DECISION

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

60182

FILE: B-184476 DATE: November 18, 1975

MATTER OF: Machinery Associates, Inc.

97716

DIGEST:

1. Protester's claim for loss of anticipated profits and expenses incurred in protesting award to another bidder is denied, since unsuccessful bidder is not entitled to reimbursement for anticipated profits and no basis exists for payment of protest expenses. Further, while bid preparation costs may be allowed where bid is not fairly considered because of bad faith or illegal action on part of Government procurement personnel, record establishes that contracting officer acted legally and in good faith in awarding contract to firm other than protester.

2. Although GAO normally would recommend that contract awarded on basis of other than agency's minimum needs be terminated for convenience of the Government, completed delivery under contract precludes such action. However, it is recommended to agency that greater care be taken in drafting specifications that reflect Government's actual minimum needs.

The protesting concern has objected to the Department of the Navy's actions in awarding a contract to the Mattison Machine Works rather than to the protester and then modifying the specifications to permit delivery of an item which did not meet the original specifications. The protester requests $20,000 as compensation for the loss of anticipated profits and for various administrative expenses incurred in protesting the agency's actions.

Contract N00600-75-C-0546 was awarded by the Naval Regional Procurement Office, Washington Navy Yard, to Mattison Machine Works, effective December 13, 1974. The contract required the delivery of a Rotary Surface Grinding Machine in accordance with contract specifications, and was awarded at Mattison's total bid price of $100,220. The protester, the only other bidder, bid $105,043.

Prior to award, the protester questioned whether Mattison would furnish a grinder in compliance with the following specification provision:

"3.9 Coolant System: Add coolant system shall be flood type, 300 gallon capacity, tank in base with sludge conveyor in base to sludge tote box. Sludge conveyor which automatically and continuously removes from the base into a tote pan. Coolant to be fed to inside and outside of grinding wheel."

The protester's specific concern was whether Mattison would deliver a machine with a tank in the base since it was the protester's belief that Mattison's machines featured a coolant system utilizing a separate coolant tank located external to the grinder. In response to the protester's assertion, the Navy requested that the pre-award survey of Mattison include consideration of Mattison's ability to comply with the requirements of paragraph 3.9. The survey team reported that Mattison was "cognizant of the requirements" and recommended award.

Subsequent to the award, the contractor delivered installation and floor plans indicating that the coolant reservoir tank was not in the base of the grinder. The contractor took the position that it interpreted paragraph 3.9 to permit the external situation of the tank and that the grinder it would furnish would not have a coolant tank in the base of the machine. Agency technical personnel then reappraised the requirement in question and during the third week of March concluded that, irrespective of the location of the tank, any grinder that would physically fit within an area 14 feet by 15 feet would be considered satisfactory and that the specification requirement for a tank-in-base feature was superfluous to their actual needs.

The Navy then considered terminating the contract and resoliciting the requirement without the unneeded tank-in-base feature. However, the purchasing activity reported that the grinder was immediately required since it did not then possess an alternative grinding capacity to do the work of the 60-inch grinder requisitioned, but was temporarily relying on unsatisfactory substitute methods. It also advised that should delays ensuing from termination and reprocurement result in an increased purchase price, the requirement would have to be cancelled since funds in excess of the authorized $100,200 were unavailable. Further complicating the matter was the fact that as of March 21, 1975, the contractor claimed to have incurred expenses in the vicinity of 25 percent of the contract price, and refused to accept a no-cost termination of the contract. Under those circumstances, the Navy determined that the only practical

alternative was to allow the contract to continue without the tank-in-base requirement. Ultimately, Mattison and the Navy agreed upon a price reduction of $1,500.00 and an acceleration of 43 days in the scheduled delivery date. (The purchasing activity reported that the accelerated delivery translated into approximate estimated savings of $1,872.00.) The contract was formally amended on May 20, 1975, to reflect the foregoing terms.

With regard to the protester's requested compensation for loss of anticipated profits and for protest expenses incurred for long-distance telephone calls and trips to the procuring activity, it is well established that anticipated profits may not be awarded to an unsuccessful bidder not a party to a contract. See Keco Industries, Inc. v. United States, 492 F. 2d 1200 (Ct. Cl. 1974); Keco Industries, Inc. v. United States, 428 F. 2d 1233 (Ct. Cl. 1970); Heyer Products Company v. United States, 140 F. Supp. 409 (Ct. Cl. 1956). It is also clear that expenses incurred in pursuing a protest are noncompensable costs. Descomp, Inc. v. Sampson, 377 F. Supp. 254 (D. Del. 1974); T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345.

Under certain circumstances, where it is shown that a bid was not fairly or properly considered for award because of subjective bad faith or actions contrary to law or regulation on the part of procuring officials, or that there was no reasonable basis for the agency's action, bid preparation expenses may be awarded. Keco Industries, Inc. v. United States, 492 F. 2d 1200, supra; The McCarty Corporation v. United States, 499 F. 2d 633 (Ct. Cl. 1974); T&H Company, supra. Here, however, the record does not support the conclusion that the protester was denied a contract because of illegal actions or bad faith on the part of Navy procurement personnel. The contracting officer was required by 10 U.S.C. 2305(c) (1970) and Armed Services Procurement Regulation (ASPR) § 2-407.1 (1974 ed.) to award the contract to the low responsive, responsible bidder. Mattison submitted the low bid and, as recognized by the protester, did not take exception to any of the specification provisions or other invitation requirements. Thus, the Mattison bid was responsive. That Mattison was a responsible bidder was determined after a pre-award survey was conducted which took into account the various factors for determining responsibility set forth in ASPR § 1-900 as well as the question of whether Mattison would comply with paragraph 3.9 of the specifications. Although it appears from the record that the pre-award survey team merely queried Mattison on this point and accepted its response that it was aware of the specification

provision, we cannot say that the contracting officer acted improperly in accepting the survey team's recommendation that the contract be awarded to Mattison. See Illinois Glove Company, B-182821, June 30, 1975, 75-1 CPD 396. Affirmative determinations of responsibility are based in large measure upon the subjective judgments of procurement officials who are vested with broad discretion in this area. As the Court of Claims recently stated:

> "* * * there would seem to be a strong presumption against entitlement to bid preparation expenses where the allegation is that the Government incorrectly adjudged a competitor to be 'responsible' prior to contract award. As we have noted, procurement officials have a great deal of discretion in making this determination * * * and some of the criteria are not readily susceptible to reasoned judicial review. * * * Absent fraud or bad faith, it is not easy, therefore, to conjure up situations in which a disappointed bidder could recover bid preparation expenses under the claim that the defendant wrongly appraised the awardee as 'responsible.'" Keco Industries, Inc. v. United States, 492 F. 2d 1200, 1205-6, supra.

Here, we do not find that the record contains any evidence indicating that the contracting officer acted fraudulently or in bad faith or otherwise abused his discretion. Accordingly, there is no basis for allowing bid preparation costs in this case.

We are concerned that this procurement was conducted on the basis of specifications which did not reflect the Navy's minimum needs. Our conclusion above that the award to Mattison was not illegal is based on the indication in the record that at the time of award the contracting officer believed in good faith that the specifications did reflect the using activity's minimum needs. Nonetheless, we would ordinarily recommend that a contract, awarded on the basis of what is determined after award to be in excess of those minimum needs, be terminated for the convenience of the Government and that the contracting agency resolicit on the

basis of revised requirements. See, e.g., Data Test Corporation, 54 Comp. Gen. 715 (1975), 75-1 CPD 138. Here we are precluded from so recommending since delivery was scheduled to be completed by October 30, 1975. However, we are recommending to the Secretary of the Navy that steps be taken to insure that Navy contracting activities exercise greater care in drafting specifications that reflect the Government's actual minimum needs.

Deputy Comptroller General
of the United States