25247

DECISION

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

FILE: B-208827 **DATE:** June 1, 1983

MATTER OF: M.L. MacKay & Associates, Inc.

DIGEST:

1. Protest is sustained where the contracting agency admits that the contracting officer used an unauthorized evaluation methodology to eliminate the protester's proposal from the competitive range.

2. Claim for anticipated profits and the costs of pursuing the bid protest is denied since no legal basis exists which authorizes such a recovery; moreover, no legal basis exists for authorizing a sole-source award to the protester under a future procurement as a means of compensating the protester for the loss of the earlier contract.

3. Claim for proposal preparation costs is allowed where agency arbitrarily excluded proposal from competitive range thereby preventing technical evaluation and opportunity for offeror to show it had a substantial chance of receiving the award.

M.L. MacKay & Associates, Inc. (MacKay), protests the rejection of its proposal under request for proposals (RFP) No. DACW84-82-R-0034, issued by the Pacific Ocean Division, United States Army Corps of Engineers (Army).

We sustain the protest and allow the claim for proposal preparation costs.

The RFP solicited proposals for hydrographic surveys in American Samoa. The Government estimate for this work was $39,697. In response to the RFP, the Army received the following offers:

Offerors	Price
MacKay	$ 6,564
R.M. Towill Corp.	11,369.70

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121507

Austin, Tsutsumi & Associates	17,900
Sam O. Hirota, Inc.	21,041.03
Geoterrex Ltd., Inc.	48,520
Prescott Follet & Associates	48,970

In determining the competitive range, the contracting officer relied on a memorandum issued by the Mobile District, Corps of Engineers, Mobile, Alabama. This memorandum set forth a method for "price weighting." According to the memorandum, it is necessary to determine unrealistic prices to be outside of the competitive range since there "exists a minimum price for any work that no firm can, no matter how technically capable, produce a quality product." Thus, the memorandum advocated the use of the Government estimate, or a combination of the Government estimate and the mean of all prices submitted, to establish a standard against which each price would be compared and given a weighted score for evaluation purposes. This score would then be added to a weighted technical score, and those firms found to fall within a previously established combined point range would be determined to be within the competitive range.

Following this procedure, the contracting officer determined that only R.M. Towill, Sam O. Hirota and Austin, Tsutsumi & Associates were in the competitive range. Negotiations were conducted with these firms and, after the receipt of best and final offers, the Army awarded the contract to R.M. Towill, for $9,703.67. The contract has been fully performed.

MacKay argues that its proposal should have been found in the competitive range and that it should have had an opportunity to negotiate with the Army. In MacKay's opinion, it is absurd that it should have been penalized points for offering the lowest price. (MacKay received 70 points under the price weighting procedure while the higher priced Towill received 100.) Moreover, MacKay believes that any questions the Army had about its pricing could have been easily cleared up in a telephone conversation. If the contracting officer had made such a call, MacKay argues that it could have explained that its low price was due to hourly labor rates which only represented out-of-pocket costs with no markup for overhead or profit. MacKay saw this procurement as an opportunity to prove to the Army that it was capable of performing this type of work both now and under future procurements.

The Office of the Chief of Engineers states that the Pacific Ocean Division should not have relied on the Mobile District memorandum; the evaluation method outlined in that memorandum has not been approved for use. According to the Office of the Chief of Engineers, MacKay, if properly evaluated, would have been found within the competitive range; however, since further negotiations would have been required to insure that MacKay had a complete understanding of the work required, the contracting officer is unable at this point to say that MacKay would have received the award. In light of this and the fact that the contract has been completed, the Office of the Chief of Engineers concludes that it is unable to grant MacKay any type of relief. Nevertheless, the Office of the Chief of Engineers advises us that the Pacific Ocean Division has been notified that the price evaluation methodology employed here is not authorized and should not be used in the future.

We have held that there is no legal prohibition against the Government accepting a below-cost offer provided that the offeror has been determined to be a responsible contractor. Kirschner Associates, Inc., B-199212, July 3, 1980, 80-2 CPD 11. Here, the Office of the Chief of Engineers acknowledges that MacKay was improperly excluded from the competitive range and, thus, recognizes that MacKay's low offer should not have been rejected unless MacKay was first determined to be technically unacceptable. MacKay has indicated that several Corps of Engineers Districts have rejected its low priced offers under other solicitations apparently on the belief that no one could perform the proposed contract at such a low price. Therefore, by separate letter of today to the Secretary of the Army, we are recommending that the various districts be advised that they should only reject apparent below-cost offers if the offeror is determined to be technically unacceptable.

Even though the Army admits that MacKay's offer should not have been excluded from the competitive range, it argues that, since the contract has been completed, no relief is now possible. MacKay, on the other hand, argues that it should either be paid the $6,564 it would have received had it been awarded the contract, be awarded a contract on a sole-source basis by the Pacific Ocean Division when a similar project is planned, or be compensated for the cost of preparing its proposal and pursuing the bid protest process.

We have held that there is no legal basis for allowing an unsuccessful offeror to recover anticipated profits. Jekyll Towing and Marine Services Corporation, B-199199, December 2, 1980, 80-2 CPD 413. Thus, MacKay may not

recover damages in the amount it would have received had it been awarded the contract. In addition, we are unaware of any legal basis for recommending that a future contract be awarded to MacKay on a sole-source basis as a means of compensating MacKay for the loss of the earlier contract. Finally, we have held that legal fees incurred in pursuing a bid protest at the General Accounting Office are not compensable. Spacesaver Systems, Inc., B-197174, August 25, 1980, 80-2 CPD 146. Therefore, MacKay may not recover any cost it incurred in pursuing this bid protest.

On the other hand, the costs of preparing a proposal may be recovered provided that the claimant can show that the Government acted arbitrarily or capriciously with respect to the claimant's proposal and that it had a substantial chance of receiving the award except for the agency's improper action. Boone, Young & Associates, Inc., B-199540.3, November 16, 1982, 82-2 CPD 443.

Here, the agency arbitrarily excluded MacKay's proposal from the competitive range and therefore, precluded an evaluation of the proposal from a technical standpoint. As a result, it is impossible to determine from the record if MacKay had a substantial chance for award or was in the "zone of active consideration." See Morgan Business Associates, Inc., v. United States, 619 F. 2d 892 (Ct. Cl. 1980). The agency's improper action here prevented MacKay from ever having the opportunity to show it had a substantial chance for award. In fairness, we think that MacKay should be entitled to receive proposal preparation costs, in view of its lower price. MacKay should submit documentation to support its costs to the agency.

The protest is sustained and the claim allowed.

for Milton J. Socolar
Comptroller General
of the United States