



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Kora & Williams Corporation

File: B-224987

Date: February 27, 1987

DIGEST

1. Doubt as to when the protester first knew its basis of protest is resolved in favor of the protester for timeliness purposes.
2. Agency properly canceled an invitation for bids (IFB) where all bid prices exceeded the funds available for the construction project. The protester's contention that award is required because a provision on the cover sheet of the IFB expressed the agency's intention to fund the project either with fiscal year 1986 or fiscal year 1987 appropriations is clearly unreasonable, since no government official has the authority to award a contract or to obligate funds when to do so would violate a statute or regulation.
3. Protester's request for reimbursement of its bid preparation costs is denied because recovery of such costs is not permissible where a decision on the merits denies the protest.

DECISION

Kora & Williams Corporation (K&W) protests the cancellation, because of a lack of funds, of invitation for bids (IFB) No. F49642-86-B-0452, issued by the Department of the Air Force for additions and alterations to a commissary on Andrews Air Force Base, Maryland. K&W, whose bid was low, contends that a provision in the IFB committed the government to make an award funded by fiscal year 1986 appropriations if available or, if not, by fiscal year 1987 appropriations. K&W contends that it relied on this alleged commitment when it assigned its estimating staff for 3 weeks to prepare its bid. K&W requests that the Air Force be directed to reinstate the procurement and make award to K&W when funds become available or, alternatively, to reimburse K&W for its bid preparation costs.

We deny the protest and the request for bid preparation costs.

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The Air Force contends that, since it informed K&W on September 29, 1986, that the procurement was being canceled, K&W's protest filed on October 16 is untimely under our Bid Protest Regulations. These regulations require that protests, other than those based on alleged improprieties apparent prior to bid opening or the closing date for receipt of proposals, must be filed not later than 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1986).

Although the contracting officer states that K&W was told on September 29 that the procurement was being canceled because of the lack of funds, the Air Force concedes that K&W was not given the reason for the cancellation at that time. K&W insists that the telephone call of September 29 was from a secretary in the procurement office who advised that the Air Force was not certain at that time what the status of the procurement was. Moreover, the record indicates that it was not until October 3 that a written determination to cancel was made because all bids exceeded "the funds available/authorized." Thus, it is not clear when K&W first knew the reason for the cancellation. In such cases, it is our policy to resolve any doubt as to when the protester first knew the basis of its protest in favor of the protester for timeliness purposes. Benco Contract Services Co., B-218465.2, Jan. 15, 1986, 86-1 CPD ¶ 40. Accordingly, as we received K&W's protest within 10 working days of October 8 (when K&W received the October 3 amendment canceling the procurement), we consider the protest to be timely and will consider it on its merits.

The provision on which K&W bases its contention that the Air Force is committed to make an award appears in the cover sheet to the IFB and reads as follows:

"While funds are not presently on hand to fund this project, we anticipate that the funds will be available within 30-45 days. It is this command's intention to fund this project using FY 86 appropriations. In the remote possibility that this project cannot be funded with FY 86 appropriations, it will be funded with FY 87 money."

A total of four bids was received and K&W's bid price of \$3,967,000 was low but exceeded the government estimate by \$1,069,289 and the available funding. On October 3, the procurement was canceled on the basis that all bids exceeded the available funds.

We find that the cancellation was within the authority of the Air Force. Although cancellation of a solicitation is not permitted after bids have been opened and the prices have been exposed unless a compelling reason for the cancellation exists, an agency's determination that funds are not available for obligation to the contract is such a reason. NDT-1, Inc., B-220570, Nov. 20, 1985, 85-2 CPD ¶ 576, aff'd on reconsideration, B-220570.2, Apr. 15, 1986, 86-1 CPD ¶ 364.

The record indicates that Congress appropriated \$2,650,000 for the project. In addition, Air Force Regulation 86-1, § G (26) (May 7, 1984), authorizes funding of Air Force Commissary projects to a maximum of 125 percent of the approved, (appropriated) amount^{1/}, for a maximum for this project of \$3,312,500. There is nothing in the record here to indicate that the cancellation was due to anything other than the unavailability of adequate funds to obligate to a contract at the price bid by K&W. Furthermore, the Air Force reports that it plans to reevaluate the requirement and to make appropriate design modifications to bring the project within the applicable funding limitation.

Therefore, because its price exceeded the applicable cost limitation, K&W's bid was properly rejected since no government official has the authority to award a contract or to obligate funds when to do so would violate a statute or regulation. See Vanport Manufacturing Co., B-186559, Oct. 19, 1976, 76-2 CPD ¶ 343 at 4.

Moreover, the Federal Acquisition Regulation, 48 C.F.R. § 1.602-1 (1986), specifically states that contracting officers may bind the government only to the extent of the authority delegated to them and that no contract shall be entered into unless the contracting officer ensures that all requirements of law have been met. In our view, the provision relied upon by K&W to support its position indicates only the contracting activity's optimistic intention to obtain funds for the project if legally possible. An interpretation that the provision requires an award to K&W even though it would exceed the available funds and violate the statutory and regulatory limitation on costs is clearly unreasonable.

Finally, this deficiency and the circumstances of this case do not warrant reimbursement of K&W's bid preparation costs since recovery of such costs is not permitted where the

^{1/} Authorized by 10 U.S.C. § 2853(a)(2) (1982).

solicitation has been properly canceled. R.H.G. Systems--
Request for Reconsideration, B-224176.2, Nov. 19, 1986, 86-2
CPD ¶ 589; Contemporary Roofing, Inc., B-222691, June 2,
1986, 86-1 CPD ¶ 510.

The protest and the claim for bid preparation costs are denied.

for *Seymour Efron*
Harry R. Van Cleve
General Counsel