

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

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FILE: B-208469.3**DATE:** December 14, 1983**MATTER OF:** DaNeal Construction, Inc.**DIGEST:**

1. Claim for bid preparation costs is allowed where agency improperly evaluated bids and awarded contract to other than lowest priced bidder.
2. There is no legal basis for allowing unsuccessful bidder to recover anticipated profits, even if claimant has been wrongfully denied a contract.
3. Attorneys' fees incurred in pursuing a bid protest are not compensable.

DaNeal Construction, Inc. (DaNeal), seeks reimbursement for bid preparation costs it incurred in connection with invitation for bids (IFB) No. R6-3-82-67C issued by the Forest Service, Department of Agriculture (Forest Service). This procurement was the subject of two previous decisions issued by our Office.

In our first decision (DaNeal Construction, Inc., B-208469, December 28, 1982, 82-2 CPD 584), we sustained DaNeal's protest on the basis that the Forest Service improperly evaluated DaNeal's bid, which contained a discrepancy between the unit price and the extended price for a particular item, by using DaNeal's clearly erroneous unit price rather than the extended price. Thus, the Forest Service evaluation showed DaNeal to be other than the low bidder when, in fact, if the bids had been properly evaluated, DaNeal would have been low. In our second decision (Forest Service--Request for Reconsideration, B-208469.2, March 14, 1983, 83-1 CPD 247), we dismissed the Forest Service's request for reconsideration as untimely filed. Since the facts were fully set forth in our prior decisions, they will not be restated here. We gave the Forest Service an opportunity to comment upon DaNeal's claim for bid preparation costs, but the Forest Service declined to make any comments.

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We recognize that the United States Court of Appeals for the Federal Circuit recently ruled that, under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (Supp. V, 1981), boards of contract appeals do not have jurisdiction over claims for bid preparation costs. Coastal Corporation, et al. v. United States, Appeal No. 83-706, decided August 3, 1983, 2 FPD 17. However, that case had no effect on our Office's authority to decide claims for bid preparation costs since our authority is based in the claims settlement authority vested in our Office by 31 U.S.C.A. § 3702 (formerly 31 U.S.C. § 71 (1976)).

The test established by the courts for bid/proposal preparation cost recovery is whether, if the government had acted properly, the claimant would have had a substantial chance of receiving the award. See Morgan Business Associates, Inc. v. United States, 619 F.2d 892 (Ct. Cl. 1980). Such costs can only be recovered if the government has acted arbitrarily or capriciously with respect to the claimant's bid or proposal. See Ramsey Canyon Enterprises, B-204576, March 15, 1982, 82-1 CPD 237.

Here, the Forest Service improperly evaluated DaNeal's bid in an arbitrary manner. See DeRalco, Inc., B-205120, May 6, 1982, 82-1 CPD 430, wherein we held that an agency's determination to allow a bidder to correct its bid and displace the protester as low bidder was improper and, therefore, the protester was entitled to compensation for bid preparation costs. See also M.L. McKay & Associates, Inc., B-208827, June 1, 1983, 83-1 CPD 587. Accordingly, DaNeal's request that we allow it recovery of its bid preparation costs is granted, and DaNeal should submit substantiating documentation to the Forest Service to support its claim for bid preparation costs. M.L. McKay & Associates, Inc., supra.

DaNeal has also requested reimbursement of the profits it lost as a result of being denied this contract and attorneys' fees it incurred by pursuing its protest. However, there is no legal basis for allowing any unsuccessful bidder to recover anticipated profits, even if the claimant is wrongfully denied a contract. See The Eagle Construction Company, B-191498, March 5, 1979, 79-1 CPD 144. Moreover, the legal fees incurred in pursuing a bid

protest at the General Accounting Office are not compensable. M.L. McKay & Associates, Inc., supra. Accordingly, DaNeal's claim for anticipated profits and attorneys' fees is denied.

for Milton J. Aroslan
Comptroller General
of the United States