

DECISION



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

M. R. Abelfield

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18617

FILE: B-204439

DATE: June 8, 1982

MATTER OF: Kunert Electric

DIGEST:

1. Where facts presented by contracting agency and protester conflict as to when protester knew basis of protest, which has bearing on timeliness of protest filing, doubt as to timeliness is resolved in favor of protester.
2. Where amount of funds available makes award possible only on base bid rather than on base bid and all additive items for which prices are requested, award on base bid basis is proper.
3. Claim for bid preparation costs is denied, since there is no evidence the agency's denial of award was arbitrary or capricious.
4. There is no legal basis to pay anticipated profit to unsuccessful bidder.
5. Claim for expenses incurred in anticipation of contract performance is denied, since bidder admits it had no written contract and person who allegedly said it would have award was not contracting officer.

Kunert Electric (Kunert) protests the rejection of its bid under Los Angeles Air Force Station invitation for bids No. F04693-81-B-0007.

The basis of the protest is that Kunert was the low bidder, that the buyer advised Kunert that it would be awarded the contract, and that as a result of this advice it incurred expenses in anticipation of contract performance. In the circumstances, Kunert contends that the procurement should be resolicited and that it should recover costs incurred in preparing to perform the contract, lost profit and bid preparation expenses. We deny the protest and the claims for payment.

The Air Force contends that the protest is untimely since Kunert was advised orally by the buyer on July 7 that it was not the low bidder and it did not file a protest with our Office until August 17. However, Kunert denies that it had a conversation with the buyer on July 7. It admits to a conversation on July 10, but contends that the gist of the conversation was that the agency was proceeding to award and that no mention was made as to whom the award would be made. Kunert contends that it first learned that the award would be made to someone else upon receipt of the award notification on August 8. Our receipt of the protest on August 17 was within 10 working days of Kunert's receipt of the award notice.

The facts conflict as to when Kunert first knew the basis of the protest. Under the facts advanced by the contracting agency, the Kunert protest is untimely. Under the facts advanced by Kunert, the protest is timely. We resolve doubt as to the timeliness of a protest in favor of the protester. Applied Devices Corporation, B-199371, February 4, 1981, 81-1 CPD 65. Accordingly, we will consider the protest on the merits.

Kunert offered the lowest price for the base bid plus the additive. However, an award on that basis would have exceeded the funds available for the project. The contracting agency decided to make an award for the base bid alone. Kunert was not the low bidder on a base bid basis. Another bidder was low on that basis and award was made to it.

Kunert doubts the validity of the funding availability because Kunert allegedly was told by the buyer that the funding availability would pose no problem to the acceptance of its bid. However, even if the buyer made the statement attributed to him, the report from the contracting agency indicates that the buyer was mistaken in his belief, since subsequently it was decided that the funding availability was "the government's price constraint" and Andrews Air Force Base "directed the award of the base bid only," apparently because of the limitation in the amount of funds that was available. Where the amount of funds available makes award possible only on the base bid rather than on the base bid and all the

additive items for which bid prices are requested, an award on the base bid basis is proper. Utley-James, Inc., B-198406, June 16, 1980, 80-1 CPD 417. Therefore, Kunert's contention that the procurement should be resolicited is denied.

Further, an award of bid preparation costs is made only where the agency actions in denying the bidder the award are arbitrary or capricious. American Dredging Company--Reconsideration, B-201687, June 17, 1981, 81-1 CPD 504. We find no evidence of that in this case. Therefore, we deny the claim for bid preparation costs. Moreover, there is no legal basis to allow an unsuccessful bidder anticipated profit. Lamson Division of Diebold, Incorporated, B-196029.3, August 8, 1980, 80-2 CPD 101.

Finally, Kunert is not entitled to recover the expenses incurred in anticipation of contract performance. Kunert admits that it had no written award. Further, while the buyer allegedly told Kunert that the contract would be awarded to it, the buyer was not the contracting officer who was authorized to consummate a contract. In that regard, the United States is not bound by agents acting beyond their authority. D&S Universal Mining, Inc., B-200815, August 31, 1981, 81-2 CPD 136.

for *Milton J. Aroslan*
Comptroller General
of the United States