Part II.

DECISION

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

8126

FILE: B-186932 DATE: October 25, 1978

MATTER OF: Base Information Systems, Inc.

DIGEST:

Claim for proposal preparation costs is denied because fact that proposal conformed to RFP was not so clear as to support inference that rejection of claimant was motivated by caprice or bad faith.

Base Information Systems, Inc, (Base) claims proposal preparation costs in connection with RFP 3-76 issued by the Federal Trade Commission (FTC) for procurement of a word processing and telecommunications system, including a teleprocessing network linking FTC headquarters with its regional offices. Contract award was made to Daconics Incorporated (Daconics).

An earlier protest filed by Base was sustained in our decision in Sigma Data Computing Corporation and Base Information Systems, Inc., 56 Comp. Gen. 830 (1977), 77-2 CPD 59 (Sigma/Base I). At that time, we also considered a protest and claim for proposal preparation costs filed by Sigma Data Computing Corporation, whose claim was further reviewed on reconsideration in Sigma Data Computing Corporation, B-186932, September 22, 1977, 77-2 CPD 212 (Sigma II).

Base requests our decision only on the question of liability for proposed preparation costs, with the understanding that the amount of any entitlement would be considered subsequently, in the event the Government were found to be liable. Cf. Amram Nowak Associates, 56 Comp. Gen. 448 (1977), 77-1 CPD 219.

Noting that a similar claim filed by Sigma Data Computing Corporation was denied because that firm was unable to show that it was in line for award, or otherwise entitled to it, the FTC urges that similar reasoning applies here. As we pointed out in Sigma II,

> "* * * we stated in Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344 * * * [that] 'the courts and this Office have allowed recovery of bid or proposal preparation costs only where the Government's action was "so arbitrary or capricious as to preclude a particular bidder from an award to which it was otherwise entitled."' At most, we view such claims as payable only as compensation for losses suffered as a direct and proximate result of the Government's breach, making it incumbent upon a claimant to show that its loss was occasioned by those acts or omissions of which it complains. Cf. Continental Business Enterprises, Inc., 196 Ct. Cl. 627, 639 (1971). We recognize that costs might be allowed in other circumstances, e.g., on proof that a selection was made before a solicitation was issued and the agency intended to reject arbitrarily any bid or offer * * * received. Heyer Products Co. v. United States, 135 Ct. Cl. 63 (1956). However, the essential nexus between the breach and the injury is not demonstrated simply because an offeror can show that he would have been accorded a second opportunity to receive an award, had negotiations been reopened * * *."

The FTC argues that the errors for which we sustained Base's protest, at best, would have resulted in an additional round of negotiations, citing our statement in Sigma/Base I where we concluded that we would not recommend termination, in part, because:

> "* * *there is no reasonable assurance that award would not have gone to Daconics whose proposal in the judgment of the evaluators clearly offered a superior system of more reliability and earlier availability than any other offeror's proposal."

Moreover, according to the FTC, "Base was not in as advantageous [a] position as [was] Sigma inasmuch as Base was not adjudged responsive to the technical and cost criteria of the solicitation."

However, Base's protest was sustained because its proposal conformed, i.e. "was responsive," to the RFP and because its rejection was improper, without more. In regard to the cost proposal submitted by Base, we found that the term "full payout lease" as used by Base was something of a term of art, which the FTC should have taken notice of, at least as a matter of evaluating that proposal. We also determined that the Base proposal should have been evaluated by deducting the residual value of the equipment offered. Had that been done the difference between the evaluated price of the Daconics and Base proposals which as perceived by the agency favored the former would have been more than offset.

In support of the claim, Base contends that it was in line for award and that the Government's failure to terminate the award and to reopen negotiations leaves it without a remedy. Base views the FTC's actions as being without reasonable basis, labeling the FTC's conduct arbitrary and capricious. In this regard, Base points to our decision in Sigma/Base I, where we indicated that the FTC went so far as to negotiate purchase terms with Daconics even though it was arguing here that it had properly rejected Base's proposal because Base had offered lease terms leading to Government ownership.

To establish a right to relief, Base is required to show something more than that it was in a position to have obtained the award, and did not receive it due to mistake or inadvertence. The record must demonstrate facts indicating that the procuring activity knew or should have known that it was acting improperly, or that in this regard, its actions were at least constructively motivated by caprice or bad faith. Keco Industries, Inc. v. United States, 192 Ct. Cl. 773 (1970); Keco Industries, Inc v. United States, 203 Ct. Cl. 566 (1974).

As indicated in Sigma/Base I, there is no doubt that the FTC acted contrary to sound procurement practice. However, Base sets out a series of assertions which it contends cumulatively demonstrate the nature of the FTC's alleged misconduct. These include, according

to Base:

> "* * * inducement for Base to submit a proposal under RFP 3-76, when [the FTC] had no intention to give that proposal fair and honest consideration; a hasty and predetermined evaluation of best and final offers; violations of pertinent regulations in allowing Daconics to modify its proposal after the * * * date [for receipt of best and final offers]; unequal treatment and an unjustified rejection of Base's proposal; misrepresentation of the basis for the rejection of that proposal; unreasonable delay in submitting the administrative reports required for the protest proceeding; and an inflated assessment of potential resolicitation costs."

The record is devoid of evidence tending to suggest in any way that the FTC had decided to make award to Daconics before RFP 3-76 was issued. Our independent examination of the FTC contract file has failed to disclose any evidence tending to show that the FTC had decided to make award to Daconics prior to the date for receipt of best and final offers, or that its request for best and final offers was intended to induce offerors to participate notwithstanding that the matter of contractor selection was already decided. We believe that the FTC made award to Daconics out of a sense of certainty that such an award was in the best interest of the Government. To conclude otherwise would seem at varience with Base's statement to our Office, that:

> "Base requested and was granted a postponement of the system demonstration until May 20, 1976, in order that its new system (Ultra-text) would be as operational as possible. At the demonstration * * *, the FTC staff showed great interest and at the final negotiation session on June 2, 1976, told Base's representatives that Base had no major problems and led Base to believe that it was at the top of the list of vendors."

We recognize that throughout the progress of these cases Base has believed that the debriefing it received from the FTC was inadequate, that the FTC acted in a

dilatory manner, and that the FTC improperly used delaying tactics to effectively prevent this Office from recommending remedial corrective action for this procurement. Moreover, Base reasserts that the FTC improperly permitted Daconics to change its proposal after the closing date for receipt of best and final offers by withdrawing its objections to certain mandatory language contained in the RFP.

As reflected in our decision in Sigma/Base I, the FTC's believed that it simply sought clarification from Daconics. Daconics had agreed to withdraw its objection to the questioned language during negotiations, but failed to follow up in its best and final offer. We found it unnecessary to reach this issue.

That the FTC may have made an erroneous award to Daconics would not of itself entitle Base to proposal preparation costs. Morever, even if Base could establish that the FTC intentionally sought to delay our review or to frustrate Base's efforts to effect its protest to our Office, it could not on that evidence alone establish that the FTC acted with caprice or actual ill-will at the time rejected it the Base proposal.

In this connection, Base contends that:

"After the offers were opened on June 9, 1976, * * * [the] Director, FTC Division of Management, telephoned Paul Callender of Base's Market Support Group and inquired how Base had been able to reduce its hardware costs. Mr. Callender received the impression that [the FTC representative] was not only surprised but unhappy about Base's offer. Although [he] suggested that Base had made changes in the design and equipment submitted * * * he was assured that such was not the case. On June 14, 1976, Mr. Callender was told by * * * [the] FTC Procurement Agent, that three of the seven vendors who submitted best and final offers were out of the running and that Base's offer had hit like a bolt out of the blue. As a result, * * * [the FTC Procurement Agent] stated that the evaluation

> would take longer than the week that was originally anticipated."

Noting that by memorandum dated June 11, 1976, the FTC's Director of its Division of Management had reported that the evaluation team had actually completed its review of the proposals, and recommended award to Daconics, Base views the above reported communications as intended to obfuscate the actions being taken by the FTC, and to mislead Base permitting the FTC to carry out its intended plan to make award to Daconics. Contrary to Base's belief, the FTC contract file indicates that it was not decided by June 11 that award would be made to Daconics. If the technical evaluation team had completed its review by that date, the question of Base's so-called "nonresponsiveness" to the solicitation was submitted to the FTC's Office of General Counsel, for review, along with the question of whether the FTC could make award other than on the basis of price. A memorandum from counsel was signed and dated on June 18, 1976, erroneously in our view suggesting to Division of Management personnel that the action proposed was proper, because in counsel's opinion "an offer which does not comply with the terms of an RFP may be considered nonresponsive," and

> "As long as the contracting officer has a reasonable basis for determining that a technically superior offer is most advantageous to the government and he evaluates offers according to the criteria set forth in the RFP, he may award a contract to a bidder who is not lowest in cost."

Evidently in reliance on this opinion Daconics was awarded the contract on June 30, 1976.

Caprice or constructive bad faith emphasizes a lack of evident motivation suggesting willfulness--or in this context, deficiencies of reasoning or methodology so substantial as to indicate that a decision is not only arbitrary, but that it was made without reason. It appears that Base included the full payout lease only in its best and final offer. The reference there to such terms was included only as a footnote to its pricing table. Although we believe the meaning of

the phrase "full payout lease" should have been understood by FTC contracting personnel, its implications on other terms of the Base proposal were not in our opinion so clear as to prevent the FTC from drawing erroneous conclusions regarding Base's intentions.

The FTC's understanding of Base's proposal was gained or contributed to by the telephone conversations mentioned above and referred to in our decision in Sigma/Base I, where we said:

> "* * * FTC personnel refer to a telephone call to Base after the closing date for receipt of best and final offers, in which it is claimed Base indicated that the Government assumed the risk of early cancellation. From this the FTC concluded that the Base offer did not permit early termination.
>
> "* * * While Base does not deny that telephone conversations took place, it insists that it offered to meet the FTC's requirements and specifically, stated in its best and final letter that it 'takes no exception to any of the mandatory FTC requirements specified in the RFP.'
>
> * * * * because no contemporaneous record was made of the disputed telephone conversation, or submitted to us, we are unable to give FTC's present recollection of it any weight."

Although we were unable to agree with the FTC's contention that Base had failed to meet its mandatory requirements, we cannot conclude that the FTC personnel involved believed that Base had offered to meet those requirements, but disregarded that knowledge in making award to Datronics. Base bears the burden of showing entitlement to proposal preparation costs. Although it was in line for award under the solicitation, on the present record we conclude that its rejection was not motivated by caprice or constructive bad faith.

Accordingly, Base's claim is denied.

R.F. Keller

Deputy Comptroller General
of the United States