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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Firetrace Aerospace, LLC--Costs

File: B-403193.4

Date: December 17, 2010

Stephen S. Kaye, Esq., Joyce L. Tong, Esq., and Angela L. Nadler, Esq., Bryan Cave LLP, for the protester.

Wade L. Brown, Esq., and Joseph E. Jecks, Esq., Department of the Army, for the agency.

Louis A. Chiarella, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not entitled to reimbursement of the costs of filing and pursuing its protest where the agency decides to take corrective action in response to the protest, and the protest was not clearly meritorious.

DECISION

Firetrace Aerospace, LLC, of Scottsdale, Arizona, requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the sole-source award of contract No. W56HZV-10-C-0358 to Hazard Protection Systems, Inc. (HPS), of Anchorage, Alaska, by the Department of the Army, Army Materiel Command, Army Tank-Automotive and Armaments Life Cycle Management Command (TACOM), for fuel tank fire suppression (FTFS) blanket kits for use on the Army's Heavy Expanded Mobility Tactical Truck (HEMTT). We dismissed the protest after the agency advised our Office that it would take corrective action by terminating the contract awarded to HPS and reexamining its noncompetitive acquisition strategy. Firetrace argues that the Army's corrective action was unduly delayed and its protest was clearly meritorious.

We deny the request.

The HEMTT is a series of 10-ton, eight-wheel-drive vehicles designed to provide heavy transport capabilities for the supply of Army combat vehicles and weapons systems. There are more than 17,000 HEMTTs currently in service, and they

represent an extremely important component of the Army's heavy tactical wheeled vehicle fleet.

The FTFS blanket kit is essentially a series of panels that encapsulate a vehicle's fuel tank(s). As used on the Army's heavy transportation vehicles, including the HEMTT, the purpose of the FTFS blanket kits is to prevent secondary fires when fuel tanks are impacted by direct weapons fire or improvised explosive devices (IED) during enemy attacks. Avoidance of secondary fuel fires helps prevent the loss of life and the destruction of military equipment costing hundreds of thousands of dollars. Contracting Officer's Statement, July 30, 2010, at 2.

Beginning in 2007, the Army purchased fire suppression systems from Firetrace and HPS to determine whether commercial products could satisfy the agency's needs. The Army ultimately concluded that both the Firetrace and HPS products were capable of meeting the agency's fuel tank fire suppression requirements with regard to the heavy equipment transporter (HET) and M915 series of vehicles.¹

The Army subsequently conducted a procurement--limited to Firetrace and HPS--for FTFS blanket kits for six different heavy transportation vehicles, including the HEMTT, using a performance-type specification (RFP No. W56HZV-08-R-0082). Although both the HPS and Firetrace fire suppression products had been qualified for use on the HET and M915 trucks, neither company's systems had been qualified for use on the other vehicles. As a result, the procurement included first article testing requirements.² On May 20, 2008, the Army awarded HPS a contract for FTFS blanket kits, including 6 first articles and 2,390 production units for the HEMTT. Agency Report (AR), Tab 13, HPS Contract No. W56HZV-08-C-0274. HPS became an approved source for the HEMTT FTFS blanket kits and a national stock number (NSN) was assigned to HPS's product after successful completion of the contract's first article testing.

The Army began developing its requirement for additional HEMTT FTFS blanket kits in July 2009, and finalized the current requirement for 995 HEMTT fire suppression blanket kits in Spring 2010. On April 23, TACOM prepared a justification and approval for other than full and open competition (J&A) for the sole-source award of 995 HEMTT FTFS blanket kits to HPS. The stated rationale for this noncompetitive procurement was that HPS was the only responsible (*i.e.*, approved) source for the HEMTT fire suppression blanket kits, and that no other supplies would satisfy the

¹ As a qualified, or approved, source of HET and M915 FTFS blanket kits, Firetrace was subsequently awarded follow-on contracts for these items in 2007 and 2008.

² The first article testing was to ensure that the contractor's fire suppression system met all performance and durability requirements. This included performing ballistics and system survivability tests, automotive tests, and live fire tests.

agency's requirements (citing 10 U.S.C. § 2304(c)(1) (2006) and Federal Acquisition Regulation (FAR) § 6.302-1). Id., Tab 9, J&A, Apr. 23, 2010.

On April 21, TACOM issued a "Sources Sought" notice on the Federal Business Opportunities (FBO) website to qualify additional sources for the HEMTT FTFS blanket kits. Id., Tab 11, Sources Sought Notice: Fire Suppression Blanket Kit, Apr. 21, 2010. The notice here was unrelated to the Army's J&A or pending non-competitive procurement of HEMTT FTFS blanket kits from HPS. See id., Tab 9, J&A, Apr. 23, 2010, at 3 ("there are no current or planned efforts to qualify any additional sources"). The notice also informed potential sources how to submit a source approval request by reference to the TACOM Source Approval Information Booklet, and established a submittal deadline of May 21.

On May 18, Firetrace submitted its source approval request for the HEMTT FTFS blanket kits.³ Firetrace's submission provided a description of the company's capabilities, its fire suppression system, and similar products previously built and delivered. Firetrace also represented that the design work for its HEMTT fuel tank fire suppression system had already been completed, prototypes had been built, and additional production units could be delivered within a few weeks time to support the government's evaluation. Protest, June 30, 2010, exh. 4, Firetrace Source Approval Request, May 18, 2010, at 4, 20-21. Firetrace, however, did not provide its completed prototypes for testing, and its submission contained, in terms of technical data, only a high-level bill of materials, one high-level drawing, and a material safety data sheet regarding the extinguishing agent in its fire suppression system. Id. at Appendices A-C.

On May 21 the Army informed Firetrace that its submission failed to provide the required information and in the appropriate format for source approval. Referencing the TACOM source approval information booklet cited in the FBO sources sought notice, the Army provided Firetrace with extensive detail about what information was required in a source approval request and what information was missing. Agency Dismissal Request, July 16, 2010, Tab 5, TACOM E-mail to Firetrace, May 21, 2010.

Firetrace did not dispute that its source approval request submission lacked the required information. Rather, Firetrace informed the Army on May 24 that it would quickly remedy the deficiencies in its source approval request and that a planned trip to TACOM the following week would provide an opportunity to discuss its modified submission. Id., Firetrace E-mail to TACOM, May 24, 2010. Firetrace, however,

³ Firetrace made no effort prior to May 18, 2010, to seek source approval for its HEMTT fire suppression system, although it was aware since at least May 2009 that the Army was procuring such items noncompetitively. Protest, June 30, 2010, exh. 6, Firetrace E-mail to TACOM, May 26, 2009.

failed to address the deficiencies in its source approval request.⁴ As to why it failed to address the noted deficiencies in its source approval request submission, Firetrace explained that it was unaware of any near-term requirement for the award of HEMTT FTFS blanket kits and that it did not receive further guidance from the Army on the additional information that was required. *Id.*, attach. 1, Declaration of Firetrace Director of Business Development, at 1.

On June 21, the Army noncompetitively awarded contract No. W56HZV-10-C-0358 to HPS for 995 HEMTT FTFS blanket kits at a price of \$2,930,275.

Firetrace filed its protest with our Office on June 30 challenging the Army's sole-source award to HPS. Among other things the protester asserted that it was unnecessary and unduly restrictive for the Army to define its HEMTT FTFS blanket kit requirement by reference to an NSN from an approved source, and that the rejection of Firetrace's source approval request submission was irrational. Firetrace also asserted that the Army had improperly imposed a qualification requirement here without complying with applicable statutory and regulatory requirements (citing 10 U.S.C. § 2319(b)(1)-(3) and FAR § 9.202(a)(1)).

The Army filed a report responding to the protest allegations and defending the propriety of the sole-source award to HPS. The Army contended that the approved source requirement for the HEMTT FTFS blanket kits was necessary and not unduly restrictive, and that the rejection of Firetrace's source approval request was reasonable and did not indicate a lack of advance planning. The Army also maintained that it had complied with applicable procedural requirements when establishing the qualification requirement for the HEMTT FTFS blanket kits.

Our Office convened a status conference with the parties on September 17 in order to discuss various procedural and substantive issues involved in the protest. At this conference the GAO attorney to whom the protest was assigned informed the parties that: 1) the record indicated that neither the agency's nor protester's conduct during the procurement was without fault; 2) the protest was a "close call" and could come

⁴ It was not until September 21—some 4 months after receiving notice that its first submission was deficient submission and 3 months after filing its protest—that Firetrace announced it “can and will” resubmit its source approval request to the Army for approval. Firetrace Letter to GAO, Sept. 21, 2010, at 1.

out either way; and 3) GAO would not conduct an “outcome prediction” alternative dispute resolution (ADR) because the protest result was uncertain.⁵

By letter dated October 4, the Army notified our Office of its intent to take corrective action by terminating the HPS contract and reexamining its noncompetitive acquisition strategy. We concluded that the Army’s actions rendered Firetrace’s protest of the sole-source contract award to HPS academic and, on October 7, we dismissed the protest. Firetrace Aerospace, LLC, B-403193, B-403193.2, Oct. 7, 2010.

Firetrace requests that our Office recommend that the agency reimburse the protester’s costs of filing and pursuing its June 30 protest. Firetrace argues that the Army unduly delayed taking corrective action—as evidenced by its failure to do so until after filing of the agency report and submission of comments by the protester—and that its protest was clearly meritorious. The agency opposes Firetrace’s request, arguing that the protest here was not clearly meritorious.

Under the Competition in Contracting Act of 1984 (CICA), our Office may recommend that protest costs be reimbursed where we find that an agency’s action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1). Our Bid Protest Regulations further provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(e) (2010).

Our Regulations do not contemplate a recommendation for the reimbursement of protest costs in every case in which an agency takes corrective action, but rather only where an agency unduly delays taking corrective action in the face of a clearly meritorious protest.⁶ Waterfront Techs., Inc.—Costs, B-401948.8, Sept. 14, 2010,

⁵ In outcome prediction ADR, the GAO attorney handling a protest explains what the GAO attorney believes the likely outcome will be and the reasons for that belief. A GAO attorney will engage in this form of ADR only where there is a high degree of confidence regarding the outcome. Where the party predicted to lose the protest takes action obviating the need for a written decision (either the agency taking corrective action or the protester withdrawing the protest), our Office closes the case. All of the statements in this decision regarding what transpired in the status conference are reflected in written contemporaneous notes made by the GAO attorney.

⁶ As a general rule, so long as an agency takes corrective action in response to a protest by the due date of its protest report, we regard such action as prompt and decline to consider favorably a request to recommend reimbursement of protests costs. The Sandi-Sterling Consortium—Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3; Envirosolve—Costs, B-294420.3, Feb. 17, 2005, 2005 CPD ¶ 35 at 3.

2010 CPD ¶ 232 at 3. Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. *Id.* A protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position.⁷ Information Ventures, Inc.--Costs, B-294567.2, Nov. 16, 2004, 2004 CPD ¶ 234 at 2.

Here, based on the record presented (including the agency report and the protester's comments thereto), we cannot conclude that Firetrace's protest was clearly meritorious. The Army explained, in response to Firetrace's protest, why an approved source requirement for the HEMTT FTFS blanket kits was necessary and not unduly restrictive: "[i]t is beyond cavil that an agency need not risk injury to personnel or property in order to conduct a competitive acquisition." AR, July 30, 2010, at 1 (citing Signals & Sys., Inc., B-288107, Sept. 21, 2001, 2001 CPD ¶ 168 at 10). Further, the Army argued that while it restricted the contract to an approved product or source and utilized a qualification requirement, it provided other potential sources like Firetrace with a reasonable opportunity to qualify. As Firetrace was both required to seek qualification in advance and independent of any specific acquisition, and contributed to the failure to obtain source approval prior to award, the Army argued, there was no agency obligation to delay award to determine if or when Firetrace would become an approved source. Lastly, the Army asserted that the J&A executed here in support of the sole-source award to HPS as well as its internal source approval program regulation met the statutory and regulatory requirements for establishing a qualification requirement. Based on the record here, and even resolving doubts in Firetrace's favor, the issues presented here were indeed close questions.

The request for a recommendation that the agency reimburse Firetrace's protest costs is denied.

Lynn H. Gibson
Acting General Counsel

⁷ The mere fact that an agency decides to take corrective action does not necessarily establish that a protest is clearly meritorious. Metalcraft, Inc.-Costs, B-402181.3, May 17, 2010, 2010 CPD ¶ 116 at 3.