

7075
DECISION



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

FILE: B-189320

DATE: July 21, 1978

MATTER OF: Tompkins & Company

DIGEST:

Claim for proposal preparation costs and anticipated profits for partial cancellation of solicitation for emergency flood debris removal is denied because cancellation was reasonable where lowest offer exceeded reasonable guideline. Anticipated profits are not recoverable in any event. Given exigencies of situation, refusal to consider claimant's later offer to perform for amount equal to guideline was not unreasonable since it would have required discussion with all competitive offerors.

Tompkins & Company (Tompkins) claims proposal preparation costs and anticipated profits incident to the partial cancellation of a request for proposals (RFP) issued by the Corps of Engineers.

The solicitation involved here was issued on April 23, 1977, seeking proposals for emergency flood debris removal from 13 separate areas in Pike County, Kentucky. The contracting officer determined prior to the opening of proposals that \$7 per cubic yard was a reasonable rate for these services and that no offer in excess of that amount would be accepted. Tompkins was the low offeror for areas 1, 2, and 3 at \$8.90/cubic yard. The contracting officer determined Tompkins' offer to be unreasonable and canceled the solicitation for areas 1, 2, and 3. Within hours of opening proposals Tompkins offered to reduce its price to \$7/cubic yard; this offer was rejected. No awards were made under the canceled parts of the solicitation. The work in these areas was performed by modification to existing letter contracts with local contractors already performing in these three areas. Tompkins claims its out-of-pocket expenses and anticipated profits incident to the contracting officer's cancellation of the solicitation for areas 1, 2, and 3.

We note at the outset that anticipated profits are not recoverable against the Government even if a claimant is wrongfully denied a contract. Keco Industries v. United States, 428 F.2d 1233 (Ct. Cl. 1970) (Keco); Bell & Howell, 54 Comp. Gen. 937 (1975), 75-1 CPD 273. We therefore deny Tompkins' claim for anticipated profits.

In Keco, supra, the Court of Claims defined the basic standard for the recovery of bid or proposal preparation costs by an offeror as whether the Government fairly and honestly considered the offeror's proposal or bid. The ultimate standard is whether the agency's actions with respect to the offeror were arbitrary and capricious. The court indicated four ways in which this standard might be met: (1) subjective bad faith on the part of procuring officials which deprives the offeror of a fair and honest consideration of his proposal; (2) no reasonable basis for the administrative action; (3) a sliding degree of proof commensurate with the amount of discretion afforded the procuring official; and (4) proven violation of pertinent statutes or regulations which may suffice for recovery. We have adopted these standards. T & H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345; A.R.F. Products, Inc., B-186248, December 30, 1976, 76-2 CPD 541. In addition, we require the protester-claimant to present argument and evidence which affirmatively establish the liability of the United States for proposal preparation costs. DOT Systems, Inc., B-183697, June 11, 1976, 76-1 CPD 368.

We find no justification here for the award of proposal preparation costs. It has long been the general rule that contracting officers have broad discretion in deciding whether an invitation should be canceled. 50 Comp. Gen. 177 (1970); Support Contractors, Inc., 5-181607, March 18, 1975, 75-1 CPD 160. We have on prior occasions approved of the rejection of all offers as unreasonable where they have exceeded reasonable guidelines. See, e.g., Clark Brothers Contractors, B-189625, January 6, 1978, 78-1 CPD 11; W. G. Construction Corporation, B-188837, August 9, 1977, 77-2 CPD 100. There has been no allegation that the FDAA

established guideline was unreasonable. We conclude that the contracting officer's rejection of all offers for areas 1, 2, and 3 was reasonable.

Furthermore, consideration by the contracting officer of Tompkins' later offer to perform for \$7/cubic yard would have constituted the conduct of discussions with Tompkins, requiring the reopening of negotiations with all offerors, or at least those determined to be competitive. PRC Information Sciences Company, B-188305, July 7, 1977, 77-2 CPD 11; Burroughs Corporation, 56 Comp. Gen. 142 (1976), 76-2 CPD 472. In view of the circumstances and the exigencies of the situation, we find nothing unreasonable in the contracting officer's refusal to consider this late offer.

The claim is denied.


Deputy Comptroller General
of the United States