



United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-218204.2

February 10, 1987

The Honorable Tim Valentine
House of Representatives

Dear Mr. Valentine:

This is in response to your letter dated December 2, 1986, on behalf of Morrison-Knudsen Co., Inc., Power Systems Division.

Morrison-Knudsen has filed a claim of \$18,125.88 for bid preparation costs with the Naval Facilities Engineering Command (NAVFAC), based on our Office's decision, Power Systems--Claim for Costs, B-210032.2, Mar. 26, 1984, 84-1 C.P.D. ¶ 344. In that decision, we allowed Morrison-Knudsen's claim for bid preparation costs because NAVFAC's improper action under solicitation No. N62472-82-B-1663 had precluded Morrison-Knudsen from being considered for an award.

To date, NAVFAC has declined to pay Morrison-Knudsen's claim. NAVFAC claims that it has no legal authority to pay such claims in conjunction with protests such as this, which were filed in our Office prior to January 15, 1985, and which are therefore not covered by the Competition in Contracting Act of 1984 (CICA). You have inquired as to how you could assist Morrison-Knudsen in its efforts to obtain payment from NAVFAC.

CICA specifically authorizes the General Accounting Office (GAO) to allow bid and proposal preparation costs in conjunction with GAO's authority to issue bid protest decisions. However, in pre-CICA cases such as Morrison-Knudsen's, GAO has awarded bid and proposal preparation costs since 1975 under the same rationale as the Claims Court. That is, the allowance of such costs arises from the government's implied responsibility to fairly and honestly consider a bid or proposal submitted in response to a solicitation. Where the procuring activity's conduct is arbitrary or capricious, thereby resulting in the bid or proposal not receiving the requisite fair and honest consideration, we awarded bid or

proposal preparation costs where the bidder or offeror otherwise would have had a substantial chance of receiving an award. We awarded bid preparation costs to Morrison-Knudsen on this basis.

To the best of our knowledge, NAVFAC is the only contracting activity which, either before or after CICA, has declined to pay bid or proposal preparation costs based on an alleged lack of authority to do so. NAVFAC also declined to pay bid preparation costs, as recommended by our Office, in Vulcan Engineering Co., B-214595, Oct. 12, 1984, 84-2 C.P.D. ¶ 403, another case which was decided before the applicable date of CICA. In that case, NAVFAC has asserted that the protester was not an interested party, and lacked a substantial chance for award, as additional bases for declining to follow our Office's decision.

Vulcan has filed suit in the United States Claims Court for bid preparation costs, and for attorney's fees and interest. This case is docketed as Vulcan Engineering Company v. United States, Cl. Ct. No. 381-86C, and a motion hearing is scheduled for March 1987, with a decision anticipated some time next summer. The Department of Justice requested a litigation report from our Office in this matter, and our Office advised Justice by letter of July 24, 1986 (copy enclosed), that in our view Vulcan was entitled to bid preparation costs in an amount that is substantiated and determined to be reasonable. However, it is our understanding from Justice that it plans to defend NAVFAC on the basis that Vulcan is not an interested party, and thus is without standing, and that Vulcan lacked any substantial chance of receiving an award.

Morrison-Knudsen has as a possible recourse the filing of a similar complaint in Claims Court, alleging its entitlement to bid preparation costs based upon the decision of our Office. Alternately, Morrison-Knudsen could elect to wait the outcome of the Vulcan litigation, and in the event that the result is wholly or partially favorable, Morrison-Knudsen may then be in a better position to convince NAVFAC that NAVFAC is legally authorized and required to pay a claim for proposal preparation costs pursuant to our Office's decision.

Subsequent to your inquiry, Morrison-Knudsen has requested payment of its claim from our Office. However, our Office has no authority to make such a payment to satisfy the obligation of another federal agency.

We trust that this information will satisfy the purpose of your inquiry.

Sincerely yours,

Harry R. Van Cleve
Harry R. Van Cleve
General Counsel

Enclosure