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DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548****FILE: B-189756****DATE: March 3, 1978****MATTER OF: Murphy Brothers, Inc.****DIGEST:**

1. Bidder who is awarded contract by agency despite claim of error is entitled to relief where error is substantiated by worksheets showing that bidder omitted item from its cost estimate. Although bidder did not compute its bid price directly from its cost estimate, such estimate was used by bidder as a basis for determining its final bid price.
2. Mistake relief is not precluded merely because bid on item in which mistake is alleged was in line with the Government's estimate and other bids on that item. While bidder has the responsibility for preparing its bid accurately, the Government may not take advantage of a bidder's error where the Government is on notice of the error.

Murphy Brothers, Inc. (Murphy) has claimed a mistake in its bid on Solicitation No. 77-27-R10, issued by the Federal Highway Administration (FHWA), which resulted in award of contract DOT-FH-10-3148 for the construction of approximately four miles of grading and base in Panhandle National Forests, Shoshone County, Idaho.

Seven bids were received in response to the subject solicitation, as follows:

Murphy Bros., Inc.	\$1,683,273
Max J. Kuney Co.	2,072,720
Clark Bros. Contractors	2,117,953
Washington Constr. Co.	2,121,069
L. M. Johnson, Inc.	2,146,941

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Roy D. Garren, Inc.	2,186,749
Materne Bros. Co.	2,394,384

The Government estimate was \$1,777,935.

By letter of July 11, 1977, Murphy requested FHWA to modify its bid to \$1,879,923 due to a mistake of \$196,650. Murphy asserted that the error in its bid resulted from the omission of presplitting costs from "unclassified excavation," required in item 203(3) of the specifications. The following day, Murphy delivered its worksheets to the FHWA Regional Office. By letter of July 29, 1977, FHWA informed Murphy that it was not allowed correction or withdrawal of its bid and that its bid was accepted in its original amount of \$1,683,273. Murphy has requested our Office to review the denial of its request for relief.

Murphy has submitted several sets of workpapers used in the preparation of its bid. One set, entitled "Excavation Costs by G. Gray & D. Larsen," contains a sheet entitled "drill & shoot" which has at the bottom an estimate of \$.69 per cubic yard. This estimate allegedly included the cost of presplitting. The next sheet in this set, entitled "drill & blast," contains an estimate of \$.87 per cubic yard of rock. In addition to these two sheets is a "drill & shoot summary" sheet which contains a total figure of \$1.16 per cubic yard of excavation. The computations on this sheet indicate that the \$.87 per cubic yard of rock for "drill & blast" was included while the \$.69 per cubic yard for presplitting ("drill & shoot") was not included. An "excavation summary" sheet, totalling \$2.26, includes the \$1.16 amount from the "drill & shoot summary" but does not otherwise include the \$.69 per cubic yard for presplitting. The \$2.26 figure from the "excavation summary" was carried forward as an entry for item 203(3) on a bid schedule entitled "Gil's Cost." A figure of \$.28 was also included in the space for item 203(3), for a total of \$2.54 for that item. The figures in this bid schedule total \$1,516,304.

Murphy also submitted a bid schedule entitled "Gil's Bid." This schedule contains an entry of \$3.00 for item 203(3). Murphy has explained that this amount was assigned to item 203(3) because it was reasonable but it did not necessarily include the same allocation of indirect costs and markups as was applied to other items in the schedule. The figures in "Gil's Bid" total \$1,755,323.

A bid schedule entitled "Office Copy of Bid Submitted W.O. Murphy Notes" contains the same entries as those in "Gil's Bid," and the same total of \$1,755,323. There is a subtraction of \$72,050 from this amount, which Murphy explains represented a reduction in the bids on three items made the night before the bid opening. The total on this bid schedule, after the subtraction mentioned, was \$1,683,272, the amount bid by Murphy.

The "Office Copy of Bid Submitted" also contains several notations which Murphy alleges were used as a basis for the bid. Murphy states that the first column represents "Gil's Cost" of \$1,516,304, rounded off, less a subcontractor modification of \$13,000 for an approximate total cost of \$1,502,000. To this figure was added \$150,000 (approximately 10 percent) and \$75,000 (approximately 5 percent), for a total of \$1,727,000. The total of \$1,700,000 in the second column represented an alternative computation of costs plus overhead and profit. Murphy states that the two figures of \$1,727,000 and \$1,700,000, based on rounded off actual cost figures, were used as a basis of comparison to check the reasonableness of the \$1,683,273, bid, which was based on estimates.

FHWA contends that Murphy has not clearly established the fact that a mistake in bid Item 203(3) actually occurred. FHWA also contends that Murphy's worksheets are in such condition as to make it impossible to determine how the actual bid price of \$1,683,273 was arrived at.

It appears that Murphy's bid was not computed directly from its costs by the application of a uniform markup percentage. Nevertheless, it is clear that the

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computed costs, which contained the alleged mistake, were used as a basis for computing the amount of the final bid. Consequently, while we agree with FHWA that it is impossible to determine from Murphy's worksheets precisely how its actual bid price was derived from its estimated costs, it is clear to us that Murphy made a mistake in the computation of its estimated costs and that this mistake materially affected Murphy's actual bid.

FHWA points out that the tabulation of bids shows that Murphy's bid on item 203(3) was in line with the Government's estimate and other bids on that particular item. However, where a bidder has presented evidence in the form of worksheets tracing the alleged mistake, a comparison of the bidder's actual bid on an item with other bidders' bids on that item is not sufficient to show that no mistake was made.

FHWA has also asserted that Murphy should have diligently prepared its bid to assure that it was correct as to item 203(3) because the IFB stated that: "Pay item 203 (3) is a major item." While it is true that the responsibility for the preparation of a bid is upon the bidder, who ordinarily must bear the consequences of an error in the bid upon which a contract is based, that rule does not entitle the Government to take advantage of a bidder's error when, as in the present case, it has been alleged and satisfactorily established prior to award. See Ruggiero v. United States, 420 F.2d 709, 713, 190 Ct. Cl. 327 (1970).

The general rule, established by the Courts and this Office, is that the acceptance of a bid with actual or constructive knowledge of error therein does not consummate a valid and binding contract. See Nason Coal Company v. United States, 64 Ct. Cl. 526 (1922); 36 Comp. Gen. 441, 446 (1956); 17 id. 575, 576 (1938). We conclude that in this case, the Government had knowledge of a mistake and thus no contract was affected at the award price. Because the contract work has been substantially completed and rescission is not feasible, Murphy should receive payment on a

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quantum valebant or quantum meruit basis, that is, the reasonable value of the services and materials actually furnished by Murphy to the Government, not to exceed the amount Murphy presently claims it intended to bid. See Ubique, Ltd., B-180610, August 12, 1974, 74-2 CPD 90.

R. F. K. Ryan
Deputy Comptroller General
of the United States