Ruth Baker
Part II

DECISION

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

FILE: B-186371 DATE: November 15, 1976

MATTER OF: Paul R. Jackson Construction Company, Inc. / Swindell-Dressler Company

DIGEST:

1. Reformation of contract due to alleged mistake in bid is not justified where bidder accepted award despite its claim of mistake and did not reserve right to seek a contract adjustment. Record does not support contention that contracting agency officials coerced bidder to accept award by threatening bidder with forfeiture of bid bond without informing bidder of its right to withdraw its bid. Moreover, evidence does not support conclusion that the contract is unconscionable.

2. Failure of contracting officer to refer issue of suspected mistake in bid to contracting agency's General Counsel's Office was not prejudicial where the bidder never submitted "clear and convincing" evidence of alleged mistake in bid prior to award.

The Washington Metropolitan Area Transit Authority (WMATA) has requested our Office to render an advisory opinion regarding a claim arising under contract ID0021, awarded to the Joint Venture of Paul R. Jackson Construction Company, Inc. and Swindell-Dressler Company. Since the accounts of WMATA are not subject to settlement by the General Accounting Office, we have no authority to render a binding decision regarding contracts entered into by WMATA. See Square Deal Trucking Co., Inc., B-184989, November 18, 1975, 75-2 CPD 326. Nevertheless, in view of WMATA's request our Office will render this advisory opinion concerning the proper disposition of the claim filed by the Joint Venture.

On May 10, 1972, the Joint Venture submitted a firm bid to WMATA for contract ID0021, covering construction of the Smithsonian station of the Metro subway. A public bid opening was held on that day, with the following bids being recorded:

Jackson/Swindell-Dressler	$14,747,388
Bidder 2	$18,702,766
Bidder 3	$20,954,188
Bidder 4	$21,246,403
Bidder 5	$21,900,000
Bidder 6	$22,838,020

Due to the price variance between the Jackson/Swindell-Dressler bid and both the next low bid and the WMATA estimate of $19,643,500, representatives of the Joint Venture were orally requested on the day of bid opening to review its bid for any possibility of error. Also, by letter of May 15, 1972, WMATA requested the Joint Venture to review its total bid price and, in particular, its prices for underpinning, common excavation, dewatering, support of excavation, and concrete.

On May 19, 1972, the Joint Venture wrote in response to WMATA s letter that its total bid was confirmed although errors in bid preparation had occurred with respect to the pricing of several items. After this response, and a conference with the Joint Venture, WMATA awarded the contract to the Joint Venture. The Joint Venture signed a contract to perform at its bid price. As of July 1975, the Joint Venture had performed 93 percent of the contract.

On July 28, 1975, the Joint Venture requested reformation of the contract price. On October 20, 1975, WMATA responded with a letter denying the Joint Venture's claim. WMATA subsequently agreed, however, to submit the question to our Office for an advisory opinion.

The Joint Venture asserts that WMATA's acceptance of the Joint Venture's bid did not create a valid contract, since WMATA knew prior to award that the Joint Venture had made a mistake in its bid.

Our Office has recognized that when the contracting officer is on notice that a bidder has submitted an erroneous bid, generally, acceptance of the bid will not result in a valid contract. 48 Comp. Gen. 672 (1969); Memphis Equipment Company, B-181884, August 15, 1974, 74-2 CPD 102. However, where the contracting officer adequately verifies the bid in response to an adequate request for verification, acceptance of the bid results in a valid contract. 54 Comp. Gen. 545 (1974); 47 Comp. Gen. 616 (1968).

In the present case, it is not disputed that the possibility of a mistake in the Joint Venture's bid was apparent to the contracting officer due to the variance between the Joint Venture's bid and both the next low bid and WMATA's estimated price. However, the contracting officer, by letter of May 15, 1972, requested the Joint Venture to verify its pricing of certain specified items and its

total bid price. The Joint Venture's response to the verification request stated that its costs for common excavation, dewatering, support of excavation, and labor for the entire project was underestimated. Despite the referenced errors, the Joint Venture stated that the Joint Venture "hereby confirms its bid." Furthermore, the Joint Venture's letter concluded with the following sentence:

> "Although the described deficits exist in our estimate and although our estimate's contingency allowance should have included sufficient dollars to cover such possible deficits, but unfortunately did not, the Joint Venture states that it has thoroughly reviewed its bid pricing and is willing to proceed with the contract in accordance with its bid."

The Joint Venture has alleged that subsequent to the above confirmation, it disavowed that confirmation. The Joint Venture, in its Memorandum of Law accompanying its July 28 claim to WMATA, first argued that the Joint Venture, having alleged a mistake in its bid, had the legal right to withdraw its bid at any time prior to acceptance by WMATA. Affidavits have been submitted from principals of the Joint Venture to prove that the Joint Venture attempted to withdraw its bid on June 6, 1972, and that this attempted withdrawal was refused by WMATA. However, a report from the General Counsel of WMATA, dated October 10, 1975, states that: "there is no record that the Joint Venture ever made any verbal or written request to either withdraw or modify its bid." Moreover, the agency record contains no evidence that the Joint Venture ever disavowed its confirmation of its bid. Consequently, since the Joint Venture confirmed its bid after it became aware of the error, acceptance of the Joint Venture's bid resulted in a valid contract.

The Joint Venture next asserts that it is entitled to reformation of the contract since WMATA accepted a bid which it knew was erroneous. Our Office has recognized that where a contracting officer makes an award with knowledge of a mistake in the accepted bid, the contract may be subject to reformation so as to reflect the actual intention of the parties. See B-186130, May 12, 1976, 76-1 CPD 318; 49 Comp. Gen. 446 (1970); B-161024, July 3, 1967. Our Office has held that reformation in such circumstances may be proper when two conditions are met: (1) 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 and (2) the contractor is able to show by clear and convincing evidence the

existence and nature of the mistake and the amount of the intended bid. B-186130, May 12, 1976, 76-1 CPD 318. However, our Office has denied reformation where one or both of those conditions are lacking. See Sherkade Construction Corp., B-180681, October 30, 1974, 74-2 CPD 231; B-162543, November 27, 1967.

In the present case, the agency record does not indicate that the contract was awarded subject to a reservation by the contractor of the right to seek an adjustment in the contract price on the basis of any alleged error. Rather, the record indicates that the bidder accepted award after confirmation of its bid without the reservation of any right to seek subsequent modification of its bid price.

The Joint Venture next asserts entitlement to reformation on the basis that it was orally told by WMATA representatives that its mistake could be corrected by following a procedure through which the contracting officer would do what he could to help during the course of the administration of the contract. The Court of Claims has held that "where an agency induces a bidder to sign a contract by inducing him with promises that a mistake would be corrected according to the Government's routine," the agency will be bound to carry out its promise to correct the mistake. Edmund J. Rappoli Company, Inc. v. United States, 98 Ct. Cl. 499, 516 (1943). However, in the present case, the WMATA report states that WMATA representatives made no promises to afford the Joint Venture relief either prior to the award or thereafter.

The Joint Venture asserts further that representatives of WMATA failed to properly advise the Joint Venture of its right to withdraw its bid and suggested to it the possible forfeiture of its bid bond in the amount of $2,949,478. Our Office has held that where a bidder is influenced in his decision to accept a contract by advice from the agency that withdrawal of the bid would result in the forfeiture of the bid bond, execution of the contract will not prevent the bidders claim for reformation. See 38 Comp. Gen. 678, 681 (1959). However, WMATA states that the Joint Venture was given every reasonable opportunity prior to award of the contract to submit evidence concerning a mistake in its bid. Furthermore, WMATA states that agency representatives did not attempt to coerce acceptance of the contract by threatening to take action on the bid bond. In the absence of probative evidence other than statements by representatives of the Joint Venture, to contradict the WMATA report, we conclude that WMATA gave the Joint Venture an opportunity to submit evidence of the mistake in bid and did not threaten forfeiture of the bid bond.

We have recognized that reformation of a contract is required where it would be unconscionable to compel performance at the bid price. See 54 Comp. Gen. 305; White Abstract Company, B-183643, August 8, 1975, 75-2 CPD 98. However, in the present case, the record does not indicate that the contract as executed was "unconscionable," in the sense that the WMATA was clearly getting something for nothing. See Kemp v. United States, 38 F. Supp. 568 (D. Md. 1941); B-186643, supra. We cannot conclude therefore that the contractor is entitled to reformation on the basis of unconscionability.

The Joint Venture also asserts that the contracting officer's actions were contrary to the WMATA " Procurement Policies and Procedures." These procedures, at Chapter 5, Part C(4), read as follows:

> "4. Mistake in Bid. In cases where the Contracting Officer has reason to believe that a mistake may have been made by a bidder, the matter shall be forwarded to the General Counsel for consideration and he is authorized to make the following determinations:
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> "a. Where the bidder requests permission to withdraw a bid and clear and convincing evidence establishes the existence of a mistake, a determination permitting the bidder to withdraw his bid may be made. However, if the evidence is clear and convincing both as to existence of the mistake and as to the bid actually intended, and if the bid, both as uncorrected and as corrected, is the lowest received, a determination may be made to correct the bid and not permit its withdrawal.
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> "b. Where the bidder requests permission to correct a mistake in his bid and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended, a determination permitting the bidder to correct the mistake may be made; provided that, in the event such correction would result in displacing one or more lower 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.

"c. Where the evidence is not clear and convincing that the bid as submitted was not the bid intended, a determination may be made requiring that the bid be considered for award in the form submitted."

The contracting offficer in the present case did have "reason to believe that a mistake may have been committed by [the] bidder." However, in our opinion, the contractor was not prejudiced by the non-referral of the suspected mistake to the General Counsel. Under the criteria in 4a, the General Counsel is authorized to grant relief to the bidder "where the bidder requests permission to withdraw a bid * * *." In the present case, the record does not indicate that a request was ever made by the Joint Venture to withdraw its bid. Under the criteria in 4b, the General Counsel is authorized to grant relief to the bidder "where the bidder requests permission to correct a mistake in his bid and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended * * *." Thus, even if the Joint Venture requested correction of a mistake in its bid, it never submitted evidence of the bid actually intended. Consequently, since no grounds existed for the General Counsel to provide relief, the Joint Venture was not prejudiced by the failure of the contracting officer to submit the question of a possible mistake in bid to the General Counsel for determination.

Finally, the Joint Venture argues that WMATA did not follow Part D(5) of Chapter 2 of the WMATA Regulations, which establishes certain standards for a negotiated procurement. These regulations are not applicable to a formally advertised procurement, as is involved in the present case. Consequently, the Joint Venture's arguments which rely on this provision are inapposite to the present procurement.

In conclusion, for the reasons stated above, our Office finds no adequate basis to support the Joint Venture's claim for relief from an alleged mistake in bid.

R. F. Keller

Acting Comptroller General
of the United States