

**DECISION**



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

10,403

FILE: B-189756

DATE: June 7, 1979

MATTER OF: Murphy Brothers, Inc.--  
Reconsideration

*[Entitlement to Relief for Mistake in Bid]*  
DIGEST:

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 bidder'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 mistake, 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 rescission 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 allowed 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

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in bid cases in certain well-defined situations did not divest us of authority to review administrative determinations 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. See 49 Comp. Gen. 446 (1970).

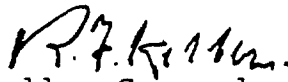
Accordingly, we believe we have not exceeded the authority recognized under the regulations to review FHWA's decisions not to allow Murphy withdrawal of its bid and not to refer the case to us as doubtful.

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