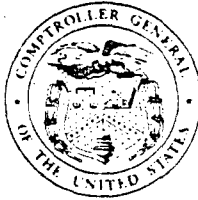


**DECISION**



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

60252

FILE: B-181447

DATE: November 28, 1975

MATTER OF: Terra Corporation

97645

**DIGEST:**

When after bid opening it appeared that radio having .40-amp drain could meet Government's needs, as could .35-amp stated in IFB as maximum, cancellation should have been considered, but was not necessarily required where (1) bidder (awardee) was otherwise responsive and low amongst bids which would provide Government with actual needs, and (2) if IFB had been canceled and .40-amp limit was used in subsequent procurement, item would have been purchased from awardee--sole supplier on Federal Supply Schedule. Agency's actions were not arbitrary and capricious and bid preparation costs claim is denied.

This is a claim filed by Terra Corporation for bid preparation costs allegedly incurred by it in connection with invitation for bids (IFB) DSC-74-363 issued on April 12, 1974, by the Department of the Interior, Bureau of Land Management (BLM), Denver Service Center.

As stated in our earlier decision on Terra's bid protest in this matter (Terra Corporation, B-181447, December 26, 1974, 74-2 CPD 383)--

"\* \* \* [the IFB] solicited bids for 29 portable transceiver radios and four headphones to be supplied to five different locations for use in the BLM fire-fighting program.

"In response to the IFB, four bids were submitted as follows:

"Bidder	Item 1 Radios	Item 2 Headphones	Total Bid
Edo Aire Division of Edo Corporation (Edo)	\$15,751.93	\$ 40.36	\$15,792.29
Genave	16,559.00	161.00	16,720.00

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"Bidder	Item 1 Radios	Item 2 Headphones	Total Bid
Narco Avionics (Narco)	\$19,289.93	\$140.00	\$19,429.93
Terra Corporation (Terra)	24,934.20	306.00	25,240.20

The bids of Genave and Narco were found to be nonresponsive to the IFB specifications in several respects. Edo's bid was found to meet or exceed all of the IFB specifications except the requirement that the receiver current drain of the radios not exceed .35 amps. Edo's bid specifications show a receiver current drain of .40 amps. Terra's bid was the only one found to meet all the IFB specifications.

"By the contracting officer's account in a supplemental statement on the protest, Edo contacted BLM upon receiving the IFB and asserted that its equipment on the Federal Supply Schedule (FSS) effective April 29, 1974, met the IFB requirements. Also, Edo, which offered its radios on the FSS, included a copy of the FSS contract price schedule with its descriptive literature in its bid package. Edo's FSS price was \$16,716.18 for the 29 radios or \$964.25 more than Edo's bid price.

"On June 4, 1974, when it became clear that BLM was going to award the contract to Edo, Terra protested to our Office the proposed award based upon relaxed specifications without allowing the other bidders the opportunity of competing on the same specifications.

"However, BLM waived Edo's exception to the IFB specifications and awarded the contract to Edo on June 5, 1974, notwithstanding Terra's pending protest, because it regarded the .05 difference between the IFB requirements and Edo's bid specifications to be a minor informality, not justifying an award at a much higher price to Terra, the only bidder fully meeting the IFB specifications. Moreover, BLM determined that the .35 amps receiver current drain requirement was not based upon any requirement for 'certain performance,' but rather was a result of the IFB specifications being written around certain commercial specifications, and that Edo's FSS radio with .40 amps receiver current drain would meet the Government's minimum needs. Also, it was found:

"'Because of the extremely dry spring this year, fire danger is considered to be critical.

"'In order for BLM to benefit from the improved capabilities resulting from adequate air-to-ground communication, it is imperative that a contract for radios be awarded at once to obtain special radio equipment for the impending fire season.'

Finally, in view of the cost savings and the urgent need for the radios, the contracting officer, according to the supplemental statement, decided that an award to Edo under the IFB rather than the FSS should be made, since he did not believe it made any difference 'as far as end results were concerned.'"

Our decision then went on to conclude that the Edo deviation exceeded the specific limits of acceptability stated in the specifications and was therefore a substantive rather than a minor departure from the advertised specification. We therefore concluded that the Edo bid should have been found nonresponsive. We also indicated that even though the BLM concluded that a receiver current drain of .40 amps would satisfy its needs, it was improper to relax this requirement in order to make an award under this IFB without the issuance of an amendment to the IFB made known to all potential bidders or, on the other hand, if this fact became known only after bid opening, cancellation of the IFB may have been in order.

In sum, we concluded that "BLM acted improperly in making an award to Edo pursuant to the IFB." However, our Office was unable to recommend corrective action on Terra's protest in that the contract awarded to Edo was fully performed as of the date of our earlier decision.

Thereafter, Terra submitted its claim for bid preparation costs in the amount of \$943.35.

As this Office stated in T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345, the ultimate standard for recovery of bid preparation costs as indicated by the Court of Claims is whether the procurement agency's actions were arbitrary and capricious toward the bidder-claimant. Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974) (hereinafter Keco II); see The McCarty Corporation v.

United States, 499 F.2d 633 (Ct. Cl. 1974); Keco Industries, Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970) (hereinafter Keco I); Excavation Construction, Inc. v. United States, 494 F.2d 1289 (Ct. Cl. 1974); Continental Business Enterprises, Inc. v. United States, 452 F.2d 1016 (Ct. Cl. 1971).

However, as set out in Keco II, there are four subsidiary criteria; namely:

1. Subjective bad faith on the part of the contracting officials--depriving the bidder of fair and honest consideration of his proposal. Heyer Products Company, Inc. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956). The court did note that wholly unreasonable action is often equated with subjective bad faith. Keco II, supra, at 1204; Cf. Rudolph F. Matzer & Associates, Inc. v. Warner, 348 F.Supp. 991, 995 (M.D. Fla. 1972);

2. That there was no reasonable basis for the agency's decision. Excavation Construction, Inc. v. United States, supra; Continental Business Enterprises, Inc. v. United States, supra;

3. That the degree of proof of error necessary for recovery is ordinarily related to the amount of discretion entrusted to the procurement officials by applicable regulations. Continental Business Enterprises, Inc. v. United States, supra; Keco I, supra; and

4. Violation of statute can, but need not, be a ground for recovery. Cf. Keco I, supra.

Application of these criteria depends on the type of error or dereliction committed by the procurement officials and whether that action was directed toward the claimant's own bid or that of a competitor.

The agency argues that its actions on the instant procurement were not arbitrary and capricious on several bases. Most significantly it notes that at the time the specifications were being prepared and the solicitation was issued the BLM was not aware that the Edo radio was on the FSS. Rather, it was only upon receiving the IFB issued April 12, 1974, that Edo contacted the BLM and asserted that its radio met the IFB requirements and that it would be listed on the FSS dated April 29, 1974. Edo then submitted a brochure to the BLM outlining the technical specifications of its radio. These specifications were analyzed by technical people within the Department of the Interior. However, during the course of the analysis bid opening

occurred (May 10, 1974). Thereafter, the technical people concluded on May 15, 1974, that the Edo radio met the IFB specifications.

The agency argues that:

"Terra was not prejudiced by the Government action after the bid opening, because after the technical staff determined that the difference in .35 and .40 amps was insignificant, an award to Terra was not possible in the best interests of the Government. An award to Terra would have been an arbitrary and capricious act since the Government's needs could be met by .40 amps, which was on the Federal Supply Schedule.

"The alternative of cancellation and readvertising also was unavailable because the Federal Supply Schedule specification (.40 amps) was adequate to the Government's needs. The only alternative available, as the Bureau of Land Management saw it, was to award to Edo-Aire under the IFB, or to order from Edo-Aire under the Federal Supply Schedule.

"The action of awarding to Edo-Aire under the IFB at a lower price than under the Federal Supply Schedule, was based on an attempt to save time under urgent circumstances and to save money. This may have been incorrect, but it was not an arbitrary and capricious action."

As indicated in our earlier decision, we do not believe that the difference between .35 amps and .40 amps is, however, insignificant. Therefore, as also indicated above, since the agency concluded subsequent to bid opening that a radio with a .40-amp receiver current drain could meet the Government's minimum needs, the IFB's specifications were deficient in not setting forth accurately the Government's minimum needs. That is, they may have unnecessarily precluded competition. Moreover, when the determination of the acceptability of Edo's bid was made, this indicated that the needs of the Government could perhaps be satisfied by a less expensive article differing from that on which bids were invited (i.e., a .40-amp radio vs. a .35-amp). Both of these factors are examples of compelling reasons to reject all bids and cancel the invitation. Federal Procurement Regulations § 1-2.404-1 (1964 ed. circ. 1). Accordingly, in the normal situation as we indicated earlier this perhaps should have been done.

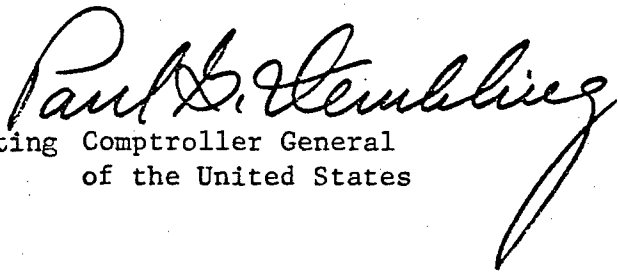
However, our Office has recognized in the past that even where an IFB contains deficient specifications, cancellation is not required if (1) from among the bidders which are otherwise responsive to the IFB, the lowest price one has agreed by its bid to provide the exact item and on the terms actually required by the Government (even though not actually set out in the IFB); (2) other bidders would not be treated in an unfair and unequal manner by an award to that bidder; and (3) the integrity of the competitive bidding system would not be harmed by such an award. Joy Manufacturing Company, 54 Comp. Gen. 237 (1974), 74-2 CPD 183; Columbia Van Lines, Inc., 54 Comp. Gen. 955 (1975), 75-1 CPD 295. See 52 Comp. Gen. 285 (1972).

In the instant case when it became apparent to the BLM after bid opening that its minimum needs could have been met with the .40-amp radio, while consideration should have been given to cancellation, we do not believe that this action was necessarily required. First, the Edo bid, which, with the exception of its response to the subsequently determined erroneous amperage limitation set out in the IFB, was otherwise responsive and amongst those bids which would provide the Government with its actual minimum needs, i.e., a drain requirement not to exceed .40 amps, was lowest. Moreover, if the IFB had been canceled and the .40-amp requirement was to be used as the upper limit of acceptability in procuring the item, then the radios in question would have been procured as required by the Federal Property Management Regulation (FPMR), 41 C.F.R. § 101-26.401 (1974) from the FSS, which meant that award would be made to no one other than Edo, the sole supplier on the FSS. For this reason, once the agency realized, after bid opening, that its minimum needs could be made by a .40-amp radio and thus that acceptable items existed on the FSS, ultimate award to Edo was a virtual certainty. Accordingly, we do not believe that any bidder either actual or potential could have been prejudiced by an award to Edo under the IFB although we remain of the view had time permitted the IFB should have been canceled and award made to Edo at its price of \$15,751.93 under the FSS. Note - in accordance with the FPMR, 41 C.F.R. § 101-26.408-5 (1974), whenever a price reduction is accorded by an FSS contractor, consonant with the provisions of its FSS contract set forth in the General Services Procurement Regulation, 41 C.F.R. § 5A-73.123-1 (1974), that price reduction is also reflected as a downward adjustment of its supply schedule price.

Thus while we feel that the agency's actions were somewhat in error, as to the form that was used in making award to Edo, we

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perceive of no basis upon which to conclude that these actions were arbitrary and capricious. Thus, the agency's obligation to fairly and honestly consider each bid submitted was not breached. Accordingly, the additional arguments raised by the agency need not be discussed and Terra's claim for bid preparation costs is denied.

  
Acting Comptroller General  
of the United States