DECISION

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

FILE: B-208662.2 **DATE:** April 2, 1984

MATTER OF: System Development Corporation and Cray Research, Inc.--Request for Reconsideration

DIGEST:

1. Decision sustaining a post-award protest but not recommending corrective action is not "legally erroneous" when based on one of many factors normally taken into account in connection with a determination as to whether corrective action is appropriate. Any one factor--in this case the fact that the system had been delivered and installed and termination and site preparation costs thus would have been substantial--properly may be determinative of the feasibility of corrective action.

2. A proposal preparation cost claim is sustained where: (1) the agency's acceptance of the awardee's proposal was unreasonable, and thus arbitrary and capricious, in view of the awardee's clear failure to satisfy a material certification provision; and (2) the claimant was one of only two offerors and had a clear chance at the award, but the agency's arbitrary action makes it impossible to determine precisely how substantial that chance was.

3. The time limitations set forth in GAO's Bid Protest Procedures do not apply to proposal preparation cost claims.

4. There is no requirement that a proposal preparation cost claim filed in GAO be accompanied by detailed evidence as to the amount claimed.

System Development Corporation and Cray Research, Inc. (SDC/Cray) request reconsideration of our decision System Development Corporation and Cray Research, Inc., B-208662, August 15, 1983, 83-2 CPD 206. In that decision, we sustained SDC/Cray's protest of a Department of Commerce contract award to Control Data Corporation (CDC) for a class VI computer system, but determined that corrective action would not be appropriate. SDC/Cray requests that we reconsider our determination in this regard. Alternatively, SDC/Cray claims it is entitled to recover its proposal preparation costs. We affirm our prior decision and sustain SDC/Cray's claim for proposal preparation costs.

We sustained SDC/Cray's protest on the ground that Commerce accepted CDC's proposal for award without first requiring CDC to fully satisfy the certification requirement under paragraph F.1.2 of the Request for Proposals (RFP). The clause plainly required each offeror to certify that its proposed computer system had been installed and accepted, had been in use in normal data processing activities for at least 6 months at three sites (one with an IBM 360/370 interface), and had operated at those sites at a 95 percent availability level. We found that CDC never satisfied the first two portions of this requirement, and although it did certify to 95 percent availability at three sites, we found it unclear whether the certification was based on availability of the full 1 million words of primary memory required under the solicitation. Since the certification encompassed material system requirements, we concluded that Commerce improperly made award to CDC before it had fully satisfied the requirements under the certification clause. We deemed corrective action inappropriate, however, in view of the fact that CDC's computer system had been installed.

Reconsideration Request

SDC/Cray contends that our decision regarding corrective action is "legally erroneous" because we based it solely on the fact that CDC's system had been installed and did not address numerous other factors considered in previous decisions. Among the factors SDC/Cray argues should have been discussed are the amount of termination costs, the good

faith of the parties, the extent of performance, the potential impact of termination upon the agency's mission, and the degree of prejudice to the competitive system. SDC/Cray believes that installation of CDC's system should not, by itself, have been found sufficient to render corrective action impracticable.

We do not agree. Simply stated, any one of the several factors identified by SDC/Cray may be controlling with respect to whether corrective action is appropriate. Here, it was clear that the equipment had been manufactured, delivered and installed. While we did not explicitly so state, it was also clear that this constituted substantial performance of CDC's contract ($8.5 million for purchase of the system), and that at a minimum the government would be liable for significant costs if CDC's contract could be terminated at that point. Furthermore, as Commerce has confirmed, replacement of CDC's system would have entailed approximately $700,000 in new site preparation, training and other expenses, and would have delayed significantly the activity's efforts to improve its weather forecasting. At the same time, there was no allegation or evidence of fraud or bad faith on Commerce's part. We continue to believe that under the circumstances corrective action in this case would not be in the government's best interest.

Proposal Preparation Cost Claim

As a preliminary matter, Commerce argues that SDC/Cray's claim should be dismissed as untimely on the ground that it was not raised in SDC/Cray's original protest submission. Alternatively, Commerce urges dismissal based on SDC/Cray's failure to submit proof as to the amount of its claim. SDC/Cray's claim is dismissible on neither ground. The time limitations set forth in our Bid Protest Procedures, 4 C.F.R. Part 21 (1983), do not apply to proposal preparation cost claims submitted in connection with timely protests. See Martel Laboratories, Inc., B-194364, August 7, 1979, 79-2 CPD 91. The claim therefore is timely. There also is no requirement that proposal preparation cost claims filed in our Office be accompanied by detailed evidence as to the amount claimed. We frequently have ruled on the issue of entitlement alone, directing the claimant to establish the amount to which it is entitled by submitting substantiating documentation to the agency.

See John F. Small & Co., Inc., B-207681.2, December 6, 1982, 82-2 CPD 505; DelRalco, Inc., B-205120, May 6, 1982, 82-1 CPD 430. We will follow that approach here.

An unsuccessful offeror will be entitled to recover the costs of preparing its proposal where the agency has acted arbitrarily or capriciously in evaluating either the claimant's or another offeror's proposal, and the claimant would have had a substantial chance of receiving the award but for the agency's improper action. See Heli-Jet Corporation v. United States, 2 Cl. Ct. 613 (1983). We find that the facts in this case satisfy both requirements.

In considering whether improper agency action was arbitrary or capricious, we will take into account the four factors enumerated by the Court of Claims in Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974): (1) whether the action was motivated by subjective bad faith on the part of procurement officials; (2) whether there was no reasonable basis for the action; (3) the extent to which the action taken fell within the discretion of contracting personnel; or (4) whether the action violated pertinent statutes or regulations. We find the second factor relevant here.

The record shows that Commerce was cognizant of the certification requirement under paragraph F.1.2 and CDC's failure to satisfy this requirement in its initial proposal. Commerce officials advised CDC on at least two occasions--once following receipt of CDC's initial proposal and again during negotiations--that its proposal did not contain a satisfactory certification. Under these circumstances, we believe Commerce should have been aware of the deficiency in CDC's proposal. We find that Commerce's acceptance of CDC's proposal notwithstanding this deficiency was without a reasonable basis.

Commerce submits that acceptance of CDC's proposal was reasonable because its staff's examination of CDC's technical data and discussions with CDC provided satisfactory assurance that the certification requirement could be met. It also notes that this procurement was negotiated, not advertised, and that the contracting officer thus had broad discretion in conducting the competition. We reject Commerce's position.

While Commerce does appear to have investigated to some extent CDC's ability to meet the 95 percent availability portion of the certification requirement, the record nowhere establishes that Commerce determined CDC capable of satisfying the first two portions of the requirement. In any case, Commerce still offers no explanation as to why CDC was not required to certify in writing or otherwise demonstrate in its proposal that its computer system satisfied the requirement. The contracting officer, even in a negotiated procurement, does not have discretion to disregard one offeror's failure to satisfy a material RFP requirement. See generally Baird Corporation, B-193261, June 19, 1979, 79-1 CPD 435. We conclude that Commerce's acceptance of CDC's nonconforming proposal had no reasonable basis and thus constituted arbitrary and capricious action.

We also find that SDC/Cray had a substantial chance of receiving the award. We recently held that where an agency's arbitrary action makes it impossible to calculate the claimant's chances for the award, and the claimant had a colorable chance at the award, fairness dictates that we adopt a presumption favoring the claimant. See M.L. MacKay & Associates, Inc., B-208827, June 1, 1983, 83-1 CPD 587. The claimant in that case was the low offeror and, we found, had been arbitrarily excluded from the competitive range. Since the contract had been completely performed at the time of the protest, it was not possible to reopen negotiations or otherwise determine the claimant's chances of receiving the award.

The facts here are comparable. SDC/Cray was the only offeror in compliance with all RFP terms, and thus was in line for award in the event CDC's proposal was found unacceptable. Because of Commerce's failure to enforce the RFP terms, it is not now possible to determine whether CDC was entitled to the award as the low conforming offeror, or whether SDC/Cray should have received the award as the only conforming offeror. Applying the rule in the above case, we believe fairness requires a finding that SDC/Cray's chance at the award was sufficient to support its claim based on Commerce's arbitrary and capricious action.

Our prior decision is affirmed and the claim is sustained. SDC/Cray should submit substantiating documentation to Commerce to establish the amount it is entitled to recover.

for Milton J. Socolar
Comptroller General
of the United States