

DECISION

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

40393

FILE: B-179286

DATE: January 30, 1974

MATTER OF: F. A. Villalba & Company

DIGEST: Rejection of technical proposal submitted under two-step formally advertised procurement and cancellation of two-step method of procurement is authorized since contracting officer not required by either ASPR 2-503.1(e) or (h) to elicit additional information from offeror of unacceptable proposal even if it is the only proposal submitted and absent a showing of arbitrary or capricious action rejection of proposal and cancellation of procurement will not be questioned by GAO.

A bidder is not entitled to bid preparation costs unless it is shown that bids were not invited in good faith or award made in an arbitrary or capricious manner.

On November 15, 1972, request for technical proposals (RFTP) DACA63-73-R-0004 was issued by the Department of the Army, Fort Worth District, Corps of Engineers. The RFTP solicited technical proposals for the design, construction and replacement of the sprinkler system--parade grounds, Fort Bliss, Texas. The final date for submission of technical proposals was set for December 19, 1972. F. A. Villalba & Co. (Villalba), El Paso, Texas, submitted the only proposal.

The proposal was reviewed in early January and copies of it together with the Fort Worth District Engineering Corps' comments were forwarded to the using service at Fort Bliss in mid-January. The Fort Worth District received the using service's reply in mid-May. After evaluation, it was determined that the technical proposal was incomplete and unacceptable.

On June 29, 1973, the contracting officer notified Villalba that its technical proposal:

"* * * [failed] to conform to the essential requirements of the solicitation due to * * * [its] failure to furnish sufficient information. Revision of * * * [the] proposal will not be considered. Accordingly, * * * [the] proposal is hereby rejected.

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"Since no acceptable proposal was received under this solicitation, it has been determined to be necessary and in the best interests of the Government to design and advertise this project using normal Corps of Engineers procedures."

Upon receipt of this letter, Villalba requested a full statement of the reasons for rejection. In a letter of July 20, 1973, the contracting officer stated:

"The proposal was evaluated jointly by the Fort Worth District and the Using Service * * * It was determined that the Technical proposal was incomplete and therefore unacceptable. The complete listing of deficiencies is long and is available for review in this office if deemed desirable. Some of these included:

"1. Representative design calculations as shown on Sheet 3 of drawings were not in sufficient detail to substantiate capacities of the system (Para 1A(2)(b)).

"2. Review and approval by a registered engineer was not shown (Para 4).

"3. Resurfacing of paved areas after installation was not shown.

"4. Existing pump shelter, pump and all components are not suitable for reuse as implied by note to modify existing pump plant. Pump shelter design and pump station schematic was not provided.

"5. Back flow preventers were not shown as indicated."

Villalba alleges that the contracting officer's determinations to reject its proposal and to discontinue the two-step method of procurement were erroneous, and requests that either the determinations be set aside or that it be granted reimbursement for expenses incurred in the preparation of its proposal. In support of its position, Villalba argues:

"The procuring agency has listed 5 objections to * * * [its] proposal each of which have been rebutted in our letter of August 8, 1973. The report and recommendation and supplemental findings of the contracting officer fail to raise any

new grounds for objection. Furthermore the reasons given by the contracting officer for deciding against making a request for additional information as stated on Page 3 of the August 15, 1973 report are purely speculative in nature and entirely unsubstantiated * * *

The purpose of the RFTP (and of two-step formal advertising in general) was to maximize competition where adequate technical specifications for the sprinkler system did not exist. Technical proposals submitted in response to RFTP's are evaluated in accordance with the provisions of ASPR 2-503.1(e) and are categorized as follows:

- "(i) acceptable;
- "(ii) reasonably susceptible of being made acceptable by additional information clarifying or supplementing, but not basically changing the proposal as submitted; or
- "(iii) in all other cases, unacceptable."

Proposals may be categorized as unacceptable if they modify or fail to conform to the essential requirements of an RFTP. Paragraph 3 of the instant RFTP reiterated the provisions of ASPR 2-503.1(e) and specifically warned offerors that:

"* * * Proposals which, in the judgment of the Contracting Officer, are not reasonably susceptible to being made acceptable will be classified as 'Unacceptable', and no further discussions will be initiated. * * *"

Villalba argued that had the contracting officer conducted further discussions with Villalba, the deficiencies in its proposal could have been remedied and the proposal would have become "acceptable." However, neither ASPR 2-503.1(e) nor (h) required that a contracting officer conduct negotiations with Villalba. ASPR 2-503.1(h) permits the conduct of negotiations with offerors of unacceptable proposals where step one of a two-step formally advertised procurement does not result in an acceptable technical proposal, but it does not require it.

As we stated in B-165457, March 18, 1969, concerning such provisions:

"We view the above provision as investing in the technical and procurement personnel charged with * * * [a] procurement considerable latitude in framing the requirements to be met by proposals and in their evaluation * * * Whether a proposal needs clarification to be deemed acceptable, whether a proposal can be made

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acceptable by clarification and reasonable effort by the Government * * * are all matters of judgment on the part of the procurement agency, which we will not question unless there is evidence of fraud, prejudice, abuse of authority, arbitrariness or capricious action. * * *"

See also, B-175385, September 29, 1972; B-163767, August 5, 1968. In the instant case the contracting officer, based on the using service report, found that the best interests of the Government would be served by canceling the solicitation and permitting the Corps of Engineers to develop its own specifications.

The rule of our Office with regard to the cancellation of invitations is set forth in B-164749, August 26, 1968, wherein we held:

"* * * while the interest of the Government and the integrity of the competitive bidding system require that invitations for bids be cancelled only for the most cogent and compelling reasons, there necessarily is reserved in the contracting officials a substantial amount of discretion in determining whether or not an invitation should be cancelled. Our Office, therefore, will not object to an invitation cancellation unless there has been a clear abuse of administrative discretion. * * *"

See also, B-170174, August 14, 1970; 41 Comp. Gen. 76 (1961).

Therefore, when as in the instant case the record supports the contracting officer's findings, we will not reverse his determination.

While it is true that the Government failed to comply with ASPR 2-503.1(f), which requires that a contracting officer give prompt notice to all offerors of an unacceptable technical proposal submitted under part one of a two-step formally advertised procurement, such failure is merely a procedural matter, not going to the essence of a procurement since the failure to give prompt notice cannot render an unacceptable proposal acceptable. B-170135, February 5, 1971.

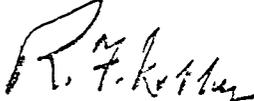
Concerning Villalba's claim for reimbursement for its bid preparation expenses, our Office has consistently held that bid preparation costs are not recoverable unless it can be shown that the offer or bid in question was not honestly considered. B-167733, February 9, 1970. The reason for this rule, as stated in Heyer Products Company, Inc. v. United States, 135 Ct. Cl. 63 (1956), is that the procurement statutes were enacted

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for the benefit of the Government and except for the expectation that bids will be honestly considered, offerors have no enforceable rights against the Government. See also Keco Industries v. United States, 192 Ct. Cl. 773, 428 F. 2d. 1233 (1970).

There is no indication in the record that the proposal was not solicited in good faith or that any action on the part of the contracting officer could be considered arbitrary or capricious. In addition, we are informed that the Army has finished drafting its specifications and will issue a new solicitation after resolution of the protest with Villalba being resolicited.

Accordingly, Villalba's protest and claim for reimbursement for bid preparation costs are denied.


Deputy Comptroller General
of the United States