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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Lockheed Martin Systems Integration--Owego--Costs

File: B-287190.5

Date: March 20, 2002

Thomas P. Humphrey, Esq., and Jonn E. McCarthy, Jr., Esq., Crowell & Moring, for the protester.

Raymond M. Saunders, Esq., Maj. Howard W. Roth, III, and Capt. Richard L. Hatfield, Department of the Army, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Costs associated with responding to requirement for common avionics architecture system did not constitute proposal preparation costs where agency did not solicit proposals but, rather, was investigating requester's viability as potential source; costs incurred thus are not proposal preparation costs, and General Accounting Office has no authority to recommend their reimbursement.

DECISION

Lockheed Martin Systems Integration--Owego (LMSI-O) requests that we recommend that the Department of the Army reimburse the firm the costs associated with its efforts to obtain a contract with the 160th Special Operations Aviation Regiment, Airborne (SOARA) for a common aviation architecture system (CAAS) software package for its fleet of helicopters.

We deny the request.

LMSI-O's request arises from the activities of SOARA in connection with its acquisition of a CAAS software package; this is our third decision regarding that purchase. As discussed in detail in our first decision, Lockheed Martin Sys. Integration--Owego, B-287190.2, B-287190.3, May 25, 2001, 2001 CPD ¶ 110, the agency was interested in replacing the software systems deployed on its fleet of five different models of helicopters. LMSI-O's product--the Integrated Avionics Software system--was installed on two of the five models, while Rockwell Collins's product--the Cockpit Management System (CMS)--was installed on the other three models.

In an effort to determine LMSI-O's and Rockwell's ability to meet the requirement, the agency engaged in a series of meetings with the firms. SOARA expressed its requirements to the firms verbally over an extended period of time and obtained information on their technical approaches, costs, and schedules for designing and installing the CAAS software package. At the conclusion of those meetings, the agency determined that only Rockwell could meet the requirement within cost and schedule constraints, see 10 U.S.C. § 2304(c)(1) (2000), and awarded two sole-source delivery orders to Rockwell.

LMSI-O protested to our Office on the basis that the agency had improperly concluded that LMSI-O could not meet the requirement. We sustained the protest, finding that SOARA had misled LMSI-O with respect to its actual requirements. In particular, we found that, during one of the meetings with LMSI-O, SOARA's project manager had identified as requirements several features of the CAAS development effort that the record showed were beyond the agency's actual requirements. As a consequence, LMSI-O abandoned one technical approach in favor of another in its effort to meet the agency's stated requirements. The record further showed that LMSI-O's initial approach met the agency's actual requirements and was comparable to Rockwell's approach in terms of cost and schedule, whereas the approach it adopted after being misled was not competitive from a cost and schedule standpoint. We concluded that the agency's sole-source determination was invalid.

Because the agency had determined that urgent and compelling circumstances existed, and had continued performance in the face of the protest on this basis, we considered it inappropriate to recommend that the agency compete the requirement. We instead recommended that the agency "determine whether it is practicable" to provide LMSI-O "an opportunity to respond to the agency's requirement," and then "take action consistent with its determination." Decision at 16. In response to our recommendation, SOARA advised us that "it is impracticable at this juncture to provide [LMSI-O] an opportunity to respond to [the] requirement due to potential disruption to schedule and substantial additional costs if Lockheed were to participate." Letter from United States Special Operations Command, Nov. 13, 2001, at 1.

LMSI-O now asks that we recommend that the agency reimburse its costs incurred in responding to the agency's requirement.¹ LMSI-O maintains that the agency's actions

¹ The agency maintains that LMSI-O's request that we modify our recommendation should have been filed within 10 days after receipt of our decision, and therefore is untimely. However, such a request would have merely anticipated that the agency's ultimate decision would be adverse to LMSI-O's interests, and therefore would have

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amounted to an “illegal competition,” and that the costs it incurred in responding to the competition amount to reimbursable proposal preparation costs. LMSI-O Response to Agency Submission, Dec. 21, 2001, at 4.

Under the Competition in Contracting Act (CICA), where our Office finds that an agency’s procurement activities fail to comply with the requirements of statute or regulation, we “may declare an appropriate interested party to be entitled to the costs of . . . filing and pursuing the protest . . . ; and . . . bid and proposal preparation.” 31 U.S.C. § 3554(c)(1) (2000).² Bid or proposal preparation costs are defined in Federal Acquisition Regulation (FAR) § 31.205-18 as costs incurred in preparing, submitting and supporting bids or proposals on potential contracts.

LMSI-O’s characterization of the agency’s actions as an illegal competition is incorrect. We did not find in our prior decision that the agency conducted an improper competition. To the contrary, we found that the agency’s proceeding without a competition was unwarranted because it improperly had determined that LMSI-O was not a viable potential source. LMSI-O’s position here does not persuade us otherwise. The agency never requested proposals or otherwise indicated to the requester that the briefings and informal meetings in which it participated would result in a contract. Further, the record shows that neither the agency nor the requester viewed the activities as proposal-related. In this regard, the record shows that the agency considered its activities to be in the nature of market research. See, e.g. Hearing Transcript (Tr.) at 250; Agency Report, exh. 78. LMSI-O also did not view its activities during this time as proposal preparation activities. At the hearing we conducted in connection with the protest, a LMSI-O employee described the firm’s activities as follows:

At that time, we were still hearing we’re going to have a competition, okay? We’re going to try to influence the competition, as good contractors do, before it happens, but we’re not ready to give a [cost] number out when we’re in the mind-set that we’re going to have a competition here.

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been premature. See The Analytic Sciences Corp., B-218074, Apr. 23, 1985, 85-1 CPD ¶ 464 at 8. Since LMSI-O’s request was filed within 10 days after it learned of SOARA’s determination, it was timely. 4 C.F.R. § 21.2(a)(2) (2001).

² In contrast to our limited and clearly defined authority regarding reimbursement of costs, we have broader authority with respect to remedies to address flaws that our Office identifies in a procurement. There, we are authorized to “implement such other recommendations as the Comptroller General determines to be necessary in order to promote compliance with procurement statutes and regulations.” 31 U.S.C. § 3554(b)(1)(G).

Tr. at 201-202. That same witness also testified: “We’re trying to do anything, we’re trying to be proactive. We’re trying to find out what is going on here. . . . We’re floating trial balloons in front of the government.” Tr. at 230. It appears from LMSI-O’s own description of its activities that, rather than “preparing, submitting or supporting a proposal for a contract,” LMSI-O was engaged in “direct selling” activity, attempting to influence a possible future competition. See FAR § 31.205-38(c).³

Given the nature of the meetings and the parties’ own characterization of their activities, we believe the agency’s meetings and discussions with LMSI-O were in the nature of market research, or a presolicitation exchange of information, for the purpose of determining whether LMSI-O was a viable potential contractor for the requirement, and how best to proceed with the acquisition. Such presolicitation activities are encouraged by the FAR as a means of improving understanding of the government’s requirements and as well as a means of exploring prospective offerors’ capabilities to meet the agency’s need. FAR § 15.201 expressly permits market research (as described in FAR part 10), and one-on-one meetings with potential offerors for these purposes.

Accordingly, since LMSI-O’s costs were not incurred in the preparation of a proposal, we cannot properly recommend that they be reimbursed. 31 U.S.C. § 3554(c)(2); see AT&T Technologies, Inc. v. U.S., 18 Cl. Ct. 315, 325 (1989) (selling costs and bid preparation costs are distinct, and the former may not properly be paid as the latter); see also Bell & Howell Co., B-180199, May 1, 1975, 75-1 CPD ¶ 273 (prior to CICA, request for proposal preparation costs denied where costs were incurred by firm in submitting an unsolicited proposal in an attempt to influence the acquiring activity to broaden the competition for a requirement, and firm had no reasonable expectation of being awarded a contract).

The request is denied.

Anthony H. Gamboa
General Counsel

³ “Direct selling” costs are defined in FAR § 31.205-38(c)(1) as costs associated with a contractor’s efforts to induce particular customers to purchase particular products or services from the contractor, including, typically: person-to-person contact, including familiarizing potential customers with the contractor’s products or services, negotiation, liaison between government and contractor personnel and the provision of technical and consulting expertise. In our view, this fairly describes the nature of LMSI-O’s activities in connection with responding to the agency’s CAAS requirement, and appears to comport with the firm’s understanding of what it was doing as well.