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DECISION

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

Protest of Proposal Rejection as Nonresponsive

FILE: B-200676 DATE: March 11, 1981

MATTER OF: Ultra Publicaciones, S.A.

DIGEST:

1. Failure of contracting officer to award on initial proposal basis to lowest priced technically acceptable offeror was unreasonable and contrary to solicitation.

2. Claim for proposal preparation costs is allowed since record establishes agency's actions were unreasonable in rejecting alternate proposal which should have been accepted for award on initial proposal basis.

Ultra Publicaciones, S.A. (Ultra), has protested the rejection of its proposal submitted under request for proposals (RFP) No. DAKF71-80-R-0205 issued by the Department of the Army, Fort Clayton, Panama.

The RFP was for language translation services for an estimated 3,000 pages of military instructional material from English to Spanish. Two offers were received and award was made to Vera M. Pimento (Pimento) at a price of $12 per page on ~~an~~ initial proposal basis. Ultra's offer contained four alternate proposals, each differing as to whether the Government or Ultra furnished certain material. Ultra's prices for the four alternates were $8.99, $9.11, $9.31, and $9.99 per page.

The contracting officer rejected Ultra's proposal as nonresponsive because, by submitting alternate proposals, Ultra changed the terms of the RFP.

The Army has recognized that Ultra's proposal should not have been rejected "out of hand" but that the proposal should have been reviewed to determine

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whether it was either technically acceptable or susceptible of being made acceptable through negotiations. The Army points out that at least the alternate proposal priced at $9.31 (a price significantly lower than Pimento's) fell in this category. The Army explained outright rejection to be:

> "* * * the result of the Contracting Division's misapplication of formal advertising procedures to a negotiated procurement. Perhaps it stemmed from the Contracting Division's lack of familiarity with negotiation procedures. Until the Panama Canal was returned to the Republic of Panama, procurements were handled much as in the continental United States, with preference for formal advertising. However, Panama is now considered a foreign country and contracting there is now handled under negotiated procedures pursuant to 10 USC 2304(a)(6) as in any foreign country. Previously the procurement personnel assigned in Panama were generally handling procurements under formally advertised procedures; hence the use of the term 'responsiveness,' not 'technical acceptability' and the failure to review all proposals received to determine whether discussions would render a particular proposal technically acceptable, especially where only one proposal was found to be in the competitive range and significant savings could possibly result from holding discussions."

Further, while the RFP contained an estimate of 3,000 pages for the 12-month requirements contract, the first delivery order placed with Pimento was for 3,991 pages or almost 33 percent more than the entire year's requirement. The Army recognizes that the Government's estimate should be based on the best information available.

In view of the misapplication of formally advertised procedures to the negotiated procurement and the faulty Government estimate, the Army has recommended that the contracting officer issue no more delivery orders under Pimento's contract. If new requirements arise for translation services, a new RFP will be issued with proper estimates and handled in accordance with proper negotiation procedures. However, since more than 50 percent of the initial delivery order has been performed, the Army believes it would not be in the best interest of the Government to disturb that work already ordered from Pimento.

Our Office has no objection to the proposed action by the Army and believe it to be the proper corrective action in this situation.

Ultra argues that while the Army has recognized the validity of its protest, the remedy is meaningless to Ultra since Ultra receives no work under the contract. Therefore, Ultra has presented a claim for proposal preparation costs and the cost of proceeding with its protest as compensation for the Army's improper action.

The recovery of bid or proposal preparation costs is based on the theory that the Government, when issuing a solicitation, enters into an implied contract with bidders or offerors that their bids or proposals will be fairly and honestly considered. Heyer Products Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956). Not every irregularity, however, entitles a bidder or offeror to compensation for the expenses incurred in preparing a bid or proposal. Keco Industries, Inc. v. United States, 492 F.2d 1200, 1203 (Ct. Cl. 1974) (hereinafter Keco II). The court in Keco II set forth the following standard and subsidiary criteria for recovery of preparation costs:

> "The ultimate standard is, * * * 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 * * *. 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 * * *; Keco Industries, Inc. v. United States, supra, 428 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 * * *. 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 competitior." Keco II at 1203-04.

Pursuant to those criteria, bid and proposal preparation costs have been awarded (1) where there has been a clear violation of a statute, see Continental Business Enterprises, Inc. v. United States, 452 F.2d 1016 (Ct. Cl. 1971), or of a procurement regulation, Armstrong & Armstrong, Inc. v. United States, 356 F. Supp. 514 (E.D. Wash. 1973), aff'd 514 F.2d 402 (9th Cir. 1975); The McCarty Corp. v. United States, 499 F.2d 633 (Ct. Cl. 1974); T & H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345;

William F. Wilke, Inc., 56 Comp. Gen. 419 (1977), 77-1 CPD 197, and (2) where the Government's action was without a reasonable basis and therefore was arbitrary and capricious. Mark A. Carroll and Sons, Inc., B-194419, November 5, 1979, 79-2 CPD 319; Amram Nowak Associates, Inc., 56 Comp. Gen. 448 (1977), 77-1 CPD 219; Bromfield Corporation, B-187659, May 5, 1977, 77-1 CPD 309; International Finance and Economics, B-186939, October 25, 1977, 77-2 CPD 320. However, Government action, to be arbitrary or capricious, must result from something more than "ordinary" or "mere" negligence. Groton Piping Corporation and Thames Electric Company (joint venture) - Claim for Bid Preparation Costs, B-185755, June 3, 1977, 77-1 CPD 389; Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344.

Here, we find the actions of the contracting officer in rejecting Ultra's proposal and awarding to Pimento to have been unreasonable and contrary to the solicitation, which did not preclude evaluation and award on the basis of Ultra's acceptable alternate proposal. Our review of the record reveals that if Ultra's alternate 3 proposal had been considered as required by the solicitation, it would have been found technically acceptable. The failure to consider Ultra's proposal, in view of Ultra's lower price, deprived Ultra of the award. Therefore, we find Ultra is entitled to recover its proposal preparation costs. However, Ultra's claim for the cost of pursuing the protest is not reimbursable. Tennessee Valley Service Company, B-188771, December 8, 1977, 77-2 CPD 442.

Ultra should submit substantiating documentation to the Army to permit the agency to determine the amount to which Ultra is entitled. If the Army and Ultra cannot agree on quantum, the matter should be returned to this Office for resolution.

The protest is sustained and the claim allowed.

Milton J. Socolar

Acting Comptroller General
of the United States