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P. Lammelli, RT

DECISION



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

FILE: B-186311

DATE: June 22, 1978

**MATTER OF: University Research Corporation -
Reconsideration**

DIGEST:

On February 3, 1978, GAO denied claim for proposal preparation costs because it could not be determined that claimant was reasonably certain of receiving award but for agency's improper actions. Upon reconsideration, claimant contends that it is entitled to proposal preparation costs since it was "reasonably likely" (more than 50-percent probability) that claimant would have received award but for agency's improper actions. Prior decision is affirmed since correct standard to be applied is one of reasonable certainty, and such determination cannot be made in present case.

University Research Corporation (URC) has requested reconsideration of our decision in the matter of University Research Corporation - Reconsideration, B-186311, February 3, 1978, 78-1 CPD 98, in which we denied URC's claim for proposal preparation costs.

URC had originally protested against the award of a contract by the Department of Labor to American Technical Assistance Corporation (ATAC). The protest was sustained in our decision of August 26, 1976 (B-186311, 76-2 CPD 188), on the bases that Labor had not conducted an adequate cost analysis and that there was lack of rational support for the source selection of ATAC. We recommended that the option under ATAC's contract not be exercised and that the requirement be resolicited. We did not consider URC's claim for proposal preparation costs in the August 26, 1976, decision because of 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 made unnecessary the consideration of entitlement to proposal or bid preparation costs. However, in Amram Nowak Associates, Inc., B-187409, March 29, 1977, 77-1 CPD 219, this aspect of Dynalectron and the URC August 26, 1976, decision was overruled. In the interim, URC had requested reconsideration of its claim for proposal preparation costs. In our decision B-186311, August 16, 1977, the claim was denied, without deciding whether URC was entitled to costs, on the basis that the costs had been reimbursed by allocation to general and administrative expenses on other Government contracts.

URC again requested reconsideration on its claim for proposal preparation costs, resulting in our decision B-186311, February 3, 1978. In that decision, we modified the holding in B-186311, August 16, 1977, that payment of proposal preparation costs to an offeror who was primarily a Government cost-reimbursement contractor would result in double payment and considered the issue of URC's entitlement to proposal preparation costs since URC was not completely reimbursed and agreed to credit the general and administrative costs account from any payment it might receive pursuant to its claim. However, we denied URC's claim for proposal preparation costs, although we found that URC met the standards for entitlement to proposal preparation costs contained in Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974), because we could not find that it was "reasonably certain" that URC would have received award but for the improper handling of the procurement by the Department of Labor.

In its request for reconsideration of our February 3, 1978, decision, URC takes issue with our use of the "reasonably certain" standard in determining if a claimant would otherwise be entitled to award. URC argues that, in cases where the improper action of the agency makes it difficult for a claimant to show that it was reasonably certain that the claimant would have received award but for the arbitrary and capricious agency actions, we should apply a much more liberal "reasonable likelihood" standard. URC contends that "reasonable certainty" of award is too difficult to show, and, therefore, we should allow recovery if the claimant can show that the probability of award was "reasonably likely" or over 50 percent. We do not agree.

In our February 3, 1978, decision, we applied a two-pronged test. We first determined that the Department of Labor's actions fell within one of the categories of arbitrary and capricious conduct outlined in Kebo Industries, Inc. v. United States, supra. The second aspect of the test involved consideration of whether Labor's actions precluded URC from receiving "an award to which it was otherwise entitled"--a test derived from Ampex Corporation, B-183739, November 14, 1975, 75-2 CPD 304, and cases cited therein. We believe that the correct standard to use in applying this second test is that it must be "reasonably certain" that the claimant would have received award but for the agency's improper conduct of the procurement. We are not convinced that the standard should be relaxed because of the difficulties encountered by the claimant in meeting the standard in the present case.

In the URC February 3, 1978, decision, we carefully reviewed the cost analysis prepared by the Department of Labor and all arguments advanced by URC in support of its claim. We determined that, although URC was rated higher technically than ATAC, it was also higher priced, and, therefore, award would have to be based on a trade-off between cost and technical. Accordingly, we were unable to find that URC would have been reasonably certain of award.

URC now contends that its offered price would have been less if it had been aware that the contract awarded would be based on a 9-month performance period rather than the 12-month performance period specified in the request for proposals. According to URC, both its total cost and its cost per day would have been reduced if a 9-month performance period had been used in calculating its budget. Thus, it is argued that a lower price would have been offered. However, the offer was never prepared or calculated on a 9-month basis and that it would have been less than a proportionate reduction on that basis before the competition was disclosed is purely speculative. Moreover, if the cost was not the lowest, it would be equally conjectural what the technical and cost trade-off would have been. Accordingly, the circumstances do not warrant a determination that it was reasonably certain that URC would have been awarded the contract had the procurement been properly conducted.

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Accordingly, our decision of February 3, 1978, is affirmed and the claim of URC for proposal preparation costs is denied.

R. Kellum
Acting Comptroller General
of the United States