

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

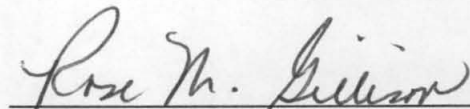
DATE: September 21, 1989

TO: Jack Rephan, Esq.
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RE: Protest of Pinnacle Corporation, Under IFB No. 86-0062-
AA-2-0-CC

Enclosed is a copy of the Board's decision in the above-referenced case.



ROSE M. GILLISON
Clerk to the Board

Enc.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD**

PROTEST OF:

PINNACLE CORPORATION)
)
Under IFB No. 86-0062-AA-2-0-CC)

For the Protester: Jack Rephan, Esq. For the Government: Frank E. Barber,
Assistant Corporation Counsel.

Opinion by Administrative Judge Davis with Administrative Judge Booker
concurring.^{1/}

DISCUSSION

On November 18, 1988, the Board sustained a protest filed by Pinnacle Corporation (Pinnacle) against a solicitation issued by the D.C. Department of Public Works.^{2/} In our decision we found, inter alia, that the conduct of the District in failing to adequately state its new policy concerning roofing experience requirements for contractors, and its application of that policy to Pinnacle, was unreasonable and, therefore, arbitrary and capricious within the meaning of § 1-1189.8(c)(2) of the D.C.

^{1/}The panel designated to hear and decide this matter consisted of Judges Davis, Booker and Sharpe. During the deliberation stage of this matter, Judge Sharpe, whose participation in this case is pursuant to the authority contained in the D.C. Procurement Practices Act of 1985, D.C. Code, §1-1189.2(c)(2)(1987 Replacement), took ill and was unable to continue.

^{2/}Pinnacle Corporation (D.C. CAB, Nov. 18, 1988) 36 D.C. 3965, June 2, 1989. This case originated during the period when the District of Columbia Contract Appeals Board was functioning pursuant to Commissioner's Order No. 9, D.C. Code, Supplement V (1987), as amended by Mayor's Order 86-65, 33 DCR 3006 (May 16, 1986). Pursuant to the D.C. Procurement Practices Act of 1985, D.C. Code, § 1-1189.1 (1987), a new independent agency denominated as the Contract Appeals Board was created. This new Board became operational on August 1, 1988, and succeeded to the jurisdiction of all cases pending before the previously established Board.

Procurement Practices Act of 1985 (PPA).^{3/} Based on the Board's opinion, Pinnacle, on December 22, 1988, filed a claim for bid preparation costs.

The District opposes the amount Pinnacle has claimed for bid preparation costs and argues that (1) the bid preparation costs claimed are inadequately documented, and (2) the claim is not presented in a manner consistent with generally accepted accounting principles. The District acknowledges, however, that the PPA and its implementing regulations do not address the issue of what level of proof the Board needs in order to determine the amount of bid preparation costs which may be awarded to a successful protester; and it urges the Board to adopt standards articulated in Chapter 33, Title 27, District of Columbia Municipal Regulations (27 DCMR), as the guiding principle for determining whether a protester's bid costs submission is sufficient.

In addition, the District proffers for the Board's consideration its own estimate of what Pinnacle's costs should have been to prepare the bid. That estimate, \$2,896.00, is the work product of one Joseph F. Murphy, an engineering technical estimator employed by the Department of Public Works. [See Affidavit of Joseph Murphy, attachment No. 2 to the District's motion in opposition to Pinnacle's claim for bid preparation cost.]

The Board rejects the District's suggestion that the contract cost principles set out in Chapter 33, 27 DCMR, be applied in this case for the reasons hereinafter stated.

It is clear to this Board that in enacting § 1-1189.8(c)(2), the Council of the District of Columbia intended that bid or proposal preparation costs constitute a form of damages to the protester for monetary loss caused by the arbitrary and capricious action of District officials. The District appears to suggest that the extent of these damages be quantified to a mathematical certainty. We note however that the District, for reasons best known to it, failed to seek any discovery from Pinnacle concerning their cost.

We believe it would be manifestly unjust to deny relief, where governmental responsibility for damages is clear, simply because the damages claimed cannot be measured with exactness and precision. The ascertainment of damages is not an exact science and the lack of certainty as to the amount of damages does not preclude recovery. J.D. Hedin Construction Co. v. United States, 171 Ct.Cl. 70, 347 F.2d 235 (1961). All that we require in a claim for bid preparation costs, where responsibility for damage is clear, is that the evidence adduced be sufficient to enable us to make a fair and reasonable approximation. Specialty Assembling & Packing Co. v. United States,

^{3/}Section 1-1189.8(c)(2) reads as follows: "The Board may, when requested, award reasonable bid or proposal preparation costs not including legal fees, if it finds that the District government actions toward the protester or claimant were arbitrary and capricious."

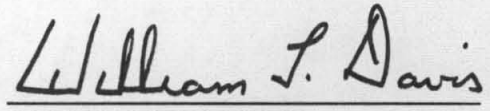
3. Project Manager, James Testaguzza Base Salary \$1,000 (weekly) Field Verification Time 15 hours x \$25.00	375.00	
(Adjusted to 8 hours at \$25.00)		200.00
4. Project Manager, James Testaguzza Phone Verification for Materials 10 hours x \$25.00	250.00	
(Adjusted to 5 hours at \$25.00)		125.00
5. Vice President, Vernon Smith Field Verification after Bid Results 6 hours x \$40.85	245.10	245.10
6. Bid Package Preparation Office Administrative Secretary and Office Manager, 10 hours each 20 hours x \$15.00	300.00	300.00
7. Vice President, Vernon Smith Preparation Phone Time of Bonding Forms 10 hours x \$40.85	408.50	
(Adjusted to 5 hours at \$40.85)		204.25
	<u>\$4,233.84</u>	<u>\$2,601.65</u>
Payroll Taxes (\$4,233.35 x 11.41%)	- 483.08	
Adjusted Payroll Taxes (\$2,601.65 x 11.41%)		296.85
	<u>\$4,716.92</u>	<u>\$2,898.50</u>
Workmen's Compensation (\$4,716.92 x 22.5%)	1,061.31	
Adjusted Workmen's Compensation (\$2,898.50 x 22.5%)		652.16
	<u>\$5,778.23</u>	<u>\$3,550.66</u>

Bid Bond	<u>2,148.43</u>	<u>2,148.43</u>
	\$7,926.66	\$5,699.09
Overhead (\$7,926.66 x 19.07%)	1,511.61	
Adjusted Overhead (\$5,699.09 x 19.07%)		<u>1,086.82</u>
Total	<u>\$9,438.27⁴</u>	<u>\$6,785.91</u>

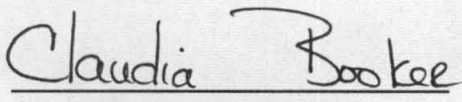
DECISION

The protester's motion is granted. The protester is awarded \$6,785.91 as bid preparation costs. The facts of this case fully justify the open-minded approach with regard to the burden of proof that we have taken, and we remain satisfied that the result we have reached represents a fair and reasonable approximation of the protester's costs.

DATE: September 21, 1989


WILLIAM L. DAVIS
Chief Administrative Judge

CONCUR:


CLAUDIA D. BOOKER
Administrative Judge

⁴The protester's costs have been calculated by taking the hourly rate of pay for each individual involved in the bid preparation process and multiplying those rates by the number of hours worked, to which has been added a payroll tax rate of 11.41%, and a 22% factor for workmen's compensation, for a total personnel cost of \$5,778.23. A bid bond premium of \$2,148.48 plus an overhead rate of 19.07% result in a total bid preparation claim of \$9,438.27. The vice president of Pinnacle Corporation has certified to the validity of these costs.