

PL-11

DECISION



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

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FILE: B-186932

DATE: March 22, 1979

MATTER OF: Base Information Systems,
Inc.--Reconsideration

CNG - 01512

DIGEST:
Request For Reconsideration of Denial of Proposal Preparation Costs

Denial of claim for proposal preparation costs is affirmed where claimant offers no new evidence and has not established that prior decision resulted from error of law.

Base Information Systems, Inc. (Base) requests reconsideration of our decision in Base Information Systems, Inc., B-186932, October 25, 1978, 78-2 CPD 299 (Base). In that case we denied Base's claim for proposal preparation costs in connection with a solicitation, RFP 3-76, issued by the Federal Trade Commission (FTC) for procurement of a word processing and telecommunications system. We previously sustained the protest underlying Base's claim. See Sigma Data Computing Corporation and Base Information Systems, Inc., 56 Comp. Gen. 829 (1977), 77-2 CPD 59. However, the claim for proposal preparation costs was denied because Base failed to establish that the FTC's action in rejecting Base was motivated by caprice or bad faith.

Base reiterates its view that the FTC's conduct in this matter was arbitrary and capricious. It has offered no additional evidence to support its position, but asserts that the conclusions of fact and law drawn in our previous denial were erroneous. At the outset, Base contends that the legal standards applied in reviewing the claim are erroneous. Referring to the decision in Keco Industries, Inc. v. United States, 203 Ct. Cl. 566 (1974), Base argues that it is entitled to recover its costs if any of the general criteria set out there are met.

We disagree with Base's interpretation of the Keco decision. As the Court has recently indicated in Tide-water Management Services, Inc. v. United States, 573

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F.2d 65 (1978), Keco recognizes essentially three "subsidiary" criteria, which may establish a basis for a bid or proposal preparation cost claim. In this regard, a proven violation of pertinent statutes or regulations can, but need not necessarily, be a ground for recovery. Moreover, proof of "subjective bad faith on the part of the procuring officials, depriving a bidder of the fair and honest consideration of his proposal normally warrant[s] recovery," and that "proof that there was 'no reasonable basis' for the administrative decision will also suffice, at least in many situations" (Keco, supra). In Keco, the Court referred to these criteria as "subsidiary" to "the ultimate standard," viz: "whether the Government's conduct was arbitrary and capricious." This view we believe is reinforced by the Court's statement in Tidewater, that:

"In order to recover, a disappointed bidder such as the plaintiff must prove that the Government acted in an arbitrary or capricious manner in awarding the contract * * *.

Keco Industries (I) v. United States, 192 Ct. Cl. 773, 782 (1970) * * *. As was said in Keco Industries (I), supra, and repeated thereafter, 'the standard of proof to be applied in cases where arbitrary and capricious action is charged should be a high one.' * * *."

Moreover, the Court in Keco refers to the terms "arbitrary" and "capricious" as joined conjunctively, and not as used in a disjunctive sense. In this regard, we noted in our previous denial of this claim:

"Caprice or constructive bad faith emphasizes a lack of evident motivation suggesting willfulness -- or in this context, deficiencies of reasoning or methodology so substantial as to indicate that a decision is not only arbitrary, but that it was made without reason."

The Court has not held that the Government warrants that procurements will be wholly free of error, nor must

the Government indemnify offerors if a mistake is made. We recognize, as did the Keco court, that "the degree of proof * * * necessary for recovery [in a particular instance] is ordinarily related to the amount of discretion entrusted to the procurement officials." Errors of judgment are to be expected in any human undertaking. The exercise of discretion by its nature includes the possibility that the action taken may be wrong. Error may be compounded upon other error, appearing in retrospect to have been quite arbitrary, if well intended. In effect, Keco and related cases recognize only a limited theory of recovery -- one springing from the Government's obligation to fairly evaluate all proposals submitted in response to its solicitation. The possibility of inadvertent error is a risk of doing business with the Government.

The seriousness of an error or the number of errors committed may bear upon whether the action complained of was capricious. It is not enough in our judgment that a claimant can establish that the actions complained of appear arbitrary in retrospect. It must appear that the action was motivated by caprice or constructive bad faith -- the evidence showing that those involved knew or should have known that what they were doing was arbitrary. The claimant need not show actual ill will on the part of Government officials but must show that in the circumstances procuring officials should be held responsible for at least not having recognized the nature of what they did. The claimant must establish that the action complained of was taken without reason, i.e. without any reasonable basis.

For related reasons we do not agree with Base's characterization that our prior decision "shows needless confusion regarding at what stage of the procurement [wrongful] intent must arise." We stated that:

"* * * even if Base could establish that the FTC intentionally sought to delay our review or to frustrate Base's efforts to effect its protest to our Office, it could not on that

evidence alone establish that the FTC acted with caprice or actual ill will at the time it rejected the Base proposal."

Nothing in Heyer Products Co. v. United States, 135 Ct. Cl. 63 (1956), cited by Base, suggests that a claimant may recover proposal preparation costs without showing that the Government's actions leading to an erroneous award resulted from a compensable wrong. That a right to recover bid preparation costs has been recognized in a limited class of cases reflects the view that an offeror has no enforceable right at law to insist that the Government terminate any contract. Base cannot be compensated for the FTC's refusal to terminate the contract awarded to Daconics. Even if we assume arguendo that Base were correct, and that the FTC did contrive to delay our initial protest decision, Base can recover only if it can show that it is entitled to its proposal preparation costs as a result of FTC misconduct regarding the evaluation of its proposal.

Even though we found in our earlier decisions that Base was in line for award under the established award criteria and therefore should not have been rejected without further negotiations, we concluded that Base had not established that the rejection of its proposal was the result of caprice or constructive bad faith. We still hold to that opinion.

Base continues to place considerable weight on what it views as "illegal" FTC conduct in permitting Daconics to change its proposal after the closing date for receipt of best and final offers. In its view, Daconics was permitted to withdraw its objections to mandatory language contained in the RFP. Base states:

"It is inconceivable that Daconics, an experienced Government contractor, could have inadvertently committed such a gross 'mistake' as to strike the liquidated damages provision in its best and final offer after having just been warned in negotiations that these [provisions] were mandatory."

As we understand what occurred, Daconics did not strike the liquidated damages provision when it submitted its best and final offer but had ~~had~~ crossed out the provision in its initial proposal. Its best and final offer merely updated its earlier proposals. Daconics agreed during negotiations that the exception should be withdrawn. According to the FTC, it merely permitted the contract record to be corrected to conform to an agreement which had already been reached. Base evidently disbelieves this explanation, but offers no other evidence. In our view, the FTC's understanding of what was done is not beyond reason -- even if the action taken were found to be technically improper.

Base also expresses disbelief that the FTC completed its evaluation within two days after the closing date for receipt of best and final offers. We do not find the circumstances complained of particularly surprising, or unusual. Most of the offerors simply updated their earlier proposals to reflect the negotiations conducted.

To be sure, Base complains not only that the FTC evaluators made up their minds within only two days, but that they recommended award to Daconics (whose offer Base insists was nonconforming) despite Base's lower offer. The question of the acceptability of the Daconics offer previously has been considered. That the FTC evaluators believed that Base's offer was low and acceptable is inferred by Base:

"FTC called Base the day it received all best and final offers to express its suspicion and disappointment at Base's low price offer."

As indicated in our prior decisions, there is no question but that telephone conversations occurred. The characterization of the nature of the call is ascribed by Base. Frankly, we find it incongruous that any agency bent upon making an improper award would call a potential offeror to "express * * * suspicion and disappointment" that the prospective protester had placed itself in line for award.

Base contends that:

"After the offers were opened on June 9, 1976, * * * [the] Director, FTC Division of Management, telephoned Paul Callender of Base's Market Support Group and inquired how Base had been able to reduce its hardware costs. Mr. Callender received the impression that [the FTC representative] was not only surprised but unhappy about Base's offer. Although [he] suggested that Base had made changes in the design and equipment submitted * * * he was assured that such was not the case. On June 14, 1976, Mr. Callender was told by * * * [the] FTC Procurement Agent, that three of the seven vendors who submitted best and final offers were out of the running and that Base's offer had hit like a bolt out of the blue. As a result, * * * [the FTC Procurement Agent] stated that the evaluation would take longer than the week that was originally anticipated."

We indicated in our prior decision that the contracting officer's evaluation did take more than a week, at least in part because several questions were submitted to the FTC's legal counsel for his opinion. Furthermore, the facts as related by the two sides are not fundamentally inconsistent, even if they draw diverging conclusions from them. They do not disagree that Base significantly lowered its costs in submitting its best and final offer. In such circumstances, a contracting officer may justifiably question whether a mistake might have been made. Moreover, Base for the first time proposed to furnish equipment on a "full payout lease basis," raising issues which had not been discussed during negotiations -- or at least leading the FTC to wonder what it was that Base had offered.

Finally, Base's reference to the "full payout lease" was included only as a footnote to its best and final pricing table. Moreover, the FTC believed that Base had modified its proposal by including provisions which

took exception to mandatory requirements, and that in any event, that Base was not entitled to credit for the residual value of its equipment under the RFP. We continue to be of the view that the implications of Base's proposal were not so clear as to prevent FTC personnel from drawing such erroneous conclusions, given the uncertainty resulting from Base's last minute changes. If it appears in retrospect that the FTC wrongly and even arbitrarily concluded that Base's proposal was unacceptable, or other than low, Base's failure to discuss these aspects of its proposal earlier, or to make its intentions clearer, in our opinion precludes a finding that the FTC acted without reason.

The protest was sustained because we believed the FTC should have understood what was meant by a full payout lease and because the FTC's rejection of Base was founded on supposed changes to the solicitation which the FTC failed to adequately carry out through formal amendment. The confusion resulted in a solicitation containing provisions which did not preclude consideration of a full payout lease proposal or credit for residual value. As we indicated in sustaining Base's protest, the FTC should have amended its solicitation to clarify its requirements and requested a new round of best and final offers. Although Base would have been low had residual value been evaluated, we have never stated that it would have been proper to have made award to Base, unless Base remained low after the procurement were further developed. Had award been made to Base, we believe, Daconics or others might have protested, arguing that they relied upon FTC advice to them leading them to believe they could not offer the kind of proposal Base tendered. Whatever the outcome might have been, the FTC evidently did discuss some aspects of this with some offerors, potentially leading different offerors to differing conclusions.

On reconsideration, Base's claim for proposal preparation costs is denied.



Comptroller General
of the United States