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DECISION

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

FILE: B-193595 DATE: September 22, 1980

MATTER OF: Prototype Development Associates, Inc.--Reconsideration

DIGEST:

[Request for]

Decision denying claim for proposal preparation cost is affirmed where it is conjectural whether claimant would have received award.

Prototype Development Associates, Inc. (PDA), requests reconsideration of the portion of our decision in Intercontinental Technical Air Coordinators; Prototype Development Associates, Inc., B-193595, August 22, 1979, 79-2 CPD 143, which denied PDA's claim for proposal preparation costs. PDA's claim was filed in conjunction with its protest after the Army rejected PDA's proposal for the provision of Manned Aircraft Tow Target (MATT) services. PDA failed to demonstrate that its proposed propeller-driven tow aircraft, the Douglas AD-4N "Skyraider" (AD-4), could meet the speed requirement set out in the request for proposals (RFP). The incumbent/awardee met the speed requirement by proposing the use of military surplus jet aircraft, the Canadair Model T-33, Mark 3 (T-33). Although we sustained PDA's protest, in part, because we believed that the Army had prejudicially misapplied the RFP's Federal Aviation Administration regulation compliance requirement (FAA requirement), we denied PDA's claim for two reasons: (1) PDA's proposal was properly rejected for failure to meet the speed requirement and was therefore ineligible for award; and (2) it was conjectural whether, in the absence of the noted deficiency in the procurement (Army failure to communicate a shift in its intent/interpretation of the FAA requirement), PDA would have received the award.

We viewed the FAA requirement as being of central importance since its interpretation could influence the offeror's choice of aircraft (AD-4 v. T-33). PDA's interpretation of the FAA requirement precluded its consideration of the T-33 which met the speed requirement.

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PDA urges that the success of its claim should turn on its ability to show that the Army breached an implied promise to fairly and honestly consider PDA's proposal and not on whether PDA would have received the award.

PDA contends that it was "deceived into bidding * * * a contract materially different from that awarded or 'intended.'" PDA believes it unfair to require a showing that, "but for" the Army's breach of the implied promise of fair consideration, PDA would have received the award, since, in PDA's view, the Army's actions have rendered such proof impossible. PDA argues that it never had an opportunity to bid the contract that was actually awarded and that "* * * to require PDA to prove that it would have won when it never had a chance to play is too heavy a burden."

In a recent decision, Burroughs Corporation v. United States, No. 251-78 (Ct. Cl. March 19, 1980), the Court of Claims reiterated the law applicable to the recovery of proposal preparation costs by disappointed offerors in negotiated procurements under the standards delineated in Keco Industries, Inc. v. United States, 192 Ct. Cl. 773 (1970), and Keco Industries, Inc. v. United States, 203 Ct. Cl. 566 (1974) (Keco II). The claimant there argued that the Government's conduct toward the claimant was arbitrary and capricious. Specifically, the claimant urged that (1) the Government's acceptance of a competitor's "qualified" best and final offer (unqualified offers were sought); and (2) the Government's determination that the same competitor's offer was technically responsive, the Government having permitted corrections in the competitor's proposal, without affording the claimant an opportunity to amend its proposal, constituted such arbitrary and capricious conduct as to entitle it to the award of proposal preparation costs.

In denying the claim for proposal preparation costs, the Court of Claims used a two-step analysis. It first applied the Keco II criteria to the complained-of actions and then examined whether the complained-of

actions harmed the claimant. The court concluded the actions were not arbitrary and capricious and further concluded that:

> "* * * it simply cannot be said the rejected offeror has been harmed thereby because there is no assurance the rejected offeror would have otherwise won the contract." Burroughs Corporation, supra, p. 10.

This conclusion was repeated twice, as follows:

(1) "* * * the contracting officer, upon discovery of any irregularities in * * * [the competitor's] proposal had the authority to engage in discussions and call for another round of best and final offers. He would not have been required to award the contract to * * * [claimant]. * * * In summary, it is highly questionable whether * * * [claimant] has necessarily been harmed by the alleged misconduct of the Government." Burroughs Corporation, supra, p. 11.

(2) "Finally, when we add to these factors * * * [referring to the factors upon which it founded its determination that the complained of actions were reasonable actions] (7) the uncertainty that * * * [claimant] would have won the contract regardless of the derelictions alleged, * * * we must conclude the actions of the Government toward * * * [claimant] were not arbitrary or capricious." Burroughs Corporation, supra, p. 16.

In view of the above, we believe that our consideration of the uncertainty surrounding the issue of whether the Army's actions precluded PDA from receipt of an award was proper and denial of award of proposal preparation costs was proper.

Accordingly, our prior decision is affirmed.

Milton J. Socolar

For the Comptroller General
of the United States