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DECISION

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

FILE: B-191130 DATE: October 24, 1978

MATTER OF: Claim of A Better Way, Inc.

DIGEST:

1. Claimant's unsolicited value engineering proposal recommending that Defense Logistics Agency require that faucets it procures be constructed of zinc-based material constitutes mere suggestion and not within the exclusive list of intellectual property which can be purchased by Department of Defense under 10 U.S.C. § 2386 (1976).

2. Since agency officials had no authority to contract for purchase of suggestion doctrine of estoppel is not for application.

A Better Way, Inc. (ABW) has submitted claims for $25,896.90 and $3,500 for several unsolicited Value Engineering (VE) proposals which were submitted by ABW under the provisions of Armed Services Procurement Regulation (ASPR) (now Defense Acquisition Regulation (DAR)) § 1-1708 (1976 ed.). The case turns on whether the Court of Claims' decision in Grismac Corporation v. United States 556 F 2d. 494 (Ct. Cl. 1977) is controlling.

On May 20, 1976 ABW began submitting to the Defense Logistics Agency (DLA) the first of several unsolicited VE proposals. All except one of them deal with the material used in fabricating faucet handles used on lavatories and sinks purchased by DLA.

At that time, DAR/ASPR 1-1708 (1976 ed.) provided for consideration of an unsolicited VE proposal with regard to a supply or service for which the proposer company did not have a current contract. Such proposals under the regulation must have provided for reduction of costs without impairing essential functions or characteristics of the supply or service. The Government could purchase an unsolicited VE proposal, however, the contract price could not exceed 20 percent of the savings.

To date, DLA has accepted and contracted for three of ABW's unsolicited VE proposals covering sinks or faucets under four National Stock Numbers (NSN). The instant claims arise out of three VE proposals dated March 18, 1977 and one dated July 8, 1976, concerning sinks or faucets under four other NSN's.

ABW's VE proposals concerned the fact that DLA's purchase descriptions required that faucet handles be made of chrome-plated brass. ABW proposed that chrome-plated zinc alloy faucet handles would meet the Government's minimum needs; foster more competition due to the non-availability of brass to some lavatory suppliers; and reduce the costs of the faucets significantly. ABW's proposals are grounded on the fact that the plumbing industry has long recognized the interchangeability of brass and zinc alloy in faucet handles. The Federal Specifications, under which purchase descriptions were issued, merely allowed, but did not require, zinc alloy to be substituted for brass on a procurement by procurement basis. Consequently, the effect of ABW's proposals was to have the Government make mandatory what had been a permissive use of zinc alloy for faucet handles.

DLA initially rejected ABW's three VE proposals of March 18 because the agency determined that its earlier acceptance and purchase of similar VE proposals from ABW regarding the material to be used in faucet handles entitled it to use the idea for other faucets in the supply system. The agency changed that determination when it was informed by ABW that it had been advised by a DLA VE official to submit separate VE proposals for each NSN item affected. DLA then proceeded to evaluate the proposals. DLA finally rejected the VE proposals by letter dated November 29, 1977 which indicated that in view of the Grismac decision handed down on May 18, 1977 DLA had no legal authority for compensating persons for suggestions made.

ABW's July 8, 1976 VE proposal was ultimately rejected for the same reason. However, prior to DLA's January 24, 1978 rejection of the VE proposal, DLA discovered that management authority for the item affected had been transferred to the General Services

Administration (GSA). It is reported that GSA takes the position that it has no authority to compensate anyone for an unsolicited VE proposal and suggests that DLA pay ABW.

In reports submitted to this Office in connection with the March 18 and July 8 VE proposals the contracting officer takes the position that ABW's claims not be paid in both instances because DLA lacks the authority to pay for unsolicited ideas. In the case of the July 8 proposal, rejection of the claim is also urged because the actual benefit, if any, was bestowed upon GSA rather than DLA. In connection with the March 18 proposals the contracting officer maintains that DLA had a right to use this idea because it had been purchased under earlier VE proposals from ABW. DLA Headquarters takes the position that the claims must be decided without the benefit of Grismac v. United States, supra, because that case was decided under an earlier version of DAR/ASPR 1-1708 (1976).

The first issue to be decided is whether Grismac is applicable here, because, as DLA points out, the DAR/ASPR provision which was interpreted and applied in Grismac was an earlier version and not the same as DAR/ASPR 1-1708 (1976 ed.). It is our view, as discussed below, that Grismac was decided on a ground which makes the DAR/ASPR provision immaterial.

In GKS, Inc., B-187593, June 26, 1978, 78-1 CPD 461, we considered the rationale on which Grismac was decided. We held that the court relied on the prohibition implicit in 10 U.S.C. § 2386 (1976) that only intellectual property specified in that section could be purchased with appropriated funds. 10 U.S.C. § 2386 (1976) allows Department of Defense officials to purchase the following types of intellectual property:

* * * * *

" ' (1) Copyrights, patents, and applications for patents.

" ' (2) Licenses under copyrights, patents, and applications for patents.

" ' (3) Designs, processes, and manufacturing data.

" ' (4) Releases before suit is brought, for past infringement of patents or copyrights.'"

Both Grismac's and GKS' proposals were held to be outside the scope of 10 U.S.C. § 2386 (1976), because they were actually suggestions and not classifiable as copyrights, patents, designs, processes, or manufacturing data. Grismac, for example, had recommended various changes in the size and grade of plywood used in wooden pallets serving as bases for storing and handling boxed ammunition. We find that the proposals made by ABW in this case to be mere suggestions and also not within the rubric of 10 U.S.C. § 2386 (1976).

However, DLA maintains that the provisions of DAR/ASPR 1-1708 (1976 ed.) (this section has been deleted by Defense Procurement Circular 76-9, August 30, 1977) which specifically provided for the submission of unsolicited VE proposals supplies the regulatory authority for payment which was lacking when the Grismac case was decided. The regulation in effect during Grismac merely provided that unsolicited proposals could be purchased on a case by case basis in accordance with 10 U.S.C. § 2386 or Part 9 of ASPR, (a section which concerned rights in technical data).

We do not believe that the existence of DAR/ASPR 1-1708 (1976 ed.) has any effect on the Grismac holding. Although the court searched the regulations for provisions which could be interpreted as permitting the purchase of unsolicited ideas, the decision was firmly based on 10 U.S.C. § 2386 (1976) which, of course, supersedes any inconsistent regulation purporting to govern this subject. In this regard the court states in pertinent part:

"The trial judge does not advert in his opinion to § 2386 (though it is mentioned in the findings). He deduces authority to contract, which implicitly he agrees is necessary if plaintiff is to recover, from a melange of ASPR provisions. Should statutory authority

> be lacking, ASPR could hardly supply it, but no doubt a long established ASPR provision interpreting a statute would aid us in construing that statute should we find an ambiguity. * * *" Id. at 498

Although DAR/ASPR 1-1708 (1976 ed.) did provide a more elaborate scheme for the submission and approval of unsolicited VE proposals, it does not specifically provide that mere suggestions which do not meet the criteria set forth in 10 U.S.C. § 2386 (1976) could be purchased by the agency. It is clear therefore, that the Grismac case, which holds that 10 U.S.C. § 2386 (1976) prohibits Defense Agencies from expending appropriated funds for the purchase of suggestions, governs this matter despite the existence of DAR/ASPR 1-1708 (1976 ed.). See, Grismac, supra.

As in this case, the protester in GKS, supra, argued that the Government was estopped to deny the existence of an agreement to pay the company for its VE proposal. In that case, we stated that the protester, in order to establish an estoppel, had to meet the threshold requirement that the agreement to be established must be within the scope of the authority of the responsible Government officials. Emeco Industries, Inc., v. United States 485 F 2d 652 (Ct. Cl. 1963). As the court stated in Grismac, supra at page 499:

> "* * * Defendant's officials, high or low in the Department of Defense, did not have authority to make express contracts obligating appropriated funds for the purchase of suggestions * * *."

Accordingly, a case for estoppel can not be made in this instance.

The claims are therefore denied.

For the Comptroller General
of the United States