Proc I

DECISION

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

[Protest of Solicitation Cancellation By Defense Logistics Agency 9793]

FILE: B-193047 DATE: April 13, 1979

MATTER OF: A&C Building and Industrial Maintenance Corporation. DLG00031

DIGEST:

1. Furnishing protester unexecuted award document does not constitute formal contract award.

2. Low bidder contends that it incurred expenses in anticipation of contract performance in reliance on Government's alleged advice that contract had been issued. IFB was canceled prior to formal contract award. Protest that Government should be estopped to deny existence of contract and that expenses incurred are reimbursable is denied, since record does not support protester's position that Government gave advice as indicated, that Government intended protester to incur such expenses, or that protester was ignorant of true facts.

3. Agency issued IFB contemplating construction contract, and therefore included therein Davis-Bacon Act provisions and wage rates. After bid opening, agency determined that work requirements constituted "services," not "construction," and Service Contract Act was therefore applicable. Since such determination was reasonable, cancellation of IFB prior to award was proper.

4. Claim by low bidder under IFB canceled after bid opening for recovery of bid preparation costs is denied. Record does not show that issuance of IFB in form subsequently found improper and therefore necessitating cancellation was in bad faith. In addition, since cancellation was proper it did not reflect arbitrary or capricious action toward claimant.

Invitation for bids (IFB) No. DLA004-78-B-0034 was issued on July 28, 1978, by the Defense Logistics Agency (DLA), Defense Depot Memphis, Memphis, Tennessee (DDMT), for the following requirement:

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> "Furnish all plant, equipment, appliances, transportation, fuel, supplies, materials, labor (except any materials, equipment, services, if any, specified herein to be furnished by the Government) and perform all operations in connection with lighting energy conservation project in 28 buildings, consisting of lamp replacement and fixture washing at [DDMT] * * * complete in strict accordance with DDMT Drawing No. 39-92, dated 15 May 1978, 28 sheets and subject to the terms and conditions of the contract."

The IFB contemplated a construction contract, and therefore required compliance with the pertinent wage determinations issued by the Secretary of Labor pursuant to the Davis-Bacon Act, 40 U.S.C. § 276a (1976), which were attached to the IFB. The Davis-Bacon Act requires that certain Government contracts over $2,000 for the "construction, alteration, and/or repair, including painting and decorating," of public buildings or public works within the United States contain a provision to the effect that no laborer or mechanic employed directly upon the site shall receive less than the prevailing wage, including basic hourly rates and fringe benefits, as determined by the Secretary of Labor.

The low bid of the 12 received and opened on August 29 was submitted by A&C Building and Industrial Maintenance Corporation (A&C). A preaward survey resulted in a recommendation dated September 14 that award be made to that firm.

On September 20, the procurement file was forwarded to DLA Headquarters for review and approval prior to award, in accordance with DLA procurement regulations. At 3 p.m. on Thursday, September 27, DLA Headquarters advised DDMT by

telephone that the required work should be performed under a service contract, not a construction contract. In such case, the wage and fringe benefits payments specified by the Secretary of Labor pursuant to the Service Contract Act, 41 U.S.C. § 351 et seq. (1976), would apply, instead of those specified pursuant to the Davis-Bacon Act.

Based on DLA Headquarters' advice, DDMT decided to cancel the solicitation under Defense Acquisition Regulation (DAR) § 2-404.1 (1976 ed.), which provides in pertinent part:

> "(a) The preservation of the integrity of the competitive bid system dictates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation.
>
> "(b) * * * Invitations for bids may be canceled after opening but prior to award when such action is consistent with (a) above and the contracting officer determines in writing that
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> * * * * *
>
> "(viii) * * * cancellation is clearly in the best interest of the Government."

A&C then filed a protest in our Office on the matter.

A&C's first basis of protest is that the Government should be estopped to deny the existence of a contract with the firm. The basis therefor involves the issuance to the bidder on September 27 of what A&C terms an "award document" (which A&C suggests may in itself constitute a formal contract award) and advice allegedly given to A&C by the DDMT Procurement Agent in two telephone conservations on that same date. A&C contends that in those conversations it was told that it had been issued a contract, and that the required performance bonds, therefore, should be obtained as quickly as possible. A&C states that in reliance on DDMT's actions and advice, it obtained the bonds and proceeded to place purchase orders for necessary supplies and equipment, thereby incurring $1,200 in expenses, for which A&C believes it should be reimbursed.

In a report on the protest, the contracting officer denies that a contract with A&C ever existed. The contracting officer states that funds for the requirement could not be obligated after September 30, 1978, a nonworkday, and, therefore, award was necessary not later than September 29. On September 27, DLA Headquarters advised the contracting officer in an early telephone conversation (prior to the 3 p.m. conversation referenced above) that although its review of the procurement file was not completed, there was no indication that the proposed contract with A&C would not be approved. The contracting officer states that based on that advice and her experience that some contractors encounter problems in obtaining performance bonds in short time periods, she had the Procurement Agent call A&C that same date to inquire whether performance and payment bonds dated September 29 could be obtained if A&C were awarded the contract. The contracting officer further states that to assist A&C if it received the award, an unexecuted Standard Form (SF) 23, Construction Contract (the alleged "award document"), including all information necessary to obtain bonds, was sent to the protester that morning.

The Procurement Agent's memorandum of a 1:45 p.m. telephone call states that A&C's president was not available, but that the Procurement Agent told an A&C representative that award of the contract, if approved, will be not later than September 29, and that payment and performance bonds, therefore, must be executed not later than that date.

The contracting officer states that A&C's president returned the Procurement Agent's call at 4 p.m. (1 hour after DDMT was told by DLA Headquarters that a solicitation contemplating a service contract should have been issued). The Procurement Agent's memorandum of the 4 p.m. telephone call states in pertinent part:

> "* * * I advised him [Mr. Hipple, A&C president] that the approving official will not approve the solicitation because the requirement was solicited under construction contracting procedures and it should be covered by service contract procedures, and that this office had been advised by the approving office the solicitation would have to be cancelled in its entirety - possibly a service contract can be solicited by oral negotiation. * * *
>
> "Mr. Hipple stated that he would agree to oral negotiation under the service contracting procedures because he had spent money and manhours in order to secure a contract.
>
> "I further advised Mr. Hipple that if oral negotiation was approved by the approving official, a payment and performance bond would be required and that the identification number of such a contract would be DLA004-78-C-0037. This number was given to permit him to readily obtain bonds in the event he were awarded a contract. Mr. Hipple asked me if I

> could tell him how soon the Government would require him to proceed on the project, and I told him that I could not give him that information * * *."

At approximately 9 a.m. the following day, September 28, DLA Headquarters formally advised DDMT to cancel the IFB, and that an oral solicitation could not be effected under service contracting procedures. One hour later, the Procurement Agent informed A&C's president by telephone that the solicitation would be canceled. The contracting officer suggests that the unexecuted SF 23 could not have been delivered to A&C prior to this call. The cancellation was formalized on October 5.

Thus, it is the contracting officer's position that A&C was never advised that a contract had been awarded, to obtain bonds (only to make arrangements for them to be issued if awarded the contract), or to commence work.

Concerning A&C's suggestion as to the independent effect of the issuance of the SF 23, DAR § 2-407.1 (1976 ed.) provides that a contract award shall be made by the contracting officer through mailing or otherwise furnishing the bidder a properly executed award document or notice of award on such forms as may be prescribed by the procuring authority. Although the document furnished A&C on September 27 contained all necessary information, it was not "executed" by the contracting officer and, therefore, no formal contract came into existence. Cf. Donald Clark Asosociates, B-184629, March 24, 1978, 78-1 CPD 230.

The Government may be estopped to deny that a contract exists with a bidder if the following elements are present:

(1) the Government knows the facts;

(2) the Government intends that its conduct shall be acted on or the Government so

acts that the bidder has a right to believe that the Government's conduct is so intended;

(3) the bidder is ignorant of the true facts; and

(4) the bidder relies on the Government's conduct to his injury.

See ITE Imperial Corporation, Subsidiary of Gould, Inc., B-190759, August 14, 1978, 78-2 CPD 116, at p. 10.

The protester has the burden to affirmatively prove its case. Reliable Maintenance Service, Inc.,--request for reconsideration, B-185103, May 24,1971, 76-1 CPD 337. On the basis of the record before our Office, we cannot say that the Government intended that its statements or actions should cause A&C to do more than prepare to procure the subject bonds, or that A&C should have believed that the Government so intended. Further, in view of DDMT's memoranda of the September 27 telephone calls, and the expeditiously furnished advice to A&C first of a potential problem with the procurement and then of the cancellation, we cannot conclude that A&C was actually ignorant of the true facts when it allegedly incurred $1,200 in expenses. In this connection, it is not even clear from the record when those alleged expenses were incurred. Distinguish Fink Sanitary Service, Inc., 53 Comp. Gen. 502 (1974), 74-1 CPD 36. Consequently, the Government is not estopped to deny the existence of a contract with A&C. Laurence Hall d/b/a/ Halcyon Day, B-189697, February 1, 1978, 78-1 CPD 91. Contrast System Development Corporation, B-191195, August 31, 1978, 78-2 CPD 159, cited by the protester to support its position, in which all four elements of estoppel were satisfied in the record.

A&C's second basis of protest is that the solicitation was proper as issued and need not have been canceled. A&C contends that the work required by the IFB was in the nature of alterations and repair to existing structures; involved a "one-time inspection, repair and/or replacement" of fixtures by "laborers" (rather

than "cleaners") and licensed electricians; and did not require periodic maintenance or continued custodial care. On that basis, A&C argues that the work qualifies as "construction," and the Davis-Bacon Act applies. In this connection, DAR § 18-101.1 (1976 ed.) defines "construction" for purposes of the Davis-Bacon Act in pertinent part as "construction, alteration or repair (including dredging, excavating, and painting) of buildings, structures or other real property. * * *"

A&C also argues that DAR § 12-106 (1976 ed.) would require that the work be solicited for performance under a construction contract. That regulation states, by reference to DAR § 18, part 7 (1976 ed.), "Labor Standards for Contract Involving Construction," the applicability of the Davis-Bacon Act to contracts requiring both construction and nonconstruction work if a substantial amount of construction work, as determined by the type and quantity of work to be performed, is involved or will be necessary for the performance of the contract; the construction work is physically or functionally separate from and can be performed on a segregated basis from the other contract work; and the requirements are otherwise applicable to the contract under the regulations.

In addition, A&C suggests that the present work requirement is at the least "hybrid in nature," i.e., can be considered either "service" or "construction" work. A&C contends that in such case it is within the procuring agency's discretion to choose the type of solicitation and contract to be issued. Citing our decision in D. E. Clarke, B-146824, October 17, 1974, 74-2 CPD 212, A&C alleges that we have held under similar circumstances that the agency may not be permitted to subsequently change its decision. A&C contends that to do so after bids have been opened is arbitrary and capricious; constitutes an action contrary to the basic principles of competitive solicitations; and is "tantamount to the [unlawful] debarment of the company."

The Service Contract Act requires that every Government contract over $2,500, "the principal purpose of which is to furnish services in the United States through the use of service employees," shall contain a provision specifying minimum wages and fringe benefits to be paid the various classes of service employees, as determined by the Secretary of Labor in accordance with the prevailing wage rates and fringe benefits for such employees in the locality. The relevant implementing regulations are at DAR § 12, part 10 (1976 ed.). DAR § 12-1002.3 (1976 ed.) provides a list of the types of covered service contracts, and defines "service employee" as:

> "* * * guards, watchmen, and any person engaged in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semiskilled, or skilled manual labor occupations, and any other employee including a foreman or supervisor in a position having trade, craft, or laboring experience as the paramount requirement * * *."

The contracting officer states that the IFB was issued in a form contemplating a construction contract and including the Davis-Bacon Act provisions for the following reason:

> "* * * The Facilities Engineer stated [at a presolicitation conference] that this project consisted of de-energizing fluorescent fixtures which included disconnection of the hot wire at the ballast and energizing previously disconnected fluorescent fixtures, either replugging the fixtures into receptacles or reconnecting the circuits in the panel boards. The project, according to the Facilities Engineer, would also include checking for leakage and replacing ballasts where needed or any faulty wiring. It was determined that this type of work required a certified electrician and

> would be considered repairs to real property. Cleaning and relamping of the fixtures was considered minor to the electrical work * * *."

In this connection, we made the following statement in our decision in 40 Comp. Gen. 565, 567 (1961), regarding the applicability of the Davis-Bacon Act:

> "* * * it is not necessarily the nature of specific work but contract content which governs applicability; whether or not the work to be done is in the nature of repairs or maintenance is not the sole determinative factor. A proper test to determine applicability would be whether or not a contract essentially or substantially contemplates the performance of work described by the enumerated items [construction, alteration, and/or repair, including painting and decorating]."

DLA Headquarters' basis for concluding that the work requirements constituted services rather than construction, and that the Service Contract Act, therefore, was applicable, is stated as follows:

> "* * * The Facilities Engineer anticipated that the fixture reflectors only would be removed from the fixtures and cleaned. However, even if the entire fixture were removed, * * * this only requires unbolting the fixture hanger * * *. With reference to connecting or disconnecting wiring for plug-in type fixtures, what is involved is plugging or unplugging the plug. Otherwise it involves cutting or reconnecting the 'hot' wire. In our view, this does not constitute alteration of a building,

> [DAR § 18-101.1 (1976 ed.)], and in any case does not involve 'substantial amounts' of construction work which would require the use of procedures and clauses utilized for construction contracts in accordance with [DAR § 12-106 (1976 ed.)] * * *. Accordingly, not only was there a rational basis for DLA's decision to cancel this solicitation, but this decision was required by Department of Defense regulations."

The determination whether a proposed contract may be subject to the Service Contract Act is for the procuring activity, and it will not be questioned by our Office unless shown to have been unreasonable. 53 Comp. Gen. 412, 416 (1973); 50 id. 807 (1971). In view of the IFB's stated work requirements; DDMT's reason for contemplating a construction contract; and DLA Headquarters' reasoning as set out above, we agree with DLA Headquarters as to the applicability of the Service Contract Act, and therefore cannot agree with A&C that DDMT's requirements were "hybrid in nature," or that our decision in D.E. Clarke, supra, is controlling.

It is recognized that the rejection of bids after opening tends to discourage competition because it publicly exposes bids without award and causes bidders to expend manpower and money in bid preparation without the possibility of acceptance. 52 Comp. Gen. 285 (1972). It is primarily for these reasons that the procurement regulations require that a "compelling reason" must exist for such cancellation.

The timing of DLA Headquarters' determination was unfortunate, although we recognize that under DLA procurement regulations there is no requirement for an earlier procurement review than that conducted here. Nevertheless, we have stated that affording protection to service workers and thereby furthering the purposes of the Service Contract Act may be regarded as a "compelling reason" to cancel an IFB after bid opening to resolicit based on a revised

wage determination. Square Deal Trucking Company, Inc., B-182436, February 19, 1978, 78-1 CPD 103. In addition, we have held that an IFB containing an incorrect Service Contract Act wage determination should be canceled and the requirement resolicited based on the correct wage determination. Dyneteria, Inc., 55 Comp. Gen. 97 (1975), 75-2 CPD 36, affirmed on reconsideration, Tombs & Sons, Inc., B-178701, November 20, 1975, 75-2 CPD 332. In view thereof, we consider the cancellation of the instant IFB for the reason stated to have been proper. Therefore, the protest is denied.

Finally, A&C requests reimbursement for the costs incurred in the preparation of its bid.

In a series of cases beginning with Heyer Products Company v. United States, 140 F. Supp. 409 (Ct. Cl. 1956), the Federal courts have recognized that because bidders and offerors are entitled to have their bids and proposals considered fairly and honestly for award, the preparation costs of a bid or proposal which was not so considered may be recoverable in certain circumstances. Heyer held that recovery could be had only where clear and convincing proof showed a fraudulent inducement of bids. That is, bids were not invited in good faith, but as a pretense to conceal the purpose to award the contract to some favored bidder or bidders, and with the intent to willfully, capriciously, and arbitrarily disregard the obligation to let the contract to the bidder whose bid was most advantageous to the Government. 140 F. Supp., supra, at 414.

Subsequently, the courts modified the standard set forth in Heyer in order to allow recovery of preparation costs where the Government's actions have been so arbitrary or capricious as to preclude a particular firm from an award to which it was otherwise entitled. McCarty Corporation v. United States, 499 F. 2d 633 (Ct. Cl. 1974); Armstrong & Armstrong, Inc. v. United States, 356 F. Supp. 514 (D.D.C. 1973); see T & H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345.

To the extent that the claim for bid preparation costs is based on DDMT's invitation of bids under a solicitation subsequently found defective, we do not consider the claim allowable under the Heyer standard of review. There is no evidence to suggest that the issuance of the solicitation in a form contemplating a construction contract reflected more than a good faith error in judgment, and perhaps some confusion, on DDMT's part as to what constitutes "construction" and "services" under the procurement statutes and regulations. Documentation Associates - Claim for Proposal Preparation Costs, B-190238, June 15, 1978, 78-1 CPD 437; Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344; Amram Nowak Associates, Inc., B-187253, March 15, 1977, 77-1 CPD 189.

In addition, since we have concluded that the IFB was properly canceled and there accordingly was no arbitrary or capricious action toward A&C, the subject costs are not reimbursable under the modified Heyer standard either. See Ikard Manufacturing Company, B-192248, September 22, 1978, 78-2 CPD 220.

R.F. Keller

Deputy Comptroller General
of the United States