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DECISION

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

FILE: B-189173 DATE: October 31, 1977

MATTER OF: R.G. Ross Construction Co., Inc.

DIGEST:

1. Where solicitation is ambiguous as to application of St. Louis affirmative action plan to procurement and low bidder fails to return plan with bid, readvertisement of procurement using clear notice that plan requirements for submission are applicable is appropriate. Bidder does not commit itself to affirmative action requirements merely by signing bid when solicitation requires something more.

2. Claim for restitution as a result of no award being made to bidder and procurement being readvertised is denied, since record does not indicate that contracting officer acted fraudulently or in bad faith or otherwise abused his discretion.

On March 14, 1977, the Department of the Interior (Interior) issued a solicitation (No. 6520-9708) through the National Park Service for acoustical improvements to the Arch Visitor Center, Jefferson National Expansion Memorial National Historic Site (Center) in Missouri. The solicitation contained the affirmative action plan (plan), required by the Department of Labor for work within the St. Louis, Missouri, area. R.G. Ross Construction Co., Inc. (Ross), the low bidder, and Hubbard and Hubbard, Inc., the second low bidder, did not return the plan with their bids. The third low bidder failed to acknowledge receipt of an amendment of the solicitation. The three low bidders were determined to be nonresponsive and the award was made to the fourth low bidder, Hoel-Steffen Construction Company.

Ross protested the rejection of its bid to Interior. The protest was denied. Ross then filed a protest with this Office. As a result of the latter protest, the contracting officer determined that the solicitation was ambiguous and terminated the Hoel-Steffen contract for the convenience of the Government. Interior now proposes a readvertisement "using a clear notice to all bidders that Imposed Plan requirements are applicable to this procurement." Ross disagrees that the procurement should be readvertised. Ross contends that the award should be made to it under the original solicitation.

On the first page of the affirmative action material there is a warning:

> "TO BE ELIGIBLE FOR AWARD OF THE CONTRACT, EACH BIDDER MUST FULLY COMPLY WITH THE REQUIREMENTS, TERMS AND CONDITIONS OF THIS DOCUMENT"

Under the "REQUIREMENTS, TERMS AND CONDITIONS" section, the following is provided:

> "1. No contracts or subcontracts shall be awarded for Federal or Federally-assisted construction in the St. Louis, Missouri Area on projects whose estimated cost exceeds $500,000 unless the bidder completes and submits, prior to bid opening, this document or a substantially similar document, which shall include specific goals of minority manpower utilization for each trade designated * * *
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> "A bidder who fails or refuses to complete or submit such goals shall not be deemed a responsive bidder and may not be awarded the contract or subcontract, * * *"

It is well settled that an ambiguity exists when two or more reasonable interpretations are possible. See 48 Comp. Gen. 757, 760 (1968), citing Dittmore-Freimuth Corp. v. United States, 182 Ct. Cl. 507, 390 F.2d 664 (1968).

Ross contends that the solicitation specifications were not ambiguous. In support of this, Ross argues that nowhere in the bid documents does it state that a bidder is required to submit the plan on a project whose estimated cost does not exceed $500,000. It is Ross' position that since the solicitation states that the estimated price of the project is between $150,000 and $180,000 and the project has its own number (6520-9708), the bid should not have been declared nonresponsive. Moreover, under these circumstances, Ross contends that it is not necessary for the solicitation to contain, which it does not, a definition of the term "project."

On the other hand, Interior contends that Ross' bid was nonresponsive because it failed to include the plan. Interior agrees with Ross that the solicitation does not state specifically that the plan should be submitted with the bid. However, it is Interior's position, based on the Department of Labor's interpretation of 41 C.F.R. § 60-5.2 (1976), that the term "project" is defined as a total development of a site and the entire development of the Center constitutes the project and not each individual contract. See 41 C.F.R. § 60-7.2 (1976) (concerning the St. Louis plan). Interior states that it is unfortunate that the plan did not include a definition of "project" and, in the future, it will correct this deficiency. Nevertheless, Interior contends that this does not change the requirement for submitting the plan with the bid.

While it might have been Interior's intention that the plan be submitted with the bid, this was not clearly set forth in the bid documents and to that extent the solicitation was ambiguous. Moreover, a reading of the plan could reasonably lead one to conclude that "project" means a single contract (Ross) as easily as total development of an entire site (Interior). Therefore, since Ross' interpretation was not unreasonable, the bid could not be rejected as nonresponsive to the terms of the solicitation as written. See B-169205, May 22, 1970, affirmed, B-169205, June 23, 1970. However, while we are unable to agree with Interior that Ross' bid was nonresponsive, we are of the opinion that an award should not have been made, since the solicitation failed to provide clear and objective instructions whereunder all bidders were apprised, in advance of bid opening, of the manner in which to submit their bids in order to be eligible for award. See B-169205, supra.

Ross indicates that, rather than readvertising, the award should be made to it because the plan was included in the specification book and it is bound by the submission of its bid to all documents contained in the specifications. However, a bidder does not commit itself to affirmative action requirements of a solicitation merely by signing the bid when the solicitation requires something more. See 52 Comp. Gen. 874 (1973).

Interior has stated also that, as substantial work has been performed by the terminated contractor, an award to Ross based on its original bid would result in Interior contracting now for some work which has been done. Ross has suggested then that the contract could be awarded to it and a change order could be issued eliminating the accomplished work. However, in 53 Comp. Gen. 838, 839-840 (1974), it was stated:

> "* * * the competition to be achieved in the award of Government contracts must be held to the work actually to be performed. Thus, a contracting officer may not award a contract competed under a given specification with the intention to change to a different specification after award. Otherwise a major purpose of the Federal procurement system would be thwarted. Cf. 37 Comp. Gen. 524 (1958); 46 id. 281 (1966)."

Accordingly, we concur with Interior's proposal to readvertise the procurement using a clear notice to all bidders that the plan requirements are applicable.

There are two additional areas of concern which Ross presented:

1. Where in the plan is it mentioned that it was an imposed plan?

2. Restitution, in some form, to compensate the firm for its time, loss of overhead and profit, embarrassment, and potential lay-offs of key personnel.

With reference to the first point, although the plan does not state that it is an imposed plan, C.F.R. contains the imposed plans. See 41 C.F.R. part 60.7 (1976) for the St. Louis Plan.

Concerning the second point, Ross' request for restitution is denied. It is well established that anticipated profit may not be awarded to an unsuccessful bidder. See 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, 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 in this case.

Accordingly, the protest and claim for restitution are denied.

Acting Comptroller General
of the United States