

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

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**FILE:** B-212996.2**DATE:** August 1, 1984**MATTER OF:** Unified Industries Incorporated**DIGEST:**

1. Fourth low bidder in the second step of a two-step, formally advertised procurement may have a valid claim for bid and proposal preparation costs if it can show that because of arbitrary or capricious agency action it was induced to incur the costs of participating in the procurement.
2. Claim for bid and proposal preparation costs incurred under a two-step, formally advertised procurement is denied where the record does not indicate that the agency misled offerors into believing that the owner of proprietary data needed to perform the contract was obligated to release such data.

Unified Industries Incorporated claims the bid and proposal preparation costs it incurred in connection with request for technical proposals (RFTP) No. N61339-83-R-0089 and invitation for bids (IFB) No. N61339-83-B-0026, a two-step, formally advertised procurement conducted by the Naval Training Equipment Center, Orlando, Florida. We deny the claim.

The procurement was for technical publications and services relating to the Enhanced Shipboard Simulator, a training device that the Navy had procured from the manufacturer, Micronics, Inc., under a separate contract. The first-step RFTP provided that the successful offeror would be responsible for gathering all data needed to perform the contract and required each offeror to describe in its proposal the arrangements made with Micronics to obtain the data. An amendment to the RFTP informed offerors that Micronics was under no obligation

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to provide data or liaison but that the firm had agreed to provide data to all interested contractors at the same price.

Four offerors submitted technically acceptable first-step proposals. In response to the second-step invitation for bids, the four offered to perform at the following prices:

Craftsmen Corp.	\$299,995.00
Micronics, Inc.	369,137.00
Instructional Development Corp.	557,220.50
Unified Industries, Inc.	817,000.00

Shortly after bid opening, Micronics informed the agency that it and Craftsmen had not consummated an agreement concerning access to the required data and that it therefore would protest an award to any firm other than itself. The agency determined that given the necessity for access to the data and Micronics' control over this information, competition had been unduly restricted. The agency then canceled the solicitation. No one, including Unified, has protested that action.

The basis for Unified's claim is that the agency misled offerors into believing that Micronics was committed to providing the required data when in fact no such commitment existed. Unified contends also that issuance of the solicitation despite the agency's failure to assure that the data would be made available was reckless, arbitrary and capricious. For these reasons, Unified says that it is entitled to be paid its bid and proposal preparation costs, including a \$10,000 fee Unified says it paid Micronics to obtain the data.

The recovery of bid or proposal preparation costs is based on the theory that in issuing a solicitation the government enters into an implied contract with bidders or offerors that their bids or proposals will be fairly and honestly considered. Hub Testing Laboratories--Claim for Costs, B-199368.3, June 18, 1982, 82-1 ¶ CPD 602. This implied contract may be breached, and the bidder or offeror thus entitled to recover its costs, where the record

indicates both that the agency's actions were arbitrary and capricious and that these actions prejudiced the claimant. See, e.g. Amram Nowak Associates, Inc., 56 Comp. Gen. 448 (1977), 77-1 CPD ¶ 219. Generally, to establish the requisite prejudice, the claimant must show that but for the unfair agency action it would have had a substantial chance of receiving an award. Morgan Business Associates, Inc., 619 F.2d 892 (Ct. Cl. 1980); Space Age Engineering, Inc., B-209543.2, April 19, 1984, 84-1 CPD ¶ 447.

In this case, the agency urges us to dismiss the claim for costs because, as the fourth-low bidder, Unified did not have a substantial chance for award. We have recognized, however, that a valid claim for costs may exist even when no award is possible if it can be shown that through arbitrary and capricious agency action bidders were put to needless expense in preparing their bids. See Bean Dredging Corporation, B-209374, July 6, 1983, 83-2 CPD ¶ 56 (no proof that agency solicited bids with knowledge that the bids could not be considered). Thus, Unified may be entitled to recover its costs if, as it alleges, it was induced by improper agency action to incur the costs of participating in this procurement. As discussed below, however, Unified's allegations of improper agency action are not supported by the record.

Unified's contention that the agency misled competitors concerning Mictronic's commitment to provide the required data is based on a statement contained in amendment No. 0002 to the RFTP. The amendment was structured in a question and answer format; the relevant portion is as follows:

"Is Mictronics obligated to provide data and liaison?"

"Answer - No, however, Mictronics has agreed to provide data to all interested contractors at the same price."

The record indicates that the answer to this question was based on telephone discussions between Mictronics and agency personnel during which Mictronics indicated that it would not release the data to its competitors but that,

should its bid not be low, it would enter into agreements on a case-by-case basis and that it would make the data available to all vendors at the same price. To this end, Mictronics provided firms participating in the procurement with a proposed agreement providing for Mictronics to release the data to the successful bidder and to provide training personnel in exchange for one-half of the payments due under the contract, a promise not to compete with Mictronics or to disclose its proprietary information, and an advance payment of \$10,000.

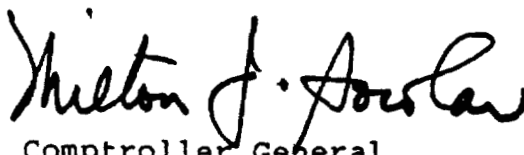
We fail to see how the answer to Question 11 could be read as anything other than an unambiguous statement that Mictronics was under no obligation to release its data. Although Unified contends that the response suggests that Mictronics was so obligated, this interpretation completely ignores the direct response to the question posed: "No," Mictronics was not obligated to provide data. In our view, the remainder of the response merely informed the offerors that Mictronics had agreed to contract for the release of the data and that its price for such contracts would be the same for all. Read as a whole, the solicitation clearly informed offerors that data needed to perform the contract were in the possession of Mictronics, that Mictronics was at that time under no obligation to release this information, and that an agreement with Mictronics concerning release of the data would be the responsibility of the contractor.

Further, Unified's contention that the agency's issuance of the solicitation without assuring that Mictronics would provide the required data was arbitrary and capricious is both untimely and without merit. As indicated, it was apparent from the solicitation that arrangements for obtaining necessary data would be the responsibility of the offerors, not the agency. Any objection in this regard should have been raised prior to the closing date for the receipt of proposals. 4 C.F.R. § 21.2(b)(1) (1984). In any event, the agency was not required to provide for release of data so long as it did not mislead offerors to believe that it had. In addition, from our review of the record, we believe the agency reasonably could have concluded that Mictronics would make the data available were it not the successful bidder.

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We recognize that participation in this procurement, as in all procurements, required offerors to incur expenses and assume risks, including the risk that the solicitation would be canceled. In the absence of evidence of arbitrary or capricious agency action, however, the expenses are simply part of the cost of doing business and are not recoverable from the government.

We deny the claim.

*for*   
Comptroller General  
of the United States