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**DECISION**



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

**FILE:** B-190518

**DATE:** April 17, 1978

**MATTER OF:** Bendix Field Engineering Corporation

**DIGEST:**

Cancellation of solicitation involving conversion of in-house base operating support function to commercial contract where enactment of Department of Defense Appropriation Act, 1978, containing prohibition on use of appropriated funds for such purposes, was imminent was not arbitrary or capricious action entitling offeror to proposal preparation costs.

Bendix Field Engineering Corporation (Bendix) of Columbia, Maryland has filed a claim with this Office for \$31,457 representing proposal preparation expenses incurred in connection with request for proposal (RFP) F08650-77-09025, issued by the Air Force and for profit in the amount of \$1,038,270 "that would have been received by Bendix \* \* \* over the course of performance of the contract."

For the reasons stated herein, the claim is denied.

The RFP requested proposals to manage and operate the Standard Base Supply System, (SBSS) a base operating support activity, at Patrick Air Force Base, Florida for the period October 1, 1977 through September 30, 1978. The cover letter accompanying the RFP stated in paragraph 2 as follows:

"2. The objective of this procurement is to conduct a competitive negotiation to determine the economical feasibility of accomplishing the SBSS function with in-house civil service personnel or by contractor personnel in accordance with the Notice of Cost Comparison set forth on the cover sheet (DD form 1707) of the RFP."

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The "Notice of Cost Comparison" provided:

"Offerors are placed on notice that this solicitation is subject to a Government cost comparison to determine the economical feasibility of accomplishing the specified workload in-house or by contract. \* \* \*

"At the conclusion of negotiations, and after best and final offers have been received, if appropriate, the contracting officer will determine the most favorable offer received from a responsive and responsible offeror. After such a determination, the Government's in-house cost estimate, without an entry for contract cost, will be opened and provided for review to all contractors who submitted a proposal, and to the labor organization which is the exclusive representative of the employees concerned. Other interested parties will also be provided a copy upon request.

"No earlier than 5 workdays after the in-house cost estimate was released, it will be compared with the most favorable offer as determined by the contracting officer. If the total contractor cost is lower than the Government's in-house estimate, a contract award will be made if otherwise appropriate. If it is not, the workload will be accomplished in-house. A copy of the completed cost comparison will be made available after contract award or cancellation of the solicitation, as appropriate."

The cost comparison indicated that it would be more economical to contract for the services than to have them performed in-house. However, because of the prohibition in the use of funds for contracting for such services contained in the 1978 Department of Defense

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Appropriation Bill, passage of which was imminent, the Air Force directed that the solicitation be canceled and the contracting officer did so.

Bendix participated in the procurement, submitting both an initial and a best and final offer, and predicates its claim on an asserted violation of Air Force Manual (AFM) 26-1, which provides that after the comparative cost analysis is completed "[b]ased on the relative cost of an in-house operation to a contractor operation, the contracting officer either cancels the solicitation or awards contract. In either case all successful offerors are notified of the final determination."

Recovery of bid or proposal preparation costs is permitted where the Government acts arbitrarily or capriciously with respect to a claimant's bid or proposal, thereby precluding the claimant from an award to which it was otherwise entitled. The McCarty Corporation v. United States, 499 F. 2d 633 (Ct. Cl. 1974); Keco Industries, Inc. v. United States, 482 F. 2d 1233 (Ct. Cl. 1970); Amram Nowak Associates, Inc., 56 Comp. Gen. 448 (1977), 77-1 CPD 219; International Finance and Economics, B-186939, October 25, 1977, 77-2 CPD 320. We see no basis for allowing proposal preparation costs in this case.

First, we note that there is nothing in the record to indicate that Bendix, of all the offerors, would have received the award had the RFP not been canceled. In the absence of any evidence which demonstrates that Bendix would have been entitled to award but for the cancellation, the claim cannot be allowed. Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344; William D. Freeman, M.D., B-191050, February 10, 1978, 78-1 CPD 120.

Nevertheless, even if we assume that Bendix would have been entitled to award, we cannot conclude the contracting officer's actions were arbitrary or capricious. The provisions of AFM 26-1 do not mandate award of a contract; they merely set forth "policies and procedures for

determining which forms of manpower should be used to accomplish essential Air Force workloads." The RFP itself also placed offerors on notice that award might not be made. The "Notice of Cost Comparison" provided that "[i]f the total contractor cost is lower than the Government's in-house estimate, a contract award will be made if otherwise appropriate" (emphasis added), thus indicating that there was no guarantee that a contract would be awarded based on cost comparison alone. In addition, paragraph 10(b), Solicitation Instructions and Conditions (SF Form 33A), provided in part that "[t]he Government reserves the right to reject any and all offers \* \* \*." The RFP further stated:

"1. AVAILABILITY OF FUNDS.

Funds are not presently available for this procurement. Government's obligation hereunder is contingent upon the availability of appropriated funds from which payment for the contract purposes can be made. No legal liability on the part of the Government for payment of any money shall arise unless and until funds are made available to the Contracting Officer for this procurement and notice of such availability, to be confirmed in writing by the Contracting Officer, is given to the Contractor. \* \* \* "

These provisions of the RFP clearly permitted the Air Force not to make award regardless of the results of the cost comparison.

In this regard, the impending enactment of the statutory prohibition obviously provided a sound basis for cancellation of the RFP. The proposed statutory provision stated as follows:

"Sec. 852. (a) None of the funds appropriated by this Act may be used to (1) convert base operating support functions, excluding real property maintenance and repair, to commercial contract during the

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period October 1, 1977. through September 30, 1978, or (2) to fund continued performance during fiscal year 1978 of base operating support contracts, excluding real property maintenance and repair, awarded between the date of enactment of this Act and September 30, 1977, which convert base operating support activities performed by employees of the Government of the United States to commercial contract."

That provision was enacted as section 852(a) of the Department of Defense Appropriation Act, 1978, Pub. L. 95-111, 91 Stat. 886, 908, September 21, 1977.

In What-Mac Contractors, Inc., B-190241, March 3, 1978, 78-1 CPD, \_\_\_ involving another claim for proposal preparation costs arising out of the cancellation of an RFP because of the imminent enactment of the 1978 Defense Appropriation Act, this Office stated as follows:

"Since the procurement involved conversion of BOS functions from Government to contractor personnel, the use of fiscal year 1978 appropriated funds to continue performance under the contract, if awarded between enactment of the Act and September 30, 1977, would be prohibited under section 852(a)(2). In this regard, we have held that an agency determination that funds are not available for contract obligation is sufficient justification for canceling a solicitation. Cf. TIMCO, B-136177, September 14, 1976, 76-2 CPD 242. Moreover, it appears that the contract would have been in violation of the provisions of section 852(a)(1) of the Act if it were awarded after September 30, 1977. In such case, the Air Force would have no choice but to cancel the

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solicitation. See Vanport Manufacturing Company, B-186559, October 19, 1976, 76-2 CPD 343.

"Regarding What-Mac's claim for an unspecified amount for proposal preparation costs, the courts and our Office have allowed recovery of bid or proposal preparation costs where the Government acted arbitrarily or capriciously with respect to a claimant's bid or proposal. Condur Aerospace Corporation--Claim for Proposal Preparation Costs, B-187347, July 14, 1977, 77-2 CPD 24; National Construction Company, B-185148, March 23, 1976, 76-1 CPD 192. We have examined the record in the matter, and we find no evidence that the Air Force acted arbitrarily or capriciously toward What-Mac. To the contrary, we find rational support for the Air Force's decision to cancel the solicitation in view of the fact that passage of the Department of Defense Appropriation Act, 1978, prohibiting the use of appropriated funds for such contracts, was imminent."

Here, the record shows that the purpose of the procurement was to convert a base operating support function to commercial contract on October 1, 1978, which action would necessitate the use of fiscal year 1978 funds and fall clearly within the prohibition contained in section 852(a)(1).

Accordingly, the claim for proposal preparation costs must be denied.

With respect to the claim for loss of anticipated profits, we have previously stated:

"With regard to the request for recovery of anticipated profits, the Court of Claims has stated that there is no basis

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for the recovery thereof by a claimant who is not a party to Government contract. Heyer Products Company, Inc. v. United States, 135 Ct. Cl. 63 (1956), and Keeco Industries, Inc. v. United States, 428 F. 2d 233 (Ct. Cl. 1970) \* \* \* Since no contract \* \* \* ever came into existence, there is no legal basis to allow recovery for loss of anticipated profits."

Roy McGinnis and Company, B-180615, August 15, 1974, 74-2 CPD 100.

The claim by Bendix for proposal preparation costs and anticipated profits is denied.

  
Deputy Comptroller General  
of the United States