01642

DECISION

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

FILE: B-187489 DATE: March 29, 1977

MATTER OF: Amram Nowak Associates, Inc.

DIGEST:

1. Award in negotiated procurement to offeror whose offered price would become low price only upon agency's exercise of option is improper where solicitation did not provide for evaluation of option; consequently, it is recommended that option not be exercised and that any option requirements be resolicited.

2. GAO will consider question of protester's entitlement to proposal preparation costs, notwithstanding GAO recommendation that contract option not be exercised; prior decisions overruled to extent they are inconsistent with this determination.

3. Agency's evaluation of proposals and award to higher priced offeror was without reasonable basis, arbitrary and capricious as to low offeror, and constituted failure to give fair and honest consideration to low offeror's proposal, thus entitling low offeror to proposal preparation costs.

4. Where claimant has not provided supporting documentation to establish quantum of compensation due for proposal preparation costs, GAO has no basis at this time to determine proper amount of compensation. Claimant should submit necessary documentation to agency in effort to reach agreement on quantum. If agreement is not reached, matter should be returned to GAO for further consideration.

Amram Nowak Associates, Inc. (Nowak), protests the award of contract No. 68-01-4230 by the United States Environmental Protection Agency (EPA) to Richter McBride Productions, Inc. (McBride), for a documentary film and supplemental material concerning aviation noise, resulting from request for proposals (RFP) No. WA 76-E303.

The RFP, a total small business set-aside, was issued on June 15, 1976, and required that initial proposals be submitted by July 19, 1976. Enclosure III of the RFP stated that proposals would be evaluated on the following bases:

> "The evaluation process designed for this procurement will be of a two-phased nature. Initially, the offeror's technical proposals will be evaluated for technical acceptability. The 100 point scale shown herein will be used and the contractors will be rated in the technical categories listed. Secondly, the offeror's proposed costs will be considered independently of the technical criteria. If there are no significant technical or financial and management differences, cost alone may be the determining factor. However, significant technical advantages or disadvantages as well as financial or management differences may offset cost differentials. Determination of award will be made pursuant to Chapter 1, Subsection 1-3.805 of the Federal Procurement Regulations."

The technical evaluation categories and their point allocations included 40 points for documentary film production achievements, 20 points for individual personnel production achievements, 40 points for proposed creative approach to the film, and 10 points for a proposal for a separate technical film. The latter technical category provided as follows:

> "4. Proposal of approximately 100 words for the follow-on technical film (separate from original film proposal), assuming without reiteration the concepts inherent in the original proposal, with references to that proposal where applicable, a simple creative proposal on the approach to the follow-on technical film.
>
> 10 points"

Of the 28 proposals received, 4 were deemed to be technically acceptable. We note that 13 offerors, including Nowak, did not submit initial price proposals for the follow-on technical film. EPA determined that McBride, Nowak, and Charlie/Papa Productions were in the competitive range. On August 25, 1976, EPA requested, telephonically and by followup letters of the same date, that

best and final offers be submitted by September 7, 1976. In requesting best and final offers, EPA's negotiator told Nowak that EPA "would need a price for the second film because the Government had to know what the film would cost if the option was exercised, even though award would be made on the first film only." Nowak asked whether both films would be made concurrently because that would make a difference in its price for the second film and was informed that the films would not be done concurrently.

By letter dated August 30, 1976, Nowak submitted its best and final offer, which only contained a price for the documentary film. EPA's negotiator requested that the offer be amended to include a price for the second film. Nowak complied with EPA's request, and submitted an amended best and final offer by letter of September 1, 1976. The best and final offers for the documentary film, the technical film, and the total offered prices submitted by the firms in the competitive range were as follows:

| Offeror | Documentary film proposal | Technical film proposal | Total of proposals |
|---|---|---|---|
| McBride | $44,130 | $10,496 | $54,626 |
| Charlie/Papa | 45,730 | 16,467 | 62,197 |
| Nowak | 41,089 | 35,000 | 76,089 |

McBride was selected as the successful offeror on September 13, 1976, and a formal contract was forwarded on that date for signature. On September 16, 1976, Nowak telephonically ascertained from EPA's contracting officer that award to another company was contemplated on the basis of the combined price for both films. Nowak objected to the proposed award, stating that had it known the cost of both films would be evaluated, this would have made a difference in the prices submitted. The firm also stated that it was going to protest the award on the basis of previous telephone conversations with the agency's negotiator. EPA undertook to review the procurement file, and the contracting officer advised Nowak on the following day that award had not been made and would not be made before September 20, 1976. The record contains mailgrams from Nowak to EPA dated September 16 and September 17, 1976, acknowledging that Nowak was withholding formal protest of the award pending EPA's reconsideration. McBride returned the endorsed contract to EPA on September 17, 1976. On September 20, 1976, EPA's contracting officer telephonically advised Nowak that EPA would make the award as previously discussed, that review of the file did not indicate an award other than the one contemplated, and that the officer did not know when the award would be made. Award was made to McBride on September 21, 1976. Nowak filed its protest with our Office within 2 working days of the award.

Nowak essentially contends that the award was improper because McBride's offered price for the documentary film was higher than Nowak's price. Nowak asserts the following grounds in support of its protest:

1. The RFP clearly implied that the contract would be awarded on the basis of the first film only.

2. The contract negotiator stated that the award was to be made on the basis of the bid for the first film only.

3. The contracting officer deliberately misled the protester into delaying the protest until after the award was made.

In addition, Nowak has claimed $5,000 for the costs involved in preparing its proposal.

EPA takes the position that because the RFP called for an initial 14-minute film with an option to order a sequel similar to the first film, the Government's interests required evaluation of the prices offered for both films. EPA asserts that Nowak was, or should have been, on notice of the dual price evaluation from three provisions of the RFP. Initially, subparagraph C of the RFP letter provides:

> "The proposal for the option film shall be submitted separately from the proposal for the other requirements, both in the technical creative proposal and in the cost proposal."

Secondly, Article V, subparagraph (iii) of the Draft Sample Contract, Enclosure I of the RFP, states:

> "The total fixed price specified in Article VI will be increased by a fixed price of $_____."

Finally, the technical evaluation criteria allocated 10 points for creativity in approach to the second film.

We have long recognized that options, due to their inherently uncertain and contingent nature, pose certain dangers to the integrity of competitive procurements. For this reason, we believe that options should be evaluated only in exceptional circumstances under appropriate criteria, and where the solicitation so provides. See, for example, Armed Services Procurement Regulation § 1-1500 (1976 ed.). However, we have traditionally held it improper to accept a high offer on the basis that it will become the low offer upon the occurrence of a contingency (i.e., exercise of an option) which may

or may not arise. B-162839, December 19, 1967; 41 Comp. Gen. 203, 205 (1961); 15 Comp. Gen. 1136 (1936). McBride's price proposal for the documentary film was higher than Nowak's price proposal; the solicitation did not provide for evaluation of the option; and McBride's price proposal will become the low price proposal only upon EPA's exercise of the option for the technical film.

Therefore, we are unable to conclude from the record that appropriate circumstances and criteria were present in the instant procurement to justify evaluation of the option proposals. According to the evaluation criteria, a superlative optional film proposal was accorded a maximum of only 10 percent of the total technical evaluation points. As stated above, 13 of the 28 offerors did not include price proposals for the optional film in their initial proposals. Notwithstanding the fact that Nowak's initial proposal did not include a price proposal for the option film, EPA determined that Nowak was in the competitive range. The RFP did not indicate how the option film would impact upon the second phase of the evaluation process. Neither the requirement for submission of separate proposals for base and option items nor the provision for increased contract price upon the exercise of an option suffices to inform offerors that award will be made on the basis of the combined price for both films. If the offerors knew that the proposals were to be evaluated on a combined-price basis, it may be that their price proposals would have been adjusted to accommodate for this method of evaluation. EPA's RFP casts doubt on the evaluation process and the agency's action has subjected the integrity of the competitive procurement process to question.

In view of the above, award to McBride on the basis of the combined prices for both films was improper. We note, however, that more than 60 percent of the work on the documentary film has already been completed. Consequently, termination of this portion of the contract would not, therefore, be in the Government's best interests. EPA has not, however, exercised the option for the follow-on technical film. In light of these circumstances, we recommend that the option not be exercised and that any requirement for a follow-on technical film be resolicited.

It is our opinion that our recommendation that the option not be exercised is not a sufficient remedy in the circumstances of this case. To the extent the decisions in Dynalectron Corporation, 55 Comp. Gen. 859, 864 (1976), 76-1 CPD 167, and in University Research Corporation, B-186311, August 26, 1976, 76-2 CPD 188, are inconsistent herewith they are overruled. We therefore feel it necessary to consider the question of entitlement to proposal preparation costs raised by Nowak.

A protester's entitlement to the costs of preparing his bid or offer arises from the Government's responsibility in considering bids or proposals submitted in response to a solicitation. The nature of the Government's obligation, with regard to advertised procurements, was characterized by the Court of Claims in The McCarty Corporation v. United States, 499 F.2d 633, 637 (Ct. Cl. 1974) (per curiam), as follows:

> "* * * It is an implied condition of every invitation for bids issued by the Government that each bid submitted pursuant to the invitation will be fairly and honestly considered (Heyer Products Co. v. United States, 140 F.Supp. 409, 412, 135 Ct. Cl. 63, 69 (1956)); and if an unsuccessful bidder is able to prove that such obligation was breached and he was put to needless expense in preparing his bid, he is entitled to recover his bid preparation costs in a suit against the Government (Keco Industries, Inc. v. United States, supra, 428 F.2d at 1240, 192 Ct. Cl. at 785)."

Not every irregularity, however, entitles a bidder or offeror to compensation for the expenses which he incurred in preparing his bid or proposal. Keco Industries, Inc. v. United States, 492 F.2d 1200, 1203 (Ct. Cl. 1974) (hereinafter Keco II). The Court in Keco II set forth the following standard and subsidiary criteria for recovery of preparation costs:

> "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, 637-638 (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 v. United States, 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." Keco II at 1203-04.

On the basis of these criteria, the principal issue for our consideration is whether EPA's evaluation of Nowak's proposal, based upon the combined price proposals for both films and the award to McBride displacing the otherwise low, responsive, responsible offeror, constituted failure to give the fair and honest treatment required by law to the displaced offeror, Nowak.

The terms of the RFP in question did not indicate the effect of the option film on the second phase of EPA's evaluation, nor did they advise offerors that their proposals were to be evaluated on a combined-price basis. 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 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.

Nowak seeks to recover $5,000 allegedly expended in preparing its proposal. The protester states that this sum represents costs involved in hiring a free lance researcher and writer, two weeks of supervisory work by two company personnel, secretarial services and delivery costs. To date, Nowak has provided no supporting documentation with regard to its preparation costs. Consequently, we have no basis upon which to determine the proper amount of compensation. We, therefore, suggest that Nowak submit the necessary documentation to EPA in the hope that an agreement can be reached on the quantum issue. In the event that agreement is not reached, the matter should be returned here for further consideration.

Because our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in

section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the House Committee on Government Operations, Senate Committee on Governmental Affairs and Committees on Appropriations concerning the action taken with respect to our recommendation.

P. J. Kyles

Deputy Comptroller General
of the United States