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DECISION

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

FILE: B-189345

DATE: August 1, 1978

MATTER OF: Scot, Incorporated

DIGEST:

Claim for bid preparation costs based on Government's improper rejection of late bid is denied where Government mishandling that caused lateness amounted to only simple negligence, rather than gross negligence or willful action, and contracting officer's determination that bid could not be accepted was not arbitrary and capricious.

Scot, Incorporated (Scot), claims bid preparation costs in the amount of $2,712.60 for its bid submitted in response to an invitation for bids (IFB) for explosive actuators, issued by the United States Missile and Readiness Command (MIRCOM). The claim was submitted in response to our decision in Scot, Incorporated, 57 Comp. Gen. 119 (1977), 77-2 CPD 425, in which we sustained Scot's protest concerning the solicitation and stated that we would consider a claim for bid preparation costs.

Scot's low bid was rejected by the contracting officer (C.O.) because it was not received in the office designated for receipt of bids until 4 days after bid opening. The salient facts, as stated in our prior decision, are as follows:

"* * * The IFB specified that bids would be received in Room A-148, Building 4488, at the Redstone Arsenal in Alabama until '1300' (1 p.m.) 'CST' (Central Standard Time), May 20, 1977.

"Scot's bid was properly addressed and identified as a bid. The bid number, opening date and time, and delivery destination were on the wrapper. The bid was delivered by Federal Express, a commerical carrier, to Building 8022 at the Redstone Arsenal at 10:20 a.m. on May 20, 1977. Apparently, the carrier attempted to deliver Scot's bid to Room A-148, Building 4488,

but was not permitted to do so. Instead, Government personnel directed the carrier to deliver the bid package to Building 8022, the Central Receiving Warehouse. The Government personnel were acting in accordance with MIRCOM Regulation No. 55-13(J), paragraph 5.b., which states:

> "'Internal Security Division, RASA, will direct all commercial carriers to Storage Branch, Supply and Transportation Division receiving area, Building 8022 * * *.'
>
> According to the contracting officer, the bid was forwarded from the warehouse through normal channels to the office designated in the IFB for receipt of bids. Scot's bid was not received in that office until May 24, 1977--4 days after bid opening. Scot's bid, therefore, was a 'late bid' as it was received in the designated Office after the time set for opening, Armed Services Procurement Regulation (ASPR) § 2-303.1 (1976 ed.). On that date, Scot was advised by telephone that its bid was late, and could not be considered for award. Scot formally protested this decision in a letter to the contracting officer dated June 2, 1977. The contracting officer denied the protest on June 8, 1977, whereupon Scot requested review by our Office."

The C.O. based his rejection of Scot's bid on his determination that, since the bid was not sent by mail, ASPR § 7-2002.2(a) (1976 ed. as amended by DPC 76-7, April 29, 1977) did not permit acceptance. That regulation, in pertinent part, provides:

> "LATE BIDS, MODIFICATIONS OF BIDS OR WITHDRAWAL OF BIDS (1977 APR)
>
> "(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and either:
>
> "(i) it was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for the receipt of bids (e.g., a bid submitted in response to

a solicitation requiring receipt of bids by the 20th of the month must have been mailed by the 15th or earlier); or,

"(ii) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation."

We decided, however, that since the carrier attempted to deliver the bid to the proper location but was apparently prevented from doing so by Government personnel, the bid should have been accepted if the Government action was "improper" and the integrity of the competitive bidding system would not have been compromised. We then found that while MIRCOM regulation No. 55-13(J), paragraph "b," requires Internal Security Division personnel to direct all commercial carriers to building 8022 to check in, it does not require that all packages be delivered there. Therefore, the action of the Government personnel was "improper." Since Scot's bid was in the hands of the Government before bid opening and remained there until it was opened, we found that Scot could not have altered it, and that to accept it under these circumstances would not compromise the integrity of the competitive bidding system. While we sustained Scot's protest, we also found that corrective action was not feasible. We then suggested, as a possible remedy, that Scot might claim bid preparation costs.

A bidder's or offeror's entitlement to the costs of preparing his bid or offer arises from the Government's responsibility in considering bids or proposals submitted in response to a solicitation. The nature of the Government's obligation, with regard to advertised procurements, was characterized by the Court of Claims in The McCarty Corporation v. United States, 499 F.2d 633, 637 (Ct. Cl. 1974) (per curiam), as follows:

"* * * It is an implied condition of every invitation for bids issued by the Government that each bid submitted pursuant to the invitation will be fairly and honestly considered (Heyer Products Co. v. United States, 140 F.Supp. 409, 412, 135 Ct. Cl. 63, 69 (1956)); and if an unsuccessful bidder is able to prove that such obligation was breached and he was

> put to needless expense in preparing his bid, he is entitled to recover his bid preparation costs in a suit against the Government (Keco Industries, Inc. v. United States, supra, 428 F.2d at 1240, 192 Ct. Cl. at 785)."

Not every irregularity, however, entitles a bidder or offeror to compensation for the expenses which he incurred in preparing his bid or proposal. Keco Industries, Inc. v. United States, 492 F.2d 1200, 1203 (Ct. Cl. 1974) (hereinafter Keco II). The court in Keco II set forth the following standard and subsidiary criteria for recovery of preparation costs:

> "The ultimate standard is, as we said in Keco Industries I, supra, whether the Government's conduct was arbitrary and capricious toward the bidder-claimant. We have likewise marked out four subsidiary, but nevertheless general, criteria controlling all or some of these claims. One is that subjective bad faith on the part of the procuring officials, depriving a bidder of the fair and honest consideration of his proposal, normally warrants recovery of bid preparation costs. Heyer Products Co. v. United States, 140 F. Supp. 409, 135 Ct. Cl. 63 (1956). A second is that proof that there was 'no reasonable basis' for the administrative decision will also suffice, at least in many situations. Continental Business Enterprises v. United States, 452 F.2d 1016, 1021, 196 Ct. Cl. 637-638 (1971). The third is 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 statutes and regulations. Continental Business Enterprises v. United States, supra, 452 F.2d at 1021, 196 Ct. Cl. at 637 (1971); Keco Industries, Inc. v. United States, supra, 428 F.2d at 1240, 192 Ct. Cl. at 784. The fourth is that proven violation of pertinent statutes or regulations can, but need not necessarily, be a ground for recovery. Cf. Keco Industries I, supra, 428 F.2d at 1240, 192 Ct. Cl. at 784. The application of these four general principles may well depend on (1) the type of error

> or dereliction committed by the Government, and (2) whether the error or dereliction occurred with respect to the claimant's own bid or that of a competitor." Keco II at 1203-04.

The principal issues to be resolved here are whether the apparent action of Government personnel in directing the carrier to deliver the bid to the wrong building and the decision of the C.O. to reject Scot's bid were arbitrary and capricious.

Concerning the apparent action of the Internal Security personnel, HIRCOM has submitted newly discovered evidence which, it argues, shows that the carrier delivered the bid package to building 8022 on its own initiative. It is not necessary for us to resolve that question. Even assuming that the carrier was directed to deliver the package to building 8022, it is our opinion that such action, involving misinterpretation of a regulation, amounts only to simple negligence. We have held that mere negligence does not constitute arbitrary and capricious action; that standard is met only by gross negligence. Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344.

We are also of the opinion that the C.O.'s decision to reject Scot's bid was not arbitrary and capricious. The decision was based on his good faith interpretation of ASPR § 7-2002.2 (1976 ed.) and our decision in Federal Contracting Corp., Taylor Air Systems, B-181286, October 25, 1974, 74-2 CPD 229. While our ultimate determination did not support his interpretation, we cannot say that it was an unreasonable interpretation.

Accordingly, the claim is denied.

R. F. Keller

Deputy Comptroller General
of the United States