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DECISION

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

FILE: B-186311 DATE: February 3, 1978

MATTER OF: University Research Corporation - Reconsideration

DIGEST:

1. Claim for proposal preparation costs is denied because, while claimant meets standards for entitlement under Keco Industries, it is not reasonably certain that claimant, rated high technically, would have received award because it did not offer lowest cost and, therefore, award would have to be based on trade-off between cost and technical.

2. Holding in B-186311, August 16, 1977, that payment of proposal preparation costs to offeror, who was primarily Government cost-reimbursement contractor, would result in double payment since contractor had already been reimbursed costs under overhead rate of other contracts, is modified where contractor agrees to credit general and administrative costs pool with any payment of claim, thereby avoiding double payment.

University Research Corporation (URC) has requested reconsideration of our decision in the matter of University Research Corporation - Reconsideration, B-186311, August 16, 1977, 77-2 CPD 118.

The August 16 decision was a reconsideration of our decision of August 26, 1976 (B-186311, 76-2 CPD 188), in which we sustained the protest of URC against the award of a contract by the Department of Labor to American Technical Assistance Corporation (ATAC). We found that Labor had not conducted an adequate cost analysis and that there was a lack of rational support for the source selection of ATAC. We recommended that the option under ATAC's contract not be exercised and the requirement be competitively resolicited. Because of the above recommendation,

we found it unnecessary to consider URC's claim for proposal preparation costs based on our holding in Dynalectron Corporation, B-184203, March 10, 1976, 76-1 CPD 167, that the sustaining of a protest and a recommendation that an option not be exercised was a bar to a claim for bid or proposal preparation costs. However, in Amram Nowak Associates, Inc., B-187489, March 29, 1977, 77-1 CPD 219, the above portion of Dynalectron and the URC August 26, 1976, decision were overruled.

In the August 16, 1977, decision, we found that since about 95 percent of URC's volume of business was Government cost-type contracts and it was URC's accounting practice to recover initial bid and proposal preparation costs as general and administrative (G&A) expenses, it had been reimbursed its proposal preparation costs under its other contracts, even if entitled to the costs in the instant case.

Further, we held that the awarding of bid and proposal preparation costs was to make a bidder or offeror whole by compensatory damages, not punitive damages. Therefore, we stated that as URC had been reimbursed once, to award such costs again would result in a double payment and be in the form of a penalty against the Government.

URC's request for reconsideration is based on its contention that if it is awarded proposal preparation costs by our Office, it would credit such funds to its G&A pool, thereby avoiding any double payment. The Defense Contract Audit Agency (DCAA) has confirmed that if these funds were credited as proposed by URC, there would not be a double payment because the Government would receive approximately 95 percent of the funds back in the form of a reduction of future G&A costs. However, DCAA questions the necessity of this administrative process of paying URC, if entitled, and then crediting.

URC argues that there is no way to prove it was reimbursed all of its proposal preparation costs because by having to submit these costs under its G&A pool instead of receiving the costs from Labor, it may have

exceeded its G&A ceiling on its contracts and, therefore, not been reimbursed that portion of the costs.

Because of this possibility and the fact that by crediting the G&A pool, the risk of double payment would be eliminated and there is still the remaining 5-percent proposal preparation costs which have not been reimbursed, we will determine URC's entitlement to the award of proposal preparation costs.

Entitlement to bid or proposal preparation costs is controlled by the following standards enunciated by the United States Court of Claims in Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974):

> "The ultimate standard is, as we said in Keco Industries I, supra, whether the Government's conduct was arbitrary and capricious toward the bidder-claimant. We have likewise marked out four subsidiary, but nevertheless general, criteria controlling all or some of these claims. One is that subjective bad faith on the part of the procuring officials, depriving a bidder of the fair and honest consideration of his proposal normally warrants recovery of bid preparation costs. Heyer Products Co. v. United States, 140 F. Supp. 409, 135 Ct. Cl. 63 (1956). A second is that proof that there was 'no reasonable basis' for the administrative decision will also suffice, at least in many situations. Continental Business Enterprises v. United States, 452 F.2d 1016, 1021, 196 Ct. Cl. 627, 637-638 (1971). The third is 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 statutes and regulations. Continental Business Enterprises v. United States, supra, 452 F.2d at 1021, 196 Ct. Cl. at 637 (1971); Keco Industries, Inc., supra,

> 423 F.2d at 1240, 192 Ct. Cl. at 784. The fourth is that proven violation of pertinent statutes or regulations can, but need not necessarily, be a ground for recovery. Cf. Keco Industries I, supra, 428 F.2d at 1240, 192 Ct. Cl. at 784. The application of these four general principles may well depend on (1) the type of error or dereliction committed by the Government, and (2) whether the error or dereliction occurred with respect to the claimant's own bid or that of a competitor."

Once it is found that one of the above standards has been breached, there still remains the determination as to whether the agency's actions precluded the bidder or offeror from receiving an award to which it was otherwise entitled. Ampex Corporation, B-183739, November 14, 1975, 75-2 CPD 304. Under formally advertised procurements, one may readily ascertain which bidder is in line for award because 10 U.S.C. § 2305 (1970) mandates that award be made to the low responsive, responsible bidder. However, in negotiated procurements other factors make it difficult in most instances to determine which offeror would have received an award. Because of the uncertainties involved in the contractor selection process under negotiated procurements, our Office has stated that the appropriate standard in these cases should be that it was reasonably certain that an offeror would have been the ultimate awardee. International Finance and Economics, B-186939, October 25, 1977, 77-2 CPD 320.

In our August 26, 1976, decision, we found that Labor had not complied with section 1-3.807-2(c) of the Federal Procurement Regulations (FPR) (1964 ed. amend. 103) regarding the conduct of a cost analysis and that the source selection decision was not rationally supported. Therefore, we believe the standards for entitlement to proposal preparation costs contained in Keco Industries, supra, have been met. Accordingly, we must now look to see if CRC was reasonably certain of being the awardee absent the above-noted shortcomings of Labor.

After receipt of the prior request for reconsideration from URC, our Office requested Labor to perform a cost analysis of the URC and ATAC proposals to ascertain whether URC's and ATAC's costs were realistic. Labor submitted the results of its analysis to our Office and URC has objected to several of the methods of computation used by Labor to show that the ATAC proposal represented the best buy to the Government.

URC's proposal received a technical rating of 197.5 points and ATAC's was rated at 181.0. The proposal of URC contained an educational option which was not offered by ATAC. URC's best and final offer contained proposed costs of $328,190 and $310,759 without the educational option. ATAC's best and final offer was $264,116.

The cost analysis submitted by Labor at the request of our Office contains the following three calculations which it contends show ATAC represented the best buy to the Government. Where URC has objected to certain figures used by Labor and Labor has agreed to the corrections, we will use the corrected figures without special note. Also, we will use URC's proposed cost for its proposal without the educational option ($310,759) and we will utilize its 197.5-point score without any reduction regarding the educational option.

First, on a direct trade-off comparison, Labor states that URC was rated 8.25 percent higher technically than ATAC while being 17.66 percent higher in total cost. URC argues that its proposal was 9.1 percent higher technically and that Labor has confused evaluation points with percentages. To our view, this difference in statistical calculations is not controlling of the outcome of the matter; however, since the rest of the calculations are in percentages, we will utilize URC's figure that it was 9.1 percent higher technically.

Second, on a labor-hour comparison, Labor argues that ATAC is 4.06 percent lower costed than URC. This figure is arrived at by the following calculations:

Total Hours Proposed: ATAC - 14,320
URC - 16,192

$\frac{\$264,116}{14,320}$ = $18.44/hour of effort for ATAC

$\frac{\$310,754}{16,192}$ = $19.19/hour of effort for URC

$19.19 (URC)
-18.44 (ATAC)
$ 0.75 difference in favor of ATAC on per hour cost basis

$\frac{0.75}{18.44}$ = 4.06%

Finally, on a cost/technical point basis, Labor states that URC is $114.26 higher than ATAC. The following calculations result in this figure:

URC: $\frac{\$310,759}{197.5}$ = $1,573.46

ATAC: $\frac{\$264,116}{181}$ = $1,459.20

$1,573.46
-1,459.20
$ 114.26 difference between ATAC and URC cost/technical point basis.

URC contends that the cost/technical point basis is meaningless because URC's proposal offered a level of effort for two tasks specified in the RFP (Labor-sponsored seminars and Readings Project) that ATAC did not propose. URC argues it is impossible to compare the proposals on a total cost basis because of these discrepancies and the only possible way to make a comparison is on a per day level of effort cost. Using this method, URC would divide the cost/technical point figures arrived at above by the days of level of effort proposed (2,024 days for URC and 1,790 days for ATAC) to arrive at a cost factor

of .777 for URC and .815 for ATAC. URC contends that this calculation shows URC to have been the best buy.

Labor has responded that ATAC did propose a level of effort for these two tasks and, further, that it is improper to consider level of effort since it was already considered in the technical scores of the proposals. To consider level of effort again would give URC double benefit for its higher level of effort and technical score according to Labor.

URC argues that using level of effort in these calculations is proper because level of effort was not an evaluation factor in the technical rating of the proposals, while Labor states it was considered under the evaluation factor, "soundness and relevance of the overall program proposal." As both proposals contained staff allocation charts, we believe that, while not separately scored, level of effort proposed did play a part in the establishment of the technical ratings. While URC, in responding to Labor's argument that ATAC did propose a level of effort for the two above-mentioned tasks, contends that if ATAC did propose a level of effort, it was insufficient, we believe this would be accounted for also in the technical scores. Therefore, we do not find it necessary to reduce the URC cost proposal by the amount it alleges it proposed for the two tasks to make a comparison of the two proposals.

Finally, URC argues that ATAC received an excessive fixed fee under the resulting cost-plus-fixed-fee contract. URC's proposed fee was 7 percent and notes that ATAC's fee was 8.26 percent because URC, in its calculations, excluded the amount ATAC had subcontracted. There is no prohibition in the procurement regulations precluding a contractor from receiving a fee for its subcontracted portion of the contract. See FPR § 1-3.808-2(h) (1964 ed. amend. 10). Accordingly, we find nothing improper in the fee allowed ATAC.

Based upon our review of the cost analysis prepared by Labor and the contentions advanced by URC, we cannot

conclude that, absent the shortcomings of Labor in the conduct of the procurement, it was reasonably certain that URC would have received the award. The cost analysis shows that while URC was rated higher technically than ATAC, it was also higher priced. Therefore, an award would depend upon a trade-off between technical and cost. For an offeror to be reasonably certain of an award under a negotiated procurement, we believe that in most circumstances it would have to be high technically and low in cost. See International Finance and Economics, supra.

Accordingly, URC's claim for proposal preparation costs is denied.

R. F. Keller

Deputy Comptroller General
of the United States