



Decision

Matter of: Alsalam Aircraft Company--Costs

File: B-401298.3

Date: November 5, 2009

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DIGEST

1. Protester is entitled to reimbursement of costs of filing and pursuing protest where agency did not take corrective action in response to a protest until after submission of agency report, and does not dispute that the protest grounds were clearly meritorious.
 2. For a procurement conducted under the Foreign Military Sales program, neither the Competition in Contracting Act, nor the Arms Export Control Act, bars GAO from recommending that the agency reimburse a successful protester's costs of filing and pursuing a protest, or bars the agency from making such reimbursement.
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DECISION

Alsalam Aircraft Company of Riyadh, Saudi Arabia, requests that we recommend that the company be reimbursed the costs of filing and pursuing its protest challenging the award of a contract to DynCorp International, LLC of Fort Worth, Texas, by the Department of the Army, U.S. Army Materiel Command, under request for proposals (RFP) No. W58RGZ-08-R-0107 for support services for the Royal Saudi Land Forces Aviation Command. Alsalam argued in its protest that the Army's technical and cost evaluations were flawed, and the agency subsequently took corrective action in response to the protest.

We grant the request.

BACKGROUND

The RFP sought proposals to provide aircraft operations support services for the government of Saudi Arabia, including maintenance, training, and other services. The procurement was conducted under the Foreign Military Sales (FMS) program, which is authorized by the Arms Export Control Act (AECA). 22 U.S.C. § 2751 *et seq.* (2006).

The AECA authorizes the Department of Defense (DOD), acting as an agent for a foreign country and using funds that the customer country has deposited in a trust fund account, to enter into contracts for the benefit of the customer country. As discussed in more detail below, the U.S. government and the customer country enter into a letter of offer and agreement (LOA), which requires the customer country to be responsible for all costs associated with the procurement, and also requires payment of an administrative fee to the U.S. government for conducting the procurement. 22 U.S.C. § 2762(a). The AECA allows the U.S. government to collect costs in advance to be deposited in the trust fund, but also permits financing by the U.S. government of an FMS procurement. *Id.* § 2762(b). DOD is required to conduct FMS procurements “under the same acquisition and contract management procedures used for other defense acquisitions.” Defense Federal Acquisition Regulation Supplement (DFARS) § 225.7301(b).

Alsalam filed its protest challenging the award of the contract to DynCorp on April 21, 2009. The agency provided its report on the protest on June 5, and the protester and intervenor submitted comments on the report on June 16; Alsalam submitted a supplemental protest at that time. The agency provided a supplemental report on the protest on June 23, and the protester and intervenor submitted supplemental comments on June 30.

On July 6, our Office conducted “outcome prediction” alternative dispute resolution (ADR), during which the Government Accountability Office (GAO) attorney assigned to the protest stated that it was likely that Alsalam’s protest would be sustained.¹ As relevant here, the GAO attorney advised during the ADR that he viewed the Army’s evaluation of DynCorp’s proposal as unreasonable with regard to the acceptability of its proposal under the transition plan technical subfactor. The GAO attorney also advised that he viewed the agency’s cost realism evaluation as possibly containing flaws regarding the evaluation of three cost-reimbursement contract line items.

On July 7, the agency advised our Office that it would take corrective action by reevaluating offerors’ proposals under the transition plan technical subfactor, and

¹ In outcome prediction ADR, the GAO attorney handling the case convenes all of the participating parties and advises them of what he or she believes the likely outcome would be if a decision on the merits were written, and the reasons for that belief.

reevaluating the three cost-reimbursement contract line items for cost realism. On July 8, we dismissed the protest as academic based on the agency's notice of corrective action. This request for entitlement followed.

DISCUSSION

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, if, 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. Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1)(A) (2006); Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2009); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible legal position. Core Tech Int'l Corp.--Costs, B-400047.2, Mar. 11, 2009, 2009 CPD ¶ 59 at 6. While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.

Here, the Army does not dispute that it took corrective action after the submission of its report on the protest, nor does the agency dispute that the protest was clearly meritorious. Instead, the Army argues that the request should be dismissed because an FMS procurement does not involve appropriated funds, and because the agency is barred under the AECA from using appropriated funds for costs associated with an FMS procurement, such as protest costs. In support of its argument, the agency cites the DOD Financial Management Regulation (FMR), which states that “[f]unds appropriated by the Congress for defense purposes cannot be used to liquidate obligations resulting from the use of FMS contracting authority.” DOD FMR, Vol. 15, § 030203. We disagree with the agency's argument.

As a preliminary matter, under CICA and our Bid Protest Regulations, our Office reviews protests concerning alleged violations of procurement statutes or regulations by federal agencies in the issuance of solicitations and the award or proposed award of contracts for procurement of goods and services. 31 U.S.C. §§ 3551, 3552 (2000); 4 C.F.R. § 21.1(a). Our Office has held that our authority to decide bid protests is based on whether the procurement was conducted by a federal agency; our jurisdiction is not dependent upon whether appropriated funds were involved in a procurement.² Ahntech--Korea Co., Ltd., B-400145.2, Aug. 18, 2008,

² The agency did not argue during the protest that our Office lacked jurisdiction to hear the protest.

2008 CPD ¶ 169 at 3 n.1. CICA also does not condition our Office’s authority to make recommendations concerning reimbursement of protest costs on the availability of appropriated funds. See 31 U.S.C. § 3554(c)(1)(A). In this regard, CICA states that when our Office recommends that an agency reimburse a protester’s costs, the agency “shall—(A) pay the costs promptly; or (B) if the Federal agency does not make such payment, promptly report to the Comptroller General the reasons for the failure to follow the Comptroller General’s recommendation.” Id. § 3554(c)(3). Moreover, nothing in the AECA states that a procuring agency is exempt from the provisions of CICA concerning reimbursement of protest costs.

The Army primarily contends that it must reimburse protest costs from appropriated funds, and that the AECA and the DOD FMR bar any use of funds appropriated by Congress in connection with an FMS procurement. Thus, the Army argues that it is prohibited from reimbursing protest costs associated with an FMS procurement. As discussed below, we disagree with the agency’s views in three respects: (1) our decisions have held that funds in a FMS trust account have the character of appropriated funds; (2) the AECA does not, in fact, bar use of appropriated funds in connection with an FMS procurement, and (3) the AECA expressly authorizes an agency to recover costs associated with an FMS procurement—which, the agency acknowledges, include protest costs—from an FMS customer.

First, the Army points to GAO’s fiscal law guidance that protest costs are “payable from the contracting agency’s procurement appropriations. 31 U.S.C. § 3554(c)(2).” Principles of Federal Appropriations Law, Vol. 1, at 4-83. In the agency’s view, this provision means that protest costs may only be paid from appropriated funds, and therefore the AECA bars reimbursement of protest costs in an FMS procurement. We disagree with the agency’s interpretation of our fiscal law guidance.

As a starting point in our analysis, our Office has viewed funds provided by customer countries and held by the U.S. government for FMS procurements as having the character of appropriated funds. Procurements Involving Foreign Military Sales, B-165731, Nov. 16, 1978, 78-2 CPD ¶ 349 at 11-12. In this pre-CICA protest, we concluded that we had jurisdiction over a challenge to an FMS procurement because funds deposited by customer countries into the FMS trust fund are under the control of the Department of the Treasury, and thus have the character of appropriated funds. In addition, the DOD Financial Management Regulation (FMR) now expressly recognizes that our decisions consider FMS funds to be appropriated. DOD FMR, Vol. 15, § 030203.³ To the extent that our fiscal law guidance states that agencies shall reimburse protest costs from procurement appropriations, we see no basis to

³ Specifically, the DOD FMR, Vol. 15, § 030203 states as follows: “According to a Comptroller General Decision amounts in the FMS Trust Fund are, in a technical sense, appropriated funds, even though they are not annually appropriated by Congress and are not subject to direct Congressional control.”

conclude that the identity of these funds as FMS funds bars their use for the reimbursement of protest costs. While FMS funds are not appropriated by Congress, they have the character of appropriated funds and are clearly intended to be used to cover the costs of an FMS procurement.

Second, we disagree with the Army's underlying premise that the AECA bars the use of funds appropriated by Congress to pay protest costs. The FMS procurement here was conducted under the authority of 22 U.S.C. § 2672. As relevant here, that statute requires customer countries to agree to pay all costs associated with the contract as follows:

Except as otherwise provided in this section, the President may, without requirement for charge to any appropriation or contract authorization otherwise provided, enter into contracts for the procurement of defense articles or defense services for sale for United States dollars to any foreign country or international organization if such country or international organization provides the United States Government with a dependable undertaking (1) to pay the full amount of such contract which will assure the United States Government against any loss on the contract, and (2) to make funds available in such amounts and at such times as may be required to meet the payments required by the contract, and any damages and costs that may accrue from the cancellation of such contract, in advance of the time such payments, damages, or costs are due.

22 U.S.C. § 2762(a) (emphasis added).

Several provisions of the AECA, however, allow for financing of the procurement by the U.S. government, as well as for the waiver of certain costs. For example, under certain emergency circumstances, letters of offer may be extended whereby customer countries may be billed after delivery of the FMS goods and services, and payment may be made up to 120 days later. *Id.* § 2762(b). Under this authority, DOD uses appropriated funds for the FMS contractual requirements, subject to subsequent repayment by the customer country, as follows:

The President may, if he determines it to be in the national interest, issue letters of offer under this section which provide for billing upon delivery of the defense article or rendering of the defense service and for payment within one hundred and twenty days after the date of billing. This authority may be exercised, however, only if the President also determines that the emergency requirements of the purchaser for acquisition of such defense articles and services exceed the ready availability to the purchaser of funds sufficient to make payments on a dependable undertaking basis . . . Appropriations available to the Department of Defense may be used to meet the payments required by the contracts for the procurement of defense articles and defense

services and shall be reimbursed by the amounts subsequently received from the country or international organization to whom articles or services are sold.

Id. § 2762(b) (emphasis added).

The AECA also authorizes DOD to use appropriated funds in the event that the President determines that certain costs or fees assessed to a customer country should be waived in connection with an FMS procurement. 22 U.S.C. § 2761(e)(3)(B). As a result, we think that the Army overreads the AECA restrictions.

Third, to the extent that the DOD FMR states that funds appropriated by Congress cannot be used for the liquidation of FMS obligations, we do not think that such a prohibition bars reimbursement of protest costs in an FMS procurement. We reach this conclusion because the AECA provides for recovery of funds from sources other than those appropriated by Congress, that is, from the FMS customer.

As discussed above, the AECA requires customer countries to provide the U.S. government with all required funding for the procurement, including costs and administrative expenses. 22 U.S.C. § 2762(a). We think that, regardless of the availability of appropriated funds, the agency is authorized to seek the required funding for reimbursement of protest costs from a customer country.

The Army states that, in its view, “protest costs and attorneys fees are considered costs in executing the FMS case, for which the country is liable,” and that the applicable statutes and regulations “require the full cost of the FMS program to be carried by the FMS customers.” Agency Responses to GAO Questions, Sept. 15, 2009, at 2. We agree. Notwithstanding this view, however, the Army also contends that it “cannot use U.S. appropriated funds for an FMS case and then later seek reimbursement,” because it did not obtain funds in advance from the government of Saudi Arabia to cover protest costs. Id.

We do not think that the Army reasonably explains why it cannot obtain funds from the government of Saudi Arabia and then reimburse the protester. In particular, the AECA states that an agreement between the United States and a foreign country may be entered into only where that government agrees “to make funds available in such amounts and at such times as may be required to meet the payments required by the contract, and any damages and costs that may accrue from the cancellation of such contract, in advance of the time such payments, damages, or costs are due.” 22 U.S.C. § 2672(a) (emphasis added). We think that this provision clearly indicates that costs that arise during the procurement may be charged to the customer country.

Furthermore two DOD regulations make clear that the U.S. government can recover costs incurred in the procurement, even when funds are not collected in advance.

The DOD Security Assistance Management Manual (SAMM), which provides guidance for DOD in conducting FMS procurements, states that “[t]he FMS program must be managed at no cost to the USG (with certain exceptions specifically identified in the AECA),” and that agreements with customer countries must require that “the purchaser pay the full program value regardless of terms of sale specified for the individual case or the estimated values provided.” DOD Instruction 5105.38-M (SAMM) ¶ C4.6.10. In order to recover these costs, “Modifications and Amendments [to an LOA] are used to update case values as necessary when changes to the program occur.” *Id.* Additionally, the DOD FMR provides for quarterly billing of FMS customers, as well as a final statement at the close of a procurement that lists any additional charges. DOD FMR, Vol. 15, §§ 080201-02.

We think these statutory and regulatory provisions show that an advance payment of costs—such as those the Army says it has received from the government of Saudi Arabia for this procurement—is not a one-time event that precludes the U.S. government from seeking funds needed for costs associated with the procurement.⁴

RECOMMENDATION

We think that the record here shows that the Army unreasonably delayed taking corrective action in response to Alsalam’s clearly meritorious protest, and we note that the Army has elected not to dispute this conclusion. In addition, we see no basis to conclude that the Army is not required to reimburse the protester its costs under CICA. We recommend that the Army make a determination about the appropriate funding source for these costs, and then proceed forthwith to reimburse the

⁴ The agency also contends that any request for reimbursement of protest costs should be directly submitted by Alsalam to the government of Saudi Arabia. The agency, however, does not give any basis for our Office to conclude that the protester has a legal right to pursue reimbursement in such a manner. To the contrary, we think it is likely that, due to the absence of a direct legal relationship between the protester and the government of Saudi Arabia with regard to this procurement, Alsalam would not be successful in such an effort. Moreover, we think that the Army’s argument here is inconsistent with one of the fundamental goals of CICA: to empower disappointed bidders to act as “private attorneys general” in challenging agency procurement decisions that do not comport with applicable laws and regulations, and also to reimburse successful protesters the costs of acting in such a capacity. See *E & R, Inc.—Costs*, B-255868.2, May 30, 1996, 96-1 CPD ¶ 264 at 3 (“In essence, entitlement to bid protest costs relieves a protester of the financial demands of acting as a private attorney general where it brings to light an agency’s failure to conduct a procurement in accordance with law and regulation.”).

protester's costs of pursuing this protest, including reasonable attorneys' fees, as required under CICA.

The request is granted.

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