



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: J.F. Taylor, Inc.--Entitlement to Costs

File: B-266039.3

Date: July 5, 1996

Jacob B. Pompan, Esq., Pompan, Ruffner & Werfel, for the protester.
Damon Martin, Esq., Department of the Navy, for the agency.
John L. Formica, Esq., and James A. Spangenberg, 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 protests where the agency decides to take corrective action in response to the protests, and the protests, which concerned the proper interpretation of the solicitation's requirements and the awardee's compliance with the requirements, were not clearly meritorious.

DECISION

J.F. Taylor, Inc. requests that we declare it entitled to reimbursement of the costs of filing and pursuing its protests against the award of a contract to Hughes Training, Inc. (HTI) under request for proposals (RFP) No. N61339-95-R-0008, issued by the Naval Air Systems Command, Department of the Navy, for the modification of two weapons systems trainers used to train personnel in the operation of the AH-1W SuperCobra helicopter.

We deny the request.

The RFP, issued on November 23, 1994, provided for the award of a firm, fixed-price contract to the offeror submitting the lowest-priced, technically acceptable proposal. The solicitation provided detailed instructions for the preparation of proposals, and among other things, informed offerors that during technical discussions they would be required to demonstrate the "major components" of their proposed visual system for the weapons systems trainers.

The agency received seven proposals from five offerors, ranging in price from \$7,234,138 to \$13,502,147. The proposals were evaluated, discussions were held, and best and final offers were requested from HTI and Taylor. The proposals of HTI and Taylor, priced at \$8,700,017 and \$11,352,190 respectively, were determined

technically acceptable, and on August 30, 1995, the agency awarded the contract to HTI.

On September 8, Taylor protested the award to our Office, arguing that HTI's proposal should have been rejected as technically unacceptable. Taylor argued that based upon its knowledge of the industry, HTI could not have demonstrated a visual system compliant with the RFP's specifications regarding the visual system's "update rate" and "infrared" capability.¹ After requesting summary dismissal of the protest on procedural grounds and having its request denied, the agency submitted its report in response to the protest on October 17. The agency argued in response to the protest that the protester had misinterpreted the requirements of the RFP and that HTI's proposal was in fact compliant with the RFP's specifications.

The protester timely commented on the agency report, and on October 30 filed a supplemental protest with our Office in which it raised more specific arguments concerning HTI's proposed approach to meeting the RFP's requirements regarding the visual system's update rate and infrared capability, and HTI's ability to demonstrate compliance with the requirements. Taylor also requested a hearing pursuant to 4 C.F.R. § 21.5 (1995), to address what the protester characterized as "inconsistencies" in the record.

Based on a telephone conference held November 11, the agency was to submit its report in response to the supplemental protest by November 20, and the protester to submit its comments on the agency report by November 27. The parties were informed during this telephone conference that our Office anticipated holding a hearing in early December, during which the issues raised by the protester in its initial and supplemental protests would be addressed.

On November 17, the agency submitted a request that Taylor's protests be dismissed because in the agency's view, they were predicated on Taylor's misunderstanding of the RFP's requirements. The agency added that if the protests were not summarily dismissed, it would "initiate appropriate corrective action and resolicit proposals." Our Office informed the agency on November 22 that the protests would not be summarily dismissed, and later that day received from the agency a request that the protests be dismissed as academic because the agency intended to "amend the solicitation involved in this protest to clarify proposal and evaluation information, and resolicit offers." Our Office dismissed the protests as

¹According to the agency, "update rate" in lay terms "is the speed at which successive images are computed in order to be subsequently displayed," while "infrared" capability involves "calculating the heat (radiance) given off by an object."

academic on November 27.² By letter of December 5, Taylor requests that we find it entitled to the costs of filing and pursuing its initial and supplemental protests.

Under the Competition in Contracting Act of 1984, our Office may find an entitlement to costs only where we find that an agency's action violated a statute or regulation. 31 U.S.C. § 3554(c)(1) (1988). Our Bid Protest Regulations provide that a protester may be entitled to the reimbursement of its costs of filing and pursuing its protest where the contracting agency decides to take corrective action in response to the protest. 4 C.F.R. § 21.6(e) (1995). This does not mean that costs are due in every case in which an agency decides to take corrective action; rather, a protester is entitled to costs where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. Thus, as a prerequisite to entitlement to 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. Baxter Healthcare Corp.--Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174; GVC Cos.--Entitlement to Costs, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292. The mere fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. Network Software Assocs., Inc.--Request for Declaration of Entitlement to Costs, 72 Comp. Gen. 78 (1993), 93-1 CPD ¶ 46.

Here, we find that Taylor's protests do not provide a basis for a finding that it is entitled to be reimbursed for the costs of filing and pursuing its protests. With regard to the issue of HTI's proposal's compliance with the solicitation's requirements, Taylor advances one interpretation of the solicitation—that offerors were required to demonstrate the compliance of their proposed visual systems, including their systems' infrared capabilities, at the update rate specified in the RFP in order to be found technically acceptable. The agency advances another—that the demonstrations, while required, were for information and illustration purposes only, and that the inability to successfully demonstrate all of the RFP's visual system requirements did not, in and of itself, render a proposal technically unacceptable.

Whether either interpretation is correct or whether the specifications were ambiguous is not readily apparent, but instead would require substantial further analysis, as indicated, in part, by our Office's statement during the pendency of the protest that it intended to hold a hearing to clarify and complete the protest record. In other words, the proper interpretation of the RFP's requirements, and whether HTI's proposal complied with the requirements, were close questions. As such,

²Taylor protested this proposed corrective action on December 8, asserting that it should receive the award. Taylor withdrew this protest on January 29, 1996.

Taylor's protests were not clearly meritorious, and do not warrant the award of costs. Id.

The request for declaration of entitlement to costs is denied.

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