

DECISION

RNY



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

FILE: B-182730

DATE: May 20, 1975

MATTER OF: Flippo Construction Co., Inc.

DIGEST:

Denial of protest against rejection of bid is affirmed, since doctrine of equitable estoppel, only legal basis upon which protester could sustain position, is not applicable where expenses were incurred in reliance on communications from persons without authority to make contract award.

Flippo Construction Co., Inc. (Flippo), has requested reconsideration of decision B-182730, March 7, 1975, wherein our Office denied the firm's protest of a contract award by the Government of the District of Columbia to the Marbro Company, Inc. (Marbro), for a culvert and paving project under invitation for bids No. 226-AA-02-0-4-KA.

Bids were solicited on two alternate approaches. At the bid opening on September 18, 1974, Marbro was the low bidder at \$278,035 for each alternate. Flippo was next low bidder at \$290,461.50 and \$298,058.50 for alternate "A" and "B," respectively. When it was discovered that Marbro had failed to acknowledge two of the three addenda issued, the contracting officer proposed to reject Marbro's bid as nonresponsive and recommended that award for alternate "B" be made to Flippo. This was orally communicated to Flippo on September 26, 1974, by the Deputy Assistant Director of the Bureau of Design, Engineering and Research, Department of Highways and Traffic, for the District.

The award of the contract to Flippo was delayed as a result of its tardiness in submitting the affirmative action program required by the District. Subsequently, it was determined by the Assistant Corporation Counsel, Chief, Special Assignments Division, that Marbro's failure to acknowledge the addenda could be waived as a minor informality.

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When the contracting officer informed Flippo on November 8, 1974, that Marbro would receive the award, Flippo protested to the District. Upon denial of the protest by the District, Flippo protested to our Office alleging that it was induced by the Government to incur costs in contemplation of award as a result of the initial notification of intent to make the award to Flippo. The firm contended that in view of the expense incurred the Government should award the contract to it.

In our decision of March 7, 1975, we expressed the belief that the doctrine of equitable estoppel had no application to the situation. We indicated that the communication upon which Flippo relied in incurring costs in contemplation of award was not from an official with authority to bind the Government.

In its request for reconsideration, the protester first maintains that we improperly invoked the doctrine of equitable estoppel. Flippo states:

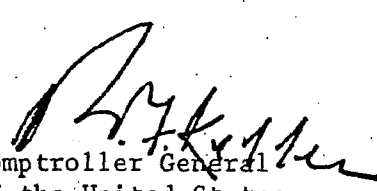
"In resorting to the doctrine of equitable estoppel as a basis for denying this protest, it should be noted that this doctrine has been injected into the case by the Comptroller General, without having been invoked either by protestant or by the District's representatives."

While our Office agrees that the doctrine, as such, was never raised, it is our opinion that it is the only legal theory upon which Flippo's position could be sustained. Since it is clear that the District of Columbia Government could waive Marbro's failure to submit addendum 2, Flippo's only grounds for protest would be on the basis that expenses were incurred as a consequence of the Government's announced intention to award the contract to Flippo. However, it has been held repeatedly that the United States is not liable for the erroneous acts or advice of its officers, agents or employees even if committed in the performance of their official duties. See Matter of A. D. Roe Company, Inc., B-181692, October 8, 1974, 54 Comp. Gen. 271; 46 Comp. Gen. 348 (1966); 44 Comp. Gen. 337 (1964); Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380 (1947); United States Immigration and Naturalization Service v. Hibi, 414 U.S. 5 (1973).

Flippo also objects to our disposition of the protest on the grounds that the District officials acted beyond their authority and contends that we ignored administrative procedures followed by the District in awarding contracts. However, the facts clearly demonstrate that Flippo received no communication from the contracting officer awarding the contract to the firm. Rather, Flippo bases its argument on the notice it received from the Deputy Assistant Director of the Bureau of Design, Engineering and Research on September 26, 1974, that it was the apparent low bidder on the project. While it appears that award to Flippo was contemplated in communications of October 2 and October 15 between the District's contracting officer and Assistant Corporation Counsel, there was no direct communication with Flippo of contract award. Moreover, the intention that no contract be manifested before the completion of formalities is evident from the October 17, 1974, letter from the District Labor Standards and Equal Opportunity Compliance Officer to Flippo wherein it is stated that the contracting officer is unable to award a contract to Flippo until it submits the required affirmative action plan program and that failure or refusal to submit the material might result in rejection of the company's bid.

A letter of November 8, 1974, from the contracting officer to Marbro was the first valid notice of award. Informal advice to Flippo prior to that time from persons without the necessary authority to make an award did not create a contract binding on the District.

Accordingly, denial of Flippo's protest against rejection of its bid is affirmed.


Deputy Comptroller General
of the United States