GAO

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

# Decision

**Matter of:** ATA Defense Industries, Inc.--Costs

**File:** B-282511.6

**Date:** March 14, 2000

Claude P. Goddard, Jr., Esq., Wickwire Gavin, for the protester.
Jeffrey I. Kessler, Esq., and Caridad Ramos, Esq., Department of the Army, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Request for recommendation that protest costs be reimbursed is denied where agency decides to take corrective action in response to protest, but the issue on which the corrective action was based was a "close question," and cannot be viewed as clearly meritorious.

## DECISION

ATA Defense Industries, Inc. requests that our Office recommend that it recover the costs, including attorneys' fees, incurred in connection with its protest challenging proposed corrective action by the Department of the Army in response to our decision in ATA Defense Indus., Inc., B-282511, B-282511.2, July 21, 1999, 99-2 CPD ¶ 33, which sustained ATA's protest of a contract award to Caswell International Corporation under request for proposals (RFP) No. DAAE20-98-R-0215, issued by the Army's Tank-Automotive and Armaments Command for the Intermediate New Generation Army Targetry System (INGATS). After ATA filed its challenge to the Army's proposed corrective action, and prior to our decision, the Army abandoned its proposed approach and adopted an approach consistent with one suggested by ATA in its protest.

We deny the request.

The disputes in this procurement, set forth in greater detail in the above-referenced decision, spring from a unique feature of the Army's scheme for evaluating INGATS proposals. In particular, the Army used adjectival ratings to assess an offeror's ability to achieve certain performance characteristics related to the solicitation's

most important technical sub-element --i.e., hit detection. The ratings of excellent and good are relevant here. The rating of excellent was reserved for offerors whose hit detection device (HDD) was able to accurately calculate "the location of hits . . . to within 60 mm of where the round actually penetrated the plane of the target . . . ." RFP amend. 0007, at 3-4. The next highest rating, good, was reserved for offerors whose device could locate hits to within 120 mm, as opposed to the 60 mm accuracy required for an excellent rating.

Our decision sustaining ATA's initial protest found that the tolerances identified in Caswell's proposal for its non-contact HDD could report hits located more than 60 mm from the point where the round penetrated the target plane. ATA Defense Indus., Inc., supra, at 11. Thus, the decision held that Army's assessment of the Caswell device as excellent under this technical sub-element, rather than good, violated the RFP's evaluation scheme. Accordingly, we recommended that the Army re-evaluate the proposals in accordance with the stated evaluation scheme, and make a new best value determination. Id. at 15.

By letter dated August 18, the Army advised ATA that rather than re-evaluate the proposals as written, it intended to reopen discussions limited to the subject of hit detection. The letter also indicated that any revisions to proposals would be similarly limited to the area of hit detection, and that revisions to other areas, or to price, would not be allowed.

On August 25, ATA filed a protest with our Office alleging that the Army's decision to reopen discussions limited to hit detection--rather than simply re-evaluate as our decision recommended--was unreasonable and could only result in confirming the initial award to Caswell. In support of its argument, ATA pointed out that: (1) Caswell's proposed approach to hit detection complied with the solicitation's requirements and did not contain weaknesses which required discussions; and that (2) ATA's proposal, which was already rated excellent in the area of hit detection, could not receive a higher rating if discussions were limited as planned. Thus, ATA argued that reopening discussions was not justified under these circumstances. For relief, ATA asked that the Army be required to simply re-evaluate the proposals, as our Office had recommended, or alternatively, permit complete discussions and unlimited proposal revisions before making a new best value determination.

On September 29, the Army submitted an agency report defending its decision to conduct limited discussions rather than to re-evaluate proposals. In particular, the Army cited our decision in Rel-Tek Sys. & Design, Inc.--Modification of Remedy, B-280463.7, July 1, 1999, 99-1 CPD ¶ 1, for the proposition that agency corrective action in response to an earlier sustained protest need not mirror our recommendation, but must simply remedy the impropriety that was the basis for our decision. Army Report, Sept. 29, 1999, at 4. In addition, the Army report identified the specific reasons for the agency's decision to reopen discussions on a limited basis.

On October 4, ATA supplemented its initial protest by challenging each of the reasons set forth in the Army's report for reopening limited discussions, and arguing that none of them were supported by the record. In ATA's view, since none of the offered reasons for reopening discussions were valid, and since only Caswell could improve its standing by the limited reopening envisioned by the agency, the decision to reopen was an abuse of agency discretion.

On October 7, our Office requested an alternative dispute resolution (ADR) meeting with representatives of the Army, ATA, and Caswell, and simultaneously, we placed a hold on the requirement that ATA submit comments on the agency report. The meeting was held on October 13.[1]

During the course of this meeting, our Office advised the parties that the dispute here appeared to be different from the dispute in our decision in Rel-Tek Sys. & Design, Inc.--Modification of Remedy, supra. We also discussed with the parties a likely approach for analyzing ATA's pending protests, and indicated that it was not clear that the agency would prevail, as it did in the above-cited Rel-Tek case. At the same time, we explained that if ATA prevailed, it would be the first instance of which we were aware in which we would conclude that reopening discussions after a GAO decision sustaining an earlier protest was an abuse of agency discretion. At the conclusion of the meeting, the Army elected to amend its proposed corrective action in response to the ATA protest, rather than continue to litigate its decision to hold limited discussions.

Five days after the ADR meeting, on October 18, the Army provided our Office and the parties with written confirmation of its intent to reopen the competition without limitations. By letter dated October 19, ATA agreed that the Army's actions addressed its concerns, but requested that it be reimbursed the costs, including attorneys' fees, of pursuing its challenge to the Army's proposal to hold limited discussions. On October 22, given the Army's intended approach, and ATA's concurrence, our Office dismissed ATA's protest as academic. This decision addresses ATA's request for the costs of pursing its protest.

When an agency takes corrective action prior to our issuing a decision on the merits, we may recommend that the protester recover the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(e) (1999). Under this provision, we will recommend recovery of protest costs where, based on the circumstances of the case, we conclude that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Griner's-A-One Pipeline Servs., Inc.--Entitlement to Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41 at 5. For a protest to be clearly

[1] This meeting was also attended by a third offeror, Fidelity Technologies Corp., which also filed a protest of the Army's proposed corrective action 2 days prior to submission of the Army's report in response to ATA's protest.

meritorious, the issue involved must not be a close question. J.F. Taylor, Inc.--Entitlement to Costs, B-266093.3, July 5, 1996, 96-2 CPD ¶ 5 at 3. Rather, the record must establish that the agency prejudicially violated a procurement statute or regulation. Tri-Ark Indus., Inc.--Declaration of Entitlement, B-274450.2, Oct. 14, 1997, 97-2 CPD ¶ 101 at 3. The fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. J.F. Taylor, Inc.--Entitlement to Costs, supra.

Here, we conclude that it is not appropriate to recommend that ATA recover its protest costs because ATA's protest was not clearly meritorious. As stated above, ATA's protest contended that the Army's proposed corrective action in response to an earlier sustained protest was improper. To succeed in this challenge, ATA would have had to convince our Office that limiting discussions in the reopened procurement was an abuse of agency discretion. While our Office was actively considering the merits of ATA's protest--as opposed to agreeing with the Army that its approach was consistent with our decision in Rel-Tek--and while we communicated our openness to the outcome ATA was urging during the ADR conference, ATA's battle was not yet won.

As a general matter, the details of implementing our recommendations for corrective action are within the sound discretion and judgment of the contracting agency. Serv-Air, Inc., B-258243.4, Mar. 3, 1995, 95-1 CPD ¶ 125 at 2-3. In addition, we have allowed agencies to remedy procurement improprieties with limited, rather than unlimited, discussions. Rel-Tek Sys. & Design, Inc.--Mod. of Remedy, supra, at 5; System Planning Corp., B-244697.4, June 15, 1992, 92-1 CPD ¶ 516 at 4. Moreover, our Office is unaware of any decision, by any forum, holding that an agency's decision to reopen discussions, or to do so on a limited basis, to remedy a specific procurement impropriety was an abuse of agency discretion--nor has the protester provided such a decision. Similarly, we will not conclude that the Army's decision to alter its approach to reopening this procurement, rather than litigate the question of the validity of the approach, means that the approach violated a statute or regulation. J.F. Taylor, Inc.--Entitlement to Costs, supra.

In conclusion, given the discretion allowed agencies attempting to correct procurement improprieties, we think that ATA's contention that the reopening of discussions here was an abuse of agency discretion, must be characterized as a "close question." As such, the protest was not clearly meritorious and does not warrant the award of costs. Network Software Assocs., Inc.--Request for Declaration of Entitlement to Costs, B-250030.4, Jan. 15, 1993, 93-1 CPD ¶ 46 at 4.

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