

4529

04440

DECISION



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

FILE: B-188986

DATE: November 29, 1977

MATTER OF: Edward E. Davis Contracting, Inc.

DIGEST:

1. Where protester supplies own bid forms, protester has responsibility to make its forms conform with essential solicitation requirements; otherwise, bid must be rejected as nonresponsive.
2. Even if erroneous advice is given by Government officials, this cannot estop an agency from rejecting a bid as nonresponsive when required to do so by law.
3. Where protested bid failed to include one page of bid package, it was nevertheless responsive as the omitted page did not require bidder to provide any information, bidder took no exception to requirement included in omitted page, and requirement was included in other provision of IFB which was submitted.
4. Protester's demand for loss of anticipated profits and expenses incurred in protesting award to another bidder is denied, since unsuccessful bidder is not entitled to reimbursement for anticipated profits and no basis exists for payment of protest expenses. Further, while bid preparation costs may be allowed where bid is not fairly considered because of bad faith or illegal action on part of Government procurement personnel, record contains no evidence indicating that contracting officer acted illegally or in bad faith in awarding contract to firm other than protester.

On April 15, 1977, the United States Air Force (Air Force) issued solicitation No. F09650-77-B0009 to five firms for installation of 19,000 square feet of vinyl asbestos floor tile and all related work at Robins Air Force Base, Georgia (Robins). Initially, a need existed for the job to be performed during the month of April 1977, since this would be the only time the contractor would have an opportunity for total occupancy and work in the area because of a current military construction program in progress in the same area of the building. Notwithstanding, the time for completion of performance was later extended to May 8, 1977.

Edward E. Davis Contracting, Inc. (Davis), was not one of the five firms solicited, as it was not within the local trade area, a 100-mile radius. However, Davis submitted a bid prior to the April 22, 1977, bid opening date. An analysis of the bids disclosed that Davis was the low bidder, but its bid was found to be nonresponsive for two reasons: (1) failure to state any minimum period of time during which it would remain open for acceptance; and (2) deviation from the 2-day requirement for execution of Standard Form 23, Construction Contract (SF-23), and the giving of performance and payment bonds. The second low bidder, Southern Plastering Company (Southern), was awarded the contract as it was found to be responsive and responsible. Davis requests that the award to Southern be set aside and award be made to it or, in the alternative, the cost of its overhead, which includes bid preparation costs, and profit be awarded to it.

Essentially, Davis alleges that the nonresponsiveness of its bid was caused by its reliance on erroneous information given to it by a Government employee in the Air Force procurement bidding section. On April 18, 1977, Davis contends that it advised the employee that page 2 of standard form 21 (SF-21) was not included in its bid package. In response, Davis alleges that it was told there was no special information contained in SF-21, that there was no special information to be written in any of the blanks on page 2 of SF-21 and that the use of a blank SF-21 already in Davis' possession would be satisfactory. Consequently, Davis submitted its bid using an SF-21 already in its possession. We note that the section concerning the time for acceptance (1) and execution (2), above, on the forms were the same, except that Davis' page 2 of SF-21 included a 5-day requirement for execution of the contract and furnishing of performance and payment bonds.

The section in the solicitation concerning the latter requirements reads:

"The undersigned agrees that, upon written acceptance of this bid, mailed or otherwise furnished within calendar days (60 calendar days unless a different period be inserted by the bidder) after the date of opening of bids, he will within 2 calendar days (unless a longer period is allowed) after receipt of the prescribed forms, execute Standard Form 23, Construction Contract, and give performance and payment bonds on Government standard forms with good and sufficient surety."

The Air Force points out that Davis' allegations are contradicted by the contracting officer. It advises that the employee in the procurement office does not recall speaking with Davis prior to bid opening, but would not make a positive statement to this effect. Additionally, the Air Force submits that its employee "was well aware that the contract in question was a priority project, and that the performance period was critical * * *." It is the Air Force's position, based on the foregoing, that Davis has not supported its allegations with sufficient evidence.

In the Air Force's report it is conceded that had Davis only failed to insert the minimum period of time during which its bid would be open for acceptance, its bid would have been responsive, as this omission can only be interpreted as a minor error. We concur. Therefore, we will only be concerned with Davis' deviation from the 2-day requirement for execution of SF-23 and the furnishing of the necessary bonds.

A review of the record does not indicate where Davis obtained its bid package but, regardless, the responsibility for the preparation and submission of a bid is upon the bidder. 31 Comp. Gen. 324, 325 (1952). The bid package as issued included, in pertinent part:

(a) Standard form 20 (SF-20), section 5(b) - "* * * Within 2 days after the prescribed forms are presented to the bidder to whom award is made for signature, a written contract on the form prescribed by the specifications shall be executed and two bonds * * * furnished * * *."

(b) Standard form 22, Section 1 - "* * * Oral explanations or instructions given before the award of the contract will not be binding."

(c) General Provisions, Number 79(GP-79) -

"The contractor will be required to commence work under this contract within 2 calendar days after the date of receipt by him of Notice to Proceed * * *. Notice to Proceed will be issued within 2 calendar days after contractor's receipt of Notice of Award. * * * The foregoing completion date [8 May 1977] is based on the assumption that the successful bidder will receive the notice to proceed by 25 April 1977. The Government

will extend the completion date by the number of calendar days after the above date that the Contractor receives the notice to proceed, except to the extent that the delay in issuance of the notice to proceed results from the failure of the Contractor to execute the contract and give the required performance and payment bonds within the time specified in the bid (1968 ASPR)."

In view of this explicit information (SF-20 and G.P.-79) concerning the 2-day requirement for the execution of SF-23 and the furnishing of the necessary bonds, which Davis does not contend was omitted from its bid package, we believe that Davis should have been able to complete properly the blank SF-21 and make it conform to this solicitation requirement. Since the SF-21 submitted by Davis included 5 days rather than the 2 days required, Davis could have effectively delayed completion by 3 days by failing to execute the contract and furnish the bonds within the 2 days required.

Also, it is our opinion that this requirement, as it concerns the completion date and, in essence, a delivery schedule for services, is material and as such may have a substantial effect on the competitive position of the bidders. Memory Display Systems Division of the EdnaLite Corporation, B-187591, January 23, 1977, 77-1 CPD 74. We have held that where the invitation requires delivery within a stated period, time must be regarded as of the essence even if the solicitation does not expressly so state. 38 Comp. Gen. 876 (1959). Thus, deviations from the specified delivery schedule may not be considered minor deviations which are correctable under ASPR § 2-405 (1976 ed.).

In the Instructions to Bidders, SF-22, specifically section 1, above, Davis was advised that oral explanations and instructions given prior to award are not binding. See generally Young Engineering Systems, 55 Comp. Gen. 654 (1976), 76-1 CPD 96; George C. Martin, Inc., 55 Comp. Gen. 100 (1975), 75-2 CPD 55; Sheffield Building Company, Incorporated, B-181242, August 9, 1974, 74-2 CPD 108. Erroneous advice given by Government officials cannot estop an agency from rejecting a bid as nonresponsive when required to do so by law. A. D. Roe Company, Inc., 54 Comp. Gen. 271, 275 (1974), 74-2 CPD 194; CFE Air Cargo, Inc., B-185515, August 27, 1976, 76-2 CPD 198. ASPR § 2-404.2(a) (1976 ed.) requires rejection of any bid which fails to conform to the essential requirements of the IFB and section (c) of that paragraph requires rejection of any bid which fails to conform to the delivery schedule listed in the IFB.

Additionally, ASPR § 2-301(c) (1976 ed.) provides:

"(c) Bids should be filled out, executed, and submitted in accordance with the instructions which are contained in the invitation for bids. If a bidder uses his own bid form or a letter to submit a bid, the bid may be considered only if (i) the bidder accepts all the terms and conditions of the invitation, and (ii) award on the bid would result in a binding contract the terms and conditions of which do not vary from the terms and conditions of the invitation."

Davis' bid could not have been considered for award as its extension from 2 to 5 days, in which the execution of SF-23 and the submission of the necessary bonds could occur, materially varied the terms and conditions of the invitation. The fact that Davis did not object to the completion date does not change this conclusion since a 3-day increase in the time allowed for execution of SF-23 would automatically extend the completion date 3 days. See G.P.-79 supra.

Davis also contends that Southern's bid could not be considered responsive since it did not include page 2 of SF-21. We cannot agree. Since page 2 was preprinted, there was no information concerning the time restraints that the bidder was required to provide. Further, Southern submitted SF-20 with its bid which included section 5(b), quoted above, containing the requirement in question and its bid included no exception to the requirement. Therefore, we concur with the contracting officer's decision to consider Southern's failure to submit page 2 as a minor informality under ASPR § 2-405 (1976 ed.).

Davis' alternative demand for overhead and profit is denied. It is well established that anticipated profit may not be awarded to an unsuccessful bidder. Keco Industries, Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970); Heyer Products Company v. United States, 140 F. Supp. 409 (Ct. Cl. 1956). The expenses incurred in pursuing a protest also are noncompensable costs. Descomp, Inc. v. Sampson, 377 F. Supp. 254 (D. Del. 1974); T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345.


Under certain circumstances, where it is shown that a bid was not fairly or properly considered for award because of subjective bad faith or actions contrary to law or regulation on the part of procuring officials,

B--188986

or that there was no reasonable basis for the agency's action, bid preparation expenses may be awarded. Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974); The McCarthy Corporation v. United States, 499 F.2d 633 (Ct. Cl. 1974); T&H Company, supra. Here, we do not find that the record contains any evidence indicating that the contracting officer acted fraudulently or in bad faith or otherwise abused his discretion. Consequently, there is no basis for allowing bid preparation costs.

Accordingly, the protest and alternative claim are denied.

Deputy


Comptroller General
of the United States



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

Anders
P. I.

B-188986

November 29, 1977

The Honorable Lawton Chiles
United States Senate

Dear Senator Chiles:

We refer to your interest in the protest of Edward E. Davis Contracting, Inc., your file number 45/Edward E. Davis, concerning the award of a contract under solicitation No. F09650-77-B0009 issued by the United States Air Force.

By decision of today, copy enclosed, we have denied the protest.

Sincerely yours,

Brinkman
Deputy Comptroller General
of the United States

Enclosure