

DECISION

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

FILE: B-218021.2 **DATE:** September 16, 1985
MATTER OF: BrightStar Communications Ltd.

DIGEST:

1. Where no solicitation is issued, a claimant asserting that nonetheless an agency violated its duty to fairly and honestly consider a proposal submitted by claimant bears a significant burden to establish entitlement to proposal preparation costs. Where record supports agency's contention that it was merely engaged in soliciting information for planning purposes and had not sought proposals as part of a process that was to result in a contract award, payment of proposal preparation expenses is not warranted.
2. Allegation that agency misappropriated proprietary information and utilized the information in a subsequent RFP is denied since protester has not met its burden of showing proprietary nature of information allegedly misappropriated.
3. A firm is not entitled to the costs of pursuing a protest including attorney's fees, where the matter is filed prior to the effective date of the Competition in Contracting Act of 1984.

BrightStar Communications Ltd. (BrightStar) requests reimbursement of the expenses incurred by the firm in preparing a proposal for the United States Information Agency (USIA) concerning the implementation of an expanded telecommunications system for USIA's Euronet System. The Euronet System transmits television quality programs originating in Washington, D.C. for closed circuit reception at United States embassies throughout Europe. BrightStar contends that USIA encouraged the firm to submit a proposal

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and then failed to consider the proposal fairly and honestly. BrightStar also complains that USIA misappropriated information contained in BrightStar's proposal by improperly using that information in a subsequent request for proposals (RFP) under which BrightStar was excluded from competing. BrightStar, in addition to its proposal preparation expenses, seeks the costs incurred by the firm in filing and pursuing this claim.

We deny the claim.

Initially, USIA contends that we should dismiss this claim because it was not filed in a timely manner. We will not consider a claim for proposal preparation costs where a protest raising the underlying issues would be untimely. The Land Group of Salt Lake City, B-202423, Apr. 16, 1981, 81-1 CPD ¶ 296. BrightStar, however, timely filed a protest with this Office. Under our Bid Protest Procedures then in effect, we requested BrightStar to furnish additional details of specific grounds for protest within 5 working days. See 4 C.F.R. § 21.2(d) (1984). BrightStar never received our letter, but promptly submitted additional details when the firm was advised that they were needed, and those details contained the request for proposal preparation costs and the basis for the claim. Since we received an initial protest that was timely filed, and since it is that protest that evolved into this claim, we will consider the claim.

By letter dated April 3, 1984, USIA informed BrightStar and six other European organizations of USIA's intention to acquire a dedicated communications system for transmitting USIA's Euronet programs. That letter stated that USIA was requesting "information and cost estimates for satellite facilities," and that seven organizations in Europe were being requested to provide this information in order to enable USIA to decide how to best proceed with this project. In response, BrightStar submitted a four-page proposal via telex on May 25, 1984 in partnership with Independent Television Services (ITS); at least two other European organizations also submitted three-page proposals at that time.

On June 25-26, 1984, at the request of certain USIA technical personnel, BrightStar representatives conducted a more detailed presentation for USIA. Thereafter, BrightStar submitted a detailed 34-page proposal in response to what it alternatively claims were questions raised at the June 25

presentation or specific requests from unnamed USIA officials to supplement its original proposal. In addition, on August 21, 1984, BrightStar received a copy of an internal USIA telex noting that USIA needed a "confirmed best and final quotation" from Visnews, Limited, and BrightStar responded by submitting a 70-page, third proposal on September 5, 1984, that represented a consolidation and further development of the first two. That proposal was received by USIA with a cover letter that for the first time expressed BrightStar's concern that the material therein not be divulged to any person outside USIA. BrightStar also provided certain corporate and financial documentation on October 17, 1984 and additional technical and cost information was provided to USIA as late as October 30, 1984.

On November 21, 1984, USIA issued a solicitation for the Euronet system which was limited solely to European governmental telecommunication agencies (PTT's). The solicitation stated that strong emphasis would be placed on the lowest cost for a system and an advance operational demonstration. BrightStar apparently became aware of the solicitation on December 3, 1984 and states that it was advised by USIA at that time that its quotation was considerably higher than various other proposals which had been received. Since the solicitation was issued to "interested PTT's only," BrightStar, a non-PTT, was excluded from the competition.

BrightStar states that subsequent discussions with USIA have demonstrated that it would not be productive to force USIA to reopen negotiations with BrightStar. Rather, BrightStar claims that the only meaningful remedy would be to require USIA to reimburse BrightStar its proposal preparation costs and the costs it has expended in pursuing this claim. BrightStar argues that it is entitled to these costs because its proposal was submitted as a reasonable response to the encouragement of USIA officials. In this regard, BrightStar notes the extensive discussions which occurred with USIA representatives as well as BrightStar's demonstration of its proposed system and argues that these actions are consistent with a negotiation process rather than merely the gathering of information to be used by USIA in a subsequent acquisition. Also, BrightStar contends that the use of procurement "terms of art" by USIA officials further misled BrightStar concerning USIA's intentions. BrightStar states that it was advised that proposals had been received and were being "evaluated" and that the firm was also requested to submit a "confirmed best and final quotation." BrightStar states that it was told that its status as a foreign firm could permit USIA to speed up the award of a contract for these services and, as a

result, BrightStar contends that USIA intended to award a contract based on the discussions which were taking place.

BrightStar argues that the issuance of a subsequent and differing RFP without any justification for canceling the original procurement action violated USIA's implied duty to fairly and honestly consider BrightStar's proposal, and that proposal preparation costs should be awarded for the needless expenses incurred by BrightStar. Also, BrightStar argues that USIA plagiarized information from its proposal and improperly included that information in the subsequent RFP, and that this was a further violation of USIA's duty to fairly consider BrightStar's proposal.

USIA argues that there was no implied duty to fairly and honestly consider BrightStar's proposal because no solicitation was ever issued. While acknowledging that certain USIA personnel utilized procurement "terms of art" in discussions with BrightStar, USIA contends that BrightStar misinterpreted the discussions which occurred and that the agency was merely engaged in the traditional and necessary process of market analysis for acquisition planning. USIA states that an exhaustive market survey was conducted, that information was received and analyzed from BrightStar and several other organizations, and that it decided that limiting the competition to PTT's, which are in effect foreign government-sanctioned telecommunications monopolies, best satisfied USIA's minimum needs.

In addition, USIA denies that it plagiarized any of BrightStar's proposal. USIA argues that many of the allegedly plagiarized terms are instead generalized technological concepts, or concepts that originally came from USIA's own requests for information issued on April 3, 1984. Moreover, USIA points out that, even if the information provided by BrightStar was proprietary or confidential, BrightStar failed to adequately mark or identify the information sought to be protected from disclosure. Under these circumstances, USIA contends that the agency is not liable for any unauthorized disclosure which may have occurred.

The basis for the payment of proposal preparation expenses is the finding of arbitrary or capricious agency action in the award of a government contract. Decision Sciences Corp.-Claim for Proposal Preparation Costs, 60 Comp. Gen. 36 (1980), 80-2 CPD ¶ 298. The theory under which the government is held liable for proposal preparation expenses is the breach of an implied assurance given all firms submitting proposals that each proposal will be fairly and honestly reviewed. T&H Co., 54 Comp. Gen. 1021 (1975),

75-1 CPD ¶ 345. This implied contract is formed by the government's solicitation of bids or proposals and the submission of a bid or proposal in response thereto. University Research Corp.-Reconsideration, B-186311, Aug. 16, 1977, 77-2 CPD ¶ 118. Where no solicitation is issued, no implied contract for fair and honest proposal consideration is ever established and therefore there can be no breach of the implied duty. Bell & Howell Co., 54 Comp. Gen. 937 (1975), 75-1 CPD ¶ 273; Computer Election Systems, Inc., B-195595, Dec. 18, 1979, 79-2 CPD ¶ 413.

Here, despite BrightStar's assertions that USIA was engaged in a formal selection process, the record shows that no solicitation was issued. Furthermore, we are unable to find that the discussions that occurred between USIA personnel and BrightStar otherwise provide a basis for the payment of proposal preparation expenses. An agency may legitimately conduct preprocurement tests and discussions with potential suppliers as well as consider cost in formulating its minimum needs. Maremont Corp., 55 Comp. Gen. 1362 (1976), 76-2 CPD ¶ 181. These discussions may be extensive and are often necessary for an agency to rationally and intelligently determine what its minimum needs are. Despite BrightStar's assertions that USIA was engaged in a formal selection process, we agree with USIA's overall characterization of the discussions which occurred as preprocurement evaluation rather than a formal selection process.

In this regard, we note that USIA's initial letter, dated April 3, 1984, stated that information and cost estimates were being requested in order to enable USIA to decide how best to move forward with this project. In our view, this notice was sufficiently clear so that all potential offerors should have understood that USIA was merely soliciting information to assist the agency in formulating its minimum needs. Also, while certain USIA officials may have utilized procurement terms of art in dealing with BrightStar, we find that their use did not in any way change the character of the evaluation process which was being conducted. At the outset, USIA was clearly soliciting only information and at that time, USIA requested that "proposals" be submitted. In our view, subsequent use of similar terminology should not have been misleading.

In addition, the fact that BrightStar conducted an in-depth presentation for USIA representatives is not inconsistent with USIA's contention that it was only engaged in information gathering. The use of tests is clearly an appropriate tool for an agency to determine what products or

services will meet its needs. See Maremont Corp., 55 Comp. Gen., supra. Also, while BrightStar claims that it was told that its status as a foreign firm could speed up an award, we note that there is no evidence in the record that USIA actually advised potential offerors that an award on the basis of the proposals submitted would be forthcoming and the basis upon which USIA would select among the participants.

In short, in a situation where no solicitation is issued, there is a significant burden upon a claimant to demonstrate its entitlement to proposal preparation expenses since, absent a solicitation, no clear and definitive framework is set forth by which to judge the agency's conduct. Based on our review of the record, we are unable to conclude that the above USIA actions were arbitrary or capricious so as to warrant the payment to BrightStar of the expenses incurred by the firm.

With respect to BrightStar's allegation that USIA's misappropriation of proprietary data and designs is evidence of bad faith, we note that the protester bears the burden of proof on this matter and must show that the material submitted was marked proprietary or that the material was disclosed in confidence, that the preparation of the material involved significant time and expense, and that the material contained data or concepts that could not be independently obtained from publicly available literature or from common knowledge. John Baker Janitorial Services, Inc., B-201287, Apr. 1, 1981, 81-1 CPD ¶ 249.

In the present case, however, we find that BrightStar has not sustained this burden. We note that only its final submission to USIA was marked proprietary. In addition, while BrightStar has pointed to similarities between the information it submitted to USIA and USIA's subsequent RFP, BrightStar has not submitted sufficient evidence to establish the proprietary nature of the information allegedly utilized by USIA. Although BrightStar alleges that USIA's subsequent RFP utilized information contained in BrightStar's submission, USIA states that the allegedly plagiarized terms are general concepts not unique to BrightStar's proposal. BrightStar has not demonstrated that the allegedly misappropriated information could not have been independently obtained and under these circumstances, we cannot conclude that USIA acted improperly.

Accordingly, BrightStar's claim for proposal preparation costs is denied. We note that since this matter was filed prior to the passage of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175, BrightStar is not in any event entitled to recover the cost of pursuing it. Beaver Linoleum & Tile Co., Inc., B-218448.2, June 5, 1985, 85-1 CPD ¶ 643.

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