DECISION

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

B-183697

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FILE: B-183697 DATE: June 11, 1976

MATTER OF: DOT Systems, Inc.

DIGEST:

1. Allegation that contracting agency, acting in bad faith, fraudulently induced claimant to submit proposal which it did not intend to fairly and honestly consider is unsupported on record and therefore speculative.

2. Where proposal submitted for total small business set-aside procurement explicitly represented that offeror was both small business concern and non-profit corporation, question of offeror's eligibility should have been referred to Small Business Administration.

3. No bidder or offeror not immediately in line for award has yet recovered its bid or proposal preparation costs. Moreover, any claimant before GAO must present argumentation establishing liability of United States. Even assuming that agency was arbitrary and capricious in failing to refer question of successful offeror's small business status to Small Business Administration, claim submitted by offeror sixth in line for award--which fails to present argumentation showing why it should be entitled to recover--is denied.

This decision concerns a claim for proposal preparation and other costs filed by DOT Systems, Inc., in regard to an award under request for proposals (RFP) No. NIH-75-P-(62)-142, issued by the National Institutes of Health, Department of Health, Education, and Welfare (HEW). The RFP sought support services for a 3-day workshop entitled "Minority and Women Opportunity and Resource Conference." The procurement was a 100-percent small business set-aside, and the RFP provided that "* * * [P]roposals received from firms which are not small business concerns shall be considered nonresponsive."

DOT Systems and 15 other offerors submitted proposals. After numerical scoring of cost and technical factors, the proposal of Educational Projects, Inc. (EPI), was rated as most favorable. A 1-page cover letter included with the EPI proposal stated in part: "Educational Projects, Inc. is a non-profit corporation." Also, the first page of attachment "B" to the proposal contained the following information:

"REPRESENTATIONS AND CERTIFICATIONS

"The offeror makes the following representations and certifications as part of his proposal (check or complete all appropriate boxes of blanks).

"1. SMALL BUSINESS REPRESENTATION

He (X) is, ( ) is not, a small business concern. If he is a small business concern and is not the manufacturer of the supplies to be furnished hereunder, he also represents that all such supplies ( ) will ( ) will not, be manufactured or produced by a small business concern in the United States, its possessions, or Puerto Rico. If a small business concern, Contractor represents that he ( ) has, (X) has not, previously been denied a Small Business Certificate of Competency by the Small Business Administration. (A small business concern for the purpose of Government Procurement is a concern, including its affiliates, which is independently owned and operated, is not dominant in the field of operation in which it is contracting and can further qualify under the criteria concerning number of employees, average annual receipts, or other criteria, as prescribed by the Small Business Administration). (See Code of Federal Regulations, Title 13, Part 121, as amended, which contains detailed definitions and related procedures).

"2. TYPE OF ORGANIZATION

He operates as an ( ) INDIVIDUAL, ( ) STATE OR LOCAL AGENCY, ( ) PARTNERSHIP, ( ) JOINT VENTURE, (X) NONPROFIT, ( ) EDUCATIONAL INSTITUTION, (X) CORPORATION organized and existing under the laws of the state of Pennsylvania."

The contract was awarded to EPI on March 17, 1975. Subsequently, DOT Systems protested to the contracting officer and to our Office, contending that the award was illegal because EPI was not a small business.

The protest was rendered academic because the 3-day conference was completed by April 24, 1975. However, the contracting officer brought the protest to the attention of the Small Business Administration (SBA). SBA determined on May 13, 1975, that EPI was not an eligible small business concern for Government procurements because it was a nonprofit organization. EPI was informed by SBA that it could not certify itself as a small business concern in future procurements until such time that SBA determined that it was an eligible small business concern.

Also, HEW's report on the protest filed with our Office conceded that acceptance of the EPI proposal was erroneous. HEW stated that a cursory examination of the proposal would have revealed that EPI represented that it was both a small business and a nonprofit corporation, and that the contracting officer should have resolved this inconsistency before making an award. HEW stated that remedial action would be taken to prevent future mistakes of this kind. Notwithstanding its error, the agency stated its belief that the conduct of the procurement was generally in accordance with the Federal Procurement Regulations (FPR) and denied that there was any willful intent to violate the regulations.

In addition to these developments, DOT Systems filed its claim for proposal preparation costs with our Office. The claimant contends that it was induced under false pretences to submit a proposal because of the total small business set-aside and suggests that HEW has acted in less than good faith. DOT Systems states that EPI appears to have had previous dealings with HEW, and that there is therefore reason to suspect that HEW knew that EPI was not a small business concern.

Further, DOT Systems maintains that HEW's actions were arbitrary and capricious. The claimant alleges that the responsible HEW procurement personnel are incompetent, because through negligence or ignorance they made an award to other than a small business concern. DOT Systems also alleges that there was a willful disregard of FPR and small business set-aside procedures.

DOT Systems has claimed $1,535 for the cost of time and materials involved in preparing its proposal. Also claimed are $123 for fee and $4,644 for "time lost, damages, and protest costs." In addition, DOT Systems claims continuing protest

costs in the amount of $1,775.15 per month subsequent to May 21, 1975.

The legal basis for recovery of bid or proposal preparation expenses is extensively described in T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345. In that decision, we stated:

> "The Court of Claims stated in The McCarty Corporation v. United States, 499 F.2d 633, 637 (1974):
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> > "'* * * it is an implied condition of every invitation for bids issued by the Government that each bid submitted pursuant to the invitation will be fairly and honestly considered (Heyer Products Co. v. United States, 140 F. Supp. 409, 412, 135 Ct. Cl. 63, 69 (1956)), and if an unsuccessful bidder is able to prove that such obligation was breached and he was put to needless expense in preparing his bid, he is entitled to his bid preparation costs * * *.' Keco Industries, Inc. v. United States, 428 F.2d 1233, 1240 (1970) (hereinafter Keco I).
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> "However, at the outset, we also note that:
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> > "'* * * if one thing is plain [in the area of bid preparation cost claims] it is that not every irregularity, no matter how small or immaterial, gives rise to the right to be compensated for the expense of undertaking the bidding process.' [Keco Industries, Inc. v. United States, 492 F.2d 1200, 1203 (Ct. Cl. 1974) (Keco II)]
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> "In Keco II, the Court of Claims outlines the standards for recovery. The ultimate standard is whether the procurement agency's actions were arbitrary and capricious toward the bidder-claimant. The McCarty Corporation v. United States, supra;

Keco I v. United States, supra. See Excavation Construction, Inc. v. United States, 494 F.2d 1289, 1290 (1974); Continental Business Enterprises, Inc. v. United States, 452 F.2d 1016, 1021 (Ct. Cl. 1971).

"However, as set out in Keco II, there are four subsidiary criteria; namely:

1. Subjective bad faith on the part of the contracting officials--depriving the bidder of fair and honest consideration of his proposal. Heyer Products Company, Inc. v. United States, supra. The court did note that wholly unreasonable action is often equated with subjective bad faith. Keco II, supra, at 1204; Cf. Rudolph F. Matzer & Associates, Inc. v. Warner, 348 F. Supp. 991, 995 (M.D. Fla. 1972);

2. That there was no reasonable basis for the agency's decision. Excavation Construction, Inc. v. United States, supra; Continental Business Enterprises, Inc. v. United States, supra;

3. That the degree of proof of error necessary for recovery is ordinarily related to the amount of discretion entrusted to the procurement officials by applicable regulations. Continental Business Enterprises, Inc. v. United States, supra; Keco I, supra; and

4. Violation of statute can, but need not, be a ground for recovery. Cf. Keco I, supra.

"Application of these criteria depends on the type of error or dereliction committed by the procurement officials and whether that action was directed toward the claimant's own bid or that of a competitor."

We believe that DOT Systems' allegations essentially raise two separate issues: (1) Did the contracting agency, acting in bad faith, induce DOT Systems to submit a proposal which it did not intend to fairly and honestly consider--i.e., was there a

fraudulent inducement of proposals within the meaning of the Heyer decision, supra? (2) Was the erroneous acceptance of EPI's proposal arbitrary and capricious agency action towards the claimant?

The first question cannot be answered in the affirmative. The only support offered by the claimant is the contention that EPI has previously had contracts with HEW. EPI's proposal lists its prior contracts since 1965, some of which were HEW contracts. However, none were entered into by the National Institutes of Health (NIH). Moreover, we believe that even if NIH had had prior contracts with EPI, to infer from this fact that the NIH contracting officials had the bad faith intent alleged by the claimant would be mere speculation.

As for the second question, FPR § 1-1.701-1(a) (1964 ed. amend. 106), which defines "small business concern," clearly states that "concern" means any business entity organized for profit. EPI stated at least twice in its proposal that it was organized as a nonprofit corporation. Under FPR § 1-1.703-1(b) (1964 ed. amend. 106), the self-certification of an offeror that it is a small business concern shall be accepted at face value by the contracting officer in the absence of a written protest "* * * or other information which would cause him to question the veracity of the self-certification." Here, as HEW suggested, even a cursory examination of the proposal should reasonably have raised a serious question in the minds of the responsible contracting personnel as to whether a nonprofit corporation could properly qualify as an eligible small business concern. The contracting officer should have referred the matter to SBA pursuant to FPR § 1-1.703-2 (1964 ed. amend. 134) to resolve the question of EPI's small business status. Had he done so, an improper award would have been prevented.

Despite the foregoing, it must be noted that in Keco II the ultimate standard for recovery is described as arbitrary and capricious agency actions toward the bidder-claimant. In the present case, HEW points out that of the 16 offerors, DOT Systems ranked sixth in the evaluation. Thus, DOT Systems did not fail to receive an award because of the erroneous acceptance of EPI's proposal. HEW notes that if EPI's proposal had been rejected, DOT Systems' relative position in the competition would merely have improved from sixth to fifth in line for award.

Up to this point in time, there is no case in which a bidder or offeror not immediately in line for award has recovered its bid or proposal preparation costs. It is also pertinent to note that any claimant before our Office must present argumentation and evidence which establish the liability of the United States. In the present case, even if it is assumed that HEW acted arbitrarily and capriciously, DOT Systems has not presented any argumentation to show why it, as the offeror sixth in line for award, should be allowed to recover. Accordingly, the claim is denied.

Deputy Comptroller General
of the United States