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DECISION

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

FILE: B-208662.3 **DATE:** February 26, 1985

MATTER OF: Department of Commerce--Request for Reconsideration

DIGEST:

Decision granting proposal preparation costs is affirmed where agency fails to establish in its reconsideration request that the decision was based on errors of law or did not properly take into account all relevant evidence timely presented.

The Department of Commerce requests reconsideration of our decision System Development Corporation and Cray Research, Inc.--Request for Reconsideration, 63 Comp. Gen. 275 (1984), 84-1 CPD ¶ 368 (1984 decision), denying SDC/Cray's reconsideration request but sustaining its claim for proposal preparation costs. Commerce maintains SDC/Cray should not have been found entitled to proposal preparation costs. We dismiss Commerce's request in part as untimely and deny it in part.

We sustained SDC/Cray's claim based on a finding in our initial decision that Commerce had failed to require the awardee to comply with a mandatory certification provision before making the award. See System Development Corporation and Cray Research, Inc., B-208662, Aug. 15, 1983, 83-2 CPD ¶ 206 (1983 decision). Because it was clear from the original record that Commerce was aware of the provision, we concluded in the reconsideration that it had acted unreasonably, and thus arbitrarily and capriciously, in awarding the contract. As we also determined SDC/Cray had a substantial chance of receiving the award, we found it was entitled to recover its proposal preparation costs under the standard established in Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974).

Commerce asserts as the first basis for its reconsideration request that our finding of arbitrary and capricious action was improper because it was based on our incorrect determination that "the record nowhere establishes that Commerce determined CDC [Control Data

Corporation] capable of satisfying the first two portions of the requirement." Commerce claims it did adequately enforce the certification by finding CDC had met all portions of the requirement, and submits supporting documentation which it asserts was included with its administrative report on SDC/Cray's original protest. This argument does not warrant reversal of our decision.

We have examined the documents submitted by Commerce and find that, but for one undated sheet containing CDC's availability level calculations, they are not included in our record on SDC/Cray's original protest. In short, these documents were not furnished by Commerce during our initial consideration of this matter, and thus our conclusion (that Commerce failed to determine CDC had met the certification) was correct based on the record before us.

If Commerce believed the documents supported its position, we fail to understand why Commerce did not call them to our attention immediately after receiving our 1983 decision. The fact is, Commerce never requested reconsideration of our 1983 decision sustaining SDC/Cray's protest, and never cited or furnished the documents it now presents in arguing in 1984 that we should deny SDC/Cray's claim for proposal preparation costs. Rather, in its response to that 1984 claim, Commerce stated--as it had in its administrative report on the 1983 protest--only that its technical and procurement officials had had several discussions with CDC, and had reviewed data from CDC installations to assure compliance with the certification requirement. In both instances, the record contained insufficient evidence to support this statement.

Therefore, to the extent Commerce now is attempting to establish--contrary to our 1983 decision--that it properly enforced the certification requirement by ensuring that CDC satisfied all parts of the requirement, its reconsideration request is untimely and not for consideration. See 4 C.F.R. § 21.9 (1984); Forest Service--Request for Reconsideration, B-208469.2, Mar. 14, 1983, 83-1 C.P.D. ¶ 247.

As its second basis for reconsideration, Commerce argues that our sustaining of SDC/Cray's claim was contrary to controlling precedent. We disagree. Commerce seems

to argue that even if our original conclusion was correct, its failure to enforce the certification provision should not have been found unreasonable under Keco. Commerce reads Keco as requiring a finding of gross negligence on the agency's part before its actions will be considered unreasonable and thus arbitrary and capricious.

Commerce's interpretation notwithstanding, we find no statement in Keco that agency action can be found arbitrary and capricious only where there is a finding of gross negligence. Nor does Keco hold that the improper agency actions involved here can never be found arbitrary and capricious. It remains our opinion that Commerce's disregard of the plain terms of the solicitation by failure to enforce material solicitation requirements is sufficiently contrary to reason that it can be considered arbitrary and capricious under the standard established in Keco.

Finally, Commerce asserts that in our 1984 decision we should have either followed or distinguished the Court of Claims' decision in Burroughs Corp. v. United States, 617 F.2d 590 (Ct. Cl. 1980). Commerce believes this decision denying a proposal preparation cost claim was controlling under the facts here. We disagree. In Burroughs, the Department of the Interior permitted the awardee to make pricing and technical changes in its proposal after negotiations had concluded. The court found Interior's explanation for permitting these late changes reasonable. Had Commerce permitted the awardee here to comply with the certification provision after negotiations had closed, perhaps our conclusion in this case would have been the same. Commerce's improper action, however, was not one involving the timing of an awardee's compliance but was the quite different impropriety of never ensuring the awardee's compliance with a mandatory solicitation requirement. Thus, while in Burroughs the awardee ultimately satisfied the solicitation requirement, the record in this case showed that the awardee here did not, possibly because it could not, possibly because it was not required to do so. We found no reasonable explanation for this

nonfeasance by Commerce and thus could only conclude that it acted unreasonably. This conclusion is not inconsistent with our reading of Burroughs.

We affirm our decision.

Milton J. Socolar

Acting Comptroller General
of the United States