convincing evidence" of a mistake in bid so as to permit that agency to allow Murphy to withdraw its bid, FHWA should have first referred to this Office for resolution the doubtful question of whether a mistake was made. B-153639, supra. Once the matter was brought here, however, FHWA's determination that Murphy's evidence was insufficient for that agency to allow Murphy to withdraw its bid in no way foreclosed this Office from making an independent determination under the less stringent criteria applied in accordance with the legal precedent referred to above.

Thus, while FHWA is correct in stating that it could not permit withdrawal, we find our previous action in this matter to be appropriate under the circumstances. Accordingly, our previous decision is sustained.

R.F. Keller

Acting Comptroller General
of the United States