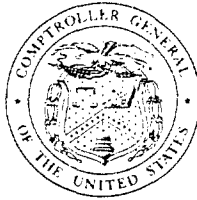


1st BTH  
QC 26  
**DECISION**



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

R. Klemm  
Page I

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8977

FILE: B-189045

DATE: January 26, 1979

MATTER OF: Harco Inc. - Claim for Legal Fees and Bid Preparation costs

DIGEST:

1. Cost of pursuing protest is not recoverable against Government.
2. Legal expenses incurred in connection with claim against Government are not recoverable unless authorized by statute or contract provision.
3. Contracting officer should have considered reasonable alternate interpretation of low bidder's prebid-opening telegram which made its bid nonresponsive. However, since contracting officer's failure to do so was not arbitrary or capricious and award to low bidder was not made in bad faith, claim for bid preparation costs is denied.

CVG 1658

In Harco Inc., B-189045, August 24, 1977, 77-2 CPD 144, we held that the low bid should have been rejected as nonresponsive because a prebid-opening telegram from the low bidder was subject to two reasonable interpretations. Under one interpretation, it would have been responsive but, under the other, it would have been nonresponsive for failing to offer a firm fixed-price contract as required by invitation for bids DAHA34-77-B-0006, issued by the Oklahoma National Guard. However, since the low bidder has reportedly completed more than 50 percent of the contract, we determined that no meaningful remedial action could be taken.

AFC 437

Harco Inc. (Harco) subsequently submitted a claim for lost profit and anticipated salary. We denied the claim, citing decisions of our Office holding that lost profit is not recoverable against the Government

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Decision

and post-bid-opening expenses are recoverable only where the expenses have been actually incurred and the Government would be estopped to deny the existence of a contract. We indicated, however, that we would consider a claim for bid preparation costs if submitted and properly documented as to the amount. Harco Inc.--Reconsideration, B-189045, October 4, 1977, 77-2 CPD 261.

Harco now claims bid preparation costs of \$882.64 and legal fees of \$141.25 incurred in connection with its claims.

The Government takes the following position with regard to Harco's claims.

1. The claimed legal fees are not recoverable since they are not bid preparation costs.

2. GAO's decision in the matter of M.A. Barr, Inc., B-189142, August 3, 1977, 77-2 CPD 77, which GAO heavily relied on because of the similarity of circumstances, was decided only 3 weeks prior to Harco, Inc., supra. At the time of Harco's protest, it was not available to the contracting officer or to the National Guard Bureau.

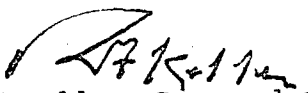
3. Under the circumstances, the contracting officer reasonably construed the prebid-opening telegram to mean that it did not qualify the low bid.

4. It follows that the failure to reject the low bid was not arbitrary or capricious; therefore, the claim for bid preparation costs should be denied.

We have held that the costs of pursuing a protest are not compensable. Documentation Associates-Claim for Proposal Preparation Costs, B-190238, June 15, 1978, 78-1 CPD 437. Similarly, legal fees arising out of a claim are not recoverable where, as here, no statute or contract provision authorizes the recovery of attorney's fees. M. Rene Santoni, B-187877, April 14, 1977, 77-1 CPD 325. Accordingly, Harco's claim for legal expenses is denied.

With regard to bid preparation costs, we have held that such costs will be allowed where the Government acted arbitrarily or capriciously with respect to a claimant's bid or proposal, or where the rejection of the claimant's bid or proposal was motivated by constructive bad faith. Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344; Base Information Systems, Inc., B-186932, October 25, 1978, 78-2 CPD 299. The underlying rationale is that every bidder or offeror has the right to have its bid or proposal honestly considered by the Government, and if the obligation is breached, and a bidder or offeror is therefore put to needless expense in preparing its bid or proposal, the bidder or offeror is entitled to the recovery of expenses. Morgan Business Associates, supra. Further, we have allowed the recovery of bid or proposal costs only where the Government's action was so arbitrary or capricious as to preclude the bidder or offeror from an award to which he was otherwise entitled. Spacesaver Corporation, B-188427, September 22, 1977, 77-2 CPD 215. Mere negligence, however, by the procuring activity is generally not sufficient to support a claim for bid or proposal preparation costs. Groton Piping Corporation and Thames Electric Company (joint venture)-Claim for Bid Preparation Costs, B-185755, June 3, 1977, 77-1 CPD 389.

In our view, the contracting officer should have considered the reasonable alternate interpretation of the low bidder's prebid-opening telegram which made its bid nonresponsive. Based on the record before us, however, we cannot say that his failure to do so was arbitrary or capricious or that he was motivated by bad faith in awarding the contract to the low bidder. It logically follows that Harco's claim for bid preparation costs cannot be sustained.

  
Deputy Comptroller General  
of the United States