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DECISION

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

FILE: B-191050 DATE: February 10, 1978

MATTER OF: William D. Freeman, M.D.

DIGEST:

Agency's decision not to fund proposal submitted in response to Program Opportunity Notice (PON) because project was regarded as operational, even though PON misled offeror into believing that operational projects were eligible for funding, was not arbitrary or made in bad faith so as to entitle offeror to proposal preparation costs. Moreover, such costs may be recovered only where it is shown that arbitrary Government action precluded offeror from award to which it was otherwise entitled, and under terms of PON no offeror could claim entitlement to award.

We have been requested by an authorized certifying officer, Department of Energy (DOE), to render a decision as to whether a claim for reimbursement of proposal preparation costs from William D. Freeman, M.D., may be paid. The claim is for $2,000 for expenses allegedly incurred in the preparation of technical and cost proposals in response to a Program Opportunity Notice (PON) issued by the Energy Research and Development Administration (ERDA), now DOE.

The PON offered various forms of financial assistance (contracts, grants, and cooperative agreements) to those who would include solar heating and cooling systems for demonstration purposes in their commercial facilities. The PON contained the following statement on page one:

> "The project proposed under this PON may currently be in any of the following stages of development: conceptual design, preliminary design, final detailed design, construction, or presently in operation." (Emphasis added.)

Dr. Freeman and his father were engaged in the construction of a solar heating unit for their medical office

building on November 19, 1976 when their proposal was submitted in response to the PON. The unit was stated to be 75 percent completed at that time. On February 15, 1977, the Freemans received a mailgram from ERDA stating that their proposal had been determined qualified for the selection process and instructing them to submit a cost proposal by March 11, 1977. At the time of submission of their cost proposal, the unit was 90 percent completed. This was stated on the first page of the cost proposal letter. On May 10, 1977, the Freemans received a letter from ERDA which stated:

> "Evaluation and selection of proposals for ERDA funding support have been completed. Since your project is considered to be in the operational phase, ERDA funding support for the installation of the solar system is not appropriate. * * *"

Dr. Freeman bases his claim on two points. First, he states that at the time his proposal was rejected, his project, while more than 90 percent complete, was not operational. Second, he asserts that he was misled by the statement in the PON that funding would be available for projects in any stage of development or construction or already in operation, which he refers to as "false advertising."

The documents submitted by the DOE certifying officer indicate that while it was not ERDA's intent to fund construction of completed projects, the language in the PON apparently misled six offerors whose proposals were rejected because their projects were operational. The documents further indicate that cost proposals were requested from those six offerors (after their technical proposals were found to be "qualified for consideration in the selection process") as the result of "an oversight." It is also stated that Dr. Freeman's project in fact was not completed at the time his proposal was rejected, and that had the proposal been selected, the project "could have been partially funded."

The recovery of bid or proposal preparation costs is based on the theory that the Government, when issuing a solicitation, enters into an implied contract with bidders or offerors that their bids or proposals will be fairly and honestly considered. Heyer Products Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956). Not every irregularity, however, entitles a bidder or offeror to compensation for the expenses incurred in preparing a bid or proposal. Keco Industries, Inc. v. United States, 492 F.2d 1200, 1203 (Ct. Cl. 1974) (hereinafter Keco II). The court in Keco II set forth the following standard and subsidiary criteria for recovery of preparation costs:

> "The ultimate standard is, * * * whether the Government's conduct was arbitrary and capricious toward the bidder-claimant. We have likewise marked out four subsidiary, but nevertheless general, criteria controlling all or some of these claims. One is that subjective bad faith on the part of the procuring officials, depriving a bidder of the fair and honest consideration of his proposal, normally warrants recovery of bid preparation costs. Heyer Products Co. v. United States * * *. A second is that proof that there was 'no reasonable basis' for the administrative decision will also suffice, as it does in many situations. Continental Business Enterprises v. United States, 452 F.2d 1016, 1021, 196 Ct. Cl. 627, 637-638 (1971). The third is that the degree of proof of error necessary for recovery is ordinarily related to the amount of discretion entrusted to the procurement officials by applicable statutes and regulations. Continental Business Enterprises v. United States, supra * * *; Keco Industries, Inc. v. United States, supra, 428 F.2d at 1240, 192 Ct. Cl. at 784. The

> fourth is that proven violation of pertinent statutes or regulations can, but need not necessarily, be a ground for recovery. Cf. Keco Industries I, supra * * *. The application of these four general principles may well depend on (1) the type of error or derelection committed by the Government, and (2) whether the error or derelection occurred with respect to the claimant's own bid or that of a competitor." Keco II at 1203-04.

Pursuant to those criteria, bid and proposal preparation costs have been awarded (1) where there has been a clear violation of a statute, see Continental Business Enterprises, Inc. v. United States, 452 F.2d 1016 (Ct. Cl. 1971), or of a procurement regulation, Armstrong & Armstrong, Inc. v. United States, 356 F. Supp. 514 (E.D. Wash. 1973), aff'd 514 F.2d 402 (9th Cir. 1975); The McCarty Corp. v. United States, 499 F.2d 633 (Ct. Cl. 1974); T & H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345; William F. Wilke, Inc., 56 Comp. Gen. 419 (1977), 77-1 CPD 197, and (2) where the Government's action was without a reasonable basis and therefore was arbitrary and capricious. Amram Nowak Associates, Inc., 56 Comp. Gen. 448 (1977), 77-1 CPD 219; Bromfield Corporation, B-187659, May 5, 1977, 77-1 CPD 309; International Finance and Economics, B-186939, October 25, 1977, 77-2 CPD 320. However, Government action, to be arbitrary or capricious, must result from something more than "ordinary" or "mere" negligence. Groton Piping Corporation and Thames Electric Company (joint venture) - Claim for Bid Preparation Costs, B-185755, June 3, 1977, 77-1 CPD 389; Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344. Moreover, proposal preparation costs may not be recovered unless it is reasonably certain that the disappointed offeror would have received the award had it not been for the complained of Government action. International Finance and Economics, supra; Morgan Business Associates, supra.

Under the facts of this case, we find no basis for allowing Dr. Freeman's claim. It is clear that ERDA did not act in bad faith in soliciting and considering Dr. Freeman's proposal and did not act arbitrarily in rejecting the proposal. According to an ERDA explanation previously furnished to Dr. Freeman, the statement in the PON was not incorrect because there were two situations in which an operational project could have been selected for an award:

> "First, an operational project could be selected for instrumentation and funded for the costs related to the installation and operation of the instrumentation (but not including incurred construction costs).
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> "Second * * * [instead of a direct funding award, a proposal could have been selected for] a cooperative agreement where in return for non-instrumented performance data submitted to ERDA, the data would be analyzed by ERDA or one of its contractors and the result of this analysis would be furnished to the contractor for his benefit."

Although the language in the PON could have been clearer to indicate that ERDA did not intend to fund the construction costs of operational projects, we cannot conclude that the statement in the PON or ERDA's ultimate decision not to accept Dr. Freeman's proposal notwithstanding that statement represent the type of action for which proposal preparation costs may be awarded. See, in this regard, Groton Piping Corporation, supra, and Ampex Corporation et al., B-183739, November 24, 1975, 75-2 CPD 304.

In the former case, some copies of the invitation for bids (IFB) erroneously contained a notice of set-aside for small businesses although the project was

not intended to be restricted to small businesses. The claimant, a small business, bid on the project in reliance of the set-aside provision contained in his copy of the IFB, but was under-bid by a large business. The claimant requested bid preparation costs on the ground that it would not have bid on the project unless it had actually been set aside for small businesses. In the latter case, a two-step procurement was set aside for small business shortly before the due date for receipt of step one technical proposals, after the agency belatedly recognized that the procurement was suitable for a small business set-aside. Two large business concerns claimed proposal preparation costs on the ground that they were misled by the agency's failure to adequately consider the possibility of a small business set-aside prior to issuance of the solicitation. In both cases, the claims were denied, not because the claimants had not been misled, but because the complained of Government action was regarded as no more than "mere negligence" not meeting the tests set forth in Keco II, supra, and Heyer Products Company, supra.

Moreover, with regard to ERDA's viewing Dr. Freeman's project as operational when it was not yet at that stage, we do not believe it was arbitrary for ERDA to reject Dr. Freeman's proposal. Since ERDA did not intend to fund construction of operational projects, and since Dr. Freeman's project was 90 percent completed at the time of submission of the cost proposal ERDA could well consider that by the time the cost proposals could be evaluated, selections made, and negotiations conducted with the successful proposers, the construction phase of the project essentially would be completed and that funding for whatever small amount of construction might remain was inappropriate.

In this connection, we point out that unlike a traditional procurement, where the Government intends to award a contract to the low bidder or to the offeror submitting the most advantageous proposal, the PON informed offerors that "ERDA reserves the right to support or not support any or all proposals, in whole or in part," and should a proposal be accepted, that assistance would be in one of several forms, and that proposals would be selected so as to maximize the number of different demonstration projects within differing geographic and climatic regions. Thus, we think it clear that no one offeror could successfully claim that it was "entitled" to an award under the PON. Thus, under the rationale of International Finance and Economics, supra, and Morgan Business Associates, supra, Dr. Freeman would not be entitled to proposal preparation expenses in any event

Accordingly, reimbursement of Dr. Freeman's proposal preparation expenses should not be allowed.

R.F.Keller

Deputy Comptroller General
of the United States