

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

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FILE: B-212775.3**DATE:** April 9, 1984**MATTER OF:** Richard Hoffman Corporation**DIGEST:**

1. An unsuccessful bidder is not entitled to anticipated profits even if the firm should have been awarded the contract.
2. An unsuccessful bidder is entitled to reimbursement for its bid preparation costs where the agency acted in an arbitrary and capricious manner with respect to the claimant's bid, and the bidder otherwise would have been awarded the contract.

Richard Hoffman Corporation has submitted a claim for anticipated profits and bid preparation costs as a consequence of a bid protest that we sustained in its favor in our decision B-212775.2, December 7, 1983, 83-2 CPD 656. The protest arose from the cancellation of invitation for bids (IFB) DACA27-83-B-0047, and the resolicitation (IFB DACA27-83-B-0103) and award of a contract by the Corps of Engineers for the design and construction of a metal building to house the MISO Computer Facility at Fort Sheridan, Illinois.

We deny the claim for anticipated profits, and we allow the claim for bid preparation costs.

In the original protest, Hoffman maintained that it was the low responsive bidder under solicitation -0047, which the Corps canceled after determining that the bid schedule was ambiguous and had confused offerors, including Hoffman. The schedule provided spaces to price two items of work and a space for a total, and the Corps anticipated that a bidder would allocate the total between the two item prices. Several bidders, however, reasonably did not read the two line items as covering all the work to be done, so that their totals exceeded the sums of the line item

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prices, while other bidders did not even furnish line item prices. The Corps canceled IFB -0047 basically because not all bidders completed the bid schedule as the agency had expected.

Although we agreed with the Army that the bidding schedule was misleading, we sustained the protest because we found that no other offeror would have been prejudiced by award to Hoffman, whose total price was low. The Corps admitted that award was to be based on the low total price for the entire job; that the two item prices were merely for informational purposes; that no bidder was misled to his prejudice in entering a total price; and that award to the low total bidder under the initial IFB would have met the Corps' needs.

In sustaining the protest, we recommended that the Corps consider terminating the contract awarded after resolicitation and awarding to Hoffman, because we had been advised that only 4 to 5 percent of the work had been accomplished. The Corps now advises, however, that substantially more than 4 to 5 percent of the work is complete and termination is impractical. Hoffman therefore claims anticipated profits and bid preparation costs as a remedy.

It is well-established that anticipated profits may not be awarded to an unsuccessful bidder not a party to a contract. Machinery Associates, Inc., B-184476, November 18, 1975, 75-2 CPD 323; Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974).

On the other hand, reimbursement for bid preparation costs is permitted under certain circumstances. An implied condition of every IFB issued by the government is that each bid submitted will be fairly and honestly considered. If a bidder denied a contract is able to prove that the obligation was breached and that it was put to needless expense in preparing its bid, the firm is entitled to recover its bid preparation costs. Bean Dredging Corporation, B-209374, July 6, 1983, 83-2 CPD 56. The ultimate standard for determining breach of that obligation and entitlement to costs is whether the procurement agency's actions with respect to the claimant's bid were arbitrary and capricious--that is, were not taken in good faith, were

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contrary to law or regulation, or had no reasonable basis-- and but for those actions the claimant would have had a substantial chance of receiving the award. See DaNeal Construction, Inc., B-208469.3, December 14, 1983, 83-2 CPD 682; Twehouse Excavating Co., Inc. - Reconsideration, B-208189.3, May 20, 1983, 83-1 CPD 541.

Whether an action is arbitrary and capricious depends on the amount of discretion vested in the contracting officer: the more discretion a contracting officer has, the less likely is his action to be arbitrary and capricious. T&H Company, 55 Comp. Gen. 1021 (1975), 75-1 CPD 345. A contracting officer's discretion to cancel a solicitation is significantly restricted after bids have been opened, because of the potential adverse impact on the competitive system, so that there must be a compelling reason to cancel after bid opening. Defense Acquisition Regulation § 2-404.1 (1976 ed.). As we indicated in our December 7 decision, the fact that some terms of an invitation are in some way deficient does not, of itself, constitute a compelling reason. Twehouse Excavating Company, Inc., B-208189, January 17, 1983, 83-1 CPD 42.

In this case, Hoffman was denied the award only because the Corp determined that the solicitation was ambiguous as to how to price two merely informational items. We found in our earlier decision, however, that while bidders may have been confused or misled as to what approach to take in pricing the two items, no bidder would have been prejudiced by an award to Hoffman, whose total price was low. Under these circumstances, there was no reasonable basis to cancel the solicitation.

Since there was no reasonable basis for canceling the Corps' solicitation, Hoffman should be paid the costs incurred in preparing its bid. Twehouse Excavating Co., Inc. - Reconsideration, supra. Hoffman should submit appropriate data in support of its claim directly to the Corps.

Milton J. Fowler
for Comptroller General
of the United States