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Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Dames & Moore

File: B-257139

Date: August 30, 1994

Michael A. Steuer, Esq., for the protester.
John C. Robbins III for Sevenson Environmental Services, Inc., an interested party.
Sherry Kinland Kaswell, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.
C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency error in issuing solicitation incorporating Federal Acquisition Regulation clause providing for indemnification under Public Law 85-804 does not provide basis for award of proposal preparation costs where decision whether to include indemnification agreement in the solicitation is within the agency's discretion, and there is no evidence that the agency acted in violation of statute or regulation; mere issuance of a defective solicitation does not justify an award of such costs.

DECISION

Dames & Moore seeks recovery of the costs incurred in preparing a proposal in response to request for proposals (RFP) No. 1425-3-SP-30-10340, issued by the Bureau of Reclamation, Department of the Interior, for cleanup of hazardous waste at a site in Westminster, California. Dames & Moore contends that the agency's decision to delete an indemnification provision from the solicitation makes competing under the RFP no longer economically viable and that it would never have prepared an initial proposal had it known that the agency would delete the provision.

We deny the protest.

During the 1930s, the site in question (now referred to as the Ralph Gray Trucking Superfund Site) was used for disposal of residual waste hauled from petroleum refineries; the high sulfur content of the waste created an offensive smell, and the owner was directed to cease and desist

further dumping of the waste. Some 30 years later, a construction firm built a housing tract at the site and moved the waste to trenches along the rear of property lines.

In response to a request from the State of California, the Environmental Protection Agency (EPA) has assumed responsibility for the site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 et seq. (1988 and Supp. IV 1992), and the Bureau of Reclamation has been working with contractors and residents, on behalf of EPA, to coordinate relocation and remediation efforts. On October 8, 1993, the Bureau issued the instant RFP for a cost-plus-fixed-fee contract for site preparation, excavation, packaging, hauling, and disposal of waste material and contaminated soil from the trenches currently located in the backyards of the existing residential site. The material to be removed consists of tarry sulfuric acid wastes from the petroleum refineries and soil.

Clauses H.5 and H.6 of the solicitation required potential contractors to maintain comprehensive general liability insurance in the amount of $500,000 (later increased to $1 million) per occurrence and provided for reimbursement both for the cost of insurance as well as for liabilities not covered by insurance, subject to the limitations of the clause at Federal Acquisition Regulation (FAR) § 52.232-20, Limitation of Cost. The solicitation, paragraph I.24, also contained the clause at FAR § 52.250-1, Indemnification Under Public Law 85-804, providing for indemnification against claims arising from risks defined in the solicitation as "unusually hazardous," but contained no language defining any risk as "unusually hazardous."

The agency received nine proposals on December 10, evaluated them, and eventually identified six offers for inclusion in the competitive range. Prior to the initiation of discussions, one offeror asked the agency to clarify what risks were considered "unusually hazardous" and therefore covered by the indemnification provisions of FAR § 52.250-1.

Upon review, the contracting officer realized that the clause had been mistakenly included in the solicitation. The contracting officer determined that absent the approval of the Secretary of the Interior, there was no authority to include the clause, nor was its use justified where, as here, the purpose of the solicitation did not involve the

national defense.[1] As a consequence, the Bureau advised offerors during negotiations that it would be amending the solicitation to eliminate the indemnification provisions of FAR § 52.250-1, and this protest followed.

The protester contends that the cleanup, which is to be performed in an occupied residential area, presents a possibility of enormous third-party liability and that Dames & Moore would never have spent the resources necessary to prepare a proposal had such an indemnity not been offered. While Dames & Moore concedes that the choice of contract provisions, including the decision whether to indemnify contractors at all, is within the agency's discretion, the protester asserts that deletion of FAR § 52.250-1 fundamentally changes the underlying nature of the contract. Dames & Moore argues that withdrawal of the indemnification provision is arbitrary and capricious and that our Office should therefore direct the agency to reimburse Dames & Moore for its proposal preparation costs.

The Competition in Contracting Act of 1984, 31 U.S.C. § 3554(c)(1) (1988), and our implementing regulations, 4 C.F.R. § 21.6(d) (1994), provide for the award of proposal preparation costs only where our Office determines that "a solicitation, proposed award, or award of a contract does not comply with a statute or regulation." Here, Dames & Moore concedes that the decision whether or not to include an indemnity provision in the solicitation is within the agency's discretion; in fact, it is not clear that the provision properly could be included in the RFP given that, according to the agency, the prerequisite to exercising the authority under Public Law 85-804--that the indemnity provision will facilitate the national defense--is not present here. Since deleting the indemnity provision from the RFP was proper, and there is no other ground on which to conclude that the agency has acted contrary to statute or regulation, there is no basis to allow Dames & Moore to recover its proposal preparation costs. Bahan Dennis Inc., B-249496.3, Mar. 3, 1994, 94-1 CPD ¶ 184.

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[1]FAR § 50.201(d) prohibits the Secretary of the Interior, as well as the other secretaries and administrators of the executive agencies, from delegating the authority to approve the use of indemnification agreements under Public Law 85-804. Public Law 85-804, 50 U.S.C. § 1431 et seq. (1988 and Supp. IV 1992), provides that the President may authorize departments or agencies of the government to enter into or modify contracts without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts but requires a finding that such action will facilitate the national defense.

In response to the agency report, the protester contends that the agency's error in including the indemnity provision in the original solicitation amounted to gross negligence justifying an award of proposal preparation costs. We disagree. While an award of costs may be warranted where there is evidence of bad faith or arbitrary and capricious action by the agency, see Camtech Co., B-252945, Aug. 5, 1993, 93-2 CPD ¶ 83, the agency's action here--mistakenly including a provision in the solicitation--clearly does not rise to that level. Moreover, an offeror always runs the risk that an agency may need to amend or even cancel a solicitation; the cost of preparing its proposal thus is a cost of doing business with the government which an offeror reasonably should expect to incur. See Cellular Prod. Serv., Inc., B-222614, July 3, 1986, 86-2 CPD ¶ 32.

The protest is denied.

/s/ Ronald Berger
for Robert P. Murphy
Acting General Counsel