



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Claim of Primary Marketing Systems, Inc.

File: B-236450

Date: May 1, 1990

DIGEST

Where contracting agency reproduced in its own solicitation specifications drafted by the claimant without that firm's prior approval, claimant is entitled, on a quantum valebant basis, to the reasonable value of those services to the government.

DECISION

Primary Marketing Systems, Inc., requests that the General Accounting Office review the Department of the Navy's denial of its claim for consulting fees in connection with request for quotations (RFQ) No. N00612-89-Q-KDZ8, for a signage system to display menu items and their caloric contents aboard the U.S.S. Canopus. The claimant alleges that the government reproduced specifications in the RFQ that were written by Primary as a consequence of its reliance on a naval non-commissioned officer's repeated requests and in anticipation of an eventual contract award, and that the agency has failed to compensate it for the expenses it incurred in drafting these specifications.

The claim is allowed.

Although the parties dispute some of the facts, the record reflects the following. The commander of the U.S.S. Canopus desired a signage system for the galley aboard ship and requested that his senior chief examine the alternatives. The senior chief initially contacted Trans-lux, since he had seen its brochure, and requested additional information. Trans-lux contacted the claimant, apparently its area dealer, to handle the request. Primary then called the senior chief to discuss the needs of the Navy, and the senior chief invited the president of the company to meet with him on board the U.S.S. Canopus to examine the area and

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discuss the agency's needs.^{1/} During this meeting the claimant alleges that he specifically asked about the procurement requirements and was told to develop the specifications and they would be used in the order. The senior chief also allegedly told him that there would be "no problem" with Primary receiving the award.

Primary prepared a proposal which included a sample menu and specifications and sent it to the senior chief on May 17, 1988. Primary met again with the senior chief to modify the specifications. During this meeting the senior chief requested a demonstration of the item, called a "Menuwall;" informed Primary that the Navy could not pay the freight costs; but did state that the demonstration was necessary in order to convince the Navy that the product would work. Primary demonstrated the product in use aboard the ship and was told at that time that the procurement would have to be approved and then Primary would be contacted. In January 1989, Primary was informed that a solicitation was soon to be issued. The RFQ, issued on May 24, contained specifications that essentially mirrored those drafted by Primary a year earlier. The RFQ stated that quotations were due to the Navy by May 25. Two quotes, including Primary's, were received and the low offeror, Motion Message, Inc., received the award.

Primary contends that its services were used to develop the specifications under the false pretenses that the award to it of a contract for the Menuwall was a mere formality. Since it did not receive the contract, the claimant contends that it should be paid as a consultant on the procurement and requests a fee of \$2,500 for its services.

While the agency disagrees with Primary's contention that it was "invited" aboard the U.S.S. Canopus and requested to draft specifications for a menu board, the agency concedes that Primary did in fact come aboard the ship and draft these specifications. Further, although the agency disputes whether the specifications in the RFQ were identical to those in Primary's May 17, 1988 proposal, it admits that they are very similar.

^{1/} The claimant had to make two trips for the initial meeting, because the first time the claimant attempted to meet with the senior chief he was denied entry to the naval base due to lack of a security clearance.

Based on our review of this matter, we conclude that Primary should be reimbursed on a quantum valebant basis, that is, for the reasonable value of the services rendered or supplies delivered.

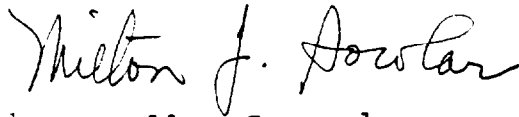
Recovery based on quantum valebant is predicated on the theory that the government should not retain a benefit without paying for it. TMG & Partners, Architects, B-206077.2, June 14, 1982, 82-1 CPD ¶ 576. We have recognized that, under appropriate circumstances, payment may be made for services rendered on a quantum valebant basis, measured by the reasonable value of work or labor. Recognition of a right to payment on this basis, however, requires a showing that (1) the government received a benefit and (2) the procurement of the services or goods in question were otherwise authorized by law. Department of Energy - Compensation for Unauthorized Servs. Provided Gov't, B-207337, Dec. 15, 1982, 82-2 CPD ¶ 544. The second of these elements is not in question.

It is common for vendors to provide to potential government customers information (including specifications) describing a certain product or to demonstrate its operation. Even if done at the request of government employees and even if the services involve appreciable time and expense, these activities normally are within the scope of a firm's ordinary marketing efforts and it may not expect to be reimbursed for the expenses it incurs on account of them. We think this case is distinguishable. Here, the Navy had identified a specific need but had no specifications to describe it. At the request of an individual who had no specific contracting authority but acted under its guise, and in the expectation of there being "no problem" receiving a contract, the protester drafted specifications tailored to this specific application and demonstrated the feasibility of these specifications through an actual on-site demonstration. Although this would not in itself make the government liable, the fact is that the specifications drafted by the claimant for this specific application were then knowingly reproduced in the Navy's solicitation without the claimant's prior consent.

Under the circumstances, we find that Primary reasonably and to its detriment relied upon the "encouragement" of the senior chief; however, since he is an individual who lacks contracting authority, his actions cannot contractually bind the government. Although we believe that Primary was always aware that it did not have a contract with the Navy, so that it incurred these expenses in anticipation of receiving an award of a contract, we find that the agency's use in its solicitation of the specifications drafted by Primary was

improper and the agency did in fact receive a benefit for which we find the claimant entitled to compensation. The claimant is not necessarily entitled, however, to the \$2,500 in costs it incurred in anticipation of receiving a contract, but to that amount which represents the reasonable value of the specifications to the government. The claim is, therefore, returned for appropriate action to the Navy.

The claim is allowed.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General
of the United States