

116951

DECISION



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

20144

FILE: B-186311.2

DATE: November 30, 1981

MATTER OF: University Research Corporation

DIGEST:

Claimant is not entitled to recover proposal preparation costs because procuring agency's postaward, cost realism analysis indicates that claimant's proposal would not have been the best buy for the Government. Therefore, the claimant did not have a substantial chance of receiving the award and the claimant was not prejudiced or damaged.

University Research Corporation (URC) requests reconsideration of our decision in the matter of University Research Corporation--Reconsideration, B-186311, June 22, 1978, 78-1 CPD 450. That decision was the fourth in a series of decisions which have denied URC's claim in the amount of \$35,093.02 for proposal preparation costs in connection with request for proposals No. L/A 76-9 issued by the Department of Labor for furnishing certain technical assistance.

URC argues that, under a recent Court of Claims decision, URC is entitled to proposal preparation costs because there was a substantial chance that it would have received the award. Labor essentially argues that URC has presented nothing new and the prior decision should be affirmed. We conclude that URC is not entitled to proposal preparation costs because a selection based on a proper cost realism analysis would not have resulted in award to URC; thus, URC was not damaged.

The four prior decisions ^{*}/ established that (1) the Department of Labor failed to conduct a cost realism analysis, as required by applicable procurement regulations, with the result that Labor's selection of another firm was not rationally supported, but (2) URC was not entitled to proposal preparation costs because Labor's postaward, cost realism analysis indicated that the same firm would have been selected and, therefore, URC was not prejudiced or damaged.

The details of Labor's cost realism analysis and its impact on source selection are set forth in our February 3, 1978, decision. In sum, the record shows that URC received a higher technical rating and the awardee received a higher cost rating. Labor reported that the awardee's proposal presented a better buy for the Government than URC's proposal. Our Office found no fault with Labor's determination. Therefore, we concluded that it was not reasonably certain that URC would have received the award.

URC argues that the legal reasoning employed to deny URC's claim has been fundamentally altered by the Court of Claims decision in Morgan Business Associates, Inc. v. United States, 619 F.2d 892 (Ct. Cl. 1980). URC states that, contrary to our decisions, the finding of reasonable certainty that a claimant would have received an award is not essential to recovery of proposal preparation costs. In URC's view, the Morgan decision seriously undermined our Office's requirement that a claimant show that it would have received the award.

The Morgan case involved a situation where the procuring agency lost Morgan's initial proposal and, therefore, failed to consider it in selecting the

^{*}/University Research Corporation, B-186311, August 26, 1976, 76-2 CPD 188; University Research Corporation - Reconsideration, B-186311, August 16, 1977, 77-2 CPD 118; University Research Corporation - Reconsideration, B-186311, February 3, 1978, 78-1 CPD 98; University Research Corporation - Reconsideration, B-186311, June 22, 1978, 78-1 CPD 450.

awardee. The court concluded that the Government's failure to consider the proposal was violative of applicable procurement regulations and was a prima facie breach of the duty to fairly consider Morgan's proposal. The court rejected, however, the proposition that any breach of duty would entitle an offeror to proposal preparation costs because the Government is not an insurer for an offeror's proposal preparation costs whenever the offeror is not selected for award. The court noted that proposal preparation expenses are a cost of doing business that is lost whenever the offeror fails to receive a contract. The court would not assume that an offeror was necessarily damaged by the Government's failure to fairly consider its proposal. Conversely, the court found that the offeror need not show that, but for the Government's failure to fairly consider its proposal, it would have received a contract, in part, because there can be no certainty about the results of any competition.

The court stated that:

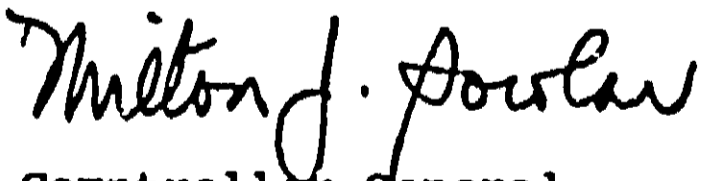
"We hold, rather, that when the Government completely fails to consider a plaintiff's bid or proposal, the plaintiff may recover its bid preparation costs if, under all the facts and circumstances, it is established that, if the bid or proposal had been considered, there was a substantial chance that the plaintiff would receive an award--that it was within the zone of active consideration. If there was no substantial chance that plaintiff's proposal would lead to an award, then the Government's breach of duty did not damage plaintiff. In that situation a plaintiff cannot rightfully recover its bid preparation expenses. This principle of liability vindicates the bidder's interest and right in having his bid considered while at the same time forestalling a windfall recovery for a bidder who was not in reality damaged."
619 F.2d at 896 (footnote omitted).

In applying these principles in the Morgan case, the court considered the agency's postaward evaluation of a copy of the proposal submitted by Morgan, indicating that Morgan's chances for award were not substantial. Based on that record, the court concluded that Morgan failed to show that it had a substantial chance for award and the court denied Morgan's claim.

URC argues that since it was in the final competition (competitive range), it was being actively considered for award. URC contends that its proposal was within the Morgan court's "zone of active consideration" and, therefore, URC is entitled to proposal preparation costs.

The URC situation and the Morgan situation are substantially similar. Both URC and Morgan involve procuring agencies' failures to observe the requirements of applicable regulations. To recover proposal preparation costs, both URC and Morgan are required to show that they had a substantial chance to receive the award. Both records contain postaward procuring agency evaluations indicating that if the agency had acted properly, neither claimant had a substantial chance of receiving an award. Therefore, in accord with the Morgan court's holding, we conclude that, although URC was in the competitive range, URC is not entitled to proposal preparation costs because, based on a proper cost realism analysis, Labor would not have made award to URC. As noted by the Morgan court, to allow a claimant, like URC, to recover proposal preparation costs where it was not in reality damaged would give the claimant a windfall.

The prior decision denying URC's claim is affirmed.

for 
Comptroller General
of the United States