Matter of: Tucson Mobilephone, Inc.--Request for Entitlement

File: B-252659.3

Date: January 11, 1994

Theodore M. Bailey, Esq., Bailey, Shaw & Deadman, P.C., for the protester.
Lt. Col. Duane L. Brummett and Joseph M. Goldstein, Esq., Department of the Air Force, for the agency.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is entitled to the costs of filing and pursuing its protests challenging the proposed sole-source awards of contracts for the maintenance of land mobile radios where the agency failed to promptly or adequately investigate the clearly meritorious protest allegations attacking the sole-source justifications, but only took corrective action when the hearing testimony showed the bases for the sole-source awards were unfounded.

DECISION

Tucson Mobilephone, Inc. (TMI) requests our declaration of its entitlement to be reimbursed the costs of pursuing its protests against the proposed sole-source awards of contracts to Motorola, Inc., under request for proposals (RFP) Nos. F08620-93-R-0001 and F08651-93-R-0271, issued by the Department of the Air Force for maintenance of land mobile radio systems at Hurlburt Field and Eglin Air Force Base (AFB), respectively. TMI contends that the Air Force unduly delayed the taking of corrective action in response to its clearly meritorious protests, and only addressed TMI's concerns by amending the solicitations after a hearing on the protests. In response to TMI's request the Air Force stated that it "does not oppose TMI's request for declaration of entitlement to costs."

We find that TMI is entitled to the costs of filing and pursuing its protests, including reasonable attorneys' fees.

On March 12 and March 24, 1993, TMI protested the agency's solicitation of mobile radio system maintenance services for Hurlburt Field, alleging that the reasons for the sole-source award to Motorola were not valid and that TMI could satisfy the agency's actual requirements. On April 16, TMI protested the proposed sole-source award to Motorola for the Eglin AFB mobile radio system maintenance requirements for essentially the same reasons. The agency submitted its report on the protest of the Hurlburt Field services on April 19 and on the protest of the Eglin AFB services on May 13. The protester submitted various comments on the agency reports. A hearing on these protests was conducted at our Office on July 2, 1993, at which various Air Force witnesses testified as to the reasons for sole sourcing the requirements to Motorola and a TMI witness testified as to TMI's capabilities.

A major reason advanced by the Air Force for the sole-source procurements of maintenance services for Motorola equipment was the agency's concern that the radios could not be maintained without some means of accessing the Motorola proprietary software embedded in the radios. The agency based its position in part on oral statements of Motorola representatives concerning Motorola's policy of not providing software engineering support where Motorola was not the maintenance contractor[1] and, in part, on its stated understanding that a trade secret provision of an Air Force-Motorola software license agreement precluded maintenance contractors not licensed by Motorola from accessing the software code to repair the radios.

Both of TMI's protests essentially questioned the Air Force's determination that Motorola had unique legal access to the software code embedded in the radio systems that precluded competition. TMI contended that its extensive experience maintaining computer controlled Motorola equipment at a number of government installations showed that the maintenance contractor rarely requires access to the source code embedded in the equipment's firmware chips, and that if it did require such access it was readily available under a Motorola site license agreement. TMI explained that it has a history of purchasing Motorola site license agreements and Motorola parts (including firmware chips) directly from Motorola[2] on an unrestricted basis and that it is unreasonable to think Motorola would withdraw this support in light of applicable Federal Trade Commission

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[1]The Motorola representatives were from Motorola's Federal Sales division.

[2]TMI's purchases were from Motorola's Commercial Sales division and not from Motorola's Federal Sales division.

regulations and federal law, and Motorola's dominant position in the land mobile radic industry. TMI also claimed to have the test equipment and Motorola technical data necessary to determine when the equipment repairs required Motorola support. Finally, TMI argued that TMI, in an emergency, had the expertise and legal right, in its role as the government's maintenance contractor, to access the embedded source code to make emergency repairs (i.e., software changes or "patches").

The hearing evidence did not support the Air Force's sole-source rationale. The written statement of Motorola's software engineering support policy, which we requested for the hearing, differed substantially from the oral advice the Air Force had assertedly received from the Motorola representatives. In addition, the evidence showed that the license agreement cited by the Air Force did not apply, and government maintenance contractors could access the equipment software and had the ability to perform the services.

Another reason advanced by the Air Force for the sole-source awards was that only Motorola could meet the requirement that the maintenance contractor provide Motorola certificates stating that the contractor's maintenance employees had received certain specialized training on specific Motorola equipment since Motorola refused to provide the required training to its competitors. TMI contended that this requirement was unreasonable because: (1) it used Motorola training materials, theory, and operation training manuals in its in-house training program; (2) TMI had recognized industry certification; and (3) TMI had successfully provided maintenance on similar but more complex Motorola equipment at several Air Force installations.

Again, the hearing evidence did not support the Air Force's sole-source rationale. The Air Force witnesses were unable to provide a factual basis for this clearly restrictive requirement and other evidence presented showed that other training may satisfy the Air Force requirements.

On July 13, after the hearing, the Air Force announced that it was canceling the proposed noncompetitive awards and deleting the Motorola training certificate requirements. On July 14, we dismissed TMI's protests as academic.

On July 27, TMI filed its request for a declaration of entitlement to protest costs under section 21.6(e) of our Bid Protest Regulations. Under that section, we may declare a protester entitled to costs, including reasonable attorneys' fees, 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. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. We believe that a protest is clearly meritorious when a reasonable agency inquiry into the protester's allegations would show facts disclosing the absence of a defensible agency legal position. See Carl Zeiss, Inc.--Entitlement to Costs, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274.

Both of TMI's protests essentially questioned the Air Force's determination that only Motorola could provide the required services because of Motorola's unique legal access to the software code embedded in the radio systems and because of Motorola's unique access to the training required to meet the agency's Motorola training certification requirements. TMI challenged each of the reasons that supported the sole-source awards, providing specific reasons why Motorola was not the only source capable of successfully satisfying the agency's requirements.

It is clear from the record that TMI's protests were meritorious and that the Air Force corrective action was in response to these protests. Notwithstanding the details provided by TMI in its early protest filings, the Air Force did not promptly or adequately investigate the merits of TMI's protest allegations until the hearing evidence showed that the sole-source bases were unfounded. For example, the Air Force did not confirm Motorola's alleged but undocumented software code service support policies in the face of TMI's specific challenge. The Air Force reliance on an Air Force-Motorola software license agreement also was clearly misplaced in view of TMI's specific challenge; the license agreement identified an Air Force contract that did not include the equipment to be maintained under this RFP, equipment which had been acquired under another contract that did provide for maintenance contractor access for purposes of repair. Similarly, as was made clear at the hearing, the Air Force did not investigate the nature and content of the Motorola training, despite TMI's specific assertion that other training was equivalent to Motorola training and could fulfill the Air Force's needs. Had the Air Force promptly undertaken a reasonable factual investigation before filing its reports on the protests, the merits of TMI's contentions would have been clear at the outset. Carl Zeiss, Inc.--Entitlement to Costs, supra.

Accordingly, in view of the fact that the Air Force only took corrective action after the protester undertook the expense of filing comments on the protest, and preparing for, and participating in, a hearing that confirmed that the agency's position lacked support, we find that TMI is entitled to recover the costs of filing and pursuing the protest, including reasonable attorneys' fees. Id. TMI

should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the agency within 60 working days of receipt of this decision. 4 C.F.R. § 21.6(f)(1) (1993).

Comptroller General
of the United States