

**DECISION**



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

**FILE:** B-218794

**DATE:** July 19, 1985

**MATTER OF:** Tenavision, Inc.--Request for Award of  
Proposal Preparation Costs

**DIGEST:**

Claim for proposal preparation costs incurred during step one of a two-step, formally advertised procurement is sustained where the claimant, one of three offerors, was eliminated from participation in the procurement through the contracting agency's improper action before being able to submit a bid under step two of the procurement.

Tenavision, Inc. (Tenavision) claims the proposal preparation costs it incurred in connection with request for technical proposals (RFTP) No. 541-86-84, issued by the Veterans Administration (VA). The RFTP was the first step of a two-step, formally advertised procurement for the acquisition and installation of an audio-visual nurse call system and radio entertainment system for the VA Medical Center, Cleveland, Ohio. We sustain Tenavision's claim.

Tenavision previously protested the rejection of its step one proposal on the ground that certain of the RFTP's technical requirements were ambiguous. Tenavision also contended that the VA conducted discussions with the other two offerors to correct the deficiencies in their proposals, yet failed to do the same with Tenavision.

We sustained the claimant's bid protest in Tenavision, Inc., B-216274, Apr. 15, 1985, 85-1 C.P.D. ¶ 427. We determined the VA improperly had used commercial availability of the offered equipment, a requirement not expressly indicated in the solicitation, as a precondition to award. The VA also implicitly had required, in the agency's view, that an offeror have a Federal Supply Schedule contract for any proposed equipment. We deemed such a requirement questionable since the schedule was not a mandatory source of supply, and since an offeror could satisfy the requirement's purpose (i.e., to assure that the offered equipment was state-of-the-art) in other ways.

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While we did not recommend corrective action that might result in terminating the awarded contract because installation already had begun, we did recommend that VA take steps to preclude a recurrence of these procurement deficiencies. Tenavision now seeks to be reimbursed for the costs of preparing its step-one proposal (\$2,542.13).

Generally, an unsuccessful offeror will be entitled to recover proposal preparation costs 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 Space Age Engineering, Inc., B-209543.2, Apr. 19, 1984, 84-1 C.P.D. ¶ 447.

The VA unreasonably determined <sup>1/</sup> that Tenavision's technical proposal was too deficient to warrant corrective negotiations with the firm. The agency consequently sent invitations to bid to the other two offerors, but not to Tenavision. Tenavision argues that it nonetheless had a substantial chance for the award. It alleges it has installed nurse call and similar systems throughout the United States and contends that, because it has a history of being competitive in such procurements, it would have been a serious contender for award under a proper solicitation.

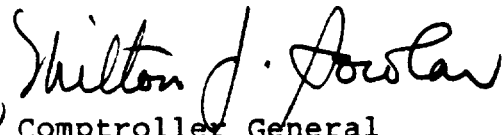
We have held that where an agency's unfair action makes it impossible to determine precisely a claimant's chance of receiving an award, fairness dictates that we adopt a presumption favoring the claimant if we nevertheless can determine that the claimant otherwise had a colorable chance at the award. See M.L. MacKay & Associates, Inc., B-208827, June 1, 1983, 83-1 C.P.D. ¶ 587. In determining whether a claimant had a colorable chance at an award, we have

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<sup>1/</sup> In responding to Tenavision's claim, the VA asserts that its actions were at most negligent, not arbitrary or capricious. For purposes of a proposal preparation cost claim, however, the standard is met by action that has no reasonable basis. Richard Hoffman Corp., B-212775.3, Apr. 9, 1984, 84-1 C.P.D. ¶ 393. The agency's actions, as discussed in our initial decision, were unreasonable.

considered the number of competitors, see System Development Corporation and Cray Research, Inc.--Request for Reconsideration, 63 Comp. Gen. 275 (1984), 84-1 C.P.D. ¶ 368; the claimant's offered price, see M.L. MacKay & Associates, Inc., B-208827, supra; and the stage in the procurement at which the protester was excluded, see Development Associates, Inc.--Reconsideration, B-205380.2, B-205380.3, Mar. 28, 1983, 83-1 C.P.D. ¶ 313.

Here, the VA's rejection of Tenavision's step-one proposal improperly excluded the firm from price competition against only two other bidders, and we have no reason to believe that Tenavision had any less of a chance at the award than either of them. In view of the two-step nature of the procurement and this limited field of competition, we conclude that Tenavision had the necessary colorable chance at the award. Accordingly, by separate letter to the VA we are recommending that Tenavision be reimbursed the reasonable costs of preparing its step-one proposal.

*for*   
Comptroller General  
of the United States