

DOCUMENT RESUME

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[Claim for Bid Preparation Costs]. B-185755. June 3, 1977. 5 pp.

Decision re: Groton Piping Corp.; Thames Electric Co.; by Robert P. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: General Government: Other General Government (806).

Organization Concerned: Department of the Navy: Naval Submarine Base, New London, CT.

Authority: Federal Tort Claims Act (28 U.S.C. 2671-2680).

B-186481 (1976). Keco Industries, Inc. v. United States, 492

F.2d 1200, 1203 (Ct. Cl. 1974). McCarty Corp. v. United

States, 499 F.2d 633, 637 (Ct. Cl. 1974). Heyer Products Co.

v. United States, 140 F. Supp. 409, 412, 135 (1956).

Continental Business Enterprises v. United States, 452 F.2d 1016, 1021.

Two businesses engaged in a joint venture claimed bid preparation costs for their bid submitted in response to an invitation for bids (IFB) for utilities improvements at a naval submarine base. Mere negligence by the procuring activity is not generally sufficient to support a claim for bid preparation costs. The award to a large business, even though a small business set-aside provision was inadvertently included in the IFB of the protester, was not an arbitrary or capricious action to justify a claim for bid preparation costs, since the evidence indicates no intent by the agency to restrict procurement to small business, and no set-aside provision was included in the awardee's bid. (Author/SC)

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DECISION



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

FILE: B-185755

DATE: June 3, 1977

MATTER OF: Groton Piping Corporation and Thames Electric
Company (joint venture) - Claim for Bid Preparation
Costs

DIGEST:

Mere negligence by procuring activity is not generally sufficient to support claim for bid preparation costs. Furthermore, award to large business, even though a small business set-aside provision was inadvertently included in IFB of protester, is not arbitrary or capricious action to justify claim for bid preparation costs since evidence indicates no intent by agency to restrict procurement to small business and no set-aside provision was included in awardee's bid.

Groton Piping Corporation and Thames Electric Company (G&T), doing business as a joint venture, claim bid preparation costs in the amount of \$15,597.42 for its bid submitted in response to an invitation for bids (IFB) for utilities improvements at the Naval Submarine Base, New London, Connecticut. In April 1976, our Office denied G&T's protest concerning this procurement. Groton Piping Corporation and Thames Electric Company, B-185755, April 12, 1976, 76-1 CPD 247. Since we have resolved G&T's protest on the merits, G&T's claim for bid preparation costs may properly be considered. See DWC Leasing, B-186481, November 12, 1976, 76-2 CPD 404.

The salient facts were set forth as follows in our decision on the protest:

"The IFB, issued on November 26, 1975, requested bids for utilities improvements at the Naval Submarine Base, New London, Connecticut. The procurement was not intended to be restricted to small business. However, some copies of the IFB did contain a small business set-aside restriction while it had been deleted from other copies. The agency report states:

"* * * In this case the IFB was mailed to all prospective bidders while the section on bidding information and the plans and specifications were being reproduced. Upon receipt of the section on bidding information, the procurement clerk noticed that a notice on small business set aside had been printed. An "X" was drawn on the master and the words "deleted" on the left hand side of the page. * * * Despite the fact that all copies of the original reproduction showing the small business restriction should have been discarded, it appears that to some undeterminable extent, the deleted section was sent to some prospective bidders and the undeleted section to others."

"On January 15, 1976, the date of bid opening, 16 bids were received. The low bidder in the amount of \$916,540 was Baldwin which represented itself as a large business. The second low bidder in the amount of \$1,089,081 was G&T which represented itself as a small business. The remaining bids ranged from \$1,089,100 to \$1,497,318. Only two bids were received from large business concerns.

"By telegram dated January 16, 1976, G&T protested an award to any other bidder. In its letter of January 29, 1976, G&T contends that an award cannot be made to the low bidder, since it is a large business and paragraph 7 of section 00101 provides that bids received from firms which are not small business concerns shall be considered nonresponsive and shall be rejected."

G&T argues that the Navy was negligent in failing to inform G&T that a small business set-aside was not contemplated by the IFB. G&T further contends that the Navy acted unreasonably by issuing an IFB which had an error in it. Consequently, G&T claims bid preparation costs of \$15,597.42.

a bidder's or offeror's entitlement to the costs of preparing his bid or offer arises from the Government's responsibility in considering bids or proposals submitted in response to a solicitation. The nature of the Government's obligation, with regard to advertised procurements, was characterized by the Court of Claims in The McCarty Corporation v. United States, 499 F.2d 633, 637 (Ct. Cl. 1974) (per curiam), as follows:

"* * * 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 recover his bid preparation costs in a suit against the Government (Keco Industries, Inc. v. United States, supra, 428 F.2d at 1240, 192 Ct. Cl. at 785)."

Not every irregularity, however, entitles a bidder or offeror to compensation for the expenses which he incurred in preparing his bid or proposal. Keco Industries, Inc. v. United States, 492 F.2d 1200, 1203 (Ct. Cl. 1974) (hereinafter Keco II). The Court in Keco II set forth the following standard and subsidiary criteria for recovery of preparation costs:

"The ultimate standard is, as we said in Keco Industries I, supra, whether the Government's conduct was arbitrary and capricious toward the bidder-claimant. We have likewise marked out four subsidiary, but nevertheless general, criteria controlling all or some of these claims. One is that subjective bad faith on the part of the procuring officials, depriving a bidder of the fair and honest consideration of his proposal normally warrants recovery of bid preparation costs. Heyer Products Co. v. United States, 140 F. Supp. 409, 135 Ct. Cl. 63 (1956). A second is that

proof that there was 'no reasonable basis' for the administrative decision will also suffice, at least in many situations. Continental Business Enterprises v. United States, 452 F.2d 1016, 1021, 196 Ct. Cl. 627, 637-638 (1971). The third is 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 statutes and regulations. Continental Business Enterprises v. United States, *supra*, 452 F.2d at 1021, 196 Ct. Cl. at 637 (1971); Keco Industries, Inc. v. United States, *supra*, 428 F.2d at 1240, 192 Ct. Cl. at 784. The fourth is that proven violation of pertinent statutes or regulations can, but need not necessarily, be a ground for recovery. *Cf.* Keco Industries I, *supra*, 428 F.2d at 1240, 192 Ct. Cl. at 784. The application of these four general principles may well depend on (1) the type of error or dereliction committed by the Government, and (2) whether the error or dereliction occurred with respect to the claimant's own bid or that of a competitor." Keco II at 1203-04.

On the basis of these criteria, the principal issue for our consideration is whether the Navy's award to the large business, Baldwin, whose bid did not include the set-aside provision, as the low, responsive, responsible bidder, constituted arbitrary and capricious agency action toward the next low bidder, G&T.

It is our view that under the foregoing criteria mere negligence by the procuring activity is not generally sufficient to support a claim for bid preparation costs. In this connection, we stated in our decision on the protest that:

"The inclusion of the set-aside provision in the IFB received by G&T was due to an agency oversight. The Navy never intended the IFB to be restricted to small business. The small business set-aside review form, executed by the small business specialist on November 26, 1975, and concurred in by the procurement officer on the

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same date, indicates that a determination was made that there not be a small business set-aside. In addition, the synopsis which appeared in the Commerce Business Daily on December 10, 1975, gave no indication that the Navy intended to restrict this procurement. Therefore, notwithstanding the provision in the IFB, a set-aside determination was never made. Thus, it would not be proper to apply the small business restriction to the IFB. * * *

* * * * *

"* * * Accordingly, we concur with the Navy that the award should be made to Baldwin."

In view of the above, we find no evidence of arbitrary or capricious action by the Navy toward G&T. Therefore, G&T's claim for bid preparation costs is denied.

G&T asserts that it is entitled to bid preparation costs under the Federal Tort Claims Act. The Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1970), vests exclusive jurisdiction over tort claims arising out of acts of officers and employees acting within the scope of their employment, in the head of the Federal agency involved, subject to the claimant's appeal to United States district courts.


Deputy Comptroller General
of the United States