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DECISION



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

*B. Chambers
Proc I*

FILE: B-186655

DATE: January 18, 1977

MATTER OF: Trataros Painting and Construction Corp.

DIGEST:

1. Protest against cancellation of solicitation due to inclusion of erroneous estimate of paintable area for closet interiors which inadvertently permitted bidders to submit unbalanced bids is denied since where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel solicitation and resolicit based on revised estimate which adequately reflects agency's needs.
2. Claim based on estoppel is denied since party to be estopped must know all facts at time that party induced claimant to act to its detriment and Government was unaware that solicitation contained erroneous estimates when it informed claimant of contract number and requested payment and performance bonds.
3. Claim based on alleged improper rescission is denied since acts of assigning contract number and requesting payment and performance bonds almost 6 weeks prior to commencement of contract period is not action a reasonable bidder would act on without obtaining confirmation in writing. Actions taken by Air Force were merely preparatory to contract and without confirmation in writing, claimant acted at its own peril.

Trataros Painting and Construction Corp. (Trataros) protests against the cancellation of solicitation No. F28609-76-09053 and rescission of the alleged contract arising from this solicitation issued by the Department of the Air Force (Air Force), McGuire Air Force Base, New Jersey, for the painting of family living quarters.

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The solicitation was issued on March 8, 1976, and bid opening, as amended, was scheduled for April 14, 1976. The solicitation contemplated a requirements-type contract covering a 12-month period.

After bid opening Trataros was informed by the buyer that it was low bidder and that notice would be forthcoming if it was to receive the award. On April 20, 1976, the buyer advised Trataros that a contract number had been assigned and instructed Trataros to obtain payment and performance bonds in the required sums.

On April 22, 1976, the base procurement office received a protest from another bidder questioning item No. 3 of the solicitation relating to the painting of closet interiors. This bidder took issue with the estimates for interior closet areas but its principal argument was that the award should be based on unit prices rather than a lump-sum aggregate price. Trataros was notified of this protest by the procurement office on April 26, 1976. The protest was denied and the bidder was informed by letter dated May 19, 1976, that the contract would be awarded on the basis of unit prices quoted by each bidder.

By letter dated May 21, 1976, Trataros was requested to verify its bid price. It was informed that its bid appeared low in comparison with the other bids submitted and with the Government estimate. Trataros, on May 22, 1976, verified its bid and stated that the unit prices as submitted were correct.

On May 27, 1976, orally and in writing, all bidders were advised of the contracting officer's decision to cancel the solicitation on the basis that the solicitation as released contained substantial erroneous quantities relating to the actual amount of closet area to be painted, thereby inadvertently permitting bidders to submit unbalanced bids. The Air Force states that review of the information contained in the solicitation indicates that cancellation is clearly in the best interest of the Government. Trataros was further advised that its alleged contract was not consummated and that authority to proceed as requested could not be authorized.

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By letter dated June 2, 1976, Trataros protested against the cancellation of the solicitation on the basis that specifications had been the same for the preceding 3 years and, therefore, the amount of closet area to be painted was not erroneous. It is also Trataros' position that a contract had been consummated and improperly rescinded. By letter dated August 20, 1976, after receipt of the agency report, Trataros has stated that a cogent and compelling reason is lacking to justify cancellation of the solicitation. Trataros further contends that the protest by the other bidder which was denied and which challenged item No. 3, the item which was subsequently proven to contain erroneous estimates, was significant since this was the eventual reason for cancellation of the solicitation. In addition, Trataros has requested payment in the amount of \$41,875 for reimbursement of alleged damages and expenses it suffered when the solicitation was canceled. Finally, Trataros claims the Government is estopped to deny the existence of a binding contract.

It is the Air Force's position that: (1) the Trataros' bid is mathematically unbalanced; (2) the erroneous Government estimates contained in item No. 3 of the solicitation constitute adequate justification for canceling the solicitation; and (3) the contract with Trataros was never consummated and, therefore, the protester is not entitled to any compensation.

In our decision B-168205(1), June 30, 1970, unbalanced bidding is described as follows:

"* * * The term 'unbalanced' * * * is applied to bids on procurements which include a number of items as to which the actual quantities to be furnished are not fixed, in which a bidder quotes high prices on items which he believes will be required in larger quantities than those used for bid evaluation, and/or low prices on items of which he believes fewer will be called for.
* * *"

Our Office has recognized the two-fold aspect of unbalanced bidding. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of

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the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect--material unbalancing--involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is not materially unbalanced unless there is reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the Government. See Mobilcase Corporation, 54 Comp. Gen. 242 (1974), 74-2 CPD 185.

In the Trataros' bid, substantially all of its aggregate price was on item No. 3, the closet interiors, which was only one of 10 separate items on the bidding schedule. This was done with the expectation, according to Trataros, that " * * * the paintable closet area was usually proportionate to the rest of the areas." We have been informed that in preceding years, the estimated area for closets was listed on the schedule as 75,000 square feet. This year it was decided that the repainting would be limited to selected portions of rooms that were judged to be in need of it rather than painting entire rooms including trim and closets. Accordingly, the specifications were changed from prior years so that all surfaces would not have to be painted. If inspection showed that only a certain part of the room needed painting, that is all that would be reflected in the work order. It appears that Trataros ignored this change and concentrated its bid price on one item of the schedule. While contract award would be on the basis of an evaluation of aggregate bid prices, the payment for work done would be strictly on separate item prices.

There is reasonable doubt that an award to any mathematically unbalanced bidder would result in the lowest cost to the Government. There is a substantial variation between the solicitation's first estimate and the succeeding estimate. This in itself creates a substantial doubt that an award to any mathematically unbalanced bid would result in the lowest cost. As we stated in Edward B. Friel, Inc., 55 Comp. Gen. 231 (1975), 75-2 CPD 164:

" * * * In other words, where the IFB's estimates are not reasonably accurate, there is a strong indication per se that material unbalancing is present. In this

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regard, it must be noted that whatever estimated quantities are used in evaluating the bids are, of course, precisely that--estimates of what may be ordered in the future under the contract. There are no 'actual requirements' on which to evaluate bids, and the substitution of one estimate for another merely reflects the agency's best judgment, at a given point in time, of what may transpire in the future and what ultimate costs the Government may incur."

Based on the foregoing, we agree with the Air Force's position that the Trataros' bid was mathematically unbalanced. Since it also appears that the Government would not be getting the lowest cost, it is our view that the Trataros' bid was also materially unbalanced.

Armed Services Procurement Regulation § 2-404.1(b)(viii) (1975 ed.) provides that cancellation of a solicitation is permitted where, for compelling reasons, it is clearly in the best interests of the Government to do so. We have sustained the cancellation of an invitation where after bid opening but prior to award it has been determined that the original specifications no longer serve the Government's actual needs. See 49 Comp. Gen. 211 (1969); Cottrell Engineering Corporation, B-183795, September 22, 1975, 75-2 CPD 165.

In the instant case the deficiency in the Government estimates inadvertently permitted bidders to submit unbalanced bids. Our Office has held that where examination of the estimate discloses that it is not reasonably accurate the proper course of action is to cancel the solicitation and resolicit based upon a revised estimate. Edward B. Friel, Inc., 55 Comp. Gen. 231, supra.

In a new solicitation for this procurement a revised bidding schedule has been adopted. The schedule now reflects the best estimate of needs for the projected contractual period. The area for closet interiors has been reduced from 75,000 square feet to 5,500 square feet.

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Based on the above, we agree that there was a compelling reason for the Air Force's decision to cancel the solicitation and resolicit based upon a revised estimate which reflects the agency's actual needs.

In regards to the protest by another bidder, the contracting officer did not find that the estimates for interior closet areas were reasonable. It was explained to the protesting bidder that the assumption that all closets would be painted was incorrect and that the total of all extended unit prices would be the basis for award. This protest did lead to a review of the estimates in the solicitation by agency personnel. It was concluded that the existing estimates did not reflect actual anticipated needs and the decision was made to cancel the solicitation.

We do not agree with the protester that the Government is estopped to deny the existence of a legally binding contract. In Emeco Industries, Inc. v. United States, 202 Ct. Cl. 1006 (1973), the Court of Claims reasserted the four elements of estoppel propounded in United States v. Georgia-Pacific Company, 421 F. 2d 92 (9th Cir. 1970), requiring that:

- 1) the party to be estopped must know the facts;
- 2) the party must intend that its conduct shall be acted upon, or must act so that the party asserting the estoppel has a right to believe that the conduct is so intended;
- 3) the claimant must be ignorant of the true facts; and
- 4) the claimant must rely on the other's conduct to his injury.

We do not believe that all 4 elements exist in the instant situation to justify estoppel. At the time that Trataros was informed that it was the low bidder and was requested to execute the payment and performance bonds, the Government did not know all the facts. As of April 26, 1976, the date of the Government's

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actions, the procuring activity was not aware of the true facts. It was not until five weeks later that the Air Force discovered that its estimates were erroneous. The key to discovering the erroneous estimates was the protest by another bidder which led to a review of the estimates and this protest was not decided until May 19, 1976.

Our Office has considered the issue of estoppel in Fink Sanitary Services, Inc., 53 Comp. Gen. 502 (1974), 74-1 CPD 36. In that case, we stated that the agency's actions in giving a contract number to the apparent low bidder just 6 days prior to commencement of the contract period is an action which a reasonable bidder has a right to act on. This situation is easily distinguishable from the instant case. We have been advised that the commencement of the contract period was not to begin until mid-June, a period of at least 7 weeks from the time Trataros was given the contract number. Therefore, the acts of assigning a contract number and requesting the protester to obtain payment and performance bonds 7 weeks prior to commencement of the contract period is not, we believe, an action which a reasonable bidder has a right to believe was intended for it to act upon without obtaining a written confirmation that it was the intended contractor. The actions taken by the Air Force were merely preparatory to a contract and Trataros was acting at its own peril by proceeding without formal written notification that award would be made to it.

Accordingly, the protest and the claim for damages are denied.

R. F. Kistler

Deputy Comptroller General
of the United States