

DOCUMENT RESUME

03299 - [A2293422]

[Request for Reconsideration of Claim for Bid Preparation Costs]. B-186311. August 16, 1977. 3 pp.

Decision re: University Research Corp.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services: Reasonableness of Prices Under Negotiated Contracts and Subcontracts (1904).

Contact: Office of the General Counsel: Procurement Law I. Budget Function: General Government: Other General Government (806).

Organization Concerned: American Technical Assistance Corp.; Department of Labor.

Authority: B-184203 (1976). B-187489 (1977). Wozack v. United States, 182 Ct. Cl. 339 (1968). Heyer Products Inc. v. United States, 140 P. Supp. 409 (Ct. Cl. 1956).

The petitioner requested reconsideration of a decision which recommended that the option under a contract awarded to their competitor not be exercised and that the requirement be resolicited on a competitive basis and which did not consider the petitioner's claim for bid preparation costs. The claim for proposal preparation costs was denied because, even assuming that the claimant was entitled to costs, it had been reimbursed by allocation of costs, included in general and administrative expenses, to other Government contracts. To allow the claim would result in double payment and make payment a penalty rather than compensatory. (Author/SC)

Vickers  
P.L.I

3422

03299



**DECISION**

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

FILE: B-186311

DATE: August 16, 1977

MATTER OF: University Research Corporation - Reconsideration

**DIGEST:**

Claim for proposal preparation costs is denied because, even assuming claimant is entitled to costs, it has been reimbursed by allocation of costs, included in G&A expenses, to other Government contracts. To allow claim would result in double payment and make payment a penalty, rather than compensatory, which is proper measure of damages for breach of contract, theory upon which claim for bid or proposal preparation costs is based.

University Research Corporation (URC) has requested reconsideration of our decision in University Research Corporation, B-186311, August 26, 1976, 76-2 CPD 188.

The August 26, 1976, decision sustained the protest of URC against the award of a contract by the Department of Labor to American Technical Assistance Corporation (ATAC). Our Office found that Labor had not conducted an adequate cost analysis and that there was a lack of rational support for the source selection which was made. We recommended that the option under the contract awarded to ATAC not be exercised and that the requirement be resolicited on a competitive basis.

Because of the above recommendation, we did not find it necessary to consider URC's claim for proposal preparation costs. We reached this conclusion based on our decision in Dynallectron Corporation, B-184203, March 10, 1976, 76-1 CPD 167. However, in Amram Nowak Associates, Inc., B-187489, March 29, 1977, 77-1 CPD 219, portions of the Dynallectron and University Research Corporation, supra, decisions were overruled and the sustaining of a protest and a recommendation that an option not be exercised is no longer a bar to the consideration of a claim for bid or proposal preparation costs.

B-186311

After receipt of the request for reconsideration from URC, our Office requested Labor to perform a cost analysis of the URC and ATAC proposals in an attempt to ascertain whether URC's and ATAC's costs were realistic. Labor has submitted the results of its analysis to our Office and URC has objected to several of the methods of computation used by Labor.

However, for the reasons discussed below, we do not believe it is necessary to resolve the dispute regarding the cost analysis.

The Department of Labor has pointed out that 95 percent of URC's volume of business consists of Government contracts and has forwarded to our Office a copy of a letter from the Defense Contract Audit Agency (DCAA) which states that it is URC's accounting practice to recover the initial bid and proposal preparation costs as general and administrative expense (G&A). By letter dated July 29, 1977, DCAA confirmed that URC had in fact been reimbursed through this process for the amount claimed here. Therefore, Labor takes the position that URC has been reimbursed its claimed \$35,093.02 in proposal preparation costs through allocation of its G&A costs to Government contracts.

URC argues that where the Government fails to give fair and honest consideration to a proposal, an independent right to damages exists. URC contends that through Labor's improper actions, a direct right to compensation arises and that right is not affected by reimbursement of costs under existing contracts.

The issue is whether claims for bid or proposal preparation costs are to be treated as a reimbursement of costs incurred by an offeror to make it whole, or whether the costs are to be treated as punitive damages or a penalty against the Government for improper actions in considering a bid or proposal. If treated as a penalty, the fact that an offeror has been reimbursed for the costs would not affect its right to recovery.

To our knowledge, this issue has not been resolved by the courts and our Office has not addressed the matter. However, we believe that an analysis of the first case in the area, Heyer Products Company, Inc. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956), is helpful to a resolution of the matter. In Heyer, at pages 412-13, the Court of Claims based the recovery of bid or proposal preparation costs on the following theory:

B-96311

"It was an implied condition of the request for offers that each of them would be honestly considered, and that that offer which in the honest opinion of the contracting officer was most advantageous to the Government would be accepted. \* \* \*

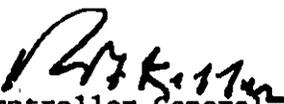
\* \* \* \* \*

"This implied contract has been broken, and plaintiff may maintain an action for damages for its breach."

Therefore, an action or claim for proposal preparation costs is based upon a breach of contract and the damages to be awarded are those normally recoverable for breach of contract under the law of damages. As a general rule, punitive or exemplary damages are not recoverable for breach of contract. Damages for breach are applied for the purpose of giving compensation for the injury done and not for punishment of the breaching party. Corbin on Contracts, Punitive Damages § 1077 (1964). This theory of damages has been adopted by the United States Court of Claims in Womack v. United States, 192 Ct. Cl. 399 (1968), where the court stated that the victim of a breach of contract is made whole by compensatory not punitive damages.

Accordingly, we believe that a claim for bid or proposal preparation costs should be denied when a bidder or offeror has been reimbursed the money it expended in preparing its bid or proposal through allocation of such costs to other Government contracts. To allow a claim for bid or proposal preparation costs after such a reimbursement would result in a double payment to the claimant and be in the nature of a penalty, contrary to the law of damages for breach of contract.

For the above reasons, while we have not decided whether URC is entitled to proposal preparation costs, even assuming that it is, URC has been reimbursed for its costs and the claim is denied.

  
Deputy Comptroller General  
of the United States