

Cohen  
P.L. #1

**DECISION**



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

04696

**FILE: B-188594**

**DATE: December 23, 1977**

**MATTER OF: Dunbar & Sullivan Dredging Co.**

**DIGEST:**

Where low bidder alleges after award that State sales tax and related factors were mistakenly omitted from bid, and contracting officer was on constructive notice of mistake because of disparity relative to second low bid and Government estimate, no valid contract was consummated, notwithstanding mistake was one of law and bidder may in fact have verified bid if requested. Since intended bid is not clear, and rescission is not feasible, payment on quantum valebant basis is limited to award price plus actual tax liability.

Invitation for bids (IFB) No. DALW62-74-B-0055, for dredging work in Mississippi, Tennessee, and Alabama, was issued in March of 1974 by the United States Army Corps of Engineers (Corps). The five bids received were opened as scheduled on April 10. Dunbar & Sullivan Dredging Co. (Dunbar & Sullivan) was the low bidder at \$7,199,000. The next low bid was \$7,947,500, and the Government estimate for the project was \$8,685,000. The contract was awarded to Dunbar & Sullivan on April 24.

On May 1, Dunbar & Sullivan advised the contracting officer of a mistake in its bid. Dunbar & Sullivan alleged that in preparing its bid it had consulted a standard commercial tax service to determine the sales tax liability that could be anticipated from the required performance. The tax service apparently provided that the State of Mississippi Occupational Sales Tax of 2-1/2 percent of gross receipts did not apply to gross receipts from the sale of services to the Federal Government. Dunbar & Sullivan alleged that on the basis of that information no provision was made in its bid for the cost of such tax. However, after Dunbar & Sullivan was awarded the contract, it took steps to qualify to do business in Mississippi, where it had never worked before, and was advised by the Mississippi State Tax Commission that the 2-1/2-percent Occupational Sales Tax did in fact apply to gross receipts from Government contracts. Dunbar & Sullivan therefore requested that the Corps increase the contract price. In this connection, the Corps states that the subject tax was not included in the Government estimate.

1-188584

At the contracting officer's request, Dunbar & Sullivan submitted evidence, including its worksheets and costsheets, in support of its alleged mistake. However, after a review of such evidence, the Corps declined to reform the contract on the basis that Dunbar & Sullivan had failed to present clear and convincing evidence that a mistake had been made, or of the amount of the alleged error. Dunbar & Sullivan subsequently submitted the matter to our Office for consideration.

Concerning whether a mistake was in fact made, the contracting officer, in recommending denial of the claim for relief, stated as follows:

"\* \* \* Work sheet does not show either state or federal taxes. Tax could be included in one of the amounts shown; however, it is not identified. Work sheets showing a breakdown of the large amounts listed were not available, so definite determination as to what made up each item could not be made."

However, on the basis of the documentation provided to our Office, including a copy of the relevant sections of the commercial tax service, we are convinced that Dunbar & Sullivan in fact mistakenly failed to include the subject tax in its bid. The contractor's worksheets indicate that the tax would have been listed as a special tax in the "Standard Accounts" section of its estimate. On a preliminary "Standard Accounts" worksheet there is a "?" entry for "special tax," and no amount for that item was included in that preliminary total. After consulting the tax service, Dunbar & Sullivan entered the preliminary total on its final worksheet, which formed the basis for the bid submitted. In this connection, we agree with the contractor's interpretation of the information provided in the tax service. Thus, Dunbar & Sullivan's bid erroneously did not provide for the Mississippi Occupational Sales Tax.

We have consistently held that the responsibility for preparation of a bid rests with the bidder. See 48 Comp. Gen. 672, 674 (1969). Therefore, where a mistake in bid is alleged after award of a contract, our Office will grant relief only if the mistake was mutual or, in the case of a unilateral mistake, if the contracting officer was

B-188584

on actual or constructive notice of the error prior to award.  
Smith Decalcomania Co., Inc., B-182414, January 27, 1975, 75-1  
CPD 54.

In arguing that relief is appropriate under that principle, Dunbar & Sullivan contends that the mistake should be categorized as mutual on the basis that neither the bidder nor the Corps was aware that the subject tax was applicable. The essence of a mutual mistake, however, is that the contract as reduced to writing does not reflect the actual agreement of the parties. See B-154920, August 21, 1964; 30 Comp. Gen. 220 (1950). Here, it is clear that the contract in fact represented the parties' actual agreement. Moreover, since the mistake was one of law, and since there was no misrepresentation by the Government to induce the mistake, equitable relief on that basis would not be available from our Office. See Rust Engineering Company, B-130071, February 25, 1964, 74-1 CPD 101; B-169959, August 3, 1970; B-169061, March 20, 1970; B-159064, May 11, 1966; and B-153472, December 2, 1965.

Nevertheless, we believe that even though the mistake must be considered a unilateral one on Dunbar & Sullivan's part, relief is appropriate under the circumstances.

No valid and binding contract is consummated when a contracting officer knew or should have known of the probability of error in a bid but failed to take proper steps to verify the bid. In determining whether a contracting officer had a duty to verify a bid price, we have stated that the test is 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. R. E. Lee Electric Co., Inc., B-184249, November 14, 1975, 75-2 CPD 305, and cases cited therein. If appropriate, the contract price is ordinarily corrected upon presentation of evidence establishing error and the intended price. Charles E. Weber & Associates, B-186267, May 12, 1976, 76-1 CPD 319.

B-188584

Dunbar & Sullivan's low bid was \$748,500 lower than the second low bid and \$1,486,000, or more than 17 percent, lower than the Government estimate. We believe that these price disparities should have caused the contracting officer to suspect that a mistake had been made. See Dietary Products Division of American Hospital Supply Corporation, B-184500, August 11, 1975, 75-2 CPD 103. Distinguish Capitol Aviation, Inc., B-184238, July 30, 1975, 75-2 CPD 68, in which we denied the low bidder relief where there was a 13-percent difference between the low bid and the second low bid, because of the broad price range of the 10 bids received. In this connection, we emphasize that it is the reasonable presumption of error, not the actual mistake or speculation as to the result of a request to verify, that is the important factor when considering whether verification was necessary and a binding obligation incurred. Thus, the fact that the mistake was one of law, for which relief is generally not available, or that Dunbar & Sullivan may in fact have verified the bid if requested, is not relevant to the issue.

As stated above, in similar circumstances a contract would normally be reformed, if actual existence of a mistake is established, to reflect the intended bid price, which must be shown by clear and convincing evidence. See Charles E. Weber & Associates, supra; International Harvester Company, B-184424, April 30, 1975, 75-1 CPD 272. Such price in effect establishes the proper amount of payment on a quantum valebant or quantum meruit basis, that is, the reasonable value of the services and materials actually furnished. See Ubique Ltd., B-180610, August 12, 1974, 74-2 CPL 90.


Dunbar & Sullivan contends that the evidence it has submitted indicates that it would have included \$260,000 in its bid for the cost of the subject tax. The contractor points out that in its preliminary Standard Accounts worksheet it computed the estimated cost of the required performance bond as a percentage of \$8,000,000, its preliminary rough estimate for the project, and argues that it would have used the same basis for its tax estimate, increasing the Standard Accounts entry on its preliminary and final worksheets by 2-1/2 percent of \$8,000,000, or \$200,000. Dunbar & Sullivan further states that since an additional 30 percent for overhead and

B-188584

profit was clearly added to the Standard Accounts total, another \$60,000 would have been included, and the proper amount of relief would therefore be in the amount of \$260,000.

However, we do not agree that the evidence submitted by the contractor clearly establishes the amount of the error. The "Estimate" column total on the final worksheet is the total of three columns labeled "Total Cost" (which was comprised of six price factors including "Standard Accounts"), "Plant Rent," and "OH & P" (overhead and profit). Using Dunbar & Sullivan's reasoning, the "Estimate" total should have been \$260,000 greater than it was. However, the actual bid was \$388,300 lower than the "Estimate" total. Although \$290,000 of that amount is explained as reflecting a "last-minute 'gut' decision \* \* \* to be even more competitive," we are unable to determine the reason for the remaining \$98,300 reduction. Thus, it is not clear what effect a \$260,000 tax entry would have had on that \$98,300 figure, i.e., we cannot be sure that the bid would have been increased by the full \$260,000 rather than by a lesser amount.

Accordingly, the contracting officer's failure to verify Dunbar & Sullivan's bid under the circumstances prevented a contract from being effected at the award price, and the existence of a mistake, but not the amount of the intended bid, has been established. However, the contract has been completed and rescission is not feasible. Under the circumstances, we believe that payment should be made to the contractor on the basis of the award price of \$7,199,000, increased by the amount of the Mississippi Occupational Sales Tax, or \$179,975. See Ubique Ltd., supra.

  
Deputy, Comptroller General  
of the United States