MATTER OF: Murphy Brothers, Inc.—
Reconsideration

[Entitlement to Relief for Mistake in Bid]

1. Authority under FPR § 1-2.406-3 in executive
agencies to determine whether a mistake in
bid case is doubtful and therefore should be
referred to GAO does not foreclose GAO from
reviewing that determination as well as agency
determination regarding sufficiency of bid-
der's evidence.

2. Where bidder only requests permission to
correct bid price, bidder may alternatively
be allowed to withdraw its bid if evidence
is clear and convincing only as to the mis-
take, but not as to the intended bid.

The Federal Highway Administration (FHWA) requests
that we reconsider our decisions, Murphy Brothers, Inc.,
B-189756, March 8, 1978, 78-1 CPD 182 and 58 Comp.
Gen. 185 (1978), 78-2 CPD 440, 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 the original 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
correction or withdrawal of the bid. Because rescis-
sion was not feasible, we granted Murphy relief on a
quantum valebant or quantum meruit basis.

In the first reconsideration, we held that FHWA
should have referred the doubtful matter to us for
determination as to whether withdrawal could be al-
lowed under less stringent criteria applied by this
Office pursuant to decisions of the Court of Claims.
We additionally held that FHWA's authority under FPR
§ 1-2.406-3 (1964 ed., amend. 165) to determine mistake
in bid cases in certain well-defined situations did not
divest us of authority to review administrative deter-
minations and decide doubtful cases.

We further stated in that decision that FHWA had
authority to determine that the evidence submitted by
Murphy was not "clear and convincing evidence" of a
mistake in bid so as to permit Murphy to withdraw its
bid. The agency now argues that it may also determine
whether a case is doubtful and therefore should be
referred to this Office. FHWA contends that it made
the determination that this was not a doubtful case
and implies that because the agency fully complied with
the applicable regulations, this Office is precluded
from reviewing the agency decision. While admittedly
the determination whether a case is doubtful must be
made before the agency submits it to this Office, as
discussed below, we believe that we are not foreclosed
from reviewing that determination as well as the agency
determination as to whether a bidder's evidence is clear
and convincing.

The authority of various agencies to handle certain
mistake in bid questions was agreed to by this Office
subject to the express condition that the procedure
authorized not operate to deprive a bidder of its right
to have the matter determined by this Office. We also
reserved the right to question the correctness of agency
determinations. 38 Comp. Gen. 177 (1958). Consequently
the regulations granting agencies the authority to decide
mistake in bid cases acknowledge the authority of this
Office "to question the correctness of any administrative
determination" under the regulation. (FPR § 1-2.406-3(e))
(Emphasis added.)

The regulation also states that nothing contained
therein shall "deprive any bidder of his right to have
the matter determined by the Comptroller General should
he so request." Although Murphy accepted the award after
its allegation of a mistake but prior to the correction
thereof, it did not waive any rights to relief since
it reserved its right to possible relief from this Office.
Accordingly, we believe we have not exceeded the authority recognized under the regulations to review FHWA's decisions not to allow Murphy withdrawal of its bid and not to refer the case to us as doubtful.

The agency has not provided any new information that convinces us that this was not a doubtful case. In our earlier decisions in this case, we observed that the evidence submitted by Murphy made it reasonably clear that a mistake was made. Thus, FHWA's concern that our decisions will encourage bidders to seek bid withdrawals after bid opening "on the slightest pretext of possible mistake" is unfounded.

FHWA also argues that we could not decide that Murphy's bid should have been withdrawn when Murphy sought permission only to correct its bid and never requested to have it withdrawn. We note that FHWA itself decided the issue of withdrawal although Murphy had requested correction, as its response to Murphy's request for correction also denied Murphy permission to withdraw. Murphy reserved "the right to protest the award," which we interpret as objection to FHWA's denial of both correction and withdrawal of its bid. In any event, Murphy did not expressly request withdrawal of its bid in its request for review of the agency decision since the contract award had already been made.

Furthermore, even where a bidder requests permission to correct its bid, an agency may permit the bidder to withdraw its bid if the evidence is clear and convincing only as to the mistake, but not as to the intended bid. FPR § 1-2.406-3(a)(3). Thus, the agency's function is broad enough to grant withdrawal where correction is requested but not allowed. As stated above, we may review the agency's determination. Moreover, we have allowed bid withdrawal where correction was the relief requested. See 52 Comp. Gen. 400 (1972).

Our previous decisions are sustained.

Deputy Comptroller General of the United States