



# Decision

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**Matter of:** Hi-Tech Bed Systems Corporation

**File:** B-416972; B-416972.2

**Date:** January 16, 2019

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## DIGEST

Protest challenging agency's issuance of a Federal Supply Schedule order is sustained where agency failed to meaningfully consider whether an item quoted by the awardee met the solicitation requirement that quoted items be listed on the vendor's schedule contract and comply with the contract's testing requirements.

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## DECISION

Hi-Tech Bed Systems Corporation, a woman-owned small business located in Wheatland, Wyoming, challenges the issuance of a General Services Administration (GSA) Federal Supply Schedule (FSS) order to Chicago American Manufacturing LLC, a small business located in Chicago, Illinois, under request for quotations (RFQ) No. W912DY-18-T-0175, issued by the Department of the Army for the provision of lift deck beds for eight buildings located at the Naval Station Great Lakes. The protester primarily argues that the awardee quoted a bed that was not listed on its GSA schedule.

We sustain the protest.

## BACKGROUND

In May 2018, the Army conducted market research for the instant requirement by contacting GSA to identify potential interested vendors. See Agency Report (AR), Tab 10, May 15 Email Chain with GSA, at 1-2; see also AR, Tab 29, Supp. Decl. of Agency Tech. Expert, at 1. In response to this inquiry, GSA provided the Army with

three vendors that had lift deck beds listed on their GSA schedules, and also provided the Army with the model numbers of those beds. See id.

On May 22, the agency sent the RFQ via email to the three vendors, which included Hi-Tech and Chicago American, seeking the acquisition of beds for Naval Station Great Lakes buildings 7101, 7102, 7103, 7104, 7105, 7116, 7117, and 7121. The specific type of bed was initially listed as “Bed, Bunkable, Lift Deck, Single.” RFQ, attach. 1. The specific technical requirements for this bed were described within a “Furniture Item Description” (FID) document attached to the RFQ. RFQ, attach. 2. One of the technical requirements specified that the beds should “be stackable, but easily unstacked.” Id. at 6.

The solicitation anticipated the issuance of a fixed-price FSS order to the vendor whose quotation was the lowest-priced quotation to be rated acceptable under the non-price evaluation factors. RFQ at 19. These non-price factors were: (1) technical evaluation, (2) schedule, and (3) past performance. Id. at 18-19. The technical evaluation factor was to be rated acceptable “if all line items meet the specifications shown in the [FID].” Id. at 18.

The RFQ further provided that all quoted items must “comply with current GSA test requirements and be on the GSA contract schedule, unless specified as open market items.” RFQ at 15. Vendors were not required to submit testing documentation with their quotations; however, the agency reserved the right to “request actual copies of test reports at any time prior to or after award.” Id. at 16.

On June 12, the agency received quotations from two vendors, Hi-Tech and Chicago American. On June 14, the agency sent discussion items to both vendors, and issued RFQ amendment two, which amended the FID to remove references to the beds being stackable or bunkable. For example, the sentence, “[h]ead and foot frame shall serve as a ladder when beds are stacked,” was amended to read, “[h]ead and foot frame shall be one piece and serve as a ladder.” RFQ amend. 2, attach. 2, at 7. Similarly, the requirement that the beds “be stackable, but easily unstacked” was deleted. Id. at 6. On June 18, both vendors submitted revised quotations.

On June 25, the agency issued RFQ amendment three, which again revised the FID, and answered the following vendor questions:

1) We noticed you have taken every reference to stackable or bunkable out of the RFQ, [i]s it your intention that this bed is to be utilized only as a single bed, because the GSA requirements and all of the requirements [sic] additional requirements in the RFQ are bunk beds?

[Agency] Response: The racks for this [sic] locations consist of a 1 piece head and foot, with two sleeping surfaces mounted to them. The base does not want the top sleeping surface to be removable.

2) Do the beds need [sic] still need to be on GSA contract?

[Agency] Response: Absolutely

3) Does the end user ever plan on bunking the beds?

[Agency] Response: There will be no need since each rack will consist of two sleeping surfaces.

RFQ amend. 3 at 11.

Following this change in the technical specifications, Chicago American submitted a revised drawing of its quoted bed. See AR, Tab 31, Chicago American Revised Tech. Drawing. The revised drawing showed a bed with two sleeping surfaces with a continuous steel tubing head frame and a continuous steel tubing foot frame connecting the two sleeping surfaces. See id.; see also Memo. for Record of Jan. 4 Conference Call (MFR) ¶ 3. Although Chicago American's revised drawing continued to reference the same model number as its initially identified bed, the modified bed differed from the same-model-number bed listed on Chicago American's GSA schedule contract, which had previously been tested according to GSA's testing standards in June 2016. See, e.g., AR, Tab 32, Testing Report, at 13. In this regard, the bed that was previously tested had bunk connector parts, which connected two bunk beds, rather than a single piece connecting the two sleeping surfaces. See id. at 28.

After another round of quotation submissions, the agency sent the revised RFQ to an additional vendor (Vendor #2) on August 31. Prior to sending the RFQ to this vendor, the agency confirmed with GSA that the vendor had three lift beds on its GSA schedule contract. See AR, Tab 46, Aug. 22 Email to GSA.

On September 27, the agency issued a FSS order for the requirement to Chicago American, in the amount of \$4,117,372. Vendor #2's quotation was the second-lowest priced, while Hi-Tech's quotation, which was more than double the price of Vendor #2's quotation, was the third lowest.<sup>1</sup> All three vendors were found to be technically acceptable.<sup>2</sup>

This protest followed.

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<sup>1</sup> We note that Hi-Tech's initial quotation, submitted prior to the agency's revisions to the FID, was initially the lowest-priced quotation. Following the agency's revisions to the FID, however, the protester substantially increased its price.

<sup>2</sup> As discussed further below, we find a reasonable possibility of prejudice, despite the fact that the protester was third in line, because the agency errors discussed herein applied to both the evaluation of the awardee and the second-in-line vendor.

## DISCUSSION

The protester asserts that the beds quoted by the awardee and Vendor #2 were not on their GSA schedules and therefore did not comply with the solicitation requirement that quoted items be listed on each vendor's schedule and comply with GSA's testing requirements. The protester notes that the beds actually listed on the two vendors' schedule contracts did not comply with the revised FID, which required quoted beds to have a solid end frame with two sleeping surfaces mounted to them (rather than being a stackable or bunk bed). The protester contends that, instead of offering their schedule-listed beds, the awardee and Vendor #2 quoted beds that were substantially different and were, in fact, "nothing more than untested, theoretical beds drawn on a piece of paper." Protester's Jan. 9 Brief at 3. Last, the protester asserts that the two vendors did not provide sufficient information, as required by the RFQ, for the agency to verify that their quoted items were listed on their GSA schedules.

Where an agency announces its intention to order from an existing FSS, all items quoted and ordered are required to be on the vendor's schedule contract as a precondition to its receiving the order. AmeriGuard Sec. Servs., Inc., B-411513.2, Oct. 2, 2015, 2015 CPD ¶ 308 at 4. The sole exception to this requirement is for items that do not exceed the micropurchase threshold, since such items properly may be purchased outside the normal competition requirements. Maybank Indus., LLC, B-403327, B-403327.2, Oct. 21, 2010, 2010 CPD ¶ 249 at 4.

In response to Hi-Tech's protest, the agency asserts that the beds quoted by Chicago American and Vendor #2 were permissible "customized versions" of the beds listed on these vendors' GSA schedules. Agency's Jan. 7 Memorandum of Law (MOL) at 1. In support of this assertion, the Army cites language in the GSA Schedule 71 solicitation, which provides that "[c]ontractors are permitted to quote customized versions of a current GSA Schedule 71 product solution at the order level as long as [the products] [a]dhere to the technical requirements of Schedule 71, AND [a]re quoted in accordance with each respective schedule holder's approved current GSA discounts and product lines." AR, Tab 43, GSA Schedule 71 Solicitation, at 42.

The Army argues that the modifications made by Chicago American and Vendor #2 to the beds listed on their GSA schedule contracts do not render the beds noncompliant with the technical requirements of the applicable GSA schedule contracts, because the modifications "do not reduce the structural integrity of the bed, [such that] the original testing for the bed model suffices the requirement and further testing is not required." MFR ¶ 3. The Army argues that the bed would not need to be retested because it had already been tested under "the worst case scenario," *i.e.*, when it was bunked. MFR ¶ 3. Accordingly, the agency contends that the modified beds complied with the RFQ requirement that quoted items be listed on the vendor's GSA schedule and comply with GSA's testing requirements.

Based on our review of the evaluation record, however, we see no evidence that the Army contemporaneously considered the question of whether the beds, as modified by

Chicago American and Vendor #2, constituted acceptable customized versions of the beds listed on those vendors' schedules. Accordingly, we see no indication that the agency meaningfully assessed whether the modified beds complied with the RFQ requirement that quoted items be listed on the applicable vendor's GSA schedule contract. Instead, the Army appears to have limited its inquiry in this area to simply confirming that the model numbers provided by each vendor were listed on that vendor's schedule. See AR, Tab 10, May 15 Email Chain with GSA, at 1-2; AR, Tab 46, Aug. 22 Email to GSA. In addition, the Army did not request GSA's view on this question, either prior to the award decision or afterwards. This is significant because, while the Army contends that the applicable changes were merely "minor order level changes," Agency's Jan. 7 MOL at 2, the changes involved significant changes to the structure of the beds.

For example, the design of Chicago American's bed changed from a bunked "lift bed," i.e., two beds connected together with two separate frame pieces connected via "bunk connectors," AR, Tab 32, Testing Report, at 28, to a bed that had two bed decks connected via continuous steel tubing pieces "fastened to the front and back of the top deck." AR, Tab 42, Chicago American Tech. Specifications, at 1.<sup>3</sup> The steel tubing was a different style and structure, and had a different number of ladder rungs, from the original frame pieces.

In addition, we note that the agency's view--that a modification to a schedule item is permissible so long as the modified design structure is not "the worst case scenario," MFR ¶ 3--is inconsistent with post-protest guidance provided to the Army by the GSA's Branch Chief for the Multiple Award Schedule program. Specifically, in response to a post-protest question raised by the contracting officer, the GSA Branch Chief explained that an item modified from its GSA schedule contract listing would not qualify as a customized item where the item does not meet the technical requirements of the schedule, for example where it would be required to be retested. AR, Tab 45, Email with GSA Branch Chief, at 1.<sup>4</sup> Such retesting would normally be required where there were changes to the design of the product, for instance, a change to the "shape of a steel formation in the product." Id. This guidance thus did not support the Army's view that a change in the design structure would be permissible, so long as the change does

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<sup>3</sup> Vendor #2 similarly modified a bed listed as a bunkable bed on its GSA schedule, in order to quote a bed that had "one unit with a continuous steel tubing head frame, a continuous steel tubing foot frame, and two sleeping surfaces, as required in the FID." MFR ¶ 8.

<sup>4</sup> The GSA official additionally noted that prior to quoting such a customized item, "contractors should confirm with the ordering activity that they will permit variations of schedule items." Id. There is no indication in the evaluation record that either Chicago American or Vendor #2 sought such permission from the Army.

not affect the worst case scenario.<sup>5</sup> Moreover, the Army does not cite any regulation or contractual guidance from the GSA to support this position.<sup>6</sup>

In sum, we find the agency's assessment here to be unreasonable because there is no indication within the contemporaneous record that the agency meaningfully considered whether the modified bed design quoted by the two vendors would qualify as a customized version of their applicable schedule items. Similarly, there is no documentation that the Army contemporaneously concluded that the modified beds complied with the GSA schedule technical requirements, including the applicable testing requirements. The absence of such consideration was unreasonable in light of the significant differences between the design of the bed, as listed on the two vendors' GSA schedules, and the design of the bed, as quoted by each vendor. Accordingly, the record fails to establish that the agency reasonably considered whether the beds would satisfy the RFQ requirement that quoted items "comply with current GSA test requirements and be on the GSA contract schedule, unless specified as open market items." RFQ at 15.

### Prejudice

The Army takes the position that Hi-Tech was not prejudiced by the agency's errors in evaluating Chicago American's quotation, because the procurement anticipated award to the lowest-priced, technically-acceptable quotation and another vendor, Vendor #2, quoted a lower-price than Hi-Tech.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. Raytheon Co., B-409651, B-409651.2, July 9, 2014, 2014 CPD ¶ 207 at 17. Furthermore, we resolve any doubts regarding prejudice in favor of a

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<sup>5</sup> Additionally, we note that there is no evidence within the contemporaneous record supporting the agency's bare assertion that the two vendors' GSA-listed beds represented the "worst case scenario." MFR ¶ 3.

<sup>6</sup> The intervenor cites a GSA document titled "General Specification for Furniture Systems," as evidence that Chicago American was "required only to test the worst-case scenario, not every potential variation and combination of options." Intervenor's Jan. 9 Brief at 3. This document, however, discusses testing for "worst case constructions" only in certain contexts, e.g., flammability, and does not set forth a general rule that a change in the structure of an item need not be retested if the "worst-case scenario" has already been tested. General Specification for Furniture Systems, FCNE 87-441F, May 11, 2012 available at [https://www.gsa.gov/cdnstatic/Furniture\\_Systems.pdf](https://www.gsa.gov/cdnstatic/Furniture_Systems.pdf) (last visited January 11, 2019). Moreover, we note that the document does not discuss the test standard, GSA 3FNE 99-582E, used to test Chicago American's GSA schedule-listed bed. See id.; AR, Tab 32, Testing Report.

protester since a reasonable possibility of prejudice is a sufficient basis to sustain a protest. Coburn Contractors, LLC, B-408279.2, Sept. 30, 2013, 2013 CPD ¶ 230 at 5.

Here, we find that the protester has adequately demonstrated that it was prejudiced by the above-described errors because these same errors occurred in the agency's evaluation of Vendor #2. In this regard, both Chicago American and Vendor #2 made similar changes to the structures of their quoted beds, but, despite this, the record does not demonstrate that the agency adequately considered whether the quoted beds complied with the solicitation requirement that items comply with GSA testing requirements and be listed on vendors' schedule contracts. In addition, the agency has not contested the protester's assertion that all of the beds quoted by Hi-Tech were listed on its GSA Schedule. See Protest at 4. Accordingly, we conclude that the protester has demonstrated a reasonable possibility that, but for the agency's actions, it would have had a substantial chance of receiving the award.

#### RECOMMENDATION

We recommend that the agency reevaluate quotations in a manner consistent with the RFQ evaluation factors and this decision, and make a new source selection decision based on that reevaluation. We further recommend that the agency reimburse the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees. The protester's certified claim for costs, detailing the time expended and the costs incurred on this issue, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong  
General Counsel