

30955

P. II

DECISION



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

FILE: B-218294.2 **DATE:** April 12, 1985
MATTER OF: I.E. Levick and Associates

DIGEST:

1. Award of proposal preparation costs is only justified if protester shows both that the government's conduct towards the protester was arbitrary and capricious and that, if the government had acted properly, the protester would have had a substantial chance of receiving the award. Where the protester fails to show it had a substantial chance for award, GAO will deny a claim for proposal preparation costs.
2. An unsuccessful offeror is not entitled to the costs of filing and pursuing its protest, including attorneys fees, where the protest was filed prior to the effective date of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175, even though GAO decided the protest in its favor.

I.E. Levick and Associates has submitted a claim for proposal preparation costs and the costs of filing and pursuing its protest, including attorneys fees, as a consequence of a protest that we sustained in its favor in our decision I.E. Levick and Associates, B-214648, Dec. 26, 1984, 84-2 CPD ¶ 695. The protest arose under solicitation for offers (SFO) No. MPA 83222, issued by the General Services Administration (GSA), for the rental of office space in Erie, Pennsylvania, to house the Social Security Administration for a 10-year term.

We deny the claim for proposal preparation costs and for the costs of filing and pursuing the protest, including attorneys fees.

031767

In the original protest, filed after the award of a lease to a competitor, Levick contended that GSA erroneously calculated the competing price proposals that were submitted and therefore improperly awarded the lease to other than the low offeror, Levick. GSA maintained that Levick's proposal was deficient because it omitted various cost factors which, when properly added to Levick's offer, resulted in an evaluated cost greater than Levick's competitor. We found, however, that GSA improperly made numerous oral changes to its requirements without amending the solicitation in writing and that therefore any inadequacies or omissions in Levick's offer should be ascribed to GSA's failure to make timely and precise written amendments to its solicitation so that Levick would have been properly advised of GSA's changed requirements.

In sustaining the protest, we explained in our decision that since the improperly awarded lease did not contain a termination for convenience clause, our Office could not recommend remedial action. Levick now claims proposal preparation costs as a remedy.

We will not grant Levick's request for proposal preparation costs. Not every irregularity entitles a disappointed offeror to compensation for the expenses incurred in submitting a proposal. Ultra Publicaciones, S.A., B-200676, Mar. 11, 1981, 81-1 CPD ¶ 190. Rather, the award of proposal preparation costs is only justified where the protester shows both that the government's conduct towards the protester was arbitrary and capricious, as opposed to merely negligent, and that, if the government had acted properly, the protester would have had a substantial chance of receiving the award. See McQuiston Associates, B-202766; B-203351, Aug. 12, 1982, 82-2 CPD ¶ 127. Levick apparently contends that, had GSA fully disclosed in writing its changed requirements, then Levick would have been reasonably certain of receiving the award. We think this contention is, at best, speculative. While Levick was one of the offerors in contention for the award of the lease, the fact remains that Levick's offer, as submitted, failed to price certain significant items that GSA required. The record does not contain any indication of how Levick might have revised its proposal had these changes been communicated to the firm. We therefore conclude that Levick has failed to demonstrate that, if the government had acted properly, Levick would have had

B-218294.2

a substantial chance of receiving the award. Accordingly, we need not consider whether the government's conduct towards Levick was arbitrary and capricious, since we deny the claim in any event.

Concerning Levick's request for the costs of filing and pursuing its protest, including attorneys fees, section 2741 of the Competition in Contracting Act of 1984 (Act), Pub. L. No. 98-369, 98 Stat. 1175, 1199 (1984) and our Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1985), do provide authority for our Office to grant such a remedy. However, Levick's protest was filed on Mar. 4, 1984, and the Act is only effective with respect to protests filed after January 14, 1985. Pub. L. 98-369, supra, § 2751(b). Prior to the effective date of the Act, we lacked the authority to award such costs.

The claim is denied.

for *Harry D. Van Cleave*
Comptroller General
of the United States