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DECISION

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

FILE: B-186594 DATE: October 19, 1976

MATTER OF: Lloyd Kessler

DIGEST:

Where due to presence of defective award provision in IFB contracting officer fails to recognize tie-bid situation and further fails to apply proper tie breaking procedures, claim for bid preparation costs is denied where agency's actions are not shown to be arbitrary and capricious.

Lloyd Kessler (Kessler) has filed a claim for bid preparation costs incurred in connection with invitation for bids (IFB) R1-11-76-60 issued by the United States Forest Service (Forest Service) for the restoration of the West Fork of the Stillwater Trail, Custer National Forest. The claim is an outgrowth of our earlier bid protest decision, Lloyd Kessler, B-186594, September 3, 1976, 76-2 CPD ___, in which Kessler substantially prevailed on the merits. That decision reached the conclusion that the protested IFB contained an invalid award provision and that the Forest Service had failed to follow applicable tie bid procedures when confronted with identical low bids.

The facts of the protest were that two of the bids submitted in response to the IFB were identical in total amount bid, but differed in the amount bid on each of the two items which together constituted the total bid:

Kessler	
Base Item A	20,060
Alternate No. 1	4,000
Total	24,060
Burton	
Base Item A	15,060
Alternate No. 1	9,000
Total	24,060

The award provision in the IFB required that award be made to the bidder submitting the lowest bid for Base Item A without regard for the price bid on Alternate No. 1. The contracting officer, following the award provision, made an award to Burton for both Base Item A and Alternate No. 1 without resorting to the tie bid procedures set out in Federal Procurement Regulations § 1-2.407-6 (1964 ed.).

The proper time to protest a defective solicitation provision under our bid protest procedures is prior to bid opening. 4 CFR § 20.2(b)(1). A timely protest of such a solicitation provision gives the procuring agency the opportunity to correct the solicitation by amendment before bids are opened and prices revealed. Our earlier decision in this matter noted that in 50 Comp. Gen. 42, 43-44 (1970), we had stated that:

> "* * * bidders normally compute their bids on the basis of the terms and conditions stated in the invitation, and will otherwise rely on these provisions and that it is a serious matter to vary or disregard any of the stated terms and conditions of the solicitation after bids have been opened. In 17 Comp. Gen. 554 (1938), it was stated that to permit public officers to permit bidders to vary their proposals after bids are opened would soon reduce to a farce the whole procedure of letting contracts on an open competitive basis. Changing the ground rules upon which bidders are requested to bid after opening of bids is subject to the same criticism."

The basic defect in the award provision here was that it created the possibility of an award being made to other than the lowest responsible bidder. However, that possibility failed to materialize in the instant situation where both bidders were equally low. A properly drafted award provision would have clearly indicated to the contracting officer that he was faced with a tie bid situation. Unfortunately, such was not the case, and Kessler was forced to protest the manner in which award was made.

This Office has taken the position in T & H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345 (T & H), that the ultimate standard for recovery of bid preparation costs is whether the procuring

agency's actions toward the bidder-claimant were arbitrary and capricious, Keco Industries, Inc. v. United States, 492 F 2d 1200 (Ct. Cl. 1974). In the T & H decision, as here, the procuring agency's error was directed toward the claimant's bid. In reaching our determination in T & H, on the issue of whether the agency's action had been arbitrary and capricious, we applied the reasonable basis test taking due note and consideration of both the amount of discretion entrusted to the procurement officials by applicable regulations and whether the agency action constituted a violation of a statute.

Applying the reasonable basis test to the instant situation we cannot conclude that the contracting officer's reliance upon the then unprotested IFB award provision was without a reasonable basis. As we pointed out in our earlier decision, the regulations under which the contracting officer was operating failed to provide clear guidance in the area of award procedures where both a base bid and alternates were involved. Moreover, the contracting officer's decision to follow the terms of the solicitation necessarily precluded his ever reaching the issue of the applicability of the tie-bid regulation, for a rational interpretation of the bids submitted in light of the IFB award provisions could only lead to the conclusion that there was no tie. Finally, there was no violation of statute because award was made to one of the two equally low, responsive, responsible, bidders.

Thus, while we believe that the Forest Service erred in the procedures used to select the proper recipient for award, we cannot conclude that its actions were arbitrary and capricious. There is therefore no ground upon which to base a finding that the agency breached its obligation to fairly and honestly consider each bid submitted.

Accordingly, Kessler's claim for bid preparation costs is denied.

Acting Comptroller General.
of the United States