



G A O

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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Alaska Mechanical, Inc.--Costs

File: B-289139.2

Date: March 6, 2002

John Lukjanowicz, Esq., Oles Morrison Rinker & Baker, for the protester.
John P. Ahlers, Esq., Barokas Martin Ahlers & Tomlinson, for the GHEMM Company,
an intervenor.

Scott R. Marchand, Esq., U.S. Army Corps of Engineers, for the agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office (GAO) recommends that protester be reimbursed the reasonable costs of filing and pursuing its protest challenging the evaluation and selection process where the contracting agency unduly delayed taking corrective action in response to a clearly meritorious protest; corrective action was taken only after the protester filed comments on the agency report and after GAO expressed concerns regarding the lack of adequate documentation.

DECISION

Alaska Mechanical, Inc. (AMI) requests that we recommend that the firm be reimbursed the costs of filing and pursuing its protest challenging the award of a contract to the GHEMM Company under request for proposals (RFP) No. DACA85-01-R-0026, issued by the Department of the Army Engineer District, Alaska, to construct an emission reduction facility for six operating boilers at the central heat and power plant located at Fort Wainwright, Alaska.

We recommend that the Army reimburse AMI its protest costs.

The RFP, issued on May 2, 2001, contemplated the award of a fixed-price contract, and listed the following technical evaluation factors in descending order of importance: past performance, specialized experience, key personnel/organization, construction scheduling, and subcontracting plan and small business participation. Award was to be made on the basis of the proposal deemed to represent the best value to the government.

Five firms, including AMI and GHEMM, responded to the RFP. A source selection evaluation board (SSEB) evaluated those firms' proposals, and assigned an overall rating to each proposal. Based on that initial evaluation, the SSEB rated all five proposals marginal overall, and recommended that the contracting officer (CO) retain all five firms' proposals within the competitive range. The CO concurred with that recommendation and conducted discussions and requested revised technical proposals from all five firms.

The SSEB reevaluated revised proposals based on the responses to discussion items, and ultimately recommended a revised competitive range consisting of only AMI's and GHEMM's proposals. The CO adopted the SSEB's recommendation and reopened discussions by requesting AMI and GHEMM to submit breakdowns of their prices. Although the SSEB reevaluated the specific price information the offerors submitted, it was unable to reach consensus on which of the two proposals represented the best value to the government.

The source selection authority (SSA) reviewed AMI's and GHEMM's proposals, and the results of the SSEB's evaluations. Based on his independent review, the SSA selected GHEMM's proposal as representing the best overall value to the government. By letter dated October 1, the Army notified AMI of the award to GHEMM. AMI filed its protest in our Office following a debriefing.

In its protest, AMI challenged the evaluation of its proposal in several areas. In particular, AMI argued that in evaluating the firm's past performance, the Army unreasonably relied on performance evaluations AMI received on other projects that were either not final ratings or were under appeal. AMI also contended that the Army unreasonably downgraded its proposal under the key personnel/organization area, and the construction scheduling area.

By notice to the parties on November 19, after receipt of the Army's report and AMI's comments, the General Accounting Office (GAO) attorney handling the protest expressed concern regarding the Army's position with respect to several specific issues, and asked the Army to address those concerns prior to scheduling a hearing. The GAO notice informed the Army that the specific issues were identified because the record appeared to lack adequate documentation supporting the Army's position in response to the protest. The notice also raised questions regarding the extent and adequacy of the Army's discussions.

By letter dated November 20, the Army informed our Office that, based on its review of AMI's comments on the agency report and GAO's notice, the Army had decided to take corrective action. Specifically, the Army stated that it would terminate GHEMM's contract, request revised proposals from all offerors that responded to the solicitation, appoint a new SSEB, reevaluate proposals, and make a new source selection. Based on the Army's decision to take corrective action, AMI withdrew its protest on November 28.

AMI requests that we recommend that the Army reimburse AMI the costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2001). The Army has elected not to file a response to AMI's request.

When we determine that a solicitation, proposed award, or award does not comply with statute or regulation, the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1)(A) (Supp. IV 1998), authorizes our Office to recommend that the contracting agency pay the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees. When a procuring agency takes corrective action in response to a protest, our Office may recommend, pursuant to 4 C.F.R. § 21.8(e), 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 the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Pemco Aeroplex, Inc.--Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3.

Here, there is no dispute that a prompt and reasonable agency inquiry would have disclosed the absence of a defensible legal position rebutting AMI's allegations regarding the evaluation of its proposal. Such an inquiry also would have disclosed the absence of adequate documentation supporting the agency's position and should have alerted the agency to irregularities during discussions. As a result, we conclude that the protest was clearly meritorious. Further, the agency delayed taking corrective action until after it submitted its report; after AMI had incurred the time and expense necessary to respond the report; and after our Office expressed concerns with the record. Under the circumstances, we do not consider the agency's corrective action to have been prompt.

Accordingly, we recommend that AMI be reimbursed the reasonable costs of filing and pursuing the protest. AMI should file its certified claim for costs with the Army within 60 days after receipt of this decision.¹ 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel

¹ GHEMM also requests that we recommend that it be reimbursed the costs of participating in AMI's protest. While the firm, as the awardee in the protested procurement, was permitted to intervene in AMI's protest, see 4 C.F.R. § 21.0(b), neither CICA nor our Regulations provide any basis for our Office to recommend the award of costs incurred by an intervenor such as GHEMM.