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DECISION

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

FILE: B-196187 DATE: May 5, 1980

MATTER OF: Colin A. Houston & Associates, Inc. - Claim for Proposal Preparation Costs

DIGEST:

Claim for proposal preparation costs based on contention that agency knowingly and capriciously failed to advise offerors of level of work it was prepared to fund is denied. Record shows that failure of claimant to receive award was due solely to fact that its proposed costs for contract effort were excessive.

Colin A. Houston & Associates Inc. (CAHA) claims that the Department of the Interior, Bureau of Mines (Interior), improperly failed to advise offerors of the exceedingly limited funds available for the performance of the contract awarded under request for proposals (RFP) JO-199050, thereby misleading CAHA in the preparation of its proposal. The RFP called for the development of a systematic approach for selecting surface treatments which would promote coal dust wetting with water in underground mining operations.

CAHA initially protested the matter contending that the successful offeror was not capable of accomplishing the required literature search, sampling analysis, correlation of data, and writing of a manual with an expenditure of no more than $66,900, the contract award price. Because Interior's protest report revealed that the Government estimate for the contract work was only for 1.3 years of work at $102,870, CAHA, in a letter dated March 10, 1980, withdrew its protest. In this letter CAHA alleged that it was entitled to be compensated for its proposal preparation costs of $12,647.12 because Interior knowingly and capriciously withheld the level of work it was prepared to fund. Consequently, we are at this point treating the matter solely as a claim for proposal preparation costs.

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CAHA avers that the RFP indicates that the Interior scientists, having failed to solve the coal wetting problem, were seriously interested in solving it within 1 calendar year's time with a high success rate in order to provide sorely needed support for the nation's energy problem. According to CAHA, the company therefore assembled the best experts in the area of coal and coal mining and worked up a detailed program that was supported by a topflight mineral laboratory. In CAHA's opinion, this type of intensive effort was necessary in order to solve the problem posed by the RFP within 1 year's time. CAHA argues that its best and final price of $242,463 was, therefore, commensurate with what the company was led to believe was the required level of technical effort.

However, by allowing a little over 1 man-year of work, CAHA asserts that Interior has demonstrated that it never intended to have the contract effort completed within 1 calendar year. In this regard, CAHA alleges that 1 man-year of effort is insufficient to accomplish the tasks described in the RFP. Had it known when preparing its offer that Interior did not really desire the intensive technical effort depicted in the RFP, CAHA takes the position that it could have presented an offer "timed accordingly." Thus, CAHA claims that due to Interior's intentionally misleading action regarding technical effort, the company was denied an award to which it was otherwise entitled.

An offeror's entitlement to the costs of preparing its offer arises from the Government's responsibility to fairly and honestly consider the proposals that are submitted. Keco Industries, Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970). In Keco Industries, Inc. v. United States, 492 F.2d 1200 (1974) (Keco II), the Court of Claims outlined the basic standard for determining whether the Government fairly and honestly considered a proposal. The ultimate standard is whether the agency's actions were arbitrary and capricious toward the claimant. Keco II indicates four ways by which this standard may be satisfied: (1) subjective bad faith on the part of procuring officials which deprives the offeror of a fair and honest consideration of his proposal; (2) no reasonable basis for the administrative

action; (3) a sliding degree of proof commensurate with the amount of discretion afforded the procuring officials; and (4) proven violation of pertinent statutes or regulations which may suffice for recovery. We have adopted these standards. T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345; A.R.F. Products, Inc., B-186248, December 30, 1976, 76-2 CPD 541.

In addition, we have stated that in a negotiated procurement 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, B-186939, October 25, 1977, 77-2 CPD 320; Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344.

CAHA has alleged no violations of procurement statutes or regulations and we find none to exist here. Nor do we find any subjective bad faith or unreasonable actions on the part of Interior's procurement officials. In this connection, we note that the RFP Scope of Work clause reflected the problems and objectives of the program, leaving to the discretion of the offerors the method of approach and estimated man-hours necessary to solve the problems and accomplish the objectives. The RFP also warned that unnecessarily elaborate presentations may be construed as an indication of an offeror's lack of cost consciousness and that technical and cost proposals should not include elements which are beyond the requirements of the Scope of Work. The Evaluation and Award Factors clause listed the evaluation criteria in relative order of importance and provided that cost may be the deciding factor when proposals are ranked technically equal. The record reveals that after final evaluation the three offerors within the competitive range were determined to be essentially equal technically. Cost, then, became the determining factor in making an award. The Government estimate anticipated a price for the contract work that was consistent with the final price offers submitted by the other two offerors in the competitive range.

With respect to CAHA's argument that Interior capriciously withheld information as to the level of work it was prepared to fund, the record shows that in its evaluation of CAHA's initial proposal Interior questioned the company's use of personnel and facilities. CAHA had listed a half a dozen chemists as regular employees and another half a dozen consulting chemists. However, Interior noted that CAHA had no laboratory facilities, having subcontracted with two outside companies to do such work. As a result, Interior questioned what all the listed chemists would be doing for 5,000 hours of effort at their desks and on 60 some field trips and concluded that the hours listed for personnel by CAHA seemed like "overkill."

During discussions, CAHA was advised that its proposed level of effort and estimated costs were considered quite high and, accordingly, CAHA dropped its cost from $520,590 to $242,463. Nevertheless, despite the substantial reduction in man-hours, Interior still found in its evaluation of CAHA's best and final offer that the company was very high in this area in view of the fact that subcontractors would be doing much of the required work. In view of the foregoing, we believe that the failure of CAHA to receive the award in this procurement was solely because its proposed contract costs were in fact excessive and not because of any failure by the Government to disclose the proper level of contract work that it would fund. Cf. Northland Anthropological Research, Inc., B-195184, November 5, 1979, 79-2 CPD 320. In this regard, we also note that Interior found the approach given in the awardee's proposal to be a "simple and direct solution" to the problems posed by the RFP at substantially less cost.

CAHA's claim for proposal preparation costs is denied.

Milton J. Socolar

For The Comptroller General
of the United States