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**Comptroller General  
of the United States**

**United States General Accounting Office  
Washington, DC 20548**

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## **Decision**

**Matter of:** AAR Aircraft Services--Costs

**File:** B-291670.6

**Date:** May 12, 2003

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Joni M. Gibson, Esq., Department of Justice, for the agency.  
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

General Accounting Office recommends that the protester be reimbursed for the costs of filing and pursuing its protests, where the agency unduly delayed taking corrective action until after submission of the agency report and the protester's comments, and the protests were clearly meritorious.

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### **DECISION**

AAR Aircraft Services requests that we recommend that it be reimbursed the costs of filing and pursuing its protests of the award of a contract to CSI, Inc. under request for proposals (RFP) No. MS-02-R-0012, issued by the United States Marshals Service, Department of Justice, for the lease and maintenance of jet aircraft for prisoner transfer and other purposes.

We grant the request, and recommend that AAR be reimbursed the reasonable costs of filing and pursuing its protests, including those incurred in pursuing this request.

The United States Marshals Service currently operates a fleet of aircraft to transport prisoners and criminal aliens throughout the United States and to certain countries in Latin America. The RFP sought fixed-price proposals for the lease and maintenance of six "large jet passenger/transport aircraft" for up to 10 years to replace the agency's aircraft.

Detailed performance and design requirements were identified for the aircraft, for example:

All aircraft and engines offered by a vendor must be the same model from the same manufacturer. A number of the aircraft

makes/models that may be proposed to meet this specification are available in different “dash numbers” (for example: Boeing 737-300 and 737-400 or MD-83 and MD-88). Similarly, engines installed on these aircraft can have different “dash numbers” (for example PW JT8D-217A and -219, or CFM 56-3B1 and -3C1).

RFP § II, Part A, ¶ C. In addition, the proposed aircraft “must be able to meet the . . . range and performance requirements” identified in three trip scenarios stated in the RFP assuming certain specified parameters, such as average passenger weight, fuel density, reserve fuel and maneuver fuel allowances. With respect to the second trip scenario, the RFP required that the proposed aircraft be able to fly 2,000 nautical miles, into a 55-knot headwind, carrying 140 passengers. RFP § II, Part A, ¶ G.

The RFP provided for award on the basis of a cost/technical tradeoff considering the following evaluation factors, all of which were stated to be equal in value: aircraft acceptability, contractor’s maintenance plan, past performance, price evaluation, and delivery schedule. RFP § VII, ¶ 1. With respect to the aircraft acceptability factor, offerors were informed that “[a] comparison should be made with the requirements of . . . Specifications for Replacement Large Transport Aircraft to show that the aircraft complies with and[/]or exceeds the minimum requirements.” RFP § IV, ¶ 1(C)1(a).

The Marshals Service received four timely proposals in response to the RFP, including those of AAR and CSI.<sup>1</sup> AAR offered to provide a [deleted] aircraft. CSI offered, as its base proposal, to provide a MD90 model aircraft. CSI also offered several alternative proposals, including one that would provide a Boeing 737-300 model aircraft.<sup>2</sup>

Initial proposals were evaluated by the agency’s Technical Evaluation Team, discussions conducted, and final proposal revisions received and evaluated. The evaluation results were provided to the agency’s source selection authority, who selected CSI’s proposal of Boeing 737-300 model aircraft for award, stating:

In summary, only three of the four offerors have submitted proposals that meet all of the requirements to be awarded the contract for the Large Aircraft Replacement Program. Of those three, CSI proposed two aircraft that met and exceeded the aircraft acceptability requirements, and they were the MD90s and Boeing 737-300s. Of these aircraft, the Boeing 737-300 exhibits the best cost effective solution based on the total

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<sup>1</sup> A late proposal was also received and not considered by the agency.

<sup>2</sup> The RFP permitted alternate proposals. RFP § IV, ¶ I.A.

operational cost for the aircraft. CSI also provided an acceptable Maintenance/Logistics Plan and they rated equally well to all offerors on Past Performance. CSI's agreement to comply with the solicitation terms and conditions, sound past performance record, delivery schedule that meets the government's needs, combined with a notable lower total evaluated price, form the basis of my conclusion that the CSI proposal for the Boeing 737-300 offers the best overall value to the Government.

Agency Report, Tab O, Source Selection Decision, at 6.

On November 8, 2002, AAR protested, arguing, among other things, that CSI's proposed aircraft did not satisfy the solicitation requirements, in particular the second trip scenario.<sup>3</sup> In support of this allegation, AAR provided the detailed statement of an aircraft performance consultant, who declared that the Boeing model 727-300, as configured and proposed by CSI, could not satisfy the RFP's second trip scenario. The protester's consultant provided explanations and calculations supporting his analysis. Statement of Protester's Aviation Consultant, Nov. 20, 2002.

The agency subsequently submitted its report, in which the agency maintained that AAR's protest should be denied. With respect to the acceptability of the Boeing model 737-300, proposed by CSI, the agency stated that prior to issuing the solicitation its market research "indicated that the [Boeing] 737-300/400 and the MD83/88/90 aircraft were the best suited for [the agency's] missions because those aircraft have the capability to meet all national and international flight routes."<sup>4</sup> Agency Report at 23. In addition, the agency provided statements (all prepared after the filing of the protest) from several consultants, arguing that the Boeing model 737-300 aircraft proposed by CSI could satisfy all of the solicitation's trip scenarios.<sup>5</sup>

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<sup>3</sup> AAR also filed a number of supplemental protests challenging the evaluation of CSI's proposal.

<sup>4</sup> The agency also asserted that the RFP indicated that Boeing model 737-300 aircraft was acceptable, and therefore AAR's challenge to the acceptability of CSI's proposal of this aircraft was an untimely, post-award solicitation challenge. As we informed the agency during the protest, the RFP could not reasonably have been read as informing offerors that the Boeing model 737-300 aircraft would meet all of the solicitation requirements. Rather, the solicitation only references this aircraft where offerors were informed that different "dash numbers" of the same model aircraft may be offered. See RFP § II, Part A, ¶ C. This did not reasonably inform offerors that the Boeing model 737-300 was "pre-approved."

<sup>5</sup> CSI's proposal merely promised that its aircraft would meet these scenarios with no supporting explanation. Despite the specific request of the protester, the intervenor,  
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See Agency Report, Tab Q, “A Limited Analysis of Boeing 737-300 Range and Performance,” Dec. 5, 2002; Tab R, Boeing Trip 2 Fuel Analysis, Dec. 2, 2002; Tab T, Flight Plan, Dec. 2, 2002.

AAR timely filed its comments and two supplemental protests refuting the agency’s report. With respect to whether CSI’s proposed Boeing model 737-300 could satisfy the RFP requirements, AAR noted that the agency’s account of its market research did not establish that the Boeing model 737-300 would satisfy the trip scenarios required by the RFP. Furthermore, AAR provided another statement from its aviation consultant, rebutting the agency’s consultants’ analyses, in which he stated that the agency’s consultants used faulty assumptions and data to calculate the fuel usage of the Boeing model 737-300; that is, for example, the consultants understated the empty weight of the aircraft and failed to account for the 55-knot headwind (a required parameter for the second scenario) during climbs and descent. Protester’s Comments, attach. AD, Statement of Protester’s Aviation Consultant. The protester also provided evidence that it did not propose the Boeing 737-300 because that aircraft could not meet the second scenario requirements. Protest at 5; attach. 1, AAR Vice President/General Manager’s Affidavit, at 3.

We requested and received a supplemental agency report. In response, the protester filed supplemental comments with an additional affidavit from its consultant explaining why the Boeing 737-300 proposed by CSI did not meet the second scenario requirements. In response to the protester’s request, we scheduled a hearing on these protests, informing the parties that the agency must provide its aviation consultants, whose statements had been refuted by the evidence provided by the protester.

Prior to a hearing, the agency informed us that it would take corrective action in response to the protest. Specifically, the Marshals Service stated that it was canceling the solicitation, terminating the award to CSI, and would issue a new solicitation for the lease of the aircraft. The agency stated that the “new solicitation shall include revisions to the technical specifications, as well as to pricing, and to the evaluation criteria.” Marshals Service Letter, Jan. 22, 2003.

Based upon the agency’s proposed corrective action, we dismissed the protest as academic on January 27, 2003. Thereafter, in accordance with our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2003), AAR requested that we recommend reimbursement of its protest costs because the Marshals Service had unduly delayed taking corrective action in the face of AAR’s clearly meritorious protest.

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CSI, declined to provide documentation refuting the protester’s arguments concerning the ability of the Boeing model 737-300 to satisfy the RFP requirements, including the trip scenarios.

The Marshals Service initially contends, citing Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources, 532 U.S. 598 (2001), that we may not recommend the award of protest costs where an agency takes corrective action that results in the dismissal of a protest. This issue was resolved in Georgia Power Co.; Savannah Elec. and Power Co.—Costs, B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81, in which we determined that the Supreme Court's holding in the Buckhannon case was not applicable to recommendations that our Office made under our Bid Protest Regulations for reimbursement of protest costs in response to an agency's corrective action.

Our authority to recommend the reimbursement of protest costs is granted by the Competition in Contracting Act of 1984 (CICA), which, as amended, provides:

If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal Agency conducting the procurement pay to an appropriate interested party the costs of -

- (A) filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees; and
- (B) bid and proposal preparation.

31 U.S.C. § 3554(c)(1) (2000).

Section 21.8(e) of our Bid Protest Regulations implements our authority to recommend payment of costs, providing, in pertinent part, that:

If the contracting agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protester the costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees.

4 C.F.R. § 21.8(e).

Consistent with CICA and our Regulations, where a procuring agency takes corrective action in response to a protest, our Office has recommended that the agency reimburse the protester its protest costs where, based on the circumstances of the case, we determined that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. See Pemco Aeroplex, Inc.—Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. A protest is clearly meritorious when a

reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. AVIATE L.L.C., B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 16. For a protest to be clearly meritorious, the issue involved must not be a close question. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, 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. In finding that a protest was clearly meritorious, we determine, in accordance with CICA, that the agency's conduct of the procurement violated a statute or regulation to the detriment of the protester. Georgia Power Co.; Savannah Elec. and Power Co.--Costs, *supra*, at 9.

Here, we find that the Marshals Service failed to reasonably determine that the Boeing model 737-300, as proposed by CSI, satisfied all of the solicitation requirements, including the trip scenarios. Although the agency argues that it had determined from its pre-solicitation market research that this model aircraft would satisfy its needs, the agency provided no evidence, despite specific requests, of its market research showing that the Boeing 737-300 would meet all three trip scenarios required by the RFP. Indeed, the agency has provided no documentation establishing what examination it made of this model aircraft or what this examination established in its asserted market research. The record is simply devoid of contemporaneous documentation establishing that the agency reasonably found that the Boeing model 737-300 aircraft offered by CSI would satisfy the RFP requirements, in particular, the second scenario.<sup>6</sup>

With respect to the agency's evaluation of CSI's proposal, there is also no contemporaneous documentation showing that the agency determined that the Boeing model 737-300 proposed by CSI would satisfy all of the RFP requirements, including the trip scenarios. First of all, CSI's proposal, unlike the protester's, did not show that its proposed aircraft would satisfy the trip scenarios, but simply promised that its proposed Boeing model 737-300 would be able to perform the trip scenarios, even though the RFP required offerors to provide a "comparison . . . to show that the aircraft complies with and or exceeds the minimum requirements" of

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<sup>6</sup> In its objection to the protester's request for entitlement to protest costs, the Marshals Service argues that "[a]bsent a test flight mimicking the range and performance criteria, there is no clear way to determine whether AAR's arguments on this issue are meritorious." Agency Response to Entitlement Request at 3. We disagree. Not only does the RFP not provide for actual flight-testing to establish the acceptability of proposed aircraft, but the agency has essentially conceded by its arguments during the protest that programs (such as that used by the protester's consultant) are available to reasonably assess the probable performance of aircraft given set parameters.

the specifications.”<sup>7</sup> See RFP § IV, ¶ 1(C)1(a); Agency Report, Tab D, CSI’s Technical Proposal, at 4-5.

As noted above, in response to AAR’s protest, including the protester’s consultant’s statement, the agency provided consultants’ post-protest statements, purporting to show that the Boeing model 737-300 aircraft proposed by CSI would satisfy the trip scenarios. See Agency Report, Tab Q, “A Limited Analysis of Boeing 737-300 Range and Performance,” Dec. 5, 2002; Tab R, Boeing Trip 2 Fuel Analysis, Dec. 2, 2002; Tab T, Flight Plan, Dec. 2, 2002. In each of these analyses, the Boeing model 737-300 barely satisfied the second trip scenario requirements. For example, one of the agency’s consultants found that the Boeing model 737-300 would satisfy the second trip scenario with a mere 21 pounds (or 3 gallons) of fuel to spare. See Agency Report, Tab R, Boeing Trip 2 Fuel Analysis, Dec. 2, 2002.

As also noted, AAR rebutted the agency’s post-protest analyses in its comments, providing an additional statement from its aviation consultant who reviewed the agency’s statements. In performing his analysis of the Boeing model 737-300 proposed by CSI, the protester’s consultant used a software program prepared by the aircraft manufacturer (Boeing Corporation).<sup>8</sup> This program allows the user to input the various trip parameters (for example, aircraft operating empty weight, payload, fuel, trip distance, ascends/descends, and headwind) to determine whether the aircraft can fly the required distance.

The essential difference between the protester’s consultant’s calculations and the agency’s consultants’ calculations is in the operating empty weight of the aircraft applied in the program. That is, with respect to the aircraft’s operating empty weight, the agency’s consultants’ calculations were based upon a Boeing model 737-300 aircraft with an empty operating weight of 70,000 pounds, while the protester’s consultant’s calculation was based upon an empty operating weight of 71,720 pounds, which is the “generic weight for [a 140-seat] configuration, as stated by Boeing.”<sup>9</sup> See Protester’s Comments, attach. AD, Supplemental Statement of

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<sup>7</sup> AAR, in its proposal, provided its assumptions and analyses to show that its proposed aircraft would satisfy the trip scenarios. See Agency Report, Tab C, AAR’s Technical Proposal, at 18-20.

<sup>8</sup> The computer model used is the Boeing Electronic Performance Document version 3.06A (Apr. 2001). See Statement of Protester’s Aviation Consultant, Nov. 20, 2002, at 2.

<sup>9</sup> One of the agency’s consultants stated that he performed a separate analysis (which was not provided) for an operating empty weight of 71,000 pounds and this showed the aircraft could satisfy the trip scenario with 92 pounds of fuel remaining. See Agency Report, Tab Q, “A Limited Analysis of Boeing 737-300 Range and Performance,” at 5. Another problem with this unsupported analysis is that there is

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Protester's Aviation Consultant. Increasing the weight of the aircraft decreases fuel efficiency, thus shortening the distance the aircraft can fly on a tank of fuel. The record establishes that application of an empty operating weight of at least 71,475 pounds would alone cause the Boeing model 737-300 to fail to satisfy the second trip scenario.<sup>10</sup> Id. at 4.

During the protest, the agency and intervenor failed to support the use of a 70,000-pound figure for the operating empty weight of the aircraft and, in fact, failed to rebut the protester's consultant's statement that 71,720 pounds is the weight identified by Boeing as a generic weight for this aircraft with the required 140-seat configuration.<sup>11</sup> We note, however, the other information in the record indicated that the operating empty weight of the Boeing model 737-300 would be much greater than that stated by the agency's consultants in their post-protest analyses. For example, in an aviation article concerning the Boeing model 737 jetliner submitted by CSI with its supplemental comments, it is stated that the empty weight of a Boeing model 737-300 is 72,360 pounds. See Intervenor's Supplemental Comments, attach. 1, "Boeing 737 Short to Medium-Range Jetliner," at 2.

Thus, the record established that the agency did not have a reasonable basis to determine that CSI's proposed aircraft would satisfy the requirements of the second scenario. Under the circumstances, we find AAR's protest to be clearly meritorious. A proposal that fails to conform to the material terms and conditions of the solicitation should be considered technically unacceptable and may not form the basis for an award. See 41 U.S.C. § 253b(a); Marshall-Putnam Soil and Water

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no explanation why the consultant used an operating empty weight of 71,000 pounds, which the record also shows to be understated.

<sup>10</sup> The protester's consultant identified numerous other errors in the agency's consultants' calculations.

<sup>11</sup> In challenging the protester's request for entitlement to protest costs, the Marshals Service submitted statements from two of its consultants, who now state that the 70,000 pounds operating empty weight figure was provided by CSI. We do not find this unsupported assertion to be persuasive. As noted above, CSI, although it intervened in the protest, declined to provide documentation supporting its arguments that the Boeing model 737-300 could satisfy the RFP performance requirements or specifically supporting the 70,000-pound operating empty weight figure. In fact, CSI never identified (during the protest or later) the operating empty weight of its proposed aircraft (although it should presumably have had this information). We also note that, in responding to the protester's request for entitlement, one of the agency's consultants admitted that his original market research showed "a higher, generic empty weight" than the 70,000-pound figure now asserted by the agency. Statement of Agency Aviation Consultant, Jan. 2, 2003, at 1.



Conservation Dist., B-289949, B-289949.2, May 29, 2002, 2002 CPD ¶ 90 at 5. The Marshals Service violated this statutory requirement when it accepted CSI's proposal of the Boeing model 737-300, despite the fact that this proposal did not satisfy all of the material terms and conditions of the RFP.

Furthermore, the record shows that AAR was prejudiced by the agency's acceptance of CSI's nonconforming proposal. AAR stated that prior to submitting its initial proposal, the firm recognized that the Boeing model 737-300 aircraft offered significant performance and competitive advantages (such as, for example, excellent fuel efficiency), but that AAR found that this aircraft could not satisfy the solicitation requirements and because of this it did not offer the Boeing model 737-300. See Protest at 5; attach. 1, AAR Vice President/General Manager's Affidavit, at 3.

In sum, we find that the Marshals Service prejudicially violated 41 U.S.C. § 253b(a), when it accepted CSI's nonconforming offer to provide Boeing model 737-300 aircraft. We also find that a reasonable inquiry into the protest allegations would have disclosed the absence of a legally defensible position, and that by unduly delaying corrective action the Marshals Service caused the protester to expend unnecessary time and resources to make further use of the protest process to obtain relief.

The Marshals Service asks that we limit any recommendation that AAR be reimbursed its protest costs "to those issues on which the protester would have clearly prevailed." Agency's Response to Entitlement Request at 3.

As a general rule, we consider a successful protester should be reimbursed the costs incurred with respect to all issues pursued, not merely those upon which it prevails. Price Waterhouse--Claim for Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 3; Data Based Decisions, Inc.--Claim for Costs, B-232663.3, Dec. 11, 1989, 89-2 CPD ¶ 538 at 4. While we have limited the award of protest costs to successful protesters where a part of their costs is allocable to a protest issue that is so clearly severable as to essentially constitute a separate protest, see, e.g., Interface Flooring Sys. Inc.--Claim for Attorneys' Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106 at 2-3, limiting recovery of protest costs in all cases to only those issues on which the protester prevailed would be inconsistent with the broad, remedial congressional purpose behind the cost reimbursement provisions of CICA. TRESP Assocs., Inc.--Costs, B-258322.8, Nov. 3, 1998, 98-2 CPD ¶ 108 at 2.

Here, we conclude that the issues raised are intertwined parts of AAR's basic objection that the Marshals Service miscalculated proposals. Furthermore, we do not find that the record established that there were clearly severable issues upon which AAR would not have prevailed. Accordingly, we see no reason why AAR's recovery of protest costs should be limited to a particular issue.

AAR requests that we recommend that its recovery of attorneys' fees not be "capped" at \$150 per hour. CICA, as amended, provides that no party (other than a small business concern) may be paid pursuant to our recommendation attorneys' fees exceeding \$150 per hour unless:

the agency determines, based on the recommendation of the Comptroller General on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

31 U.S.C. § 3554(c)(2)(B). AAR contends that increases in the cost of living justify a higher hourly rate for calculating a reasonable reimbursement for attorneys' fees. We think that this request is premature. In filing its claim for costs with the Marshals Service, AAR may present this request to the agency for its review.

We recommend that AAR be reimbursed the reasonable costs of filing and pursuing the protests, including those incurred here, *i.e.*, requesting a recommendation for costs. See Jones/Hill Joint Venture--Costs, B-286194.3, Mar. 27, 2001, 2001 CPD ¶ 62 at 13-14. The protester should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the Marshals Service within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa  
General Counsel