



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

D-176404

3116
June 26, 1973

Callagher, Evelius & Jones
Attorneys at Law
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Baltimore, Maryland 21201

Attention: Joseph P. McCurdy, Jr., Esq.

Gentlemen:

Reference is made to your letter of January 29, 1973, and prior correspondence, protesting on behalf of the Knott Development Company, against the award of a contract to Urban Systems Development Corporation for the construction of a 150 Man Bachelor Officers Quarters (BOQ) at Aberdeen Proving Ground, Maryland, under Schedule C of invitation for bids No. DACA31-72-B-0074, the second step of a two-step procurement.

The United States Army Engineer District, Baltimore, Maryland, as the first step of the procurement, issued on November 23, 1971, Request for Technical Proposals (RTP), Serial No. DACA31-72-R-0003, for the design and construction of Bachelor Officers' Quarters (BOQ) at Aberdeen Proving Ground, Maryland, Fort Belvoir and Fort Lee, Virginia. Separate technical proposals were invited for each of the three projects. Those bidders who submitted acceptable technical proposals for any or all of the three projects were entitled to submit a bid for such project or projects under the subsequent invitation for bids. Prospective offerors were advised on page TP-6 of the RTP as follows:

8. COST LIMITATIONS:

a. The available amount for construction of these projects is as follows:

(1) Fort Lee 300 Man BOQ	\$3,634,078
(2) Fort Belvoir 300 Man BOQ	\$3,337,758
(3) Aberdeen Proving Ground 150 Man BOQ	\$1,894,823

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The amount available for construction includes cost of BOQ structures, all utility and site work but exclusive of the contractor's design. There is a statutory limitation of \$10,890 per man at Aberdeen Proving Ground and \$11,000 per man at Fort Lee and Fort Belvoir inside the 5-foot line, exclusive of design costs, special foundation conditions, etc. This limitation does not apply to utilities or site work beyond the 5-foot line.

Acceptable technical proposals for the Aberdeen Proving Ground BOQ were received from several offerors, including Knott. On April 27, 1972, invitation for bids No. DASA31-72-B-0074, was issued to bidders who had submitted acceptable technical proposals under the first step of the procurement. Bidders were to submit bid prices for Schedule A - Fort Lee, Schedule B - Fort Belvoir, and Schedule C - Aberdeen Proving Ground. Each of the three schedules called for separate prices for Item 1, "BOQ Structure with Utilities 5 Feet beyond building line," Item 2, "Design Cost, Outside Utilities and all site work not included in Item 1 above," and a total price for both items.

Bids under IFB - 0074 were opened on May 24, 1972. The lowest three bids for the Aberdeen BOQ, Schedule C, were as follows:

<u>Bidder</u>	<u>Item 1</u>	<u>Item 2</u>	<u>Total</u>
Stauffer Construction Co.	\$1,633,500	\$266,410	\$1,899,910
Urban Systems Development Corp.	1,665,552	415,715	2,081,268
Henry J. Knott Development Co.	1,490,000	600,000	2,090,000

Stauffer's bid was rejected because it failed to submit the required bid guarantee with its bid. Urban's price for Item 1 exceeded the statutory per-man cost limitation by approximately \$213, without taking into consideration the cost of the Government supervision, inspection, contingencies, and Government-furnished equipment. The contracting officer advises that taking these costs into consideration, the unit cost per man under the Urban bid increased to \$11,903. After careful consideration, he decided Urban's bid price was realistic and that it was unlikely that re-advertising the project would result in lower bids. On June 5, 1972, the contracting officer submitted to the Division Engineer, North Atlantic, Corps of Engineers, a recommendation for waiver of the statutory cost limitation for the Aberdeen BOQ.

By letter dated June 12, 1972, Knott protested any award to Urban for the Aberdeen BOQ on the ground that Urban had submitted a nonresponsive bid since its bid price under Item 1 revealed a cost of \$11,103 per man, a sum in excess of the statutory cost limitation of \$10,890 per man. In a letter dated June 14, 1972, the Chief, Procurement and Supply Section, advised Knott that the provisions of the Request for Technical Proposals concerning cost limitations were intended only as a guideline for design purposes and could not be used for the purpose of determining the responsiveness of bids received under step II and, further, since the Military Construction Authorization Act of 1972, 85 Stat. 394, specifically authorized the waiver of per man statutory limits for BOQs, the Government had initiated action to obtain a waiver of such statutory limits for the Aberdeen BOQs.

By letter dated June 16, 1972, Knott further protested the proposed award and the matter was submitted to the General Counsel, Office of the Chief of Engineers, for a decision. On June 28, 1972, the General Counsel denied Knott's protest. On June 29, 1972, the Office of the Chief of Engineers issued a directive, which stated that the Office of the Assistant Secretary of Defense had granted a waiver to increase the statutory limitation from \$10,890 to \$11,903 per man for the Aberdeen project. On June 30, 1972, a contract was awarded to Urban for the construction of the 150 man BOQ at the Aberdeen Proving Ground.

You contend that the action of the contracting officer in requesting, upon Urban's behalf, waiver of the statutory unit cost limitation on the structure covered by Item 1 was unfair to Knott and, in effect, changed the rules of the bidding procedure. You also maintain that the fact that Knott was able to arrive at a reasonably competitive figure, within \$10,000 of Urban's bid without exceeding the statutory unit cost limitation is probative of the practicability of complying with the statutory limitation.

Section 706 of the Military Construction Authorization Act of 1972, approved October 27, 1971, 85 Stat. 394, limits the amount which may be expended for construction of Bachelor Officer's Quarters to an amount determined by applying the local construction cost index to a basic figure of \$11,000 per man. The limit for the Aberdeen BOQ was determined to be \$10,890. Section 706 further provides that the statutory limit may be exceeded if the "Secretary of Defense or his designee determines that because of special circumstances, application to such project of the limitations on unit costs * * * is impracticable." The imposition of a statutory limit on unit costs and a provision for waiver of the limit are long-established, well-recognized features of military

construction projects of the type involved here. In implementation of the provisions contained in the annual Military Construction Authorization Acts, paragraphs 18-110(a) and (c) of the Armed Services Procurement Regulation (ASPR) provide as follows:

(a) Contracts for construction shall not be awarded at a price in excess of statutory cost limitations unless the limitations for the particular contract can be and have been waived and shall not be awarded at a price, which, with allowances for Government imposed contingencies and overhead, exceeds the statutory authorization for the project.

* * * * *

(c) A bid or proposal containing prices within statutory cost limitations only because such bid or proposal is materially unbalanced shall be rejected. An unbalanced bid or proposal is one which is based on prices significantly less than cost for some work, and prices which are overstated for other work. A bid or proposal containing prices that exceed applicable statutory cost limitations shall be rejected, unless for construction of cold storage or regular (general purpose) warehousing, barracks for enlisted personnel or bachelor officer's quarters, and the determination of the Assistant Secretary of Defense (Installations and Logistics) has been obtained that the limitations on construction costs in the annual Military Construction Act shall not apply as impracticable. In addition, where appropriate provision is made in the invitation for bids or requests for proposals, separate award may be made on individual items whose price is within or not subject to any applicable cost limitation, and those items whose price is in excess of the limitations shall be rejected. Such a provision for separate award shall not be made unless determined to be in the best interest of the Government.

Under paragraph (c), where the bid covers the construction of Bachelor Officer's Quarters and a determination has been obtained that the limitations on construction costs in the annual Military Construction Act shall not apply as impracticable, the bid need not be rejected.

While paragraph 8 of the request for technical proposals advised offerors of the unit cost limitation for the Barberden BOQ, we believe that as a matter of procurement policy bidders should have been given more detailed information concerning the application of the statutory

limitation and, in particular, the possibility of a waiver. We are drawing this matter to the attention of the Secretary of the Army for appropriate corrective action. Nevertheless, we do not think that the procedure used by the contracting officer in this procurement was inherently unfair to Knott since the procedure used was clearly defined and authorized by statute and the implementing ASPR-matters which Knott was bound to know. Thus, although it is contended that Knott could have designed the project at a \$10,500 lower total cost by exceeding the statutory limit under a waiver, we note that Knott was not restricted to submitting a single design for approval. In that connection, paragraph 1.1.5, on RFTP page TP-2, encouraged offerors to submit for approval in the first step multiple technical proposals presenting different basic approaches. Hence, if Knott had submitted its alternate approach and it had been determined acceptable, Knott would have been free to bid and be considered on that basis as well.

Moreover, we can attach no significance to the fact that Knott's bid price on Item 1 was lower than Urban's bid price. Urban, nevertheless, submitted the lowest price for construction of the entire facility. Further, the existence of a bid which is within the statutory limit but not low overall does not preclude a discretionary waiver of the statutory limit on the grounds of impracticability. B-162173, September 29, 1967, copy enclosed.

In view of the foregoing, we must conclude that the actions of the contracting officer in requesting a waiver of the statutory cost limitation, subsequent waiver and the award of a contract to Urban for the Aberdeen EOQ were proper.

Accordingly, the protest is denied.

Sincerely yours,

Paul G. Dowbling

Acting Comptroller General
of the United States

Enclosure