Michael Boyle
Proc. I

DECISION

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

FILE: B-185544 DATE: March 18, 1977

MATTER OF William F. Wilke, Inc.

DIGEST:

1. By accepting bid submitted 4 minutes after time designated as bid opening time, bid opening officer's action exceeded authority and amount of discretion entrusted by statute and regulation without reasonable basis and can be considered arbitrary and capricious. Since late bid was low bid and contract was awarded to late bidder, otherwise low, responsive, and responsible bidder is entitled to bid preparation costs. Conclusion is considered to be consistent with court's discussion in Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974), insofar as case involved favoritism toward another rather than misreading or misevaluation of claimant's bid.

2. Since amount of compensation for bid preparation costs due claimant is in dispute and claimant has not submitted adequate substantiating documentation to establish quantum of claim, there is no basis at this time to determine proper amount of compensation. Therefore, it is requested that necessary documentation be submitted to agency in effort to reach agreement on quantum. If agreement is not reached, matter should be returned to GAO for further consideration.

William F. Wilke, Inc. (Wilke), claims bid preparation costs in the amount of $23,434 relative to bids submitted in response to invitations for bids (IFB's) for barracks rehabilitation at Fort George G. Meade, Maryland. Wilke did not protest the failure to receive any award under the IFB's here but sought injunctive and declaratory relief in the Federal courts. William F. Wilke, Inc. v. Department of the Army, 357 F. Supp. 988 (D.Md. 1973), affirmed, 485 F.2d 180 (4th Cir. 1973). These court decisions and the submissions of the parties to our Office provide the record upon which this decision is based and the facts are undisputed.

A threshold question is whether we will consider Wilke's claim in view of our recent decision in DWC Leasing Company, B-186481, November 12, 1976, 76-2 CPD 404. There, we held that

a claim for bid preparation costs filed by a party whose protest was not heard by the General Accounting Office--because the protester failed to file required submissions in a timely manner--would not be considered since to do so would in effect permit circumvention of our Bid Protest Procedures, 4 C.F.R. part 20 (1976). Unlike the situation in that decision, here, a court of competent jurisdiction considered and provided a record on the matter. Accordingly, we will consider Wilke's claim on the merits.

On December 4, 1972, IFB No. DACA 31-73-B-0040 was advertised for the barracks rehabilitation under which Wilke submitted a responsive bid and was determined to be a responsible bidder. However, because of certain ambiguities in the specifications contained in that invitation, it was canceled by the Department of the Army, Baltimore District, Corps of Engineers. Subsequently, on February 20, 1973, less than 1 month after the first bid opening, the Corps readvertised the barracks rehabilitation project as IFB No. DACA 31-73-B-0066. The invitation specified that:

> "[S]ealed bids in DUPLICATE for the work described herein will be received until 3:00 p.m. local time at the place where bids are received on 73 Mar 13 at the Office of the District Engineer, U.S. Army Engineer District, Corps of Engineers, Federal Building, 31 Hopkins Plaza, Baltimore, Maryland; and at that time publicly opened. Hand carried bids must be deposited in bid depository provided therefor in Room 1225."

Attached to the invitation was "Instructions to Bidders, Standard Form 22," which, in paragraph 7 thereof, stated that bids received at the office designated in the IFB after the exact time set for opening of bids would not be considered unless they were subject to certain limited exceptions not here relevant.

On March 13, 1973, two representatives of Wilke met a representative of A. & M. Gregos, Inc. (Gregos), in room 1225, the location of the locked bid despository box, at approximately 1 hour before the time set for bid opening, 2 p.m. Thereafter, at 2:50 p.m., Wilke's representative submitted a bid in the amount of $2,941,349 by depositing the bid in the bid depository box.

At 2:56 p.m., a representative of the Corps of Engineers took the box to room 1208 (about 80 feet away) where the opening of the bids was to take place. The box arrived in room 1208 a moment or two before the scheduled opening time of 3 p.m.

On arrival, the Corps' representative placed the bid box on the table and left the room to request the attendance of an attorney from the Office of Counsel for the Corps of Engineers who entered the room at approximately 3 p.m., and agreed to serve as bid opening officer. At this time, the representative of Wilke, along with other bidders and industry representatives, including the representative of Gregos, was in the room.

The bid opening officer proceeded to unlock the bid box and remove the bids. At approximately 3:04 p.m., prior to any announcement that the time for bid opening had arrived, the representative of Gregos rose from his seat, removed a bid from his inside coat pocket, and placed it on the table where the bids were.

The bid was accepted for consideration and the bid opening officer proceeded to make the bid opening announcement with the statement, "It is now 3 o'clock time to open bids on Invitation No. DACA 31-73-B-0066. Are all bids in?" The first bid was opened at approximately 3:05 p.m. There were five bidders. The low bidder was Gregos with a bid of $2,877,000. The second low bidder was Wilke.

Shortly thereafter, Wilke sought injunctive and declaratory relief in the Federal courts to prevent the consideration of the Gregos bid by the Corps. However, the Corps did award the contract to Gregos. The Federal district court denied injunctive relief but stated that "the disappointed bidder, the Plaintiff William F. Wilke, Inc., is entitled to a judgment declaring that the successful bid of A. & M. Gregos, Inc. was not timely filed under the applicable statutes and regulations." In reaching that conclusion, the court relied on decisions of our Office involving similar facts and interpreted 10 U.S.C. § 2305(c) (1970) and then current Armed Services Procurement Regulation (ASPR) §§ 2-301(a), 2-302, 2-303.1, 2-303.5. And the court rejected the Army's position that ASPR § 2-402.1 served to create a flexible time limit for the submission of bids insofar as the bid opening officer determined the time for bid opening. Finally, the court rejected the Army's argument that the custom of making pre-bid-opening announcements was relied upon by bidders in prior years to enable them to timely submit bids in the bid opening room.

On motion to amend the judgment, the district court concluded that the acceptance of Gregos' late bid was not, as the Army argued, a mere irregularity without prejudice to the rights of any interested bidder because the purpose of the exact time requirement is not only to give all bidders an equal opportunity, to prevent fraud, and to preserve the integrity of the competitive bid system, but to provide a clear cutoff point after which bids will not be accepted. The district court's decision was affirmed on appeal.

ENTITLEMENT

In T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345, we held that a bidder-claimant would be entitled to bid preparation costs if a procuring agency's actions toward it were arbitrary and capricious. There, we recognized that the Court of Claims, in The McCarty Corporation v. United States, 499 F.2d 633, 637 (1974), stated:

> "* * * it is an implied condition of every invitation for bids issued by the Government that each bid submitted pursuant to the invitation will be fairly and honestly considered (Heyer Products Co. v. United States, 140 F. Supp. 409, 412, 135 Ct. Cl. 63, 69 (1956), and if an unsuccessful bidder is able to prove that such obligation was breached and he was put to needless expense in preparing his bid, he is entitled to his bid preparation costs * * *. Keco Industries, Inc. v. United States, 428 F.2d 1233, 1240; 192 Ct. Cl. 733 (1970) (hereinafter Keco I)."

We also noted, however, that:

> "* * * if one thing is plain [in the area of bid preparation cost claims] it is that not every irregularity, no matter how small or immaterial, gives rise to the right to be compensated for the expense of undertaking the bidding process. Keco Industries, Inc. v. United States, 492 F.2d 1200, 1203 (Ct. Cl. 1974) (hereinafter Keco II)."

In Keco II, the Court of Claims outlined the standards for recovery. The ultimate standard is whether the procurement agency's actions were arbitrary and capricious toward the bidder-claimant. The McCrary Corporation v. United States, supra; Keco I, supra. See Excavation Construction, Inc. v. United States, 494 F.2d 1289, 1290 (Ct. Cl. 1974); Continental Business Enterprises, Inc. v. United States, 452 F.2d 1016, 1021, 196 Ct. Cl. 627 (1971).

As set out in Keco II, there are four subsidiary criteria, namely:

> 1. Subjective bad faith on the part of the contracting officials--depriving the bidder of fair and honest consideration of his proposal. Heyer Products Company, Inc. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956). The court did note that wholly unreasonable action is often equated with subjective bad faith. Cf. Rudolph F. Metzger & Associates, Inc. v. Warner, 348 F. Supp. 991, 995 (M.D.Fla. 1972);
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> 2. That there was no reasonable basis for the agency's decision. Excavation Construction, Inc. v. United States, supra; Continental Business Enterprises, Inc. v. United States, supra;
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> 3. That the degree of proof of error necessary for recovery is ordinarily related to the amount of discretion entrusted to the procurement officials by applicable regulations. Continential Business Enterprises, Inc. v. United States, supra; Keco I, supra; and
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> 4. Violation of statute can, but need not, be a ground for recovery. Cf. Keco I, supra.

Finally, in Keco II, the Court of Claims stated that application of these criteria depends on the type of error or dereliction committed by the procurement officials and whether that action was directed toward the claimant's own bid or that of a competitor.

In view of the standard for recovery and four subsidiary criteria outlined above, the principal issue for our consideration is whether the Army's acceptance of Gregos' late bid, thus displacing the otherwise low, responsive, responsible bidder, constituted arbitrary and capricious agency action toward the displaced bidder, Wilke.

Wilke argues in summary that, by accepting the late bid, the Army violated ASPR §§ 2-301(a), 2-303.1, 2-404.2(a); the Army procurement officials exceeded the amount of discretion entrusted to them; and the Army had no reasonable basis for that decision. Thus, Wilke contends that at least three of the subsidiary criteria outlined above are satisfied. Wilke's principal argument is that the bid opening officer had no authority or discretion to accept Gregos' late bid and the district court's finding, affirmed by the appellate court, that Gregos' bid was late is binding on our Office. Wilke concludes that, based on (3) above, contracting officials exceeded the amount of discretion entrusted to them by regulation.

The Army essentially contends that the bid opening officer, mindful of the fact that no overt act or statement had been made prior to the acceptance of the Gregos bid, was relying on our decision in B-157598, October 15, 1965, as controlling. Therefore, the Army concludes that the bid opening officer's actions had a reasonable basis and were taken in good faith; although the Army may have erred, its actions cannot be deemed so unreasonable as to be arbitrary and capricious.

In B-157598, the invitation provided that bids would be received until 2 p.m., on August 11, 1965, at a particular naval facility but no particular building or room number was specified. There, the bid box was located in the lobby of building 127 and the bid opening room was located approximately 170 feet across the compound in building 129. At approximately 1:55 p.m., on August 11, 1965, the bid opening officer arrived at the bid box and at about 2 p.m., the bid box was closed and locked; the bid opening officer then took the box across the compound to building 129. Between buildings, a representative of a bidder submitted a bid. After arrival at the bid opening room, the bid opening officer read a prepared statement announcing that no other bids would be accepted. The time was 2:02 p.m. We concluded that the bid in question was submitted before 2 p.m., because (1) the bid opening officer decides when the designated time for bid opening has arrived, and (2) some time elapsed between submission of the bid and the bid opening officer's announcement at 2:02 p.m.

Our decision is not reasonably applicable in the instant case because the basis for our decision was that the bid was submitted before 2 p.m., the time designated for bid opening,

whereas the record here clearly shows that the Greco bid was submitted at 4 minutes after the time set for bid opening and, therefore, was late. Accordingly, we must conclude that the Army's bid opening officer, in accepting the late bid, should not have reasonably relied on that decision and exceeded the authority and amount of discretion entrusted to her by statute and regulation. In this regard, we think the district court's views concerning the Army's position that what occurred here was a mere irregularity should be followed in this instance. The bid opening officer's acceptance of the late bid in effect displaced Wilke as the low, responsive, responsible bidder, and can be considered no less than arbitrary and capricious, thus entitling Wilke to bid preparation costs.

We recognize that our conclusion that Wilke is entitled to bid preparation costs involves a situation where the Government action giving rise to entitlement favored another bidder rather than a misreading or misevaluation of the claimant's own bid. Under the guidance of Keco II, we believe our conclusion for entitlement is consistent with the court's discussion of this matter.

COMPENSATION

Wilke seeks to recover $23,434 representing a sum expended in the performance of the following functions in connection with preparing bids for the two IFB's:

(a) Researching the specifications;
(b) Reviewing and analyzing the bid forms;
(c) Searching catalogs and other sources of material for costs factors;
(d) Preparing bid forms in draft, review and preparing actual bid forms; and
(e) Mailing and other communication costs.

The amount claimed can be broken down according to Wilke, as follows, with approximately 50 percent of the total cost attributable to the preparation of each of the two bids:

(a)	Drawing and reproductions (10 sets)	$950
(b)	Long distance telephone calls	540
(c)	Printing of invitations	559
	SUBTOTAL	$2,049

(d)	Total office payroll for those assigned to perform the aforesaid tasks	$18,436
(e)	Allocated insurance and FICA taxes	2,949
		21,385
	Total bid preparation costs	$23,434

Wilke contends that the above categories of expenses have been specifically held to be recoverable by our Office in T&H Company, supra.

The Army argues that since the project was advertised on two separate occasions under different solicitation numbers and all bids on the first solicitation were properly rejected, Wilke's entitlement, if any, is limited to actual costs in preparing its bid for the second IFB.

In response, Wilke argues that the costs incurred in both instances should be viewed as costs incurred in preparing for a single contract because (1) costs incurred in the first preparation did not have to be duplicated in the second preparation, and (2) fairness requires that Wilke be entitled to recover all costs when it was damaged solely by the Army's wrongful conduct.

In our view, the procurement action connected with the first IFB is entirely independent from the contested procurement action involving the second IFB. Wilke did not protest the cancellation of the first IFB and, in any event, no arbitrary and capricious Government action is evident such as to allow the recovery of bid preparation costs in connection with that IFB. Therefore, we agree with the Army's position that Wilke's entitlement is limited to actual costs in preparing a bid for the second IFB.

We note that Wilke was invited by the Army and our Office to submit adequate documentation to substantiate the quantum of its claim and to establish the proper allocation of costs to either the first or second preparation. To date, Wilke has provided merely general allegations and no supporting documentation. Accordingly, we have no basis to determine the proper amount of compensation. We therefore request that Wilke submit the

necessary documentation to the Army in the hope that an agreement can be reached on the quantum issue. In the event that agreement is not reached, the matter should be returned here for further consideration.

Deputy Comptroller General
of the United States