

**DECISION**



95296  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548  
50593

FILE: B-182485

DATE: February 28, 1975

MATTER OF: Sundance Construction, Inc.

**DIGEST:**

Contractor, seeking upward price adjustment based upon allegation of three mistakes in bid after award and performance of contract, is not entitled to relief since contracting officer was not on actual or constructive notice of two of the mistakes, and usual rule that bidder bears consequences of unilateral mistake in bid applies; as to third mistake (suspected by contracting officer), award of contract following verification of bid when requested by contracting officer results in a valid and binding contract.

This case involves mistakes in bid alleged by the contractor, Sundance Construction, Inc. (Sundance), after award of a contract (No. DOT-FA74WA-3503) to it for expansion of the public parking lot at Dulles International Airport. Invitation for bids (IFB) WA5C-4-0328B1 was issued on May 2, 1974, by the Federal Aviation Administration (FAA) and bids were opened May 22, 1974. The IFB was structured in the alternative; item 1 for the expansion of the east end of the parking lot and alternate item 1 for expansion of the east and west ends of the parking lot.

Six firms submitted responsive bids and a determination was made by the FAA to award the contract on the basis of alternate item 1 to the low bidder, Sundance, at a price of \$134,619.59.

Bids on items relevant to this protest were as follows:

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<u>Item 1</u>	<u>Unit</u>	<u>Estimated Quantity</u>	<u>Unit Price</u>	<u>Total Price</u>
<u>Karma Const. Co., Inc.</u>				
f) electrical			lump sum	\$ 16,000.00
h) top soiling	1,000 S.F.	2.4	1.00	2.40
i) seeding	1,000 S.F.	2.4	.40	.96
Total Estimated Cost				\$107,493.36
<u>Arlington Asphalt Co.</u>				
f) electrical			lump sum	\$ 26,550.58
h) top soiling	1,000 S.F.	2.4	537.50	1,290.00
i) seeding	1,000 S.F.	2.4	119.44	286.65
Total Estimated Cost				\$ 85,536.96
<u>Chantilly Const. Corp.</u>				
f) electrical			lump sum	\$28,000.00
h) top soiling	1,000 S.F.	2.4	100.00	240.00
i) seeding	1,000 S.F.	2.4	100.00	240.00
Total Estimated Cost				\$102,550.00
<u>C. W. Stack &amp; Assoc., Inc.</u>				
f) electrical			lump sum	\$32,000.00
h) top soiling	1,000 S.F.	2.4	130.00	312.00
i) seeding	1,000 S.F.	2.4	100.00	240.00
Total Estimated Cost				\$116,667.00
<u>Sundance Const., Inc.</u>				
f) electrical			lump sum	\$24,256.00
h) top soiling	1,000 S.F.	2.4	1.13	2.71
i) seeding	1,000 S.F.	2.4	.27	6.48
Total Estimated Cost				\$82,169.16
<u>County Asphalt Co., Inc.</u>				
f) electrical			lump sum	\$31,000.00
h) top soiling	1,000 S.F.	2.4	100.00	240.00
i) seeding	1,000 S.F.	2.4	100.00	240.00
Total Estimated Cost				\$91,243.00

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<u>Alternate Item 1</u>	<u>Unit</u>	<u>Estimated Quantity</u>	<u>Unit Price</u>	<u>Total Price</u>
<u>Karma Const. Co., Inc.</u>				
f) electrical			lump sum	30,000.00
h) top soiling	1,000 S.F.	5.1	1.00	5.10
i) seeding	1,000 S.F.	5.1	.40	2.04
Total Estimated Cost				196,167.14
<u>Arlington Asphalt Co.</u>				
f) electrical			lump sum	57,269.00
h) top soiling	1,000 S.F.	5.1	500.00	2,550.00
i) seeding	1,000 S.F.	5.1	111.11	566.66
Total Estimated Cost				160,569.99
<u>Chantilly Const. Corp.</u>				
f) electrical			lump sum	60,000.00
h) top soiling	1,000 S.F.	5.1	100.00	510.00
i) seeding	1,000 S.F.	5.1	100.00	510.00
Total Estimated Cost				188,645.00
<u>C. W. Stack &amp; Assoc., Inc.</u>				
f) electrical			lump sum	50,231.00
h) top soiling	1,000 S.F.	5.1	130.00	663.00
i) seeding	1,000 S.F.	5.1	100.00	510.00
Total Estimated Cost				197,939.00
<u>Sundance Const., Inc.</u>				
f) electrical			lump sum	42,852.00
h) top soiling	1,000 S.F.	5.1	.67	3.42
i) seeding	1,000 S.F.	5.1	.19	9.69
Total Estimated Cost				134,619.59
<u>County Asphalt Co., Inc.</u>				
f) electrical			lump sum	65,000.00
h) top soiling	1,000 S.F.	5.1	100.00	510.00
i) seeding	1,000 S.F.	5.1	100.00	510.00
Total Estimated Cost				173,765.00

Before award of the contract, the FAA telephoned Sundance (June 6, 1974) to advise it that based on other bids and the Government estimate, the contracting officer suspected a mistake had been made on unit prices of items (h) and (i) (top soiling and seeding). Sundance confirmed that an error had been made but when apprised of the mistake in bid procedures of Federal Procurement Regulations (FPR) § 1-2.406-3 (1964 ed. Circ. 1) and the unlikelihood of a favorable decision on bid correction from the agency, chose to verify, rather than to allege error. A verification was made in a telegram of June 10, 1974, and by letter the following day.

The contract was awarded to Sundance on June 20, 1974. After a preconstruction conference, work was begun and the project is now completed.

By letter to the FAA dated September 5, 1974, counsel for Sundance requests additional compensation of \$21,452.41, based on three mistakes in bid. Pursuant to FPR § 1-2.406-4(i) the FAA forwarded the case to our Office for decision.

Counsel for Sundance argues that since a mistake was obvious in items (h) and (i) the contracting officer's statement to Sundance that to the best of her knowledge "the Washington Office (of the FAA) never permitted a bidder to correct his bid" was completely unauthorized and the verification by Sundance was made under duress and therefore void. Counsel's reasoning apparently is that such statement is incorrect when obvious mistakes in bid pursuant to FPR § 1-2.406-2, may be corrected by the contracting officer and the bid reformed as long as the next highest bidder is not displaced. In support of this argument, counsel cites Chris Berg, Inc. v. United States, 192 Ct. Cl. 176 (1970).

Significantly, the contracting officer did not treat the mistake pursuant to FPR § 1-2.406-2 but rather, pursuant to FPR § 1-2.406-3. In pertinent part, FPR § 1-2.406-2 states:

"Any clerical mistake, apparent on the face of a bid, may be corrected by the contracting officer

prior to award, if the contracting officer has first obtained from the bidder verification of the bid actually intended. \* \* \*

Interpreting a similar Armed Services Procurement Regulation (ASPR) § 2-406.2 (1974 ed.) we have held inter alia that "\* \* \* such regulation contemplates that the mistake must be obvious on the face of the bid and the contracting officer must be able to ascertain the intended bid without benefit of advice from the bidder \* \* \*." B-172509, July 2, 1971. In the instant case, although a mistake obviously had been made, the contracting officer could not obtain the intended bid by multiplying the quoted unit prices by the correct unit. Therefore, we agree with the FAA that the contracting officer was justified in proceeding pursuant to FPR § 1-2.406-3 since the contracting officer was unable to ascertain the intended bid from its face.

Further, we cannot agree with Sundance that its verification was made under duress. Necessarily, one of the elements of duress is "coercive acts of the opposite party." Vol. 13, Williston on Contracts, 665, § 1603 (3rd ed. 1970). Whether we accept the FAA version of the contracting officer's remark ("\* \* \* [T]o the contracting officer's knowledge, the Washington office never permitted a bidder to correct his bid.") or Sundance's version ("it would (have to) go before a board and it would most likely be thrown out"), coercion and duress are not here present. The contracting officer seems to be merely expressing her opinion that based on her experience, bid corrections were seldom allowed. Sundance exercised a business judgment and chose not to proceed pursuant to FPR § 1-2.406-3, although perfectly free to do so. It had a clear choice and chose to verify its bid prices despite an admitted mistake. Cf. Matter of Sherkade Construction Corp., B-180681, October 30, 1974. Under these circumstances, duress is not present; the verification is valid.

The case cited by counsel, Chris Berg, Inc., supra, can be distinguished on its facts. In that case, after a request for verification by the Navy and an allegation of error by the

contractor before award, the Navy refused as a matter of policy to permit an increase in the bid price; the Navy would consider only rescission. In the instant case, the FAA did not refuse to permit a price increase; rather, Sundance chose not to ask for a price increase and instead, verified, despite its knowledge of a mistake.

Counsel for Sundance next argues that the contracting officer had constructive notice of an error in bid item (f) (electrical), alternate item 1. The error allegedly occurred when an electrical subcontractor of Sundance misconstrued the specifications and based his estimate for alternate item 1 on expansion of the west parking lot only and not the east and west parking lots as called for. Because the bid submitted by Sundance was allegedly considerably lower than the next low bid on this item and in view of the fact that the bid for alternate item 1 was less than double the bid for item 1 (allegedly reflecting the fact that the lighting fixtures were supplied for the east end of the parking lot but not the west end), counsel for Sundance argues that the contracting officer had constructive notice of error and a concomitant duty to seek verification of the bid with respect to this specific item. A request for verification of the bid as a whole, he argues, is not enough to put the contractor on notice of this mistake.

The general rule is that the sole responsibility for preparation of a bid rests with the bidder. B-166734, May 9, 1969. Therefore, where the bidder makes a mistake in bid it must bear the consequences of its mistake unless the contracting officer was on actual or constructive notice of the error prior to award. Saligman v. United States, 56 F. Supp. 505 (E.D. Pa. 1944). Wender Presses, Inc. v. United States, 170 Ct. Cl. 483 (1965). The test for constructive notice is:

"\* \* \* that of reasonableness, i.e., whether under the facts and circumstances of 'the particular case there were any factors which reasonably should have raised the presumption of error in the mind of the contracting officer' \* \* \*."

Wender Presses, supra, quoting Welch, Mistakes in Bids, 18 Fed. B.J. 75, 83 (1958), 53 Comp. Gen. 30 (1973).

Based on the record, the range in bids on this item was reasonable. Bids ranged from \$30,000 to \$65,000 with Sundance bidding \$42,852 and the next low bid \$50,231. This represents an 18 percent difference between Sundance's bid and the next low bid. We do not agree with the contention that an 18 percent difference is "considerably lower." Cf. B-173417, July 29, 1971; Cf. B-164845, June 18, 1969. Additionally, another bidder, Karma Construction Co., Inc., bid less than double its bid on alternate item 1, item (f) (as did Sundance). Further, subcontractor's worksheets submitted by Sundance, though unclear as to how the quoted price was arrived at, tend to indicate that the subcontractor was aware that he was bidding on both the east and west ends of the parking lot. Therefore, under the facts and circumstances of this case, the contracting officer did not have constructive notice of an error in bid item (f) (electrical), alternate item 1.

Counsel next argues that at the preconstruction conference the FAA was advised of the error in item "f" and Sundance's resulting alleged hesitancy to begin work on the project. The FAA allegedly assured Sundance that if it commenced construction an adjustment would be made to compensate it for the loss which would otherwise occur as the result of this error. Counsel argues that since Sundance allegedly relied on this assurance, it is entitled to compensation. Counsel cites B-155704, December 18, 1964; and Edmond J. Rappoli Company, Inc. v. United States, 98 Ct. Cl. 499 (1943) in support of this argument.


Even assuming arguendo that the cited decisions support the propositions for which they are advanced, we do not find merit in this argument. The record does not support Sundance's allegation of an assurance being given by the FAA. The FAA categorically denies that such assurance was given at any time to anyone. We note further, that such assurance is not mentioned in the preconstruction conference agenda and checklist (signed by the president of Sundance and the FAA), the minutes of said conference, or the affidavit submitted by Sundance in support of its claim and signed by its president. Under these circumstances, we conclude that no assurance of a price adjustment was given by the FAA to Sundance.

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Finally, counsel for Sundance briefly argues that as a result of mathematical error in the amount of \$4,260 in the addition of items to be performed by subcontractors, Sundance should receive a price increase. In support of this allegation Sundance has submitted an affidavit signed by its president and relevant worksheets.

The general rule stated, supra, is equally applicable here. The responsibility for preparation of a bid rests with the bidder and the bidder must bear the consequences of its unilateral mistake in bid unless the contracting officer was on actual or constructive notice of the error prior to award (see cases cited, supra). The next highest bid on alternate item 1 was \$160,567.99 by Arlington Asphalt Co. This was approximately \$25,958 or 19 percent more than Sundance. We cannot say that this was a great enough difference to charge the contracting officer with constructive notice of an error in bid. B-164845, supra.

Accordingly, no legal basis exists for granting the referenced price adjustment in Sundance's contract.

  
Deputy Comptroller General  
of the United States