

Government Contracts Blog

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GAO Sides with Foreign Military Sales Program Contractors in Dispute Over Protest Costs

Contractors engaged in procurements under the Foreign Military Sales ("FMS") program can breathe a little easier after a Government Accountability Office ("GAO") ruling on November 5, 2009, in which the GAO denied the U.S. Army Material Command's ("Army's") assertion that a contractor is not entitled to reimbursement for its protest costs associated with an FMS procurement protest. In *Alsalam Aircraft Company*, B-401298.3, the GAO found that FMS trust funds have the "character of appropriated funds" and that the Arms Export Control Act, which authorizes the FMS program, allows for use of appropriated funds in an FMS procurement and provides for recovery of protest costs from the FMS customer.

The FMS program facilitates the sale of U.S. arms, defense equipment, defense services, and military training to foreign governments. Under the program, a foreign customer may request price and availability data for U.S. military products and, if the foreign customer is deemed eligible, execute a letter of offer and acceptance ("LOA") with the U.S. Government. Once the agreement is finalized, the Department of Defense ("DOD") serves much like a "purchasing agent" acting on behalf of the customer country in acquiring the identified products from the U.S. government contractor, administering the procurement, and frequently providing product support and training. Foreign governments often favor the FMS program over other U.S. military direct sales programs because FMS generally provides products and services at a lower cost and at greater convenience due to the fact that the DOD oversees the entire procurement.

Following the Army's award of a contract for support services for the Royal Saudi Land Forces Aviation Command, Alsalam Aircraft Company ("Alsalam") filed a protest in which the GAO determined that the Army unduly delayed taking corrective action in the face of the contractor's clearly meritorious protest. The agency waited to take corrective action until after the due date for the agency report responding to the protest. As a result, Alsalam would normally be entitled to reimbursement for its protest costs under the Competition in Contracting Act of 1984 ("CICA"). 31 U.S.C. § 3554(c)(1)(A) (2006).

The Army argued that reimbursement was not appropriate in this case because GAO jurisdiction is dependent upon the availability of appropriated funds and an FMS procurement does not involve funds appropriated by Congress, but, rather, involves funds deposited into a trust account by the customer country. Additionally, the Army argued that the Arms Export Control Act bars

the use of appropriated funds for costs associated with an FMS procurement because the DOD Financial Management Regulation ("FMR") mandates 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, sect. 030203. Therefore, funds appropriated to the agency would not be an appropriate source from which to reimburse Alsalam for its protest costs.

The GAO rejected each of the agency's arguments, reinforcing a prior opinion which classified funds in an FMS trust account as analogous to appropriated funds and pointing to selected Arms Export Control Act provisions that provide for the use of appropriated funds under certain circumstances in an FMS procurement. *Procurements Involving Foreign Military Sales*, B-165731, Nov. 16, 1978, 78-2 CPD ¶ 349. Because the Arms Export Control Act allows the U.S. Government to make payments under an FMS procurement when the President deems specified requirements are met or certain costs or fees should be waived, the GAO found the Army's "underlying premise" that the Arms Export Control Act bars the use of appropriated funds in connection with an FMS procurement to be fundamentally flawed. 22 U.S.C. §§ 2762(b); 2761(e)(3)(B). As such, the GAO emphasized that the Arms Export Control Act does not impose a barrier categorically restricting the use of appropriated funds in an FMS procurement.

Finally, even if the DOD FMR is interpreted to disallow reimbursement of protest costs from appropriated funds, the GAO determined that a protester may be reimbursed by funds obtained from the customer country. Although the Army indicated its understanding that funds should be collected from the customer country at the outset of the procurement rather than obtained in installments, the GAO cited the Arms Export Control Act and several DOD regulations which "make clear that the U.S. government can recover costs incurred in the procurement, even when funds are not collected in advance." These regulations permit modifications to an LOA, provide for quarterly billing of FMS customers, as well as a final billing statement listing any additional charges, and maintain that the customer country shall take responsibility for the full value of an FMS procurement. DOD Instruction 5105.38-M (SAMM) ¶ C4.6.10; DOD FMR, Vol. 15, sections 080201-02; 22 U.S.C. § 2762(a).

Based on its decision, the GAO recommended that the Army reimburse Alsalam for its protest costs and attorneys' fees, as dictated by the CICA. The GAO directed the Army to determine whether to utilize appropriated funds or monies requested directly from the customer country as the initial source of the funding.

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