01419

BRUCE KRASKER
P.L. #1

DECISION

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

FILE: B-186243 DATE: December 30, 1976

MATTER OF: A.R.F. Products, Inc.

DIGEST:

1. Claim for proposal preparation cost on basis that cancellation of RFP was motivated by prejudice against claimant is denied where claimant has not affirmatively proved that decision was not result of reasonable exercise of discretion to program limited funds to another project.

2. Cancellation of RFP due to unavailability of funds is reasonable exercise of discretion because Anti-Deficiency Statute, 31 U.S.C. 665(a) (1970), prohibits the obligation of funds in excess of amount appropriated from one program to another.

3. Procurement officials' actions in not informing offerors of possible funding problems while matter of reprogramming was being considered within agency and continuing to proceed with the procurement, thereby causing further expenditure of funds by offerors, was not the cause of claimant, which was in line for award, not receiving award and cannot serve as basis for claim for proposal preparation costs as such action was not arbitrary so as to deprive claimant of a fair appraisal of its proposal.

4. Failure to fill out form required by DOD Directive 7250.10, which contains internal guidelines for reprogramming of funds, is not a violation of a regulation as envisioned by courts to sustain claim for proposal preparation costs.

This decision concerns the claim of A.R.F. Products, Inc. (ARF), that the Naval Avionics Facility, Indianapolis, Indiana (Avionics), acted arbitrarily in canceling request for proposals (RFP) N00163-76-R-0282, for electronically tuned digital

receivers. It is ARF's contention that Avionics' actions were motivated by a desire to avoid awarding the contract to ARF, thereby constituting a basis to reimburse ARF for the expenses it incurred in responding to the RFP. ARF submitted its protest prior to the date the RFP was canceled. At that time, ARF protested the prospective cancellation and any resolicitation of the procurement or award to any other firm under the RFP. Alternatively, ARF submitted its claim for proposal preparation costs. Since the RFP was canceled, we have treated this matter solely as a claim for proposal preparation costs.

The RFP was issued on October 10, 1975, for receipt of initial proposals on November 19, 1975. Ultimately, the RFP was amended five times. Amendments 0001 and 0002 changed technical requirements and amendment 0002 also extended the closing date for receipt of proposals to December 1, 1975. Nine proposals were initially received by the specified time offering alternate proposals for differing data requirements, as required by the RFP.

On December 19, amendment 0004 was issued as "* * * a continuation of negotiations under [the] RFP * * *" and changed some of the specifications. Amendment 0005 was issued on December 22 to extend the closing date until January 5, 1976. Ten proposals were received. ARF submitted the lowest proposal for the alternate selected for award, at $359,349. ITT was next low at $367,502.

On January 16, 1976, a preaward survey (PAS) was conducted at the ARF facility. As a result, the preaward survey team recommended no award to ARF on January 22. This recommendation was:

> "* * * based on the bidder's lack of pre-planning as indicated by the unsatisfactory findings of the Preaward Survey Team in the areas of Technical Capability, Production Capability, Purchasing and Subcontracting, and Ability to Meet Required Schedule."

These were the conclusions of the survey team responsible for reviewing the technical capability of ARF.

As a consequence of the foregoing, on January 27, 1976, the contracting officer executed a determination that ARF was nonresponsible. The determination, predicated upon the PAS, stated:

> "A.R.F. Products, Inc. is nonresponsible for purposes of performing the proposed contract. This determination is based on the fact that the aforementioned contractor does not have adequate technical, production, purchasing or subcontracting capability, or the ability to meet the required schedule, nor the ability to obtain such due to the lack of capacity."

Therefore, ARF applied to the Small Business Administration (SBA) for a Certificate of Competency (COC). While this was transpiring, a PAS was conducted on ITT on January 19, which resulted in a positive recommendation for award to it. As a result of actions by the SBA and ARF, a second PAS was conducted on ARF on February 25 and 26. The reasons which prompted the initial adverse recommendations were discussed and clarified to the satisfaction of the technical review members to the extent that the negative recommendation for award was changed to positive.

Pending the outcome of these procedures all offerors were requested to extend their offers until April 5. On March 12, SBA issued a COC to ARF. On March 13, Navy advised ARF of the potential problems in receiving funding, as well as problems discovered in the specifications.

Pursuing the matter further, SBA wrote the Navy to express its concern that award had not been made to ARF since the issuance of the COC apparently resolved the Navy's objections. The Navy replied on March 25 that "* * * a decision as to awarding the contract however has been held in abeyance pending clarification of technical and fiscal problems involved in this procurement."

On March 29 the Chief of Naval Operations (CNO) advised the Naval Air Systems Command (NAVAIR) that funding for the communications jammer (COMM JAMMER) was no longer available. On April 2,

ARF protested any proposed cancellation of the RFP to our Office. On April 5, the contracting officer canceled the RFP due to the withdrawal of funds.

While the foregoing transpired, a parallel set of events was being undertaken within the Navy. Apparently in anticipation of the Department of Defense (DOD) receiving less research, development, test and evaluation (RDT&E) funds from Congress than requested, steps were pursued to accommodate the fund reductions. Thus, on December 11, the Director, RDT&E, issued a memorandum concerning possible reprogramming of funds for the fiscal transition period during the change of fiscal year accounting. Of a possible $9.1 million of reprogrammed funds, an $824,000 reduction applicable to the COMM JAMMER project was indicated. The instant procurement was a part of the communications jammer project.

On January 6, NAVAIR sent a message to the CNO outlining its concern for the viability of the COMM JAMMER project in light of an $824,000 reduction in funding. NAVAIR noted that other portions of the program were already under contract and that a contract for the instant procurement had been negotiated and was ready to be signed. The CNO responded by message of January 24 which directed a delay in implementation of the contract, while indicating that contracts already awarded should not be terminated. A briefing on the matter was scheduled for February 9. On February 9 Congress appropriated less RDT&E funds than requested. Also on this date, the Director, RDT&E, issued a memorandum expressing his concern over continued funding for electronic warfare research (as in the instant case) in favor of other programs deemed to be more critical.

On March 10, the Navy notified ARF of the funding problems. On March 29, the CNO directed Navy to discontinue all in-house efforts on the COMM JAMMER project and report any balances available for recoupment.

When superimposing the two chains of events on each other, ARF maintains that the withdrawal of funds was motivated to preclude its receipt of the contract. This conclusion is buttressed, in ARF's view, by the manner in which the first PAS was conducted. The PAS was, in effect, a technical review beyond the scope of

its purpose to determine ARF's responsibility. ARF notes that the PAS findings were based upon improper technical considerations. Thus, ARF feels that it was required to undergo unnecessary expenses for the second PAS. Furthermore, ARF contends that Avionics acted unreasonably in requiring ARF to undergo the expense of both PAS's when it was aware of the funding problems. At the least, ARF feels that the procurement should have been held in abeyance until a decision was made on the funding.

It is the position of the Navy that its actions were reasonable. The Navy maintains that proceeding with the procurement while the vagaries concerning the funding were being resolved would have allowed the Navy to make an immediate award upon a release of the funds. While there were uncertainties whether funding would be available, the Navy believed that there existed as much of a possibility for the release of the funds as for their non-release.

Moreover, the Navy feels that it pursued the funding problem positively. In this regard the Navy notes that the contracting officer was first aware of the funding problem in December. On January 6, 1976, NAVAIR sent a message to the CNO indicating that the proposed reprogramming of $824,000 from the COMM JAMMER project would "jeopardize the orderly development of this program." NAVAIR maintains that it sought to restore the funds because funds for other portions of the program had already been committed. Further, NAVAIR notes that on January 6, when the message to the CNO was transmitted, ARF was the apparent low offeror. Thus, the inference Navy would have us draw from this is that there was no effort to keep ARF from receiving the contract.

Next, Navy notes that a conference was scheduled to review the reprogramming in early February. NAVAIR was directed not to obligate any funds until that conference. Since the decision concerning funding was not made until February and ARF was determined nonresponsible on January 27, Navy maintains that ARF was not prejudiced by the delay because ARF could not have received an award in January. Also, since the delay in award was not attributable to actions of NAVAIR, but to a higher level

of command within the Navy, NAVAIR maintains that there was no direct action taken by it towards ARF.

The standards applicable to claims for proposal preparation costs have evolved from the courts in response to claims that the Government did not fairly and honestly consider the proposals submitted to satisfy the Government's requests for proposals. The ultimate standard to be applied is whether the Government's conduct was arbitrary and capricious toward the offeror. Keco Industries, Inc., v. United States, 492 F.2d 1200, 203 Ct. Cl. 566 (1974). Keco indicates four ways by which the ultimate standard may be satisfied: (1) subjective bad faith on the part of procuring officials which deprives the offeror of a fair and honest consideration of its proposal; (2) no reasonable basis for the administrative action; (3) a sliding degree of proof commensurate with the amount of discretion afforded the procuring officials; and (4) proven violation of pertinent statutes or regulations which may suffice for recovery. Proof establishing any one of the above connotes a breach of the implied contract that goes with each Government solicitation that if the offeror expends the effort and expense to prepare a response to the Government's solicitation, the Government will fairly and honestly consider that proposal.

Our Office has adopted these standards. T & H Company, B-181261, September 5, 1974, 74-2 CPD 148; National Construction Company, B-185148, March 23, 1976, 76-1 CPD 192. In addition, our Office requires the offeror/claimant to present evidence and argumentation which affirmatively establish the liability of the United States. DOT Systems, Inc., B-183697, June 11, 1976, 76-1 CPD 368. When the claim is submitted with regard to the actions of the Government in canceling a solicitation (a decision entrusted largely to the discretion of the procuring official as to when such action is in the best interests of the Government, 10 U.S.C. § 2305 (1970)), the claimant is faced with the problem that the degree of proof required under standard 3 of Keco, supra, is high due to the discretion afforded the procuring official. Our Office has held that it is proper to reject all offers and cancel a solicitation where there are not sufficient funds available to cover the contract. This conclusion is required by the Anti-Deficiency

Act, 31 U.S.C. § 665(a) (1970), which prohibits expenditures of contract obligations in excess of appropriated funds or apportionments made to achieve the most effective use of funds. Ocean Data Systems, Inc., B-180248, August 16, 1974, 74-2 CPD 103; TIMCO, B-186177, September 14, 1976, 76-2 CPD 242.

However, ARF has sought to look behind the cancellation at the reason that sufficient funds were not available for contract obligation and whether the contracting activity acted reasonably during its deliberations whether funds would be available. The first aspect raises a question of executive discretion--reprogramming of funds. This procedure allows executive officials some latitude in shifting funds within an appropriation account to move them from one program to another. Louis Fisher, Presidential Spending Power (1975). Thus, ARF is required, under the Keco standard, to establish that the CNO's decision was wholly arbitrary, in light of the discretion afforded him.

The Navy has offered that the decision to reprogram funds from the COMM JAMMER project was prompted by two considerations: (1) the amount of RDT&E funds appropriated by Congress was less than requested; and (2) the anti-aircraft research was considered a more immediate need. Navy maintains, that its choice was reasonable in light of the existing facts.

On the other hand, ARF notes that the funds which were reprogrammed were those of the fiscal transition period available during the change in the end of the fiscal year from June 30 to September 30. However, RDT&E funds are not fiscal year funds and are available for obligation within 2 years of appropriation. Thus, ARF asserts that the Navy could have used FY76 funds, since this program appears to be an on-going one. Therefore, in ARF's view, the break in funding for the transition period should not mandate the cancellation of the RFP. It is this line of reasoning that led ARF to believe that funding for the project would be continuous.

Reprogramming of funds is controlled by Department of Defense (DOD) Directives 7250.5 and 7250.10, January 14, 1975, entitled "Reprogramming of Appropriated Funds" and "Implementation of Reprogramming of Appropriated Funds," respectively (Directives). DOD 7250.10, Section IIIa, defines reprogramming actions as:

> "* * * changes in the application of financial resources from the purpose originally contemplated and budgeted for, testified to, and described in the justifications submitted to the congressional committees in support of fund authorizations and budget requests."

Three types of reprogramming actions are treated in the Directives: (1) reprogramming actions requiring prior approval of congressional committees; (2) reprogramming actions requiring notification to congressional committees; and (3) reprogramming actions classified as audit trail type changes (internal reprogramming). It is into the last category that the instant reprogramming action falls.

DOD Directive 7250.5, Section II A, underscores, as follows, the flexibility and discretion inherent in reprogramming:

> "The congressional committees * * * have generally accepted the view that rigid adherence to the amounts justified for budget activities or for subsidiary items of programs may unduly jeopardize the effective accomplishment of planned programs in the most businesslike and economical manner, and that unforeseen requirements, changes in operating conditions, revisions in price estimates, wage rate adjustments, etc., require some diversion of funds from the specific purposes for which they were justified. Reprogramming measures * * * will provide * * * a timely device for achieving flexibility in the execution of Defense programs."

Standard 4 of Keco, supra, equates arbitrary action by the Government towards the claimant with a proven violation of a statute or regulation, which may suffice for recovery. In fact, it is upon this basis that the only two suits for bid preparation

cost have been successful: Armstrong & Armstrong, Inc. v. United States, 356 F. Supp. 514 (E.D. Wash. 1973); and The McCarty Corporation v. United States, 499 F.2d 633, 204 Ct. Cl. 768 (1974). However, the regulations involved in those instances were the Armed Services Procurement Regulation concerning procedures to be followed when a mistake in bid is claimed. Little discretion is afforded the procuring official in that area, unlike reprogramming of funds. Moreover, we do not view the Directives to be the type of regulation envisioned by the court in Kaco, supra. The Directives afford internal guidelines to "* * * establish an orderly system for obtaining approvals and related operating procedures * * *." DOD Directive 7250.10(F)(b). In this light, we do not view the failure to complete DD Form 1415 as the type of violation of regulation equated with arbitrary action. Furthermore, while the information in the DD Form 1415 as to the reasons for the reprogramming action would have been helpful to determine if the funds were reprogrammed to avoid an award to ARF, in its absence, we cannot ascribe any purposeful action directed towards ARF from the record.

Since ARF has presented no direct evidence on this point, we conclude that the failure to follow the DOD Directive is not sufficient to sustain the claim of proposal preparation costs. Also, we find nothing in the record to indicate that the reprogramming action itself was directed towards ARF. The December 11 memorandum indicates that the reduction in available funding was distributed over a broad range of programs. Therefore, the claim on this basis is denied.

There remains that part of the claim that the Navy acted unreasonably in inducing ARF to expend the money necessary for the second PAS. The essence of this line of argumentation is that once the Navy was aware of the funding problems, the Navy should have alerted all offerors of the problem and suspended procurement actions until the problem was resolved, not that the proposals were improperly induced in the first instance. ARF points to the December 11 memorandum as the initial date when the contracting officer knew of the problem and should have informed

all offerors. The initial mistake, in ARF's judgment, is compounded at each step of the procurement as it became more evident that funding would be withdrawn.

We think it is clear that the Government may breach its implied contract to fairly and honestly consider proposals at any stage of the procurement process short of award. The question is whether ARF's proposal received a fair consideration, or whether action of the Government arbitrarily deprived ARF of a fair opportunity for award. It must be emphasized, at this point, that unfair or prejudicial motives will not be attributed to individuals on the basis of inference or supposition. Datawest Corporation, B-180919, January 13, 1975, 75-1 CPD 14. The record contains conflicting affidavits whether the first PAS team was prejudicially disposed to recommend no award to ARF regardless of ARF's qualifications. Affidavits submitted by ARF indicate that statements were overheard to that effect. Members of the PAS team have submitted affidavits denying the allegations.

The protester or claimant has the burden of affirmatively proving his case. We do not believe that such burden is met where conflicting statements of the parties constitute the only evidence. Reliable Maintenance Service, Inc.,--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. We are of the view that ARF has not met this burden. Therefore, the claim is doubtful and it must be disallowed. Afghan Carpet Cleaners, B-175895, April 30, 1974, 74-1 CPD 220, and cases cited therein.

We agree with ARF that the Navy should have warned offerors of the funding problem before it actually did. In ARF's case, this information should have been communicated at least before ARF was required to undergo the second PAS. However, the action of the Navy in this regard did not deprive ARF of a fair and honest consideration of its proposal or an opportunity for award. Indeed, had any award been made it would have been to ARF. The courts, as well as our Office, are aware of the right of the agency to cancel a solicitation under statute and solicitation provisions when it is deemed in the Government's best interest. Cf. Robert F. Simmons & Associates v. United States, 360 F.2d 962, 175 Ct. Cl. 510 (1966). However, it

was not these actions which precluded ARF from receiving award. Rather, it was the withdrawal of funds. Therefore, the action of the Navy in pursuing the PAS cannot give rise to a successful claim for proposal preparation costs.

Since we have concluded that the cancellation in this instance was not arbitrary or capricious, but rather resulted from a compelling reason, the claim of ARF for proposal preparation costs must be denied.

R. F. Keller

Acting Comptroller General
of the United States