



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Pemco Aeroplex, Inc.--Reconsideration and Costs

File: B-275587.5; B-275587.6

Date: October 14, 1997

Kevin P. Connelly, Esq., and G. Matthew Koehl, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester.

Thomas G. Jeter, Esq., and Suzanne L. Karbarz, Esq., McKenna & Cuneo, for Aero Corporation, an intervenor.

Gregory H. Petkoff, Esq., and John E. Lariccia, Esq., Department of the Air Force, for the agency.

John Van Schaik, Esq., and Michael Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office recommends that protester be reimbursed the costs of filing and pursuing protest, notwithstanding the agency's promise of corrective action in response to the protest and the dismissal of the protest as academic, where, without explanation, after more than 4 months the agency has apparently not taken the first steps to implement the promised corrective action.

DECISION

Pemco Aeroplex, Inc. requests reconsideration of our dismissal of its protest concerning the award of a contract to Aero Corporation under request for proposals (RFP) No. F09603-95-R-13032, issued by the Air Force for programmed depot level maintenance (PDM) of the C-130 aircraft. We dismissed that protest based on the Air Force's promise of corrective action; Pemco now argues that we should "reinstate" that protest as a result of the Air Force's failure to promptly take the promised corrective action. Alternatively, Pemco argues that we should recommend that the firm be reimbursed its costs of filing its protest, including attorneys' fees. Pemco also protests that the Air Force has improperly canceled the solicitation and challenges the agency's decision to perform the work covered by the solicitation at the Warner-Robins Air Logistics Center using government personnel.

We recommend that Pemco be reimbursed the costs of filing and pursuing its protest, including attorneys' fees, and the costs of filing and pursuing this action. We deny Pemco's protest that the RFP has been canceled and dismiss as premature Pemco's contention concerning the Air Force's decision to perform PDM work on the C-130 aircraft in-house.

Pemco initially protested to this Office on April 28, 1997. In that protest, and a supplemental protest filed on May 2, Pemco, the incumbent contractor, argued that the Air Force had improperly evaluated proposals and improperly selected Aero for award.

By letter of May 19, the Air Force requested that we dismiss Pemco's protest. The Air Force explained that it had determined that the evaluation of the offerors' past performance appeared to be inadequate. As a result, the Air Force explained that it would take corrective action, including revising the solicitation, conducting discussions with offerors, soliciting best and final offers (BAFO), reevaluating proposals, and making a new source selection decision. By decision of May 19, we dismissed the protest, since the Air Force's corrective action rendered the protest academic.

Also on May 19, in a letter to the Commander of the Air Force Materiel Command (AFMC), the Air Force's Principal Deputy Assistant Secretary (Acquisition and Management) directed the agency to take the corrective action described to this Office.¹ That letter provided the following additional direction: "[I]n view of emerging changes in depot workloads[,] re-evaluate the C-130 PDM requirement." In a May 28 memorandum, the Commander of AFMC explained that the agency had developed a timetable for taking corrective action to resolicit and make a new award. In addition, that memorandum stated:

An aggressive schedule to accomplish those tasks would not result in new awards until 6 Oct 1997, with subsequent induction of the first aircraft on 5 Jan 1998. Thus, it becomes obvious that we will not be able to accomplish any of the scheduled FY 97 PDM . . . under contract.

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Therefore, [Warner-Robins] plans to organically perform the FY 97 workload and the first two aircraft from the FY 98 workload. In order to perform the work organically, we need to be able to release the customer money which is currently obligated on the [Aero contract]. I have been advised by my Legal staff that due to requirements of the Anti-Deficiency Act, the only proper way to deobligate those funds which are currently obligated against firm FY 97 contract requirements is to terminate the [Aero contract] for the convenience of the Government.

¹That letter was not made available to Pemco or this Office until after the original protest was dismissed and the current action was filed.

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We are continuing with the re-evaluation of the C-130 PDM requirements for FY 98 and beyond. However, to accomplish the required FY 97 PDM requirements, with inputs beginning 16 June 1997, I intend to proceed with the terminations and I request your concurrence.

The course of action described in the May 28 memorandum was approved by AFMC in a memorandum dated June 24. Also on June 24, the Air Force notified Pemco as follows:

The Air Force is re-evaluating the . . . C-130 PDM effort to determine the best approach to ensure readiness and sustainability of the C-130 weapon system. As a result, the FY97 and a portion of the FY98 workload will be performed organically. The [Aero contract] will be terminated for the convenience of the government. A decision on the remainder of the C-130 PDM workload for FY98 and beyond will be announced at the conclusion of the reevaluation. After completion of the requirements review, an updated plan will be provided.

On July 3, Pemco filed the current matter with this Office.

PEMCO'S CONTENTIONS

Pemco argues that the Air Force's June 24 correspondence demonstrates that the Air Force has disregarded its promised corrective action and has removed the basis for our decision to dismiss the protest. As a result, Pemco argues, its original protest should be reinstated and a decision rendered on the firm's objections to the Air Force's handling of the C-130 procurement. Alternatively, Pemco argues that it should be awarded the costs of filing and pursuing its protest based on the Air Force's failure to promptly implement the corrective action it promised, and upon which we based the dismissal of Pemco's original protest.

Pemco also argues that the Air Force has effectively canceled the solicitation and on that basis Pemco is entitled to recover the cost of preparing its proposal. According to Pemco, the period of interim C-130 contract performance, which was originally estimated at 7 months, surely has grown longer, so that it may well exceed 1 year--or the base period of the contract under the solicitation. Pemco argues that, in these circumstances, the Air Force should be viewed as effectively canceling the solicitation. Under the circumstances, according to Pemco, since its efforts and expense preparing its proposal were wasted, it is entitled to recover its proposal preparation costs.

Finally, Pemco argues that, in addition to failing to implement the promised corrective action, the Air Force has violated applicable procurement laws and regulations by deciding to perform the C-130 PDM work in-house. In this respect, Pemco argues that 10 U.S.C. § 2462 (1994) requires that the PDM work on the C-130 be performed by a private sector source, as opposed to government personnel, if a private sector source can perform at a lower cost, and also requires a realistic and fair cost comparison to determine which would be the lower cost source.

Pemco argues that 10 U.S.C. § 2462 has been implemented by regulations published at 32 C.F.R. § 169 (1996), "Commercial Activities Program." Those regulations call for a comparison of the cost of contracting with the cost of in-house performance in order to determine which source would provide "the best value for the Government," 32 C.F.R. § 169a.4(d), and also provide for notification and development of a performance work statement. 32 C.F.R. § 169a.15(d).

Pemco notes that by her June 24 memorandum, the contracting officer announced an intent that 1 to 2 years of the C-130 PDM work would be done in-house, and argues that, under applicable laws and regulations, the Air Force cannot legally transfer work being performed by a commercial depot contractor facility to a government depot without first determining through a fair and reasonable cost comparison that the government depot can perform the services at a lower price. Pemco argues that no such comparison was performed by the Air Force.

ANALYSIS

We first address Pemco's allegation that the Air Force has canceled the RFP. Although Pemco argues that, as a result of the delay in amending the RFP, the RFP should be viewed as effectively canceled, the Air Force reports that it is currently revising the RFP to correct the evaluation scheme. Accordingly, we will not consider this allegation at this time. In addition, since the basis of Pemco's claim for entitlement to proposal preparation costs was its allegation that the RFP has been canceled, we do not recommend reimbursement of those costs.²

We next address Pemco's request that we reconsider our dismissal of its earlier protest. As explained, Pemco argues that the Air Force has failed to implement the promised corrective action and removed the basis for our decision to dismiss the protest. As a result, Pemco requests that its original protest be reinstated and a

²Pemco also argues that the agency's actions have been calculated to deprive Pemco of the award in order to punish Pemco for filing its earlier protest. Pemco has offered no evidence to support this allegation, and we will not attribute prejudicial motives to agency officials on the basis of unsupported allegations, inference, or supposition. Atherton Constr., Inc., B-266345, Feb. 8, 1996, 96-1 CPD ¶ 51 at 6.

decision rendered on its objections to the Air Force's handing of the C-130 procurement.

There is no legal basis for reopening and rendering a decision on the earlier protest, in which Pemco challenged the original evaluation and selection. The Air Force has effectively conceded that the evaluation of proposals was performed in a manner inconsistent with the RFP and that the solicitation itself was flawed. Since the original evaluation and selection no longer are valid in light of the corrective action--which will necessitate a new evaluation based on the revised solicitation and revised proposals--there no longer is any current basis for Pemco's allegations; those allegations have been rendered academic by the corrective action. See VSE Corp.--Recon. and Entitlement to Costs, B-258204.3, B-258204.4, Dec. 28, 1994, 94-2 CPD ¶ 260 at 2.

Alternatively, Pemco argues that it should be reimbursed its costs of filing and pursuing its protest based on the Air Force's failure to promptly implement the corrective action it promised and upon which we based the dismissal of Pemco's original protest. Pemco argues that more than 4 months have passed since the Air Force committed to corrective action and the agency has failed to take the first step in its proposed schedule of corrective action. Specifically, the Air Force has not issued an RFP amendment, solicited BAFOs, or conducted discussions and, according to Pemco, the agency is no closer to accomplishing the proposed corrective action than it was in May. Pemco argues that the Air Force's unexplained, unjustified failure to implement the promised corrective action frustrates the protest process and entitles Pemco to recover its costs of pursuing its protest, including attorneys' fees.

We agree with Pemco. Generally, where we determine that a solicitation, proposed award, or award does not comply with statute or regulation, we recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest; this is to relieve parties with valid claims of the burden of vindicating the public interests which Congress seeks to promote. Hydro Research Science, Inc.--Claim for Costs, 68 Comp. Gen. 506, 508 (1989), 89-1 CPD ¶ 572 at 3. In addition, under section 21.8(e) of our Bid Protest Regulations, we may recommend that a protester be reimbursed the costs of filing and pursuing a protest where the contracting agency decides to take corrective action in response to the protest. 4 C.F.R. § 21.8(e) (1997). This provision reflects our concern that in some cases agencies take longer than necessary to initiate corrective action in the face of clearly meritorious protests, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Our intent under this provision is to recommend the award of costs where, based on the circumstances of the case, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558, 559 (1991), 91-1 CPD ¶ 558 at 2.

Here, Pemco's protest was clearly meritorious. The corrective action was taken in response to Pemco's protest that the Air Force had improperly evaluated its proposal, and more specifically that its proposal had been improperly evaluated with respect to past performance. As the Air Force concedes, "This decision to revise the solicitation and re-compete the requirement for C-130 [PDM] was taken in direct response to Pemco's initial protest."

The Air Force, nonetheless, argues that there is no basis for a recommendation of the payment of costs because we have made no determination that the Air Force's actions violated statute or regulation and "there is no support in the record for such a determination." On the contrary, the Air Force itself has conceded facts which establish a violation of applicable procurement regulations. Specifically, the Air Force's Principal Deputy Assistant Secretary (Acquisition and Management) stated in her May 19 letter that

the Air Force Selection Team failed to follow the language of the solicitation in evaluating proposals. Specifically, the RFP advised offerors that past performance would be evaluated at the factor level when it actually was evaluated at the area level.

Thus, although the Air Force argues that there was no statutory or regulatory violation, the Air Force's evaluation of proposals on a basis inconsistent with the solicitation violated Federal Acquisition Regulation § 15.608(a) (1997), which requires that agencies "evaluate competitive proposals solely on the factors specified in the solicitation." We therefore conclude that the protest was clearly meritorious.

We also conclude that the corrective action has been unduly delayed. While the Air Force has repeatedly insisted that it has "prudently proceeded with the announced corrective action," the record does not support this assertion. As explained above, after the Air Force notified this Office in May that it would take corrective action in response to Pemco's protest, the agency decided upon a detailed schedule of corrective action. That schedule called for issuance of an RFP amendment in June and receipt of responses to the amendment in July, with evaluations, discussions, BAFOs and a contract awarded by October 6. As of September 30, the Air Force had not taken even the first step in this plan--amending the RFP.

In response to Pemco's contention that the planned corrective action has been unduly delayed, the Air Force simply argues that it would be "unwise" to implement the schedule more quickly. According to the Air Force, it "must ensure that the evaluation of proposals is reasonable and accomplished in accordance with the terms of the solicitation and the procurement regulations. This deliberative process cannot be accomplished in undue haste."

It may be that some slippage in the announced schedule could be justified. Nonetheless, the Air Force has shown no progress in meeting that schedule and has provided no explanation as to why it has failed to accomplish even the first milestone on the schedule--issuing an amendment--when that milestone is within the agency's control. As a result of the delay, Pemco has been denied an opportunity to compete for a portion of the work and has been forced to expend unnecessary time and resources to make further use of the protest process in order to obtain relief.

In our view, allowing more than 4 months to pass without revising the solicitation is not reasonable, particularly where the agency has offered no meaningful explanation for the delay. A protest is not resolved, where, as here, an agency does not timely implement the promised corrective action that caused us to dismiss a meritorious protest. Commercial Energies, Inc.--Recon. and Declaration of Entitlement to Costs, 71 Comp. Gen. 97, 101 (1991), 91-2 CPD ¶ 499 at 6.³ Accordingly, we recommend that Pemco be reimbursed its protest costs under 4 C.F.R. § 21.8(e).

Pemco also argues that, consistent with 10 U.S.C. § 2462, and the implementing regulations, the Air Force should have performed a cost comparison concerning the interim work. We decline to reach that issue at this time because, although work is being performed in-house on an interim basis, the Air Force has not disavowed the promised corrective action, has not canceled the RFP, and has not made a decision as to how the PDM work on the C-130 ultimately will be satisfied. When the Air Force makes a decision as to how the PDM work on the C-130 will be performed, if Pemco is not satisfied with that decision, it will be free to protest at that time. At this time, it would be premature to consider Pemco's allegations concerning a decision that has not yet been made. Consequently, we dismiss Pemco's allegation concerning the Air Force's decision to perform C-130 PDM work in-house.

In summary, we deny Pemco's reconsideration request and its allegation that the RFP has been canceled. We deny Pemco's request for a recommendation of entitlement to the costs of preparing its proposal and we dismiss as premature the allegation that the Air Force has improperly decided to perform C-130 PDM work in-

³The Air Force argues that Commercial Energies, *supra*, is distinguishable because in that case the firm improperly awarded the contract was permitted to continue to perform, while here the Air Force terminated Aero's contract and the work is being performed in-house by Air Force personnel. We do not see why this distinction should make a difference; in Commerical Energies, as here, a protester saw its protest dismissed because an agency committed to taking corrective action that would afford the protester meaningful relief and the agency then failed to do so. Regardless of whether the work is performed in the interim by Aero or by government personnel, as a result of Air Force delays in implementing the promised corrective action, Pemco has not had the opportunity to compete for that work.

house. We recommend that the Air Force pay Pemco the costs of filing and pursuing the protest, including reasonable attorneys' fees. This recommendation includes Pemco's cost for filing and pursuing the current matter before our Office. Pemco should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the agency within 60 working days of receipt of this decision.

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