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DECISION



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

FILE: B-190238

DATE: August 7, 1978

MATTER OF:

Documentation Associates - Reconsideration
of Claim for Proposal Preparation Costs

DIGEST:

Prior decision denying claim for proposal preparation costs is affirmed under standard in Heyer Products Company v. United States, 140 F. Supp. 409 (Ct. Cl. 1956), because claimant has not shown that offer was "fraudulently induced." Under Heyer standard, as subsequently modified by courts, claimant must show arbitrary or capricious Government action which precluded claimant from receiving award to which it was otherwise entitled. Where claim is based on GAO finding of improper inclusion in competitive range and proposal therefore had no reasonable chance for award, basic Heyer standard necessarily applies for any possible recovery.

In Documentation Associates, B-190238, March 23, 1978, 78-1 CPD 228, we considered a protest by Documentation Associates against the rejection of its proposal under request for proposals (RFP) No. 2-26383 for library technical processing services, issued by the National Aeronautics and Space Administration (NASA). The proposal was one of two included in the competitive range after an initial evaluation (the other was the incumbent's, Technology Development Corporation (TDC)). After technical discussions and the submission of revised offers, a further evaluation rated Documentation Associates' proposal slightly lower technically than TDC's. Therefore, and since the cost of the Documentation Associates proposal far exceeded that of TDC's, the contracting officer selected TDC for final negotiations.

Documentation Associates protested the contracting officer's decision on three bases, two of which were untimely raised under our Bid Protest

Procedures, 4 C.F.R. Part 20 (1977), and were not, therefore, considered on their merits. The third basis was that the proposal should not have been rejected because of high cost without the opportunity to discuss cost.

The record indicated that NASA believed that there was no potential for a significant cost reduction in Documentation Associates' proposal and that the proposal probably should have been rejected after the initial evaluation. On that basis, and in view of NASA procurement procedures and the language of the RFP regarding discussions and cost, we concluded that Documentation Associates should not have been included in the competitive range. We denied the protest since the firm was not, therefore, prejudiced by the lack of cost discussions.

Documentation Associates subsequently submitted a claim for reimbursement for expenses incurred in preparing its initial proposal; taking part in discussions and preparing and submitting a revised proposal; attending a debriefing after the rejection of its proposal; and pursuing the bid protest before our Office. The claim was the subject of our decision in Documentation Associates - Claim for Proposal Preparation Costs, B-190238, June 15, 1978, 78-1 CPD 437.

The basis for the claim for initial proposal preparation expenses involved the matters uniformly raised in Documentation Associates' bid protest. Accordingly, that part of the claim was not appropriate for consideration. Thus, we only reviewed the merits of the claim from the point of NASA's receipt of Documentation Associates' initial proposal.

With regard to the remaining expenses incurred prior to the rejection of its proposal, we reviewed the two standards for recovery of bid or proposal preparation expenses, which our decisions suggested included the expenses in issue. We stated the standard for recovery as first set out by the Federal courts in Heyer Products Company v. United States, 140 F. Supp. 409 (Ct. Cl. 1956):

"* * * recovery can be had only where clear and convincing proof showed a fraudulent inducement of bids. That

is, bids were not invited in good faith, but as a pretense to conceal the purpose to award the contract to some favored bidder or bidders, and with the intent to willfully, capriciously, and arbitrarily disregard the obligation to let the contract to the bidder whose bid was most advantageous to the Government."

We next stated that the courts have modified the Heyer standard to allow recovery of preparation costs where the Government's evaluation of bids has been so arbitrary or capricious as to preclude a particular firm from an award to which it was otherwise entitled.

We denied the claim on the following basis:

"* * * The standard for review of this claim must be that set forth in Heyer--a claim such as this considered under the modified Heyer standard would always fail because the claimant would not have been the ultimate awardee. See International Finance and Economics, B-186939, October 25, 1977, 77-2 CPD 320.

"On the basis of the record before our Office, we believe that the contracting officer's admittedly improper inclusion of Documentation Associates in the competitive range can at worst be characterized as a judgmental error on the side of caution, rather than a pretense to conceal a preconceived intent to award a contract to TDC. As such, and using the Heyer standard, it is not the type of procurement irregularity that would entitle Documentation Associates to recovery of the subject costs incurred as a result thereof. * * *"

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We also denied the claim for debriefing-related expenses, and we stated that the cost of pursuing a bid protest is in any case noncompensable.

Documentation Associates has requested that we reconsider our denial of that part of its claim concerning the expenses incurred in attending technical discussions and preparing and submitting its revised proposal. Documentation Associates disagrees with our statement that a claim for such expenses would always fail if considered under the modified Heyer standard, on the basis that "it is not known at this time and cannot be known until such time as this matter is resolved who, in fact, is the ultimate awardee." The claimant further points out that the demonstration by a claimant that there was "no reasonable basis" for a contracting agency's decision would establish that the decision was arbitrary and capricious. See Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974); Continental Business Enterprises, Inc. v. United States, 452 F.2d 1016 (1971). Documentation Associates argues that there was "no reasonable basis" for the contracting officer's actions, and as such they were "arbitrary and capricious within the scope and intent of the modified Heyer standard for review." In addition, regarding our characterization of the improper inclusion of the claimant in the competitive range as "a judgmental error on the side of caution," Documentation Associates states:

"* * * We believe the Government was inexplicably and unreasonably cautious at our expense in a manner that violates the law and undermines the public interest in curtailing arbitrary and capricious Government procurement actions."

As indicated above, to be successful under the modified Heyer standard a claimant must show that but for the Government's arbitrary or capricious action the claimant would have been awarded the contract in question. McCarty Corporation v. United States, 499 F.2d 633 (Ct. Cl. 1974). Therefore, in

considering a claim involving that standard, a two-fold review of a procurement history is necessary.

One element of that review involves scrutinizing the contracting agency's actions to ascertain whether they were arbitrary or capricious with respect to the claimant. The "no reasonable basis" test noted by Documentation Associates is one of four criteria set out by the court in Keco Industries, Inc. v. United States, Supra, as subsidiary to the ultimate "arbitrary or capricious" standard. The second aspect of the inquiry concerns whether the Government's actions precluded the claimant from receiving an award to which it was otherwise entitled. In our initial decision we denied Documentation Associates' protest against NASA's failure to conduct cost discussions because the record indicated that the firm's cost proposals were so high that Documentation Associates "would almost certainly never have been awarded the contract under the RFP." (Emphasis added.) Further, we brought the matter to the attention of the Administrator of NASA "since firms should not be included in the competitive range without a reasonable chance for award." (Emphasis added.)

It should be clear that under such circumstances, i.e., where a claim for proposal preparation costs is based upon the improper inclusion in the competitive range of a proposal having no reasonable chance for award, the second criterion of the modified Heyer standard is never met. A claim considered thereunder cannot therefore be successful, notwithstanding that a contracting officer's actions may be characterized as with "no reasonable basis," i.e., arbitrary and capricious within the meaning of the first criterion of the standard. In view thereof, the basic Heyer standard must necessarily be applied for any possible recovery.

We see no basis to change our position that the contracting officer's actions with respect to Documentation Associates' proposal do not entitle the

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claimant to the recovery of the subject expenses under the basic Heyer standard requiring "fraudulent inducement."

Our decision of June 15 is affirmed.


Deputy Comptroller General
of the United States