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DECISION

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

FILE: B-184629 DATE: March 24, 1978

MATTER OF: Donald Clark Associates

DIGEST:

1. No formal contract arose from negotiations between protester and Office of Education where procurement was set aside for SBA section 8(a) program and no award documents were executed by Office of Education or SBA.

2. Government is not estopped to deny existence of contract since record does not show either that Government intended its conduct to be acted upon by protester or that Government acted in manner that reasonably led protester to believe that its conduct was so intended.

3. Claim for expenses incurred in anticipation of award is denied because protester has not affirmatively established that procuring activity acted without reasonable basis or in bad faith prior to cancellation of project requirement due to lack of funds and statutory prohibition on type of procurement contemplated.

Donald Clark Associates (DCA) protests the cancellation of section 8(a) (15 U.S.C. § 637(a) (1976)) Small Business Act Requirement No. OE-75-004 issued by the Office of Education (OE), Department of Health, Education, and Welfare (HEW). This requirement called for a survey of former Right to Read Program grantees.

DCA initially instituted this protest with us in a letter dated July 28, 1975. On December 9, 1975, DCA informed us in writing that it desired to withdraw the protest without prejudice pending the outcome of discussions with HEW concerning some type of settlement. After subsequent extensive efforts on the part of OE to fund an award proved unsuccessful, DCA reinstated the protest in a letter dated October 18, 1977, received by us on October 20, 1977.

DCA contends that OE failed to meet the requirements of the Cooperative Research Act (20 U.S.C. § 331, et seq. (1970)), which required an award of a contract by June 30, 1975, under the proposal it submitted in response to OE's requirement. DCA further contends that OE acted arbitrarily in June 1975 by placing the requirement into a priority II category for award in fiscal year 1976.

In addition to protesting the cancellation of the requirement, DCA alleges that it met all required qualifications, negotiated in good faith with OE, and completed contract negotiations prior to June 30, 1975. As a consequence, DCA believes that it has a legitimate entitlement either to an award of a contract or to compensation for costs incurred in anticipation of a contract award. With respect to its claim for costs, DCA states that in pursuing a contract under the proposal it submitted it incurred certain costs, received staff commitments, and made budgetary plans for calendar years 1975 and 1976 based on the anticipation of receiving a contract.

In a letter dated January 3, 1975, OE informed the Small Business Administration (SBA) that a "Survey of Former Right to Read Grantees" had been identified for award under that agency's section 8(a) program. SBA was requested to recommend four firms for consideration. SBA subsequently concurred with the suitability of OE's requirement and submitted for technical evaluation the names of four firms, one of which was DCA.

By letter dated March 11, 1975, OE informed these four firms of the survey requirement. The firms were specifically informed that a proposal was not being requested. Instead, OE asked that these firms send a one- to three-page abstract of experience data and personnel qualifications establishing a capability to perform the survey. After reviewing the abstracts then submitted by each of these firms, OE determined that DCA received the highest technical evaluation. Consequently, DCA was selected to submit a proposal.

OE informed SBA of DCA's selection on April 24, 1975. OE requested that a schedule for negotiation of a contract be established if it concurred in the selection of DCA. It should be noted here that DCA alleges that it was informed by Region IX of SBA during the last week of April

that it "had been selected as the most qualified contractor." In any event, SBA informed OE on May 2, 1975, that it desired to enter into a contract to conduct the required survey. OE was requested to conduct negotiations with DCA in accordance with Federal Procurement Regulations (FPR) § 1-1.713 (1964 ed. amend. 100).

On May 12, 1975, OE issued a request for proposal (RFP) to DCA, which was due no later than 3:30 p.m. (local time) on May 28, 1975. DCA submitted its proposal on May 27, 1978. OE immediately transmitted it to its Evaluation Panel. After a review, the Panel returned the proposal along with its findings to OE on June 9, 1975. Negotiations with DCA were conducted by telephone between June 9 and June 13, 1975.

Although OE had completed negotiations with DCA by June 13, 1975, a fiscal year 1975 contract was not awarded in large part because of a freeze on award of management consultant contracts imposed on June 5, 1975, by HEW. Concern over funding in this area was raised on April 18, 1975, when the Deputy Assistant Secretary, Finance, for HEW requested all procuring offices within the Department to provide data for monitoring and reporting in order to insure compliance with title IV, section 408 of the fiscal year 1975 Labor-HEW Appropriation Act (P.L. 93-517). Section 408 of the act provided that funds used to pay and/or support contract services by profitmaking, consulting firms not exceed the fiscal year 1973 level.

On June 5, 1975, HEW directed all its offices to immediately stop all new contract awards to profitmaking organizations or individuals for consultant and/or management consultant services which would be funded by the Labor-HEW Appropriations Act for fiscal year 1975. HEW suggested that negotiations under RFP's calling for the above types of services be continued up to the point of a proposed definitive contract but that no award be made until notification by it.

HEW issued definitive ground rules for consultant service contracts pursuant to P.L. 93-517 on June 12, 1975. Unfunded RFP's in fiscal year 1975 were to be funded in fiscal year 1976 unless a reason existed prohibiting funding other than the section 408 restriction.

The ground rules required the classification of then current RFP's into three priorities. Priority I RFP's were delineated as those whose failure to award in fiscal year 1976 would result in immediate adverse impact upon HEW's ability to meet its obligations. Priority II RFP's were delineated as important projects whose schedule should be maintained if at all possible. Projects which could be deferred were to be classified as Priority III projects. The OE RFP upon which DCA submitted its proposal was classified as Priority II using the above criteria.

OE did intend to make an award to DCA in fiscal year 1976. On July 18, 1975, however, the contracting officer was informed that the Cooperative Research Act, which had administered the Right to Read Program, expired on June 30, 1975. As of July 1, 1975, the program was under title VII of P.L. 93-380. This act did not authorize OE to award a contract to a profitmaking organization for the type of requirement contemplated in the RFP to DCA. Consequently, OE informed both SBA and DCA on July 21, 1975, that the requirement was canceled.

Contrary to DCA's assertion, the record does not indicate that any formal contract arose out of the negotiations between DCA and the Government. In order for a binding contract to result, the contracting officer must unequivocally express an intent to accept an offer. Laurence Hall d/b/a Halcyon Days, B-189697, February 1, 1978. Also, it is well settled that the acceptance of a contractor's offer by the Government must be clear and unconditional and it must appear that both parties intended to make a binding agreement at the time of the acceptance of the contractor's offer. See 21 Comp. Gen. 605, 609 (1941); Laurence Hall d/b/a Halcyon Days, supra.

Here, the OE contracting officer did not unequivocally express an intention to accept DCA's proposal. Although DCA alleges that it was notified during the latter part of April 1975 that it was selected as the most qualified contractor, the May 12, 1975, notification merely informed DCA that it was being invited to submit a proposal. Furthermore, the final paragraph on the first page of this notification stated:

> "This RFP does not commit the Government to pay any cost for the preparation and

> submission of a proposal. It is also brought to your attention that the Contracting Officer is the only individual who can legally commit the Government to the expenditure of public funds in connection with this proposed procurement."

More importantly, with regard to the fact that the negotiations between DCA and OE were completed on June 13, 1975, it is SBA itself which enters into a formal contract with other Government agencies under the section 8(a) program. See 15 U.S.C. § 637(a). The May 2, 1975, letter from SBA to OE instructed the latter to transmit a memorandum of the negotiations with DCA to the SBA Program Development Specialist in San Francisco, California. The letter went on to state that any agreements reached as a result of the negotiations had to be approved by an authorized representative of SBA. The letter concluded by stating that written certification as to SBA's competency to perform the contract would be supplied by SBA at the conclusion of negotiations. From the record before us, no such certification was ever issued by SBA.

Finally, FPR § 1-1.713-3(d)(1) (1964 ed. amend. 100) provides that the procuring agency shall prepare for execution by the SBA Standard Form 26, Award/ Contract, and Standard Form 36, Continuation Sheet. No award documents were executed by SBA. Thus, since no award was made to SBA, no formal contract came into existence. Cf. A. B. Machine Works, Inc., B-187563, September 7, 1977, 77-2 CPD 177.

However, the Government may be estopped from denying any contract exists with DCA if the following elements are present:

(1) The Government knows the facts;

(2) The Government intends that its conduct shall be acted on or the Government so acts that the offeror has a right to believe that the Government's conduct is so intended;

(3) The offeror is ignorant of the true facts; and

(4) The offeror relies on the Government's conduct to his injury.

See Emeco Industries, Inc. v. United States, 202 Ct. Cl. 1006 (1973); Fink Sanitary Service, Inc., 53 Comp. Gen. 502, 506 (1974), 74-1 CPD 36.

The record does not demonstrate that the Government either intended that its conduct be acted on by DCA or acted in a manner that led DCA to reasonably believe that the Government's conduct was so intended. The May 12, 1975, OE notification letter to DCA emphasized that the contracting officer was the only individual who could expend public funds on the proposed procurement. While it may be true that from March 1975 to July 21, 1975, DCA acted in good faith with OE, there was no instance after the issuance of the RFP where the procuring agency informed DCA that a contract was or would be awarded. SBA's April 1975 statement to DCA prior to the issuance of the RFP that DCA was selected as the "most qualified contractor" was quickly vitiated by OE's May 12, 1975, notification letter. Any thought that DCA may have had about whether it had a contract with the Government should have been dispelled by this letter.

Consequently, the Government is not estopped from denying the existence of a contract with DCA.

Turning to DCA's claim for costs incurred in anticipation of award, the courts, in response to claims that the Government did not fairly and honestly consider proposals submitted, have evolved standards applicable to these claims. In Keco Industries, Inc. v. United States, 428 F.2d 1233 (1970), the Court of Claims held that, if a claimant's bid was not fairly and honestly considered, then the claimant should be allowed to recover only those costs incurred in preparing its bid. See also McCarty Corporation v. United States, 499 F.2d 633, 637 (1974); Heyer Products Company, Inc. v. United States, 140 F. Supp. 409, 413-414 (1956).

The courts have permitted recovery of certain items of expense incurred after bid opening or, in the case of negotiated procurements, after the closing date for receipt of proposals only in circumstances where the Government would be estopped to deny the existence of a contract. Emeco Industries, Inc., supra; United States v. Georgia - Pacific Company, 421 F.2d 92 (1970); see also T. C. Daeuble - Reconsideration, B-186889, March 3, 1977,

77-1 CPD 157. Since the Government is not estopped here from denying the existence of a contract, there is no basis for a recovery by DCA for costs incurred after May 28, 1975, the closing date for the receipt of its proposal.

As to costs incurred after verbal notification of selection to submit a proposal but prior to May 28, 1975, DCA alleges that it "proceeded to plan for a contract in terms of staffing and other resources." Such alleged costs are for the most part unrelated to any actual costs that DCA would have had in preparing its proposal. Nevertheless, we must assume that there were some expenditures directly related to the preparation of DCA's proposal even though their precise nature has not been elaborated by DCA.

In Keco Industries, Inc. v. United States, 492 F.2d 1200 (1974)(Keco II), the Court of Claims outlined the basic standard for determining whether the Government fairly and honestly considered a proposal. The ultimate standard is whether the agency's actions were arbitrary and capricious toward the claimant. DCA has alleged that OE was in part negligent. Even assuming arguendo that DCA is correct, mere negligence is not sufficient to support a claim for proposal preparation costs. See Austin-Campbell Co., B-188659, August 9, 1977, 77-2 CPD 99.

Keco II indicates four ways by which the ultimate standard of arbitrary and capricious conduct may be satisfied: (1) subjective bad faith on the part of procuring officials which deprives the offeror of a fair and honest consideration of his proposal; (2) no reasonable basis for the administrative action; (3) a sliding degree of proof commensurate with the amount of discretion afforded the procuring officials; and (4) proven violation of pertinent statutes or regulations which may suffice for recovery. We have adopted these standards. T & H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345; A.R.F. Products, Inc., B-186248, December [illegible], 1976, 76-2 CPD 541. In addition, we require the protester-claimant to present evidence and argument which affirmatively establish the liability of the United States for proposal preparation costs. DOT Systems, Inc., B-183[illegible], June 11, 1976, 76-1 CPD 368.

We have held an agency determination that adequate funds are not available for contract obligation to be sufficient reason to reject all bids received on a solicitation. TIMCO, B-186177, September 14, 1976, 76-2 CPD 242; International Multi Services, B-183333, June 13, 1975, 75-1 CPD 359; Ocean Data Systems, Inc., B-180248, August 16, 1974, 74-2 CPD 103. Also, the courts, as well as our Office, have recognized the right of an agency to cancel a solicitation under either statute or solicitation provisions when it is deemed in the Government's best interest. See International Multi Services, supra. Cf. Robert F. Simmons & Associates v. United States, 360 F.2d 962 (1966). Furthermore, rejection of all bids and cancellation of a solicitation because of insufficient funds are required by the Anti-Deficiency Act, 31 U.S.C. § 665(a) (1970), which prohibits expenditures of contract obligations in excess of appropriated funds or apportionments.

HEW states that the program legislation for the survey requirement, if a contract award had been made in fiscal year 1975, would have been the Cooperative Research Act which specifically provided for "surveys" to be carried out by "private organizations." See 20 U.S.C. § 331a. (1970). Beginning July 1, 1975, the Right to Read Program was covered exclusively by P.L. 93-380. This program legislation, according to HEW, does not provide for surveys by private organizations such as is contemplated in the RFP to DCA. Thus, in addition to the funding problem that existed with this procurement, there was no statutory authorization for it beginning July 1, 1975.

DCA, however, strenuously objects to the fact that OE continued to negotiate with it when OE was aware all along of the funding problem connected with the project. In effect, DCA is contending that the cause of the costs incurred by it was the action of OE procurement officials in unreasonably continuing the procurement. Therefore, it is not the procuring agency's handling of the project's funding which directly contributed to whatever proposal costs DCA incurred. Rather, it was the procuring agency's making DCA undergo the cost of submitting a proposal which should not have been done.

We do not believe that, given the entire situation of this procurement, there was any bad faith on the

part of OE procurement officials. We also are unable to conclude on the basis of the record that there was no reasonable basis for their administrative actions. The only suggestion of any violation of pertinent statutes or regulations is the broad statement by DCA that the Cooperative Research Act required a contract award by June 30, 1975. This statement in our opinion is insufficient. There was no violation of the act. The statute did not direct awards; it only "authorized" them to be made.

While it is true that OE, like all other offices within HEW, was put on notice in April 1975 of the funding limitations imposed by section 408 of the Labor-HEW Appropriation Act for fiscal year 1975, it was not until 4 days before telephone negotiations were conducted with DCA on its proposal that OE knew that there were no funds available in fiscal year 1975 for the procurement. Under the criteria imposed by HEW, OE placed the DCA procurement into a priority II category which means that award was to be made as soon as possible in fiscal year 1976. Presumably, then, OE conducted negotiations with DCA between June 9, 1975, and June 13, 1975, on the firm belief that a contract would be awarded immediately after June 30, 1975. Furthermore, the record establishes that the OE contracting officer was unaware until July 18, 1975, that there was any statutory prohibition against entering into the type of contract contemplated under the project.

Accordingly, the protest is denied. Protester's claim for costs incurred in anticipation of an award is also denied.

R.F. Keller

Deputy Comptroller General
of the United States