Theodore Sasso
Proc. I

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DECISION

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

FILE: B-185430 DATE: February 18, 1977

MATTER OF: Universal American Enterprises, Inc.--
request for reconsideration

DIGEST:

1. Where upon request for reconsideration of decision in which GAO found reasonable basis for contracting officer's determination of nonresponsibility protester submits new evidence which purports to show "* * * extensive * * * Government fault" and contends that contracting officer ignored pending claim (involving prior contract before ASBCA) in nonresponsibility determination, GAO notes that at time of contracting officer's determination Government liability was neither adjudicated nor admitted. Moreover, quantum of evidence of protester's continual unsatisfactory performance, substantiated by numerous sources, reasonably supported contracting officer's determination of nonresponsibility. Thus, prior decision is affirmed.

2. Where GAO has concluded that contracting officer's determination of nonresponsibility was reasonably supported by record, claimant has failed to show requisite arbitrary and capricious action by contracting activity toward offeror-claimant and claim for proposal preparation costs is denied.

By letter dated November 11, 1976, Universal American Enterprises, Inc. (UAE), requested reconsideration of our decision in Universal American Enterprises, Inc., B-185430, November 1, 1976, 76-2 CPD 373, in which we denied UAE's protest of the award of a contract to Kentron Hawaii, Ltd., for maintenance and repair of the intrusion detection alarm system (IDA) at Osan Air Base, Korea. Disagreement with the contracting officer's determination of UAE as a nonresponsible contractor formed the basis of that protest. By letter dated January 14, 1977, UAE also submitted a claim for proposal preparation costs.

UAE has requested reconsideration on the basis of new evidence in the form of an agreement between UAE and the Air Force (resulting from its claim under a prior contract before the Armed Services Board of Contract Appeals (ASBCA)) in which the Air Force has purportedly admitted "* * * extensive * * * Government fault," and agreed to pay UAE "* * * almost triple the original amount of the contract as compensation * * *." UAE contends that despite the fact that the contracting officer had been advised of UAE's then pending claim before the ASBCA alleging Government fault, he failed to consider this claim in reaching his nonresponsibility determination.

We have examined the new evidence submitted by UAE. However, even assuming that the documentation submitted by UAE does in fact represent an admission by the Air Force of "* * * extensive * * * Government fault," we think that it is crucial to recognize that at the time of the contracting officer's determination of nonresponsibility the alleged Government liability had neither been adjudicated nor admitted. Moreover, as we stated in our initial decision, "* * * the quantum of documentary evidence of UAE's continual unsatisfactory performance * * * resulted in an increased administrative burden on the Government, which reasonably supports a determination of nonresponsibility based upon past unsatisfactory performance * * *." Criticism of UAE's record of performance, we went on to note, emanated from and was substantiated by numerous sources. Under these circumstances, and in view of our recognition that the determination of a prospective contractor's responsibility is primarily a function of the procuring activity which necessarily involves the exercise of a considerable degree of discretion on the part of the contracting officer (see Columbia Loose-Leaf Corporation, B-181866, November 13, 1975, 75-2 CPD 300), we remain of the opinion that the record reasonably supported the contracting officer's determination of nonresponsibility. Thus, our prior decision is affirmed.

With regard to UAE's claim for proposal preparation costs, the standard for determining whether to allow recovery of proposal preparation costs is whether the procurement agency's actions toward the offeror-claimant were so arbitrary and capricious as to preclude award to a particular offeror to which it was otherwise entitled. Ampex Corporation, RCA Corporation, B-183739, November 14, 1975, 75-2 CPD 304; T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345; Koco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974). Based upon our finding that the record reasonably supported the contracting officer's determination of nonresponsibility, we conclude that UAE has not shown the requisite arbitrary and capricious action on the part of the contracting activity. Accordingly, the claim is denied.

R.F. Keller

Acting Comptroller General
of the United States