

DECISION

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

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FILE: B-179197

DATE: July 18, 1974

MATTER OF: Airflote, Incorporated P 3701

DIGEST:

Claim for proposal preparation costs based upon contention that claimant was misled by contracting officer's erroneous oral advice as to fabric yardage estimate for shirts being procured is not supported by record as such irregularities as did occur did not result from arbitrary or capricious action. See court cases cited.

Request for proposals (RFP) No. 60041 was issued on June 14, 1973 by the Federal Supply Service, General Services Administration (GSA), Denver, Colorado, for 20,304 cotton fire-resistant shirts in varying quantities of small, medium, large, and extra-large sizes. As the store stock supply of these shirts was completely exhausted due to the failure of a prior contractor to perform its obligation under a previous supply contract, the solicitation was negotiated pursuant to 41 U.S.C. § 252(c)(2) (1970) on the grounds of public exigency. In view of the procurement's urgent nature, the RFP was issued by telegram and was subject to GSA Form 1424 and Standard Forms (SF) 32, 33, and 33A. Five potential offerors were solicited, and by June 27, 1973, the closing date for receipt of proposals, five offers were received. While Airflote's otherwise low offer of \$10.65 per shirt was for only 15,000 shirts "in size differentials indicated", the offer was ultimately determined to be acceptable because paragraph 10(c) of SF 33A provided that offers for less than the quantities specified were acceptable. Airflote was subsequently determined to be a responsible offeror eligible for award. 43

GSA decided to execute a contract for shirts on the basis of the initial prices received. Thus, on August 9, 1973, GSA furnished a SF 33 contract and GSA Form 300 Purchase Order for 6,672 medium and 8,304 large shirts to Airflote for its execution. The cover letter to the contract documents stated that a binding contract between Airflote and GSA would result only if the documents were properly signed and accepted without

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BEST DOCUMENT AVAILABLE

change by Airflote. Airflote refused to sign the documents on the ground that its offer was based on an erroneously low fabric estimate supplied by the contracting officer, and advised that in order to accurately reflect its actual costs Airflote would require a price adjustment to \$12.40 per shirt. GSA made a counteroffer of \$11.17 per shirt, which it states was the amount of the next low offer received. (The record indicates the next low offer was \$11.40, net 2%-20.) Airflote refused to accept this counteroffer and returned the contract documents to GSA unsigned. GSA reports that it allowed the RFP to lapse because the Forest Service, for whom the shirts were primarily intended, changed its requirements to synthetic shirts.

Airflote takes the position that its initial offer was in error only because it was based on the contracting officer's estimate of fabric needed for each shirt. Airflote contends that prior to the closing date for receipt of proposals, the contracting officer instructed Airflote that shirt patterns were not then available but that each shirt consumed approximately 2.5 yards of fabric (45" width). Airflote indicates that it based its offer on this figure. Before it would sign the contract documents, received on August 16, 1973, Airflote requested GSA to furnish it with the shirt patterns, which it received from GSA on August 24, 1973. After laying out the patterns, Airflote indicates that it was of the opinion that substantially more than 2.5 yards per shirt were needed. As Airflote and GSA could not agree on an appropriate price adjustment to reflect this increase in fabric, Airflote refused the award. As a result of the above, Airflote has submitted a claim to this Office for its proposal preparation costs and its expenses incurred in discovering the error and arriving at a correct estimate.

3 As the basis for its claim, Airflote alleges that its disagreement with GSA was due solely to the contracting officer's action in furnishing it with an erroneous fabric estimate and its justifiable reliance thereon. Airflote believes its request for a price adjustment of \$1.75 per shirt (to \$12.40) was reasonable. As support for this belief, Airflote points out that on October 2, 1973, GSA awarded a contract to Lite Industries, C 1474 Incorporated, under invitation for bids (IFB) No. 90000 (issued July 16, 1973) for approximately 38,736 of the same cotton fire-resistant shirts at \$14.38 per shirt. Airflote

contends that GSA acted unreasonably in not granting its requested price adjustment because it would have been more economical for the Government to grant the price adjustment than procure the same shirts at a significantly higher price. Airflote concludes that GSA's failure in this regard damaged both Airflote and the Government.

GSA states that its contracting officer does not recall whether he did provide Airflote with an estimated amount of material per shirt. Even assuming that Airflote is correct in this regard, GSA notes that Airflote should have realized that one such estimate would not be applicable to four different shirt sizes, and that in fact Airflote should have been able to estimate the material needed for each shirt size by examining the specification initially provided the claimant. Concerning the relevancy of IFB 90000, GSA reports that this IFB was issued primarily to provide cotton shirts to agencies other than the Forest Service and that the only shirts included in the advertised solicitation being procured for the Forest Service were the 5,328 shirts under RFP 60041 on which Airflote did not make an offer. GSA contends that the contract price on IFB 90000 was not excessive and that it does not necessarily indicate that Airflote's price adjustment should have been granted. Thus, GSA recommends that Airflote's claim for proposal preparation costs be denied.

Although the Federal courts have recognized that offerors are entitled to have their proposals considered fairly and honestly for award and that the recovery of proposal preparation expenses is possible if it can be shown that proposals were not so considered, arbitrariness or capriciousness must be established as a prerequisite to recovery. Keco Industries, Inc. v. United States, No. 173-69, United States Court of Claims, February 20, 1974. See also Excavation Construction, Inc. v. United States, No. 408-71, United States Court of Claims, April 17, 1974; and B-179087, June 5, 1974. The court in Keco also cautioned that "not every irregularity, no matter how small or immaterial, gives rise to the right to be compensated for the expense of undertaking the bidding process."

After review of the record, we do not believe that Airflote is entitled to recover its proposal preparation costs. Assuming that Airflote's offer was premised upon an estimate of 2.5 yards of fabric supplied by the contracting officer, paragraph 3 of the Solicitation Instructions and Conditions (SF 33A) specifically states that oral explanations given before

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award of the contract will not be binding. That paragraph also provides that any explanation desired by an offeror regarding the meaning or interpretation of the RFP must be requested in writing and with sufficient time allowed for a reply to reach bidders before the submission of the offers. Since Airflote's request was not submitted in the manner prescribed, and oral explanations before award were specifically excluded from having any binding significance, we do not believe that Airflote reasonably relied on the contracting officer's furnishing of an oral estimate. B-170536(2), December 9, 1971.

Airflote contends that the higher price contracted for by GSA on IFB 90000 corroborates its statement that Airflote's requested price adjustment to \$12.40 was reasonable and should have been accepted. Initially it should be noted that Airflote did not submit a bid on IFB 90000 and therefore was not eligible for award under that solicitation. We find no reason to conclude that the award price of \$14.38 per shirt under IFB 90000 was unreasonably high merely because Airflote previously offered a lower unit price for the same items under a different procurement. B-171222, January 19, 1971.

With regard to GSA's refusal to contract with Airflote for \$12.40 on RFP 60041, we note that the next highest offer under that solicitation was \$11.17, net, per shirt. Therefore, had the need for the shirts called for under RFP 60041 continued to exist, GSA would have been obligated to provide that offeror, as well as all other offerors within the competitive range, an equitable opportunity to negotiate and submit a best and final offer. See Federal Procurement Regulations (FPR) section 1-3.805-1(b).

Although there were certain irregularities in the handling of this procurement, particularly with respect to negotiating only with Airflote, we do not believe that there has been a showing of arbitrary or capricious action giving "rise to a right to be compensated" for proposal preparation costs under the standards of the Keco case, supra. Accordingly, the claim is denied.

With regard to the procurement irregularities, GSA has advised our Office that appropriate steps are being taken to insure that future negotiated procurements are conducted in accordance with applicable regulations. Therefore, no further action by our Office in this regard is indicated.


Deputy Comptroller General
of the United States