



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Sperry Marine, Inc.--Claim for Costs

File: B-245654.3

Date: May 17, 1994

David R. Hazelton, Esq., and Raymond B. Grochowski, Esq.,
Latham & Watkins, for the protester.

Thomas G. Robisch, Esq., Department of the Navy, for the
agency.

John L. Formica, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Where protest of a solicitation, which contemplates the sole-source award of a contract for radars to be used in two entirely different applications with separate sole-source justifications, is sustained with regard to the proposed sole-source award for the radars to be used in one application and denied with regard to the radars to be used in the other application, the protester is entitled to recover protest costs only for portion of protest on which it was successful, inasmuch as the protest issues presented are distinct and severable.

DECISION

Sperry Marine, Inc. requests that our Office determine the amount it is entitled to recover from the Department of the Navy for filing and pursuing its protest of the proposed sole-source award of a contract to Raytheon Marine Company for Raytheon AN/SPS-64(V)9 (SPS-64) navigation radar systems and associated equipment, which we denied in part and sustained in part in Sperry Marine, Inc., B-245654, Jan. 27, 1992, 92-1 CPD ¶ 111.

On June 7, 1991, the Navy published in the Commerce Business Daily a notice of its intention to procure from Raytheon on a sole-source basis 50 Raytheon SPS-64 navigation radar systems and associated equipment to be used at the Naval Electronics Technician "A" (ET-A) School for training purposes. A justification and approval (J&A) for other than full and open competition was prepared for the 50 Raytheon SPS-64 radar systems on June 20. The J&A concluded that a sole-source award to Raytheon was justified under 10 U.S.C. § 2304(c)(1) (1988), which authorizes the use of other than

competitive procedures when the items needed by the agency are available from only one responsible source or a limited number of sources, and no other product will meet the agency's needs. The Navy issued request for proposals (RFP) No. N00164-91-R-0241 for the 50 Raytheon radar systems on July 12.

On September 3, the Navy prepared a J&A for other than full and open competition for 23 Raytheon SPS-64 radar systems for use in ship overhaul and construction. This J&A also referenced 10 U.S.C. § 2304(c)(1), and stated that only the Raytheon SPS-64 radar system could satisfy the agency's needs. The agency subsequently amended the RFP to include these 23 Raytheon SPS-64 radar systems and associated equipment.

Sperry filed a protest with our Office on September 13, challenging the agency's proposed sole-source award of a contract to Raytheon for the 50 radar systems to be used at the ET-A School for training purposes, and the 23 radar systems to be used in ship overhaul and construction. In its protest, Sperry principally contended that it and other firms manufactured navigation radar systems which met or exceeded the capabilities of the Raytheon SPS-64, and, therefore, could satisfy the Navy's needs at the ET-A School for the ship construction and overhaul requirements.

We denied Sperry's protest with regard to the 50 Raytheon radars to be used at the Navy's ET-A School, finding that the agency's determination that only the Raytheon radar system could meet its needs was reasonably based. However, we sustained Sperry's protest with regard to the 23 Raytheon SPS-64 navigation radar systems to be used in ship overhaul and construction because the record failed to show that the agency had reasonably determined that only the Raytheon radars would meet its minimum needs. In addition, we found Sperry entitled to the costs of filing and pursuing its protest, including attorneys' fees.

Sperry submitted its claim for the costs of filing and pursuing its protest, totalling \$62,847, to the agency and the parties engaged in some negotiations. The agency ultimately determined that because "the case consisted of two major issues, and each side prevailed on one," and since the issues were clearly severable, Sperry was only entitled to be reimbursed for the portion of its claim allocable to the issue on which it prevailed--the challenge to the ship overhaul and construction portion of the proposed sole-source award to Raytheon.

The agency calculated the amount allocable to Raytheon's successful challenge to the proposed sole-source award for the ship overhaul and construction requirement as

\$30,145.13. The agency explained that it had disallowed all costs claimed by Sperry which were incurred prior to September 4, 1991, the date on which the Navy amended the solicitation to add 23 Raytheon SPS-64 radar systems to be used in ship overhaul and construction, because these costs could necessarily only be related to Sperry's unsuccessful challenge to the proposed sole-source award to Raytheon for the ET-A School radar systems. The agency also disallowed those Sperry costs incurred after September 4 that were specifically identified as relating to only the ET-A School requirement. The agency allowed all costs incurred after September 4 which were identified as related only to the ship overhaul and construction requirement, and allowed 50 percent of those costs incurred by Sperry after September 4 which appeared to relate to both requirements or which were not specifically identified as relating to either requirement. The agency finally disallowed all disbursement expenses charged by the law firm used by Sperry because these costs appeared to cover "overhead-type expenses" already encompassed in other charges by the law firm, although it promised to reimburse Sperry for 50 percent of these expenses if Sperry could demonstrate that the separate billing of these "overhead-type expenses" was the firm's standard practice. The agency further stated that it had disallowed an expense claimed by Sperry for a meal on a day on which the attorney handling Sperry's protest did not charge any time to the case, and was not away from his office in Washington, D.C.

Sperry requests that our Office determine the amount of its entitlement pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1993). Sperry argues that contrary to the agency's conclusion, Sperry's protest allegations are not severable, and that because of this, it should be reimbursed for all of the costs it incurred in filing and

¹The agency deviated from this method of allocation in only one instance, allowing all costs claimed for September 5, even though they were not specifically designated as relating to the ship construction requirement, because, according to the agency, it understood, based on information other than Sperry's billing statements, that this time was in fact related only to Sperry's protest concerning the ship construction requirement. While Sperry apparently claims that the agency deviated from this method with regard to its post-hearing costs, the record shows that the agency's settlement allows 50 percent of these costs.

pursuing its protest. Sperry requests that our Office find it entitled to protest costs totalling \$60,517.50.²

As a general rule, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. Omni Analysis; Department of the Navy--Recon., B-233372.2; B-233372.3, July 24, 1989, 89-2 CPD ¶ 73. Nevertheless, we will limit the recovery of protest costs to the issues on which the protester prevailed where these issues are clearly severable from those on which the protester was unsuccessful. Komatsu Dresser Co., 71 Comp. Gen. 260 (1992), 92-1 CPD ¶ 202; Interface Flooring Sys., Inc.--Claim for Attorneys' Fees, 66 Comp. Gen. 597 (1987), 87-2 CPD ¶ 106. In our view, limiting the recovery of costs to those issues on which the protester prevailed, where those issues are clearly severable from the remainder of the protest, is consistent with our statutory authority because it allows a protester to recover only those costs associated with its challenge to the portions of a solicitation, or award or proposed award, that are determined violative of statute or regulation. Interface Flooring Sys., Inc.--Claim for Costs, supra.

Although our original decision did not so specify, we agree with the Navy that because of the nature of the procurement and the severability of the issues raised, Sperry's recovery should be limited to those costs associated with the issue on which Sperry prevailed--the proposed sole-source to Raytheon for the radars to be used for ship overhaul and construction. The RFP contemplated a sole-source award for radars to be used in two entirely different applications, with each of these applications being supported by its own J&A. The J&As set forth different explanations in justifying the use of other than competitive procedures, with each explanation being unique to the requirement to which it related. Sperry's protest of the proposed sole-source award, and our decision, were necessarily based on the analyses of the factual circumstances particular to each application of the radar systems the agency proposed to procure by sole-source, e.g., the reasonableness of the J&A and other facts presented by the agency in support of the proposed sole-source for the ET-A School requirement, and the reasonableness of the J&A and other facts presented in

²Sperry explains that the amount it now claims (\$60,517.50) differs from the amount it originally sought from the agency (\$62,847) because since it filed its original claim it has determined that a number of expenses identified in its original claim were not related to the pursuit of its protest.

support of the proposed sole-source for the ship overhaul and construction requirement.

In contrast to protests which raise several grounds of objection to the same award, the items and issues involved here were clearly distinct and severable as demonstrated by the separate treatment of the issues in our decision, as well as our recommendation that the Navy delete from the RFP the requirement for the 23 radar systems to be used in ship overhaul and construction. As a result, it is appropriate for Sperry to recover costs incurred only with regard to its successful challenge to the ship overhaul and construction requirement, and not with regard to its unsuccessful challenge to the ET-A School requirement. The fact that Sperry did not separately allocate all of its costs to each portion of its protest does not require that all costs be reimbursable.

Sperry argues in the alternative that, in addition to the \$30,145.13 already reimbursed by the agency, it should be reimbursed for those costs that were disallowed by the agency because they were incurred prior to the September 4 amendment which added the ship overhaul and construction requirement to the RFP. In this regard, Sperry contends that "most of the background research and preparation performed prior to the amendment supported both the [ship overhaul and construction] and [ET-A School] issues, and would have been required even if Sperry had protested only the [ship overhaul and construction] buy."

Costs incurred by protesters in preparation of a protest to the General Accounting Office that is sustained are ordinarily reimbursable. Diverco, Inc.--Claim for Costs, B-240639.5, May 21, 1992, 92-1 CPD ¶ 460. Here, notwithstanding the protester's speculation as to what expenses it may have incurred, the fact remains that the costs incurred by the protester prior to September 4 could only have been related to the agency's proposed sole-source award for the ET-A School requirement, which we found was proper. Prior to this date, neither the amendment, which added the ship overhaul and construction requirement to the RFP, nor the J&A in support of this aspect of the proposed sole-source had been prepared or issued.³ Therefore, the costs incurred prior to September 4, which were in fact incurred by the protester in preparation of filing its protest against the proposed sole-source for the ET-A School requirement, like the costs incurred by Sperry in pursuit of

³Sperry does not claim that it was aware prior to September 4 that such a proposed sole-source was being contemplated.

this issue after September 4, are not recoverable. Interface Flooring Sys., Inc.--Claim for Attorneys' Fees, supra; see Diverco, Inc.--Claim for Costs, supra (costs associated with fact-finding necessary to support a protest at GAO are not recoverable where the costs were in fact incurred during the pursuit of a prior agency-level protest).

The agency has provided a detailed explanation for its method of allocating the protest costs. Except as set out above, Sperry has not challenged the agency's proposed settlement of its claim.⁴ Under the circumstances, we find that Sperry is entitled to reimbursement in the amount of \$30,145.13, the amount proposed in the Navy's settlement.

/s/ Robert P. Murphy
for Comptroller General
of the United States

⁴For example, despite the agency's report and settlement, Sperry has provided no evidence to substantiate the law firm's disbursement expenses that were questioned by the agency as possibly being included the law firm's overhead.