



## Decision

**Matter of:** Greentree Transportation Company, Inc.--Costs

**File:** B-403556.4

**Date:** May 16, 2011

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Michael A. Hordell, Esq., Stanley R. Soya, Esq., and Heather Kilgore Weiner, Esq., Pepper Hamilton LLP, for the protester.  
Vera Meza, Esq., and John Dowling, Esq., Department of the Army, for the agency.  
Paula J. Haurilesko, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Request that GAO recommend reimbursement of protester's costs of filing and pursuing its protest is granted, where the issues presented clearly had merit, yet the agency delayed taking corrective action until after submitting an agency report, after the protester filed comments, and after GAO convened an alternative dispute resolution conference to advise the agency that the protest would be sustained.

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### DECISION

Greentree Transportation Company, Inc., of Pittsburgh, Pennsylvania, requests that our Office recommend that the Department of the Army reimburse its costs of filing and pursuing its protest of the terms of solicitation No. 4NXX100899F-SMM, issued by the Department of the Army, Military Surface Deployment and Distribution Command, for freight transportation services.

We grant the request.

### BACKGROUND

The Army issued solicitation No. 4NXX100776F-SMM under the Defense Transportation Regulation for the movement of various kinds of freight from the Air Force Research Laboratory at Hanscom Air Force Base (AFB) in Massachusetts to

Kirtland AFB in New Mexico and to Wright-Patterson AFB in Ohio.<sup>1</sup> Agency Report (AR), B-403556.2, Tab A, Statement of Transportation Management Specialist, at 1, 2. The Army selected Greentree's tender for award; another carrier, McCollister's Transportation Group, Inc., protested to our Office (B-403556). The Army canceled the solicitation, and we dismissed McCollister's protest as academic.<sup>2</sup>

The Army issued solicitation No. -899F for the same freight services. Greentree protested to our Office (B-403556.3) that the solicitation was ambiguous with respect to the basis for award. Specifically, Greentree argued that, although the solicitation stated that award would be made on a best value basis based on listed factors and standards, the factors and standards suggest that award would be made on a lowest-priced, technically acceptable basis because the solicitation provided no indication how the tenders would be evaluated comparatively or quantitatively. Protest, B-403556.3, at 15. Prior to the due date for the agency's report, we asked the Army to explain its evaluation criteria.

The Army submitted its report, in which it attempted to explain its evaluation criteria. The Army's explanation, however, did not reconcile the inconsistency in the solicitation, where the solicitation stated that award would be made on a best value basis, but also contained evaluation factors and standards that indicated that award would be made to the carrier with the lowest-priced, technically acceptable tender.

On December 1, at the agency's request, and after Greentree filed comments, we conducted an outcome prediction ADR conference with the parties. We explained that we would likely sustain Greentree's protest because the solicitation was ambiguous with respect to the basis for award. Following the ADR conference, the Army decided to amend the solicitation to clarify the evaluation methodology and establish a new date for receipt of tenders. Based upon this corrective action, we dismissed Greentree's protest as academic.

## DISCUSSION

Greentree requests that our Office recommend that the agency reimburse its costs of filing and pursuing its protest of the terms of the replacement solicitation.

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<sup>1</sup> The Military Surface Deployment and Distribution Command acts as a liaison between government shippers and commercial carriers, and is responsible for the establishment and maintenance of contracts, solicitations, and agreements with the carrier industry to deploy and distribute Department of Defense supplies, personal property, and personnel worldwide.

<sup>2</sup> Greentree protested the cancellation of the solicitation. We denied Greentree's protest. See Greentree Transportation Co., Inc., B-403556.2, Dec. 7, 2010, 2010 CPD ¶ 293.

When a procuring agency takes corrective action in response to a protest, our Office may recommend that the agency reimburse the protester its 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) (2010); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible legal position. Inter-Con Sec. Sys., Inc.; CASS, a Joint Venture--Costs, B-284534.7, B-284534.8, Mar. 14, 2001, 2001 CPD ¶ 54 at 3. Here, our willingness to inform the parties through outcome prediction ADR that the protest was likely to be sustained on the identified ground was an indication that we view that ground as clearly meritorious for purposes of recommending reimbursement of protest costs. T Square Logistics Servs. Corp.--Costs, B-297790.4, Apr. 26, 2006, 2006 CPD ¶ 78 at 5.

The Army argues that this protest cannot be deemed clearly meritorious overall because “Greentree was protesting numerous solicitations under many theories” and “was not successful overall in its protests and it had the opportunity to submit a proposal on the revised solicitation.” AR at 2. We find neither merit nor logic in the Army’s position. Greentree’s unsuccessful protest of the cancellation of the prior solicitation has no bearing on the merits of its challenge to the adequacy of the new solicitation. In this regard, Greentree is requesting reimbursement of protest costs only with respect to its protest of the terms of solicitation No. -899F. Moreover, the fact that Greentree was provided an opportunity to submit a tender in response to the solicitation also does not address whether Greentree’s protest of the solicitation terms was clearly meritorious.

The Army also argues that, in concluding that the solicitation was ambiguous, we failed to recognize the discretion given transportation officers under the Defense Transportation Regulation to make a best value decision. We disagree. In the ADR conference, the GAO attorney advised the parties that we were likely to sustain the protest and would recommend that the Army clarify the basis for award. Making the basis for award clear to vendors in the government’s solicitation does not, in any way, restrict the agency’s discretion to make a best value determination—it simply communicates the agency’s intentions.

In short, we find Greentree’s protest of the terms of solicitation No. -899F to be clearly meritorious. As we indicated in our ADR conference, we agree with Greentree that solicitation No. -899F was ambiguous and needed to be amended.

The Army also contends that its corrective action was not unduly delayed, citing AVIATE, L.L.C., B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162. In this regard, the Army argues that in the context of the procurement under the Defense Transportation Regulation, there is “no case law directly on point with regard to the

discretion afforded the Transportation Officer in making a best value determination.”<sup>3</sup> AR at 2.

In determining whether an agency’s corrective action was unduly delayed, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. Eagle Home Medical Corp.–Costs, B-299821.3, Feb. 4, 2008, 2008 CPD ¶ 41 at 5. We generally do not consider corrective action to be prompt if it is taken after the due date for the agency report responding to the protest. Apptis Inc.–Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 4.

Here, we think the Army unduly delayed taking corrective action in the face of a clearly meritorious protest. While we agree that there may be little case law on procurements conducted under the Defense Transportation Regulation, unlike the situation we faced in AVIATE, the law is clear with respect to an agency’s obligation to inform competitors in a federal procurement of the basis for its selection decision. In any competitive federal procurement, competing firms must be informed of the basis for selection and how their offers or tenders will be evaluated. See, e.g., Richard S. Cohen, B-256017.4, B-256017.5, June 27, 1994, 94-1 CPD ¶ 382 at 6. Given that the Army elected to ignore this basic precept, prepared a report defending its actions, required the protester to file comments rebutting the agency’s report before taking corrective action, and required our office to convene an ADR conference before acting, we conclude that the agency’s corrective action was unduly delayed.

We recommend that the Army reimburse the protester its costs of filing and pursuing the protest of the terms of solicitation No. -899F, including attorneys’ fees. Greentree should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the Army within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The request is granted.

Lynn H. Gibson  
General Counsel

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<sup>3</sup> As noted above, neither the protest, nor our discussion during the ADR conference, addressed the discretion afforded to the transportation officer in making a best value decision.