M. Boyle
Proc I

DECISION

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

FILE: B-186889 DATE: March 3, 1977

MATTER OF: T. C. Daeuble - Reconsideration

DIGEST:

On reconsideration of prior decision, claimant (low responsive, responsible bidder under improperly canceled solicitation) is not entitled to post-bid opening expenses since Government is not estopped to deny existence of contract because (1) Government was unaware of claimant's intention to incur costs; (2) claimant's reliance on verbal advice 10 weeks prior to expected commencement of work was unreasonable; and (3) Government did not know of unsafe worksite resulting in cancellation at time of verbal advice.

Our decision, T. C. Daeuble, B-186889, December 21, 1976, 76-2 CPD 510, denied a claim for bid preparation costs in the amount of $508.95 relative to the cancellation of an invitation for bids (IFB). We held that: (1) the cancellation based upon a determination to provide a safer worksite was not unreasonable; and (2) post-bid opening costs and losses are not compensable expenses as bid preparation costs. Counsel for T. C. Daeuble requests reconsideration of the portion of our decision concerning out-of-pocket, post-bid opening expenses. The relevant facts follow.

Bids in response to IFB No. R6-75-102, issued by the Forest Service, for certain construction along, and removal of debris from, the White River, were opened on June 23, 1975. The claimant was the apparent low bidder. That day, the Forest Service requested that the claimant furnish experience and financial questionnaires to determine its responsibility to perform the required work. The information was furnished that same day. It appears that the Forest Service was satisfied with the claimant's financial and technical responsibility and the claimant was so advised. The claimant states that within 2 days after bid opening Forest Service personnel verbally advised that notice of award would be forthcoming shortly, although none was issued. The claimant notes that the IFB stated that the notice to proceed on the project would be

issued on approximately September 8, 1975, because then the White River would be at its lowest water level and recreational use of the campground would be minimal. On July 10, 1975, 17 days after bid opening, the claimant was advised that the IFB was canceled. The cancellation resulted from a survey of the worksite 3 days after bid opening which determined that the worksite was potentially unsafe.

T. C. Daeuble contends that recovery of out-of-pocket, post-bid opening expenses incurred solely because of the verbal representations of the Forest Service's contracting officer and his representatives should be allowed. The exact amount claimed is not stated but the record indicates that it is substantially less than $508.95.

The courts have permitted recovery of certain expenses incurred after bid opening in circumstances where the Government would be estopped to deny the existence of a contract. Emeco Industries, Inc. v. United States, 202 Ct. Cl. 1006 (1973); United States v. Georgia-Pacific Company, 421 F.2d 92 (9th Cir. 1970). The following four elements must be present to prevail on the estoppel theory:

1. the Government must know all the facts;
2. the Government must intend that its conduct shall be acted on or must so act that the bidder has a right to believe it is so intended;
3. the bidder must be ignorant of the true facts; and
4. the bidder must rely on the Government's conduct to his injury.

Our Office applied the estoppel theory in Fink Sanitary Service, Inc., 53 Comp. Gen. 502 (1974), 74-1 CPD 36. There, on June 18, 1973, the contracting officer advised Fink that it was the apparent low bidder and on June 25, 1973, after an evaluation of Fink's financial and experience qualifications, Fink was further advised that those qualifications were acceptable. That day Fink was given a contract number and Fink advised the contracting officer that additional equipment would be purchased the next day so that performance could be started on July 1, 1973. We held that Fink was entitled to recover costs prior to termination of the contract for the convenience of the Government for the following reasons:

"In reasonably reconstructing the events of June 25, 1973, we feel that both parties left the meeting held on that day believing that Fink Sanitary Service would be the party performing refuse collection and disposal services commencing July 1, 1973. Indeed, we believe that the Government also was aware of Fink's plans to purchase an additional truck to accomplish this contract.

"The agency's action in giving the contract number to the apparent low bidder (whose status, known to the other bidder, had not been protested although known for a week) just 6 days prior to the commencement of the contract period is, we believe, an action which a reasonable bidder has a right to believe was intended for it to act upon here to prepare for commencement of the contract.

"We further believe that at the time Fink acted to its detriment in reliance upon the actions of the Government, the bidder was ignorant of the true facts--that actual award to Fink Sanitary Service was impossible since it was not in fact the lowest responsive bidder to the IFB.

"In sum, we find that Fink has met the criteria set forth in Emeco and that the Government should be estopped to deny the existence of a contract between itself and Fink. * * *"

In distinguishing Fink, we recently denied a claim based on estoppel in circumstances similar to those here. Trataros Painting and Construction Corp., B-186655, January 18, 1977, 56 comp. Gen. ____. There, on April 14, 1976, Trataros was advised that it was the apparent low bidder and on April 20, 1976, a contract number was assigned and Trataros was instructed to obtain payment and performance bonds. On April 26, 1976, Trataros was notified that the procurement was protested and on May 27, 1976, the solicitation was canceled. We held that the assigning of a contract number and request for payment and performance bonds 7 weeks prior to the intended commencement of work was not action upon which a reasonable bidder had a right to

rely without obtaining written confirmation of award and, therefore, Trataros was proceeding at its own peril. In denying the claim, we noted that the Government did not know all the facts at the time the relevant actions occurred. The discovery of erroneous estimates in the solicitation as a result of the protest which led to the cancellation did not take place until well after the Government actions.

In the instant case, as in the Trataros decision, (1) T. C. Daeuble's incurrence of costs more than 10 weeks before the IFB indicated that notice to proceed would be issued in reliance on verbal indications that award would be forthcoming was unreasonable; (2) the Government did not know about the unsafe worksite at the time of that verbal advice; and (3) the Government was apparently unaware of T. C. Daeuble's intention to incur any costs prior to formal notification of award. Therefore, the Government is not estopped to deny the existence of a contract in this case.

Since there has been no showing that our decision of December 21, 1976, was in error as a matter of law or fact, it is affirmed.

Acting Comptroller General
of the United States