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DECISION



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

FILE: B-186939

DATE: October 25, 1977

MATTER OF: International Finance and Economics

DIGEST:

1. Claim for proposal preparation costs may be allowed where agency action is unreasonable and reasonable certainty exists that claimant would have received award but for improper agency action.
2. By conducting proposals evaluation in manner different than in RFP; by failing to amend RFP when agency knew it would accept level of effort significantly below that stated in RFP; and by failing to insure equality of competition, agency rejection of claimant's proposal was arbitrary and capricious and failed to accord proposal fair and honest consideration. Since claimant's proposal was rated high technically and proper evaluation would have indicated price was in competitive range, if not lowest received, it is reasonably certain claimant would have received award but for erroneous agency action and is therefore entitled to proposal preparation costs.
3. Since claim includes nonallowable items of preparing unsolicited, as well as solicited proposal, there is no basis at this time to determine quantum. Claimant may submit necessary documentation to agency for resolution. If agreement cannot be reached matter should be returned to GAO for decision.

International Finance and Economics (IFE) claims reimbursement of proposal preparation expenses incurred in competing for the procurement under request for proposals (RFP) 6-38070 issued by the Department of Commerce for a study of foreign maritime aids which was the subject of decisions in International Finance and Economics, B-186939, January 27, 1977, 77-1 CPD 66 and Department of Commerce--Request for Reconsideration, B-186939, July 14, 1977, 77-2 CPD 23.

As stated by IFE, its claim is based upon our January 27 decision: "[T]he ruling by the Comptroller General and the record

B-186939

in the * * * file would appear to establish sufficient justification for such compensation." IFE claims that it expended \$11,800 for professional time in developing and preparing prior unsolicited and negotiated proposals, \$407.40 in indirect costs, and \$5,830 in lost time, totaling \$18,037.40.

This claim was first presented to Commerce by letter dated March 16, 1977. On April 13, 1977, Commerce denied the claim on the basis that the " * * * the record does not support the conclusion that IFE was denied a contract because of illegal actions or bad faith on the part of Commerce procurement personnel." Moreover, Commerce cited its disagreement with our decision as affording additional bases to deny the claim. We note that the crux of its disagreement was submitted to our Office with the request for reconsideration, which we declined to consider in view of the untimeliness of its filing.

Based upon the record, IFE is entitled to its proposal preparation costs incurred with respect to the competitive procurement only. The applicable standards governing our consideration were stated in Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974):

"The ultimate standard is, as we said in Keco Industries I, supra, whether the Government's conduct was arbitrary and capricious toward the bidder-claimant. We have likewise marked out four subsidiary, but nevertheless general, criteria controlling all or some of these claims. One is that subjective bad faith on the part of the procuring officials, depriving a bidder of the fair and honest consideration of his proposal normally warrants recovery of bid preparation costs. Heyer Products Co. v. United States, 140 F. Supp. 409, 135 Ct. Cl. 63 (1956). A second is that proof that there was 'no reasonable basis' for the administrative decision will also suffice, at least in many situations. Continental Business Enterprises v. United States, 452 F.2d 1016, 1021, 196 Ct.

Cl. 627, 627-638 (1971). The third is that the degree of proof of error necessary for recovery is ordinarily related to the amount of discretion entrusted to the procurement officials by applicable statutes and regulations. Continental Business Enterprises v. United States, supra 452 F.2d at 1021, 196 Ct. Cl. at 637 (1971); Keco Industries, Inc., supra, 428 F.2d at 1240, 192 Ct. Cl. at 784. The fourth is that proven violation of pertinent statutes or regulations can, but need not necessarily, be a ground for recovery. Cf. Keco Industries I, supra, 428 F.2d at 1240, 192 Ct. Cl. at 784. The application of these four general principles may well depend on (1) the type of error or dereliction committed by the Government, and (2) whether the error or dereliction occurred with respect to the claimant's own bid or that of a competitor."

Thus, a two-fold review of the procurement history is required in considering a claim for proposal preparation costs. The first concerns scrutiny of the agency's action to ascertain if it falls within one of the categories outlined in Keco Industries, Inc. v. United States, supra. On this aspect, a comparison of Commerce's actions with those of the agency in Amram Nowak Associates, Inc., 56 Comp. Gen. 448 (1977), 77-1 CPD 219, is instructive. There, the agency sought proposals for a documentary film plus an option film. The RFP indicated that the evaluation would be based primarily upon the price of the basic documentary film, with consideration of the option film subordinate. However, the agency awarded the contract on the basis of a combined evaluation of the basic plus option film. This procedure displaced the protester/claimant as low offeror on the basic film alone. We discussed the effect the departure from the evaluation scheme in the RFP had in relation to the claim for proposal preparation costs:

"* * * In evaluating the proposals on the basis of the combined prices offered for both films, EPA did not perform the evaluations in accordance with the RFP. EPA's evaluation on this basis was improper, and the agency's action in awarding the contract to McBride was without a reasonable basis. Furthermore, EPA's determination to reject Nowak's proposal was arbitrary and capricious and constituted failure to give the

B-186939

requisite fair and honest consideration to the proposal, thus entitling Nowak to proposal preparation costs. See T & H Company, 54 Comp. Gen. 1021, 1025 (1975), 75-1 CPD 345."

In our January 27 decision, we reviewed Commerce's actions and concluded that the award was improper. However, we could not recommend corrective action because work had been permitted to proceed by Commerce during the pendency of the protest to a point that termination of the contract would not have been in the Government's best interest. We noted that the extended time lapse was largely occasioned by Commerce's delay in submitting a report on the protest to our Office. The factors which prompted our conclusion that award was improper were: (1) Commerce's failure to amend the scope of work in the RFP to reflect the substantially reduced estimated level of effort acceptable to, and ultimately accepted by, Commerce violated Federal Procurement Regulations (FPR) § 1-3.805-1(d) (1964 ed. circ. 1); (2) Commerce's failure to insure that all unit prices were evaluated on the same level of effort was a departure from the evaluation method in the RFP; and (3) Commerce's failure to apply a "should-cost" analysis to compare IFE's firm, fixed-price proposal with the awardee's cost-plus-a-fixed-fee proposal did not realize the inherent benefits to the Government of fixed-price contracting.

When comparing that which transpired here with the events in Aram Nowak Associates, Inc., supra, we think it is clear that Commerce's actions must be viewed as unreasonable. The failure to insure that all proposals are treated equally and awarding of a contract on a basis other than stated in the RFP certainly does not represent reasonable procurement practices within the second test of Keco Industries, Inc. v. United States, supra. Further, we note that an error committed by Commerce occurred with respect to the evaluation of IFE's proposal.

The second aspect of our inquiry concerns whether Commerce's actions precluded IFE from receiving "* * * an award to which it was otherwise entitled." Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344. To apply this test, the difference

B-186939

between formally advertised and negotiated procurements must be considered. That is, in a formally advertised procurement, 10 U.S.C. § 2305 (1970), mandates award to the low responsive, responsible bidder. Thus, one may readily ascertain which bidder is in line for award and otherwise entitled to it. However, in negotiated procurements other factors make it difficult in most instances to determine which offeror would have received an award. In this case, had circumstances permitted, we would have recommended that the RFP be amended and negotiations reopened since we could not say with absolute certainty that IFE was entitled to award.

However, as our January 27 decision indicates, IFE clearly submitted the best technical proposal. The initial evaluation scored IFE at 86.6 points out of a possible 100, while TBS was rated at 72.3. The narrative which accompanied the evaluation panel's report stated a unanimous preference for IFE. Further, IFE's technical superiority vis-a-vis TBS remained constant upon revised evaluation occasioned by clarifications received from both offerors by Commerce. Moreover, based upon the figures before Commerce at the time it performed the price evaluation, the cost offered per hour, using only labor, burden and profit, for IFE was either \$35.63 or \$40.72 (depending upon whether an 8 or 7 hour day is used), and \$41.21 for TBS. Considering only the hourly rates submitted by IFE and TBS, the comparison is \$39.30 to \$44.92 for IFE and \$49.65 for TBS. Our analysis indicates that the projected cost (or price in the case of IFE) was directly related to the estimated hours involved in performance and a cost or price proposal based on a reduction in the number of hours would utilize essentially the same hourly rate.

While many factors may have changed upon resolicitation on the basis of an amended RFP, faced with a clearly technically superior proposal with favorable prices, it is thus reasonably certain that IFE would have been the ultimate awardee. Given the uncertainties involved in the contractor selection process under negotiated procurements, we believe reasonable certainty is the appropriate standard to apply to claims for proposal preparation costs. Therefore, we conclude that IFE is entitled to be reimbursed the expenses it incurred in competing for this contract.

B-186939

IFE is entitled only to expenses incurred in the protested procurement. Those expenses claimed for professional time in developing and preparing the unsolicited proposal are unallowable since an essential element is missing, i.e., the implied promise that a proposal submitted in response to the Government's request will be fairly and honestly considered. IFE's claim does not separate its costs for the proposals. Documentary evidence should be submitted by IFE to support its claim for preparation costs for the proposal under the negotiated procurement.

IFE also claims the following costs:

Contract typing	\$200.02
Reproduction costs	73.38
Binders	16.32
Directly related lunches	46.13
Local travel expenses	<u>71.55</u>
Total	\$407.40

Only those costs incurred in preparing the competitive proposal are compensable. T & H Company, supra. Since there is no indication whether a portion of the costs claimed above relates to the unsolicited proposal, documentation on this point is also necessary.

Finally, IFE's claim for \$5,830 for the fee it would have earned had IFE received the award is not allowable. Anticipated profits on the contract have specifically been ruled nonallowable because no contract ever came into existence. Keco Industries, Inc. v. United States, supra.

In light of the foregoing, IFE should submit the necessary documentation to Commerce in order that an agreement may be reached on the quantum issue. In the event that agreement

B-186939

is not reached, the matter should be returned here for further consideration.

Paul G. Stumbly
For the Comptroller General
of the United States