



**Comptroller General  
of the United States**

Washington, D.C. 20548

# Decision

**Matter of:** WBM Maintenance, Inc.  
**File:** B-238049  
**Date:** April 20, 1990

Donald E. Barnhill, Esq., for the protester.  
Colonel Herman A. Peguese, Department of the Air Force, for the agency.  
Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Protester is not entitled to recover proposal preparation costs where agency's cancellation of a replacement solicitation for critical medical services was proper since all prospective offerors were advised that award was contingent upon default by the incumbent contractor and cancellation was based upon the incumbent contractor's decision to continue contract performance.

## DECISION

WBM Maintenance, Inc., protests the cancellation of an oral solicitation for Hospital Aseptic Management System (HAMS) services issued by the Department of the Air Force. Specifically, WBM contends that the Air Force never intended to procure the new services, and therefore improperly induced WBM to incur costs in connection with submitting a proposal under the solicitation. WBM requests reimbursement of its proposal preparation costs.

We deny the protest and the claim for costs.

In October 1988, a contract was awarded to Marriott Corporation to provide HAMS services for 1 year, with four 1-year options, to the San Antonio area Joint Military Medical Command (JMMC), which includes the Wilford Hall Medical Center, Laughlin Air Force Base Hospital, and the clinics at Kelly Air Force Base, Randolph Air Force Base, Brooks Medical Center and the Medina Military Installation. Under the contract, HAMS services were to be provided by Marriott in approximately 52 buildings, for more than

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2.1 million square feet, including surgery, labor, delivery and other critical care areas.

On October 26, 1989, shortly after the first option was exercised, Marriott informed the Air Force's contracting officer by telephone that it was going to cease performing the HAMS services contract because it was sustaining an annual loss of \$1.5 million. To allow the Air Force enough time to locate a replacement contractor, Marriott agreed to continue performing the contract until December 31, 1989; Marriott also advised the contracting officer that written notification confirming its default action was forthcoming. That same day, the contracting officer telephoned qualified contracting sources who had submitted proposals under the 1988 solicitation and advised them that because the government anticipated Marriott's default effective December 31, a replacement HAMS services contract was being solicited on a contingency basis.

On October 27, Marriott sent the Air Force a letter which gave "notice that Marriott . . . wishes to be released" from the HAMS services contract and that the company was "await[ing]" the Air Force's "response and resolution of this matter." Included in its request for release was an explanation of the annual \$1.5 million loss; Marriott contended that because it had failed to provide an adequate full-time staff coverage estimate for performing the HAMS services at the Brooks Medical Center, the company did not incorporate the cost of approximately 40 full-time employee salaries into its contract price. Marriott further argued that because this error was so "gross," the Air Force's failure to reject Marriott's offer warranted a full, liability-free release of Marriott from performing the HAMS services contract.

By telephone on October 30, the Air Force informed Marriott that the government would not release the company from performance of the contract. Marriott was further advised that if it chose to abandon performance, the government would terminate the contract for default and hold the company liable for all procurement costs. Marriott replied that under those circumstances it would pursue the matter in court.

Because any interruption in HAMS services would jeopardize the welfare of thousands of patients, and due to the limited amount of time in which to solicit a replacement contractor in the event that Marriott did terminate performance on December 31, the Air Force decided to proceed with the replacement HAMS services procurement while simultaneously clarifying whether Marriott still intended to terminate

without a government release. Proposals were to be submitted by November 27. On November 1-3, on-site "walk-throughs" of the medical facilities were conducted for the prospective offerors.

In letters dated November 14 and 16, the Air Force informed Marriott that unless the company definitively stated by November 21 whether it would continue to perform, the Air Force would terminate Marriott's contract for default. By letter dated November 17, Marriott again asked the Air Force for release from the contract, and presented both a detailed analysis of the alleged mistake in its proposal as well as an offer to postpone its proposed December 31 termination date by 30 days.

In response, the Air Force initiated default proceedings against Marriott and continued with the reprocurement. Six proposals were submitted. After reviewing the proposals, the contracting officer determined that further discussions with the six offerors were required.

On November 28, the Air Force issued a show cause notice giving Marriott 5 business days to inform the Air Force whether it intended to cease performance. By letter dated December 1, Marriott declared that it would continue performance. Upon receiving this notice, the contracting officer informed each of the prospective offerors under the replacement solicitation by telephone that discussions would not take place since Marriott had indicated it would continue to perform the HAMS services. By letter dated December 7, the contracting officer formally advised all offerors that the replacement solicitation was "postponed" because Marriott was not going to default.

In its protest, WBM essentially contends that the Air Force acted in bad faith in issuing the replacement solicitation. WBM maintains that the Air Force had no "true intent" to ever award a new contract and proceeded with a replacement HAMS services procurement merely as a ploy to pressure Marriott into continuing performance. To support its bad faith claim, WBM relies upon the fact that at the time it issued the replacement solicitation, the Air Force knew it had a current contract with Marriott.

To show bad faith, a protester must submit convincing proof that the contracting agency directed its actions with the specific and malicious intent to injure the protester. H. David Feltoon, B-232418, Jan. 5, 1989, 89-1 CPD ¶ 10. While WBM argues that the Air Force used the replacement solicitation as a device to pressure Marriott into continuing performance, nothing in the record or in the protester's

argument constitutes evidence to support this assertion; on the contrary, there is persuasive evidence showing that the critical threat posed by the potential disruption in HAMS services warranted issuing the replacement solicitation.

HAMS services are required to ensure the safe, germ-free operation of hospitals and clinics, see Tidewater Protective Servs., Inc., and Others--Reconsideration, 56 Comp. Gen. 649 (1977), 77-1 CPD ¶ 361, and any interruption in the performance of these services would adversely affect the proper medical care of thousands of patients. Additionally, none of the JMMC medical facilities had a viable contingency contract plan which could operate in the event of such an interruption. While Marriott had not unequivocally defaulted at the time the decision was made to proceed with the new solicitation, the record shows that the company had expressed a clear desire to abandon performance after December 31. Under these circumstances, involving a threatened disruption of a critical medical service as well as an urgent deadline, we find that the Air Force acted reasonably in issuing the replacement solicitation in an effort to ensure the continued safe operation of the JMMC medical facilities.

Additionally, while WBM asserts that offerors were misled in the replacement procurement, we find no evidence to support this contention. The record clearly demonstrates that all offerors were advised that termination by Marriott was not definite. Initially, on October 26 the contracting officer told offerors by telephone that a replacement contract was being procured because the government anticipated default; additionally, during on-site "walk-throughs" of the medical facilities (which WBM representatives attended), the contracting officer informed all offerors that while the Air Force expected Marriott to abandon performance, in the event Marriott chose not to default the company would continue to perform the HAMS services.

Finally, while it is unfortunate that WBM may have incurred costs in pursuing this award, we note that efforts were taken by the Air Force to reduce the burden on the offerors. To minimize offerors' proposal preparation costs, the Air Force decided to rely on technical proposals which had been submitted by these offerors for the 1988 procurement. The only additional information which offerors were required to prepare for the replacement solicitation consisted of a detailed "start-up" plan, a staffing proposal and an identification of supplies and equipment to be used in performance.

In order to permit the recovery of proposal preparation costs, we must find that there exists a violation of law or regulation. See Bid Protest Regulations, 4 C.F.R. § 21.6(d)(2) (1989). Here, since the agency did not act in bad faith or otherwise improperly in issuing the replacement solicitation, there is no basis for granting the protester's claim for costs. SAC Management, Inc., B-219998.8, Sept. 14, 1988, 88-2 CPD ¶ 243.

The protest and the claim for proposal costs are denied.



*fr* James F. Hinchman  
General Counsel