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## Decision

**Matter of:** Sizewise Rentals, LLC--Costs

**File:** B-407566.2

**Date:** July 3, 2013

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Benjamin R. Prell, Esq., Geiger, Langin & Prell, LLC, for the protester.  
Kevin L. Pearson, Esq., Department of Veterans Affairs, for the agency.  
Matthew T. Crosby, Esq. and Sharon L. Larkin, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

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### DIGEST

GAO recommends reimbursement of protest costs where agency unduly delayed taking corrective action in response to clearly meritorious protest that challenged the agency's technical evaluation, but limits recommendation to costs reasonably related to protester's pursuit of clearly meritorious issue.

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### DECISION

Sizewise Rentals, LLC, of Kansas City, Missouri, requests that we recommend that it be reimbursed the costs of filing and pursuing its protest against the issuance of a purchase order to Hill-Rom Company, Inc., of Batesville, Indiana, by the Department of Veterans Affairs (VA) under request for quotations (RFQ) No. VA246-12-Q-3111 for critical care beds.

We grant the request in part and deny it in part.

### BACKGROUND

The solicitation, which was issued on an unrestricted basis on September 14, 2012 pursuant to General Services Administration Federal Supply Schedule procedures, requested quotations for 58 critical care beds to be delivered to four VA medical centers in North Carolina and Virginia.<sup>1</sup> RFQ at 1, 5; Contracting Officer's

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<sup>1</sup> The agency initially issued the solicitation on August 20 as a total small business set-aside. Contracting Officer's Statement at 1. After only one small business (Sizewise) responded to the solicitation and was found to have quoted a  
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Statement at 1. The solicitation stated that award would be made based on the “lowest price offer that conforms to the solicitation.” RFQ at 15.

The solicitation listed a number of “specification requirements” for the beds, including, as relevant to this decision, the following:

The ICU [intensive care unit] bed shall be capable of descending to 19” from floor for easy egress, chair egress, [T]rendelenbur[g] and reverse [T]rendelenburg with angle indicator

The ICU Bed must meet national safety standards regarding interface of both patient and caregiver, with particular attention to **FDA** [Food and Drug Administration] **side rail and entrapment issues**.  
Reference: FDA / Hospital Bed System Dimensional and Assessment Guidance to Reduce Entrapment

Id. at 4 (emphasis in original). Also as relevant to this decision, the solicitation did not include past performance as an evaluation factor, and it stated that “[t]he Government intends to evaluate offers and award a contract without discussions.” Id. at 11, 15.

Several vendors, including Sizewise and Hill-Rom, submitted quotations by the solicitation’s closing date. AR, Tab D(3), SSDD, ¶¶ 7. Sizewise quoted a lower price than Hill-Rom. Id. After an evaluation, the Agency concluded that the bed quoted by Sizewise did not permit chair egress and failed an “FDA Entrapment Test,” and, therefore, Sizewise was ineligible for award.<sup>2</sup> Id. ¶¶ 11, 12. The agency then selected Hill-Rom for award, and Sizewise filed a protest with our Office.

In its protest, Sizewise asserted that the agency’s finding that its bed failed to meet solicitation requirements was unreasonable. Protest at 5-7. Sizewise also asserted that the agency improperly failed to consider the firm’s past performance and that the agency conducted discussions with the firm that were not meaningful. Protest at 7-9.

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bed that was not technically acceptable, the agency decided to re-issue the solicitation on an unrestricted basis. Contracting Officer’s Statement at 1; Agency Report (AR), Tab D(3), Source Selection Decision Document (SSDD), ¶¶ 5-7.

<sup>2</sup> The agency tested Sizewise’s bed on August 23, 2012, in connection with a vendor product demonstration for a VA integrated process team. AR, Tab D(2), Evaluation Worksheets, at 1-2; Contracting Officer’s Statement at 1. Thus, the testing on which the agency’s source selection decision was based occurred before the solicitation was issued and before the vendors submitted their quotations.

In response to the protest, the agency filed a report with our Office in which the contracting officer asserted that Sizewise's bed "was not capable [of] positioning as required for Chair Egress," apparently due to an electrical box attached to the bed's footboard. Contracting Officer's Statement at 2. The contracting officer also asserted that Sizewise's bed failed tests related to the FDA hospital bed safety guidance document that was referenced in the solicitation. Id. Finally, the agency refuted Sizewise's allegations regarding the evaluation of past performance and discussions. AR at 4-5.

In its comments on the agency report, Sizewise responded that its bed permits chair egress and that the footboard with the electrical box is easily removable.<sup>3</sup> Comments at 3-5. Sizewise also responded that its bed complied with the FDA guidance document, as reflected by detailed information in its quotation. Id. at 5-7. Finally, Sizewise responded to the agency's position regarding the past performance and discussions claims. Id. at 9-12.

After reviewing the record, the cognizant GAO attorney conducted an "outcome prediction" alternative dispute resolution (ADR) telephone conference.<sup>4</sup> During the conference, the GAO attorney noted that the contemporaneous record included no information regarding how or why the agency determined that Sizewise's bed failed to meet the chair egress requirement. The GAO attorney also noted that the solicitation required only the capability for chair egress and, based on photographs and descriptions in Sizewise's quotation, it was unclear that Sizewise's bed did not

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<sup>3</sup> In this regard, Sizewise pointed out that its quotation included a detailed description of the bed's chair positioning capability; specifically described how the footboard easily could be removed without tools; and included photographs of the bed without the footboard. Comments at 3-4. Sizewise also pointed out that Hill-Rom's quotation showed that Hill-Rom's bed also included a footboard, but that the footboard had been removed in a photograph provided in the quotation showing the bed positioned for chair egress. Id. at 4.

<sup>4</sup> In outcome prediction ADR, the GAO attorney handling a protest convenes the parties, at their request or at GAO's initiative, and explains what she or he believes the likely outcome will be, and the reasons for that belief. 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. Although the outcome prediction reflects the view of the GAO attorney handling the protest, and generally that of a supervisor as well, it is not an opinion of our Office, and it does not bind our Office, should issuance of a written decision remain appropriate.

permit chair egress.<sup>5</sup> As a result, the GAO attorney advised the parties that in his view, our Office likely would sustain the protest.

With respect to conformance to the FDA guidance document, the GAO attorney noted that Sizewise's quotation included detailed information and diagrams regarding its bed's conformance to an industry standard that establishes identical dimensional limits to those in the FDA document. The GAO attorney also noted that neither the contemporaneous record nor the contracting officer's statement provided any information regarding how or why the agency concluded that Sizewise's bed did not conform to the FDA document.<sup>6</sup>

Finally, the GAO attorney explained that because the solicitation's evaluation criteria did not include past performance, Sizewise's claim that the agency improperly failed to consider the firm's past performance did not constitute a valid basis of protest. The GAO attorney similarly explained that GAO would not consider Sizewise's claim regarding discussions because the solicitation expressly advised that the agency intended to make the award without holding discussions, and nothing in the record indicated that the agency had conducted discussions with Sizewise.

Following the ADR conference, the agency advised our Office that it intended to take corrective action consisting of reevaluating the quotations as to technical acceptability in accordance with the solicitation and the Federal Acquisition Regulation, and making a new source selection decision. Agency Notice of Corrective Action at 1. The agency further advised that prior to the reevaluation, it would review the requirement to determine whether modification to the solicitation was necessary, and that if such modification was found to be necessary, the vendors would be notified and afforded an opportunity to respond to the modification. See id.

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<sup>5</sup> The GAO attorney also noted that if it was assumed for the sake of argument that the electrical box impeded chair egress, nothing in the record indicated that the agency considered whether the bed nevertheless met the chair egress requirement because the footboard to which the box was attached was removable. The GAO attorney added that if the solicitation did not accurately reflect the agency's needs--for example, a need for chair egress without any change to the bed's configuration--the agency could amend the solicitation to accurately reflect its needs and allow vendors to submit revised quotations.

<sup>6</sup> For example, nowhere in the record did the agency identify the zone or zones in which Sizewise's bed allegedly failed one of the entrapment tests associated with the FDA document.

Because the agency's decision to reevaluate the quotations and make a new source selection decision rendered Sizewise's protest academic, we dismissed the protest. Sizewise Rentals, LLC, B-407566.1, Dec. 10, 2012. Sizewise then filed a request that our Office recommend that the agency reimburse its costs of pursuing the protest.

## DISCUSSION

In its request, Sizewise asks our Office to recommend that the agency reimburse it for all of its reasonable costs of preparing and pursuing its protest, including reasonable attorneys' fees.<sup>7</sup>

Where a procuring agency takes corrective action in response to a protest, we may recommend that the agency reimburse the protester its protest costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. 4 C.F.R. § 21.8(e) (2013); Information Ventures, Inc.--Costs, B-294580.2 et al., Dec. 6, 2004, 2004 CPD ¶ 244 at 2-3; Georgia Power Co.; Savannah Elec. and Power Co.--Costs, B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81 at 5. We consider a protest to be clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3; Georgia Power Co.; Savannah Elec. and Power Co.--Costs, supra. A GAO attorney will inform the parties through outcome prediction that a protest is likely to be sustained only if he or she has a high degree of confidence regarding the outcome; therefore, the willingness to do so is generally an indication that the protest is viewed as clearly meritorious and satisfies the clearly meritorious requirement for purposes of recommending reimbursement of protest costs. National Opinion Research Center--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3; Millar Elevator Servs. Co.--Costs, B-284870.3, Aug. 3, 2000, 2000 CPD ¶ 126 at 3.

We conclude that Sizewise's challenge to the agency's determination that its bid did not meet solicitation requirements was clearly meritorious, given the record provided to our Office with the agency report. In this regard, the agency's determination was entirely without support; the agency did not explain, nor was it otherwise evident from the record, how Sizewise's bid failed to meet the bid requirements and FDA guidance document requirements. Accordingly, we recommend

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<sup>7</sup> Our Office afforded the agency an opportunity to respond to Sizewise's request. GAO Notification of Request for Recommendation for Reimbursement at 1. The agency did not file a response.

reimbursement of Sizewise's protest costs related to its claim that the agency unreasonably determined that its bed failed to meet solicitation requirements.

Although as a general rule we may recommend that a successful protester be reimbursed its incurred costs with respect to all issues pursued and not merely those upon which it prevails, in appropriate cases we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues as to essentially constitute a separate protest. BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3; Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined--*i.e.*, whether the successful and unsuccessful arguments share a common set of facts, are based on related legal theories, or are otherwise not readily severable. BAE Tech. Servs., Inc.--Costs, *supra*; Sodexho Mgmt., Inc.--Costs, *supra*.

As discussed above, Sizewise's protest claims regarding past performance and discussions failed to set forth cognizable bases of protest, and Sizewise was advised of the likely disposition of these issues in the outcome prediction ADR conference. Additionally, these claims plainly are severable from the claim regarding the agency's determination that Sizewise's bed did not meet solicitation requirements because the past performance and discussions claims involved distinct aspects of the record, and were not intertwined factually or legally. Accordingly, we decline to recommend reimbursement of Sizewise's protest costs related to the past performance and discussions claims.

## RECOMMENDATION

We recommend that Sizewise be reimbursed the costs associated with filing and pursuing its protest of the agency's determination that its bed did not meet solicitation requirements, including reasonable attorneys' fees. Sizewise should submit its certified claim, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Susan A. Poling  
General Counsel