

DECISION

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

FILE: B-219828.3

DATE: April 14, 1986

MATTER OF: Edgewater Machine & Fabricators, Inc.

DIGEST:

While a protest against the award of a contract to a materially unbalanced offeror was sustained, the protester's subsequent claim for proposal preparation costs and the costs of filing and pursuing the protest is denied where the record shows that the protester did not have a substantial chance of receiving the award and was therefore not unreasonably excluded from the competition because the protester's price proposal was also materially unbalanced, although to a lesser degree.

Edgewater Machine & Fabricators, Inc. (Edgewater) has submitted a claim for proposal preparation costs and the costs of pursuing its protest, including attorney's fees, following our decision, Edgewater Machine & Fabricators, Inc., B-219828, Dec. 5, 1985, 85-2 CPD ¶ 630, sustaining its protest. The protest concerned the award of a contract for missile shipping containers to Precision Machining, Inc., by the Department of the Army under request for proposals (RFP) No. DAAH01-85-R-0430. Essentially, Edgewater had protested that Precision's price for the containers, although low, was not reasonable because its price for units to be delivered for first article testing was so high that Precision would receive a financial windfall by being paid all of its anticipated overhead costs and profit before completing the first production unit.

We deny Edgewater's claim for proposal preparation costs and for the costs of pursuing the protest, including attorney's fees.

By way of background, of the 18 proposals received by the Army, the four lowest priced were rejected or withdrawn. Precision's price of \$2,989,139 was then the lowest and was composed of \$750,000 for the six first article units at \$125,000 each and \$2,239,139 for the 7,439 containers at \$301 each. Precision's total price without the first article units was \$2,983,039 for 7,439 containers at \$401 each, or \$6,100 less than its bid with first articles. Edgewater's price of \$3,128,648.80 included the price of \$159,000 for the six first article units at \$26,500 each and was the second lowest offer. Its bid without first articles was \$2,781 less. The Army awarded a contract requiring the first article units to Precision; Edgewater then filed its protest.

Edgewater conceded in its protest that Precision's total price was low and reasonable, but contended that the loading of the first article units with a price of \$750,000 resulted in the other items not carrying their share of the costs of the work and profit.

In sustaining the protest, we found that the actual value of the first articles, as determined from the face of the bids, nowhere approached the amount bid by either Precision or Edgewater. Rather, the bid prices received strongly suggested to us that Precision valued the first articles at about \$6,100 (the difference in its total bid with and without first articles). We found that contracts based on bids such as Precision's that are egregiously front-loaded provide the contractor with funds to which it is not entitled if payment is to be measured on the basis of value received. Thus, as in Riverport Industries, Inc., 64 Comp. Gen. 441 (1985), 85-1 CPD 364; aff'd upon reconsideration, B-218656.2, July 31, 1985, 85-2 CPD ¶ 108, we held that even if a bid offers the lowest price to the government, but is grossly unbalanced mathematically, it should be viewed as materially unbalanced since acceptance of the bid would result in the same evils as an advance payment. An advance payment is prohibited by law and occurs where a payment under a contract to provide a service or deliver an article is more than the value of the service already provided or the article already delivered. See 31 U.S.C. § 3324(a) (1982). However, we also noted that Edgewater's bid suffered from the same defect because it had valued the

first articles at about \$2,800 (as compared with its actual bid price of \$159,000 for the six first articles). Thus, we did not recommend termination of Precision's contract.

Edgewater now requests that it be allowed recovery of its bid preparation costs and the costs of filing and pursuing its protest, including attorney's fees. We will allow a protester to recover its bid preparation costs only where the protester had a substantial chance of receiving the award, but was unreasonably excluded from the procurement, and the remedy recommended is not one delineated in 4 C.F.R. § 21.6(a)(2-5) (1985). See EHE National Health Services, Inc., B-219361.2, Oct. 1, 1985, 65 Comp. Gen. ____, 85-2 CPD ¶ 362. Our regulations also only permit recovery of the costs of filing and pursuing a protest in situations where the protester is unreasonably excluded from the procurement. 4 C.F.R. § 21.6(e).

Since Edgewater's bid was also front-loaded and, thus, also materially unbalanced (albeit to a lesser degree than the bid of Precision), it is clear that under the Riverport standard, Edgewater was not entitled to the award even if Precision's bid was rejected. It follows that Edgewater was not unreasonably excluded from the procurement.

There is, therefore, no basis to recommend the award of proposal preparation costs and the costs of pursuing the protest.

The claim is denied.


Harry R. Van Cleve
General Counsel