

Roberts
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DECISION



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

FILE: B-199368.3

DATE: June 18, 1982

MATTER OF: Hub Testing Laboratories--Claim for Costs

DIGEST:

1. Claim for bid preparation costs is allowed since record establishes that the agency's actions to improperly reject claimant's bid as nonresponsive were arbitrary and capricious, and bidder would have received award but for the improper agency actions.
2. Legal fees incurred in pursuing a bid protest at GAO are not compensable.
3. No legal basis exists that allows an unsuccessful bidder to recover anticipated profits.

Hub Testing Laboratories (Hub) claims reimbursement for \$800 in bid preparation expenses it allegedly incurred in competing for a contract under invitation for bids (IFB) No. R6-8-80-22, a total small business set-aside issued by the Department of Agriculture's Forest Service for geotechnical analysis of sediment, soil and rock samples. In addition, Hub claims \$1,500 in legal fees resulting from its protest against the award of the contract to another firm, and \$5,151 in anticipated lost contract profits. For the following reasons, we allow Hub's claim for bid preparation expenses, but disallow its other two claims.

Background

We sustained Hub's protest under the IFB in Hub Testing Laboratories, B-199368, September 18, 1980, 80-2 CPD 204, in which we held that the Forest Service improperly rejected Hub's low bid as nonresponsive. In evaluating Hub's bid, the Forest Service determined that its responses to the IFB were inadequate because they merely restated the IFB's

technical requirements without providing more specific information regarding which type of preparation or analysis would be used for each rock, soil or sediment sample to be tested. We found, however, that Hub, by restating the IFB's technically required methods of preparation and analysis, and therefore offering to do exactly what was required by the IFB as written, was indeed responsive because the test of responsiveness in formal advertising is whether the bidder has offered to do what is required by the solicitation and not whether the proposed method of performance is satisfactory--the latter being a matter of responsibility. See Lapteff Associates, Martel Laboratories, Inc., Kappe Associates, Inc., B-196914, B-196914.2, B-197414, August 20, 1980, 80-2 CPD 135.

The Forest Service also questioned Hub's responsibility, but did not refer that matter to the Small Business Administration (SBA) for the possible issuance of a Certificate of Competency (COC) because the Forest Service's formal rejection of Hub's bid was based on the improper determination of non-responsiveness. In this respect, we noted that no small business concern may be precluded from award because of non-responsibility without referral of the matter to the SBA for a final disposition under the COC procedure, 15 U.S.C. § 637(b)(7) (Supp. I 1977); Federal Procurement Regulations § 1-1.708-2 (1964 ed. amend. 192). Therefore, we recommended that the matter be referred to the SBA for the possible issuance of a COC, and if a COC was issued, that the contract, already awarded to another firm, be terminated and award be made to Hub for the remaining portion of the terminated contract. Subsequent to our decision, the Forest Service referred the matter to the SBA which issued a COC for Hub. Thereafter, however, the Forest Service took no action to terminate the existing contract and make award to Hub, as we had recommended, because the agency determined that it would be both cost prohibitive and irresponsible from a testing standpoint to switch contractors since, at the time the COC was issued by SBA, more than 90 percent of the contract samples were either completely tested or in the process of being prepared for testing.

Bid Preparation Costs

The recovery of bid or proposal costs is based on the theory that the Government, when issuing a solicitation, enters into an implied contract with bidders or offerors that their bids or proposals will be fairly and honestly

considered. Heyer Products Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956). One type of breach of this implied contract between Government and bidder which has resulted in the award of bid preparation costs involves Government action, harmful to the bidder, which lacks a reasonable basis and therefore is arbitrary and capricious. Ultra Publicaciones, S.A., B-200676, March 11, 1981, 81-1 CPD 190.

Our decision holding that the Forest Service improperly rejected Hub's low bid as nonresponsive, coupled with SBA's favorable responsibility determination through the issuance of a COC, makes it clear that Hub would have received award but for the Forest Service's actions. In rejecting Hub's low bid, the Forest Service did not evaluate the bids in accordance with the terms of the IFB; it attempted to convert a matter of responsibility into a matter of responsiveness. The Forest Service's evaluation was therefore improper, and the agency's action in awarding a contract to another firm lacked a reasonable basis. Accordingly, we believe the Forest Service's determination to reject Hub's bid was arbitrary and capricious and constituted a failure to fairly consider the bid, thus entitling Hub to bid preparation costs. See Amram Nowak Associates, Inc., 56 Comp. Gen. 448 (1977), 77-1 CPD 219.

Hub should submit documentation to the Forest Service substantiating its \$800 bid preparation claim to permit the agency to verify the amount to which Hub is entitled. If Hub and the Forest Service cannot agree on the quantum, the matter should be returned to this Office for resolution. Ultra Publicaciones, S.A., supra. We stress that the costs are limited only to those expenses incurred in the preparation of the bid itself. T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345.

Other Costs

Hub's claim for reimbursement of costs other than those attributable to the preparation of its bid is disallowed. In this regard, legal fees incurred in pursuing a bid protest at the General Accounting Office are not compensable. Spacesaver Systems, Inc., B-197174, August 25, 1980, 80-2 CPD 146. Furthermore, no legal basis exists for allowing an unsuccessful bidder to recover anticipated profits. Jekyll Towing and Marine Services Corporation, B-199199, December 2, 1980, 80-2 CPD 413.

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The claim is allowed with regard to bid preparation costs, but disallowed for other costs.

for *Harvey D. Allen*
Comptroller General
of the United States