

E. Fitzmaurice
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DECISION



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

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DLG 709

FILE: B-191894

DATE: January 23, 1979

MATTER OF: Scona, Inc.

[Protest of IFB Cancellation and Request for Bid Preparation Costs]

DIGEST:

1. Low bidder is not entitled to bid preparation costs where agency and recipient of Federal funds under sharing agreement each agreed to fund 50 percent of project costs and agency reasonably cancels IFB because recipient could not assure that it would have adequate funds available for project. Moreover, assuming, arguendo, that agency had duty to insure availability of recipients funds prior to solicitation of bids, circumstances indicate agency had reasonable assurance or, in the alternative, any failure in this regard was mere negligence. Bidder cannot recover bid preparation costs on this basis.
2. Contracting officer has broad discretion in deciding whether to cancel IFB and GAO will not interfere with such decision unless it is unreasonable. Unavailability of adequate local funds was "compelling reason" within meaning of Federal Procurement Regulations § 1-2.404-1(a), thus permitting cancellation of IFB after bid opening. Contracting officer's decision to reject financing arrangement, which low bidder and recipient of Federal funds reached as means of overcoming recipients funding problems, because of, among other reasons, danger of conflict of interest was not unreasonable and will not be disturbed by GAO.

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Scona, Inc. (Scona), protests the cancellation of invitation for bids (IFB) No. SCS-1-ID-78 by the Soil Conservation Service, United States Department of Agriculture (SCS), and requests that it be awarded bid preparation costs.

The solicitation was issued on January 6, 1978, and requested bids for the construction of an irrigation distribution system in the Bear River Resource Conservation and Development Project near Malad, Idaho. Payment for work under the proposed contract was to be

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made in accordance with a Project Agreement, dated January 6, 1978, between SCS and the Deep Creek Irrigation Company (Deep Creek) of Malad, Idaho. The Government estimate for the work was \$4.3 million, and under the Project Agreement Deep Creek was to provide 50 percent of the cost of the Deep Creek Farm Irrigation measure, plus 100 percent of certain other costs, for an estimated total obligation of \$2,172,250. The remaining \$2,127,750 needed for the project was to be provided by SCS. 711

Bids were opened on January 25, 1978, and Scona was the apparent low, responsive and responsible bidder with a bid price of \$4,394,099.13.

Under the Project Agreement, Deep Creek had agreed to pay its proportional share of any additional funds needed to complete the project. After bid opening, Deep Creek realized that because the low bid submitted by Scona was higher than the Government's estimate it would have to provide approximately \$250,000 more than originally determined. It therefore asked its shareholders to raise the company's indebtedness limitation to allow additional financing to cover this new obligation; however, on March 3, 1978, the shareholders rejected this plan. Deep Creek then attempted to raise the additional funds by selling certain water storage rights to the State of Idaho Department of Fish and Game, but was unable to do so because the Department did not have the funds available for that fiscal year. 712

It was at this juncture that Deep Creek advised SCS of its difficulties and requested that SCS ask all bidders to extend their bid acceptance period to allow it time to assemble the additional funds. SCS did as requested and shortly thereafter received a letter from Scona in which Scona offered to sign a contract with a clause inserted that would absolve the Federal Government of any liability for work done in excess of funds appropriated by Congress. SCS rejected this offer, explaining that it was the local funding and not the Government's which was inadequate. Scona then agreed to extend its bid acceptance period to May 1, 1978, and later extended this period for an additional month.

Now aware of Deep Creek's difficulties, Scona made an offer to SCS on April 19, 1978, to lower its bid in order to allow award of the contract. Although initially receptive to this proposal, SCS would later learn that Scona was not offering a simple price reduction, but was in fact seeking SCS approval of a tentative agreement between Scona and Deep Creek that attempted to resolve Deep Creek's funding problems.

This agreement--bearing the date April 28, 1978--provided that Scona would purchase certain water storage rights from Deep Creek for \$250,000, payable in three installments coinciding with the first three payments due under the contract. Scona would then try to sell these storage rights to either the State of Idaho Department of Fish and Game or any other interested purchaser. If such a sale should occur, Scona would receive \$250,000 to recoup its purchase price, and the remainder would be paid to Deep Creek. If on the other hand no sale occurred, Deep Creek would have the right, after 2 years, to repurchase the storage rights for the sum of \$1.00.

By letter of May 9, 1978, SCS refused to approve this agreement because: (1) the suggested method of payment was not provided for either in the IFB or in Federal contracting procedures; (2) by exercising its right to repurchase the storage rights, Deep Creek would in effect receive a price reduction of \$250,000 with no cost sharing to the Federal Government as required by the project agreement; (3) despite the agreement, adequate local funds still were not assured; and (4) Scona's financial involvement in the project's funding creates a potential conflict of interest.

Thus, based on its belief that adequate local funds were not available, SCS also orally informed Scona on May 9, 1978, that all bids would be rejected and the solicitation canceled. Scona immediately filed a protest with our Office, alleging this action to be arbitrary, capricious and in violation of Federal Procurement Regulations (FPR) § 1-2.404-1 (1964 ed. circ. 1).

By letter dated May 10, 1978, SCS notified all bidders that IFB No. SCS-1-ID-78 had been canceled and on that same day resolicited the Deep Creek irrigation project by issuing IFB No. SCS-5-ID-78. Changes had been made in the specifications so that the Government's new estimate was approximately \$385,000 lower than its earlier one. Bid opening was on May 25, 1978, and Scona was again the low bidder at \$3,945,074.50. With the availability of local funds apparently no longer a problem, the contract was awarded to Scona on July 3, 1978.

Scona maintains that the SCS decision to cancel the original solicitation was arbitrary and capricious because there was no "compelling reason," as required by FPR § 1-2.404-1(a), for taking such action. SCS argues, however, that the lack of adequate local funds did provide a compelling reason for canceling the solicitation and that the proposed agreement between Scona and Deep Creek for the sale of storage rights did not correct this deficiency.

Scona's initial protest requested that our Office either order the reinstatement and award of this contract or that Scona be awarded bid preparation costs. However, Scona's later correspondence indicates that, having been awarded the contract under the resolicitation, Scona now only seeks bid preparation costs. As a basis for this request, Scona maintains that the Government misrepresented the availability of funds for the Project and that Scona's reliance on this misrepresentation entitles it to the costs it incurred in preparing its bid. Scona also contends that it is entitled to bid preparation costs because SCS canceled the original solicitation without a "compelling reason" as required by FPR § 1-2.404-1(a).

At the outset, we note that since this dispute involves "a formally advertised * * * procurement * * * by * * * an agency of the Federal Government," it is a matter for consideration under our Bid Protest Procedures (4 C.F.R. part 20 (1978)). In addition, even though the Federal Government's financial involvement in the project is that of a grantor, Federal procurement law is nonetheless controlling because the project agreement specifically requires SCS to contract for the project and to do so in accordance with Federal procedures.

As a general rule, bid preparation costs can be recovered where the Government has acted arbitrarily or capriciously with respect to a claimant's bid or proposal. Pacific West Constructors, B-190387, January 24, 1978, 78-1 CPD 63. Specific grounds for recovery under this general standard include: where there has been subjective bad faith on the part of the procuring officials; where there is no reasonable basis for an administrative decision; where the proof of an error necessary for recovery shows that the procuring officials have exceeded their statutory or regulatory discretion; or where there has been a violation of pertinent statutes or regulations. See Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974).

Scona argues that SCS had a duty to prospective bidders to insure that before an IFB was issued adequate funds were either presently available or would be available by the time they were needed. Scona maintains that SCS failed to meet this responsibility because the IFB was issued without adequate assurances from Deep Creek that it had sufficient funds available to fulfill its obligations under the Project Agreement. Accordingly, Scona argues that the Government conduct was either unreasonable or a misrepresentation which Scona relied on to its detriment.

In addition, Scona also contends that SCS had no reasonable basis for rejecting its funding agreement with Deep Creek. Consequently, Scona maintains that SCS had no compelling reason to cancel the solicitation since the funding agreement with Deep Creek assured the availability of adequate funds and, therefore, the cancellation violated FPR § 1-2.404-1(a).

From the foregoing, Scona concludes that SCS has acted in an arbitrary and capricious manner or at least in violation of applicable procurement regulations, and that this, therefore, entitles Scona to bid preparation costs.

Scona is unable to cite any authority for the proposition that the Government had a duty before the IFB was issued to insure that Deep Creek had adequate funds available. However, assuming, without deciding, that such a duty did exist, it is our view that SCS did have adequate assurances that sufficient local funds would be available since the project agreement between SCS and Deep Creek stipulated that Deep Creek would provide \$2,172,250 of the estimated total cost of \$4,300,000 and any additional funds needed in the same cost share ratio. To meet this commitment, Deep Creek had reached an agreement with the Farmers Home Administration that this agency would loan Deep Creek \$2 million and additional amounts if needed. It was with this knowledge that SCS issued the IFB. Furthermore, there is no indication that the Government estimate, upon which Deep Creek's obligation was based, was arrived at in other than good faith or on the basis of less than all available information. It was only after Scona's bid in excess of the estimated amount was received and Deep Creek's shareholders refused to raise the indebtedness limitation that SCS had any indication of a funding problem. In these circumstances, at the most SCS was negligent in regard to the funding problem. We have consistently held that "mere negligence" does not meet the standard necessary for the recovery of bid preparation costs. Norfolk Conveyor Division of Jervis B. Webb Company; E.C. Campbell, Inc., B-190433, July 7, 1978, 78-2 CPD 16; Pacific West Constructors, supra. Accordingly, Scona is not entitled to bid preparation costs on this basis.

In regard to Scona's argument that SCS had no compelling reason to cancel the original solicitation, the rule is well established that contracting officers are vested with broad powers of discretion in deciding whether an invitation should be canceled and that our Office will not interfere with such a decision unless it is unreasonable. Support Contractors, Inc., B-181607, March 18, 1975,

75-1 CPD 160; 50 Comp. Gen. 177 (1970). However, in exercising this authority, a contracting officer must comply with FPR § 1-2.404-1(a), which provides in pertinent part:

"Preservation of the integrity of the competitive bid system dictates that, after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation. * * *"
(Emphasis added.)

SCS has stated that the compelling reason for its cancellation of the invitation was the lack of adequate local funds. It reached this conclusion despite the existence of the funding agreement mentioned above because it believed for various reasons that this agreement did not guarantee that Deep Creek would have sufficient funds for the project. Since it was undisputed that without additional financing Deep Creek would not be able to meet its obligations under the project agreement, the rejection of the proposed funding agreement would clearly leave Deep Creek without adequate funds. Therefore, if SCS acted reasonably in rejecting the funding agreement, a compelling reason would have existed which justified the cancellation of the invitation.

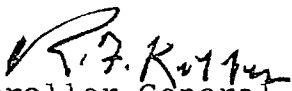
SCS has stated that the involvement of the contractor (Scona) in the financing of the project creates a conflict of interest, or at the least the appearance of a conflict of interest. Essentially, SCS is concerned with the leverage Scona might have over Deep Creek due to its control of necessary funds during the first 3 months of the contract. Scona, on the other hand, dismisses this concern as groundless, analogizing the funding arrangement to a low bidder "buying in" on a contract or unilaterally reducing his bid price.

Even though Scona has made assurances that it would not take advantage of the unusual relationship that would develop under the funding agreement, the potential for abuse nonetheless remained. Under the specific arrangement proposed, Scona has the opportunity to influence the administration of the contract in a manner incompatible with its position as project contractor. In light of this, we cannot say that SCS's decision to reject the proposed funding agreement because of the danger of a conflict of interest was unreasonable. In addition, we also find reasonable SCS's concern that because Scona is subcontracting over 80 percent of the contract and a substantial amount of the first three draws would be committed to payments to the subcontractors and other costs Scona could find it difficult to make the required payments to Deep Creek under the proposed agreement. Likewise, it was not unreasonable for SCS to be concerned that the funding arrangement could result in a price reduction for Deep Creek, but not for the Federal Government, so as to be in violation of the project agreement.

Therefore, since there was a reasonable basis for the SCS rejection of the funding agreement and Deep Creek had no other way to obtain additional financing, adequate local funds were in fact unavailable. As a consequence, SCS did have a compelling reason to cancel the solicitation and therefore did not act in an arbitrary or capricious manner so as to entitle Scona to bid preparation costs.

Accordingly, bid preparation costs may not be allowed.

As noted earlier, it appears that Scona has abandoned its request for reinstatement of the original IFB. In any event, in view of the above, there would be no basis to reinstate the original solicitation since SCS acted reasonably in canceling it. Support Contractors, Inc., supra; 50 Comp. Gen. 177, supra.


Deputy Comptroller General
of the United States