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

FILE: B-188577 DATE: May 24, 1978

MATTER OF: Intercontinental Construction, Inc.

DIGEST:

1. RFP required that offerors supplying foreign labor for service contract have labor agreement approved by respective foreign Government. Offeror claims proposal preparation costs contending that procuring activity knew foreign Government's decision to approve only labor agreement of incumbent contractor and should have had foreign Government approve all labor agreements or waive requirement. Claim is denied where record indicates that procuring activity did not know of foreign Government's decision until after best and final offers had been submitted, claimant was found nonresponsible, and award was made to low responsible offeror in accordance with RFP.

2. Anticipated profits are not recoverable against Government even if claimant is wrongfully denied contract.

3. Post-bid-opening expenses, such as excise tax, are recoverable only where expenses have been incurred and Government would be estopped to deny existence of contract.

The Department of the Air Force (Air Force) issued request for proposals (RFP) F646057609107 for base operation support of its facility on Wake Island. Paragraph 17b of section "J" of the RFP provided:

"It is important that prospective contractors be aware of the prerequisites for employing or continuing to employ Filipino workers. Employment contracts between contractors and Philippine citizens must be consistent with the standards and terms of the

> US/Philippines Offshore Labor Agreement of December 28, 1968 (T.I.A.S. 6598). Under this agreement, contracts of employment or reemployment must be submitted by contractors to the Philippines Department of Labor for approval. This approval must be obtained by prospective contractors prior to submitting their proposals. Although the present contractor has been allowed by the Philippines Government to deduct a $44.20 per week charge for subsistence and room from each Filipino's pay, the Philippines Government is seeking to eliminate such deductions. This matter must be resolved by prospective contractors with the Philippines Department of Labor."

Both the RFP and amendment 3 of the RFP provided that the contract would be awarded to the lowest responsive, responsible offeror.

Thirty-one offers were solicited. Four proposals were received.

The procuring activity evaluated the proposals, conducted discussions with the offerors and requested best and final offers. Kentron Hawaii, Ltd. (Kentron), the incumbent contractor, submitted the lowest best and final offer and a labor agreement approved by the Government of the Philippines. Consequently, the Air Force awarded the contract to that firm.

Intercontinental Construction, Inc. (ICI), states that the Government of the Philippines refused to approve a labor agreement with anyone other than Kentron. As a result, the contract was awarded to Kentron at a price higher than the price offered by ICI in its initial proposal. Had the Government of the Philippines approved ICI's labor agreement, it would have been awarded the contract on the basis of its initial offer which was low.

ICI states further that prior to award it provided the Air Force with documentation concerning the impossibility of obtaining approval of its labor agreement. Under the circumstances, the Air Force should have obtained the approval of all the labor agreements offered or waived the requirement entirely to insure a competitive procurement. By failing to take either step, the Air Force turned a competitive, negotiated purchase into a sole-source procurement.

Moreover, the failure of the Air Force to take any steps to assist the offerors was a breach of the Government's obligation to honestly consider ICI's offer and it put ICI to needless expense in preparing its proposal. If ICI had known--as the Air Force knew--that it could not obtain approval of its labor agreement, it would not have needlessly expended over $39,000 in proposal preparation costs. Based on the foregoing, ICI contends that it should be awarded proposal preparation costs ($39,482), anticipated profit ($323,698) and excise tax ($15,132).

Essentially, bid or proposal preparation costs will be allowed where the Government acted arbitrarily or capriciously with respect to a claimant's bid or proposal. The underlying rationale is that every offeror has the right to have his offer honestly considered by the Government and, if that obligation is breached and an offeror is therefore put to needless expense in preparing an offer, he is entitled to recovery of expenses. Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344. Further, we have allowed the recovery of bid or proposal preparation costs only where the Government's action was so arbitrary or capricious as to preclude a particular bidder or offeror from an award to which he was otherwise entitled. Spacesaver Corporation, B-188427, September 22, 1977, 77-2 CPD 215.

As noted, ICI contends that it would have been awarded the contract based on its initial proposal if it had submitted an approved labor agreement. We do not find this to be the case. In addition to lacking an approved labor agreement, ICI was otherwise deficient. For example, the Air Force found that ICI failed to satisfy the responsibility requirement of section C 31 of the RFP, i.e., the offeror must have 1 year of experience in performing a similar contract within the previous 5 years. Consequently, no award could have been made to ICI on the basis of its initial proposal, even if it had submitted an approved labor agreement, because of its failure to show that it was a responsible offeror. Cal-Chem Cleaning Company, Incorporated, B-179723, March 12, 1974, 74-1 CPD 127. Moreover, there is no evidence of record that the Air Force knew at the time initial proposals were received and evaluated that the labor agreement of only one offeror would be approved. In fact, the record indicates that the Air Force did not know of the decision to approve only one labor agreement until ICI provided it with this information in conjunction with the submission of its best and final offer. Consequently, we cannot fault the Air Force for not awarding a contract to ICI on the basis of its initial low proposal because, among other things, ICI did not provide the Air Force with an approved labor agreement or demonstrate that it had the requisite experience in the service contract area. Under the circumstances, it was proper for the Air Force to conduct discussions, request best and final offers and provide an additional opportunity for the submission of approved labor agreements.

As indicated, Kentron, which had an approved agreement, submitted the lowest best and final offer. If the Air Force had intervened to obtain approval of the labor agreement on behalf of offerors other than Kentron or waived the requirement, as ICI recommends, it would not have changed the competitive standing of the offerors. Accordingly, we find nothing improper in awarding the contract to Kentron, since award was made to the lowest responsible offeror in accordance with the terms of the RFP.

Based on the foregoing, we cannot find that the Air Force arbitrarily or capriciously denied ICI a contract to which it was entitled. Therefore, ICI's claim for proposal preparation costs is denied. ICI's claim for anticipated profits is also denied. In this regard, we have consistently held that anticipated profits are not recoverable against the Government even if the claimant is wrongfully denied a contract. Robert Swortzel, B-188764, April 22, 1977, 77-1 CPD 280.

Post-bid-opening expenses, such as the claimed excise tax, are recoverable only where the expenses have been incurred and the Government would be estopped to deny the existence of the contract. Harco Inc., B-189045, October 4, 1977, 77-2 CPD 261. In the instant case, the tax expenses have not been incurred and the Government would not be estopped to deny the existence of a contract, since it never implied that ICI would be the awardee. Accordingly, the excise tax claim is disallowed.

In summary, we find no basis to permit the recovery of proposal preparation costs, anticipated profit or excise tax.

P.F. Kelly

Deputy Comptroller General
of the United States