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DECISION



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

FILE: E-186889

DATE: December 21, 1976

MATTER OF: T. C. Daeuble

DIGEST:

1. Post-bid opening costs and losses are not expenses incurred in bid preparation and are not compensable.
2. Where cancellation of invitation after bid opening is based upon determination to revise location of rip rap site set forth in IFB to provide safer working site, cancellation was not unreasonable and abuse of discretion, and claim for bid preparation costs is denied.

T. C. Daeuble has filed a claim for \$508.95 as bid preparation costs as a result of the cancellation of invitation for bids (IFB) No. R6-75-102. The claimant has not itemized the costs. Although they are characterized as "bid preparation" costs, it is indicated that in part they may include losses incurred after the opening of bids. Post-bid opening costs or losses are not expenses incurred in bid preparation and are not compensable. T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345. However, since the claim also includes the expense of preparing the bid, the claim will be considered from that aspect.

The IFB was issued by Region 6 of the Forest Service for the purpose of obtaining the construction of three permeable groynes/dykes, two dykes, and a bank revetment along the White River and the removal of debris from the river. T. C. Daeuble submitted the low bid. Three days after the bid opening, at the request of the Forest Service, a mining engineer from the Mining Enforcement and Safety Administration (MESA), Department of the Interior, inspected the Buck Creek Pit, the rock source specified in the IFB for the rip rap material to be used for the construction. The mining engineer concluded that mining at the site would jeopardize the lives of persons working there unless--

"* * * a procedure should be developed so that no persons would be exposed to falling or rolling rock. One such procedure might entail setting up a dragline which could remove the rock from the slide path without exposing working personnel.

"It was also noted that the talus rock extends beneath the vegetation on either side of the slide path. Large trees are growing on one side whereas vine maple and other small growth covered the other side. Disturbing either of these sides might well result in the creation of another active slide path."

As a result of the mining engineer's determination that the rock site was potentially unsafe, the contracting officer decided to cancel the IFB pursuant to FPR § 1-2.404-1 (1964 ed. Circ. 1). The IFB ultimately was reissued designating a different site.

Daeuble's claim for bid preparation costs essentially is based on the contention that the specifications were not "inadequate, ambiguous, or otherwise deficient" and therefore the cancellation was not within the requirements of FPR § 1-2.404-1. Further, Daeuble notes that Standard Form 22 (Construction Contracts), Instructions to Bidders, stated, in pertinent part:

"2. Conditions Affecting the Work. Bidders should visit the site and make such other steps as may be reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Failure to do so will not relieve bidders from responsibility for estimating properly the difficulty or cost of successfully performing the work. * * *"

Therefore, it is contended that every bidder is presumed to have inspected the site, whether it did or not, and is obligated to do whatever is necessary for the protection of equipment and personnel.

The Government is under an obligation to honestly consider each bid and not to wantonly disregard it. Generally, if this obligation is breached and a prospective awardee is put to needless expense in preparing his bid, that bidder is entitled to recover bid preparation costs. Heyer Products Company v. United States, 140 F. Supp. 409 (1956). The ultimate standard for review is whether the Government's conduct was arbitrary and capricious toward the bidder-claimant. Keco Industries, Inc. v. United States, 428 F. 2d 1233, 1240 (1970). Criteria controlling a claim of capriciousness and arbitrariness have been held in Keco Industries, Inc., 492 F.2d 1200, 1203 (1974), to include:

- (1) subjective bad faith on the part of the procuring officials, depriving a bidder of the fair and honest consideration of his proposal;
- (2) proof that there was "no reasonable basis" for the administrative decision;
- (3) 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; and
- (4) proven violation of pertinent statutes or regulations can, but need not necessarily, be a ground for recovery.

See also T&H Company, supra, and DOT Systems, Inc., F-183697, June 11, 1976, 76-1 CPD 368.

On the question of the propriety of canceling an IFB after bid opening, in 49 Comp. Gen. 584, 585-586 (1970), our Office said:

"It has been consistently held that an invitation for bids does not import any obligation on the Government to accept any of the offers submitted in response thereto, and that all bids may be rejected where it is determined to be in the best interests of the Government to do so. 17 Comp. Gen. 554 (1938); 26 id. 49 (1946); 37 id. 760 (1958); 41 id. 709, 711 (1962).

"Subparagraph (b) of 41 U.S.C. 253, the statutory authority governing formally advertised procurement by the civilian agencies of the Government, permits the rejection of all bids when it is determined that rejection is in the public interest. Section 1-2.404-1(b) of the Federal Procurement Regulations (FPR), implementing the advertising statute, sets forth seven examples of public interest justifying the cancellation of an invitation. While FPR 1-2.404-1(b) does not include as an example the situation where the specifications have been revised, as in the present case, we believe that the listed bases for cancellation are not intended to be all inclusive, but are indicative of the type of circumstance which justifies such action. In this connection, it is noted that paragraph 2-404.1(b)(11) of the Armed Services Procurement Regulation, which implements a statute substantially similar to 41 U.S.C. 253(b), specifically provides for cancellation of an invitation when 'specifications have been revised.' Moreover, the right to reject all bids was specifically reserved to the Government by paragraph 10(b) of the Solicitation Instructions to Bidders.

"Our Office has consistently held that, while the interest of the Government and the integrity of the competitive bidding system require that invitations be canceled only for the most cogent reasons, there necessarily is reserved in the contracting officials a substantial amount of discretion in determining whether or not an invitation should be canceled. We will, therefore, not object to the cancellation of an invitation unless there has been a clear showing of abuse of administrative discretion. See B-165206, January 8, 1969, B-164520, September 24, 1968, B-162382, May 17, 1968, B-159287, July 26, 1966."

In this case, while it may be that any bidder awarded the contract would have been obligated to perform in a safe manner, the fact remains that the rip rap site was not entirely safe to work without appropriate safety measures. Therefore, we are unable

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to conclude that it was unreasonable and an abuse of discretion for the contracting officer to want to reduce the risk of injury to workers by changing the site to one where the working conditions for doing the job were better and safer than the one originally provided for performance.

Accordingly, the claim for bid preparation costs is denied.

R. F. Kyster
Deputy Comptroller General
of the United States