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Andrew Gallagher

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DECISION

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

FILE: B-182979

DATE: March 10, 1978

MATTER OF: Corbetta Construction Company of Illinois, Inc.

DIGEST:

While agency's failure to conduct required written or oral discussions was arbitrary and capricious, it is not reasonably certain that claimant would have received award but for improper agency action. Claimant's initial proposal was highest rated technically, but price--even considering reductions which allegedly would have been made had discussions been conducted--exceeded statutory cost limitation. Also, circumstances of procurement make it difficult to predict what technical or price changes various offerors would have made in their best and final offers. Claim for proposal preparation costs is accordingly denied.

This is our decision on a claim for proposal preparation costs filed by Corbetta Construction Company of Illinois, Inc. (Corbetta), in connection with request for proposals (RFP) No. N62472-72-R-0298, issued by the Northern Division, Naval Facilities Engineering Command (NAVFAC). The RFP contemplated the award of a contract for the design and construction on a turnkey basis of certain military family housing units.

Our Office has issued two prior decisions concerning this procurement. In Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 201 (1975), 75-2 CPD 144, we sustained Corbetta's protest concerning NAVFAC's award of a contract to Towne Realty, Inc., Woerfel Corporation and Miller, Waltz, Diedrich, Architect & Associates, Inc., a joint venture (Towne), and recommended, among other things, that negotiations be reopened by NAVFAC. In Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 972 (1976), 76-1 CPD 240, a reconsideration of the first decision, we withdrew the recommendation for corrective action, but affirmed the first decision in all other respects.

Corbetta now claims its proposal preparation costs. Essentially, Corbetta relies on our decisions' conclusion that the award to a proposal which substantially varied from the RFP requirements was improper in light of 10 U.S.C. § 2304(g)(1970) and Armed Services Procurement Regulation (ASPR) § 3-805.1 (1974 ed.), which required that written or oral discussions be conducted. With the exception of the improper acceptance of a late price modification to the successful proposal, NAVFAC did not conduct any written or oral discussions with the offerors within the competitive range during the procurement.

Bid or proposal preparation costs may be recoverable where it is shown that the Government's arbitrary and capricious action towards a claimant has deprived the claimant of fair and honest consideration of its bid or proposal. See, generally, T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345, and decisions cited therein. For reasons discussed at length in our two prior decisions, we believe that NAVFAC's award of the contract without conducting required written or oral discussions was arbitrary and capricious.

However, in addition to determining that arbitrary and capricious action was directed towards the claimant, in a negotiated procurement we have held it must be reasonably certain that the claimant would have received the award but for the improper agency action. See International Finance and Economics, B-186939, October 25, 1977, 77-2 CPD 320. In that case, we found it was reasonably certain that the claimant would ultimately have received the award. The claimant's revised proposal was clearly superior technically and there was evidence indicating that, but for certain errors by the agency in conducting the procurement, its price would have been lowest. Contrast University Research Corporation - Reconsideration, B-186311, February 3, 1978, where the claimant's proposal was highest rated technically but was also higher priced than the competing proposal, and the claim was denied.

Thus, the issue in the present case is whether it is reasonably certain that Corbetta would have received the award but for NAVFAC's failure to conduct written or oral discussions.

NAVFAC used a price/quality ratio in the procurement as an evaluation and selection technique. Offerors' proposed prices were divided by the number of technical quality points their proposals were accorded by NAVFAC's evaluators on a zero-to-1,000-point scale. Selection would normally be made on the basis of the lowest figure resulting from this formula. The results were as follows:

Towne: $\frac{\$6,191,000}{674} = \$9,569$

Corbetta: $\frac{\$7,690,000}{772} = \$9,962$

There were five other offerors, all of which received fewer quality points, proposed higher prices and, therefore, had higher prices per quality point. In addition, a statutory cost limitation (section 502(b) of Public Law 93-552, enacted December 27, 1974, 88 Stat. 1758) of $6,300,000 was applicable to the project. See generally, 55 Comp. Gen., supra, at 203-205.

Corbetta maintains that, if NAVFAC had conducted written or oral discussions, it would in all likelihood have become the successful offeror. Corbetta points out that, after submission of its initial proposal, it attempted to make three price reductions (apparently totaling $325,000), which the Navy rejected as unacceptable late modifications to the proposal. The claimant asserts that if NAVFAC had not erred in failing to conduct discussions, these price reductions would have made Corbetta's proposal most advantageous in price per quality point ratio:

$$\frac{\$7,690,000 - \$325,000}{772} = \$9,540$$

In regard to the statutory cost limitation, Corbetta cites section 603(b) of Public Law 93-552, 88 Stat. 1760, which provides that the amount named for any construction or acquisition in title I, II, III or IV of the act involving only one project at any military installation may be increased by not more than 25 percent of the amount named for such project by the Congress upon an appropriate determination by the Secretary of Defense or his designee.

However, as NAVFAC points out, the section 603(b) authority is explicitly restricted to the amounts specified in titles I, II, III and IV of the act. The authorization for the Military Family Housing Program is contained in title V of the act, and NAVFAC maintains that it "is not subject to this adjustment or any other." NAVFAC further suggests that the three attempted price reductions submitted by Corbetta reasonably indicate the reduction in price Corbetta would have made if discussions had been conducted. Corbetta's price so reduced ($7,365,000) is considerably in excess of the statutory cost limitation for the project ($6,300,000).

In our earlier decisions on Corbetta's protest, the pertinent issue was whether NAVFAC was required to conduct written or oral discussions. On that issue, we disagreed with NAVFAC's contention that the fact that Corbetta's initial proposal price exceeded the statutory cost limitation was dispositive of the protest, because it was always possible that if discussion had been conducted Corbetta might have been able to reduce its price so as to come within the statutory limitation. See 55 Comp. Gen., supra, at 219 and 981-982. Corbetta's claim for proposal preparation costs, however, presents a different issue--whether it is reasonably certain that Corbetta would have received the award but for the Government's improper action in failing to conduct discussions.

On this issue, we believe NAVFAC's observations concerning the impact of the statutory cost limitation are persuasive. ASPR § 18-110(c) (1974 ed.) provides that a proposal containing prices that exceed

applicable statutory cost limitations shall be rejected. As already indicated, we do not interpret this to mean that an initial proposal whose price exceeds the limitation must automatically be eliminated from consideration. However, assuming meaningful discussions are conducted and absent a waiver of the statutory cost limitation, we are unaware of any legal basis which would justify acceptance of a best and final offer whose price exceeds the limitation. Cf. 48 Comp. Gen. 34 (1968); B-166482, May 5, 1969.

In addition, even if Corbetta had alleged a price reduction greater than $325,000, which it has not, and even if a waiver of the statutory cost limitation were possible, we think it would be difficult to find a reasonable certainty that Corbetta would have received the award. In this regard, we previously noted that there were deviations, omissions and uncertainties not only in Towne's proposal, but apparently in Corbetta's and in the other five offerors' proposals as well. 55 Comp. Gen., supra, at 214 and 980-981. In such circumstances, we believe it would be extremely difficult to predict what technical and price changes the offerors would have made in their proposals if discussions had been conducted or what changes would have resulted if NAVFAC had found it necessary to revise some of the RFP requirements during the discussions.

The present case, thus, is distinguishable from International Finance and Economics, supra, where some discussions had been conducted, the claimant's revised proposal was clearly superior technically, there was evidence indicating it would have been lowest in price and there was no problem with regard to the proposal price exceeding a statutory cost limitation.

In view of the foregoing, we conclude it is not reasonably certain that Corbetta would have

received the award but for the arbitrary and capricious action on the part of NAVFAC. Accordingly, the claim is denied.

Deputy Comptroller General
of the United States