

DOCUMENT RESUME

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[Agency's Loss of Proposal after Receipt but Prior to Evaluation]. B-188387. May 16, 1977. 3 pp.

Decision re: Morgan Business Associates; by Robert P. Keller, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).

Organization Concerned: Energy Research and Development Administration.

Authority: B-187439 (1977). B-183739 (1975). The McCarty Corp. v. United States, 499 F.2d 633, 637 (Ct. Cl. 1974). Keco Industries, Inc. v. United States, 482 F.2d 1233, 1240 (Ct. Cl. 1970). Heyer Products Co., Inc. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956). Keco Industries, Inc. v. United States, 492 F.2d 1200, 1202 (Ct. Cl. 1974). 57 Am. Jur. 2d Negligence, sec. 99.

The claimant requested proposal preparation costs resulting from the agency's loss of its proposal submitted in response to a request for proposals. In the absence of evidence indicating gross negligence or willful action, the agency's loss of the proposal after receipt but before evaluation did not entitle the offeror to proposal preparation expenses. Further, such expenses may be recovered only where it is shown that arbitrary Government action precluded the offeror from an award to which it was otherwise entitled. (Author/SC)

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DECISION



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

FILE: B-188387

DATE: May 16, 1977

MATTER OF: Morgan Business Associates

DIGEST:

In the absence of evidence indicating gross negligence or willful action, agency's loss of proposal after receipt but prior to evaluation does not entitle offeror to proposal preparation expenses. Further, such expenses may be recovered only where it is shown that arbitrary Government action precluded offeror from award to which it was otherwise entitled.

This is a claim for proposal preparation costs resulting from the Energy Research and Development Administration's (ERDA) loss of the claimant's proposal submitted in response to request for proposals (RFP) E(04-3)-1341. That RFP solicited offers for the management and conduct of a series of conservation research and technology conferences, workshops and seminars.

Proposals were due on November 19, 1976, and 25 proposals, exclusive of the claimant's, were received by that date. After evaluation, four contractors were selected for further negotiations leading to ultimate award. Unsuccessful offerors were then advised of the firms selected for award, but the claimant was not among the designated recipients of that letter. Negotiations were conducted with the selected contractors during December 13 - 17, 1976, and formal contracts were executed with each during the period of December 20 - 24, 1976.

By letter of January 5, 1977, the claimant requested information from ERDA as to the status of the procurement and the standing of its proposal. Ensuing communications established that the claimant's proposal was mailed with a Certified Mail Receipt dated November 5, 1976, and that it was logged as received on November 8, 1976, but was subsequently lost and never found. ERDA suggests that possibly the package was not labeled in accordance with the RFP's instructions to offerors. However, the claimant's counsel contends that the instructed designation was in fact placed upon the proposal envelope.

As the parties here recognize, the courts and our Office will allow recovery of bid or proposal preparation expenses under certain circumstances. See Amram Nowak Associates, Inc., B-187489, March 29, 1977, 56 Comp. Gen. ____, 77-1 CPD 219, and the cases cited

therein. Basically, recovery will be allowed where the Government acted arbitrarily or capriciously with respect to a claimant's bid or proposal. The McCarty Corporation v. United States, 499 F. 2d 633, 637 (Ct. Cl. 1974); Keco Industries, Inc. v. United States, 482 F. 2d 1233, 1240 (Ct. Cl. 1970). The underlying rationale of these cases is that every bidder (or offeror) has the right to have his bid honestly considered by the Government and if that obligation is breached, and a bidder is therefore put to needless expense in preparing his bid, he is entitled to recovery of his expenses. The McCarty Corporation v. United States, *supra*.; Heyer Products Company, Inc. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956).

Morgan argues that the agency's loss of its proposal meets the standard for recovery of bid preparation expenses. It argues that since it had a right to have its proposal honestly considered, it necessarily had a right to have its proposal considered per se, and that by losing its proposal the agency breached its duty to Morgan.

We disagree with the claimant's reasoning. While it is correct to say that a bidder has the right to have its bid or proposal honestly considered, not every irregularity entitles a bidder to recovery of its bid preparation costs. As a prerequisite to recovery, the bidder or offeror must show that the agency acted arbitrarily, capriciously, or in bad faith. Keco Industries, Inc. v. United States, 492 F. 2d 1200, 1202 (Ct. Cl. 1974) (not to be confused with Keco, *supra*).

Applying this standard to the situation at hand, we cannot say that the loss of a proposal by the Government itself entitles the offeror to recover preparation costs. As ERDA indicates, a proposal may be lost because of ordinary negligence, that is, because of the Government's failure to exercise ordinary care. However, to warrant recovery of preparation costs the Government's conduct must be tantamount to arbitrary or capricious action. In our opinion, the failure to exercise ordinary care is not tantamount to an arbitrary or capricious action. A greater degree of negligence must be shown. In other words, we believe that the loss must be due to willful action or gross negligence by the Government. Gross negligence may be defined in this context as a degree of negligence greater than that which constitutes ordinary negligence. 57 Am Jur 2d Negligence : 59.

Here the record shows that the proposal was sent by certified mail and was received in the Mail and Records Division of the ERDA installation. Then, as indicated by a log entry, it was delivered

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to the clerk of the Procurement Division. In this connection, ERDA reports that the procedure utilized by the Mail and Records personnel relative to registered or certified mail is to deliver the mail to the clerk of the division involved. After receipt of a package in the Procurement Division, the package is delivered to the negotiator concerned who, in the case of an RFP, delivers it back to Mail and Records for placement in a set-aside area. The proposals remain in the set-aside area until after the closing time for receipt of proposals, at which time the proposals are listed. Regarding the claimant's proposal, ERDA reports that neither the procurement clerk who signed for the claimant's package nor the contract negotiator to whom the package was addressed by the claimant has any recollection of having received the package or any knowledge of its current whereabouts.

Based on these facts we do not find that the proposal was lost because of willful action or gross negligence. The precise circumstances of how the proposal was lost remain unknown. It appears that the proposal simply was misplaced soon after its receipt at the ERDA Procurement Division. Perhaps the mishap would not have occurred if the ERDA procedure called for immediate placement of all incoming certified or registered mail clearly labeled as a proposal within the appropriate set-aside area rather than requiring that the proposal initially be forwarded to the Procurement Division and then returned to the set-aside area. In fact ERDA reports that this revised procedure is being adopted to assure that registered or certified proposals will not be lost in the future. Nevertheless, we cannot say that the procedure which ERDA utilized here was so deficient or inadequate as to constitute gross negligence. We note in this regard that 25 proposals were received and there is no evidence that ERDA often lost proposals in the past.

In any event, 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." Ampex Corporation et al., B-183739, November 14, 1975, 75-2 CPD 304 (emphasis added). Since Morgan has not demonstrated that it would have been entitled to award had its proposal not been lost, the claim is denied.

Acting *V. F. Krizan*
Comptroller General
of the United States