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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: LSL Industries, Inc.–Costs

File: B-291777.2

Date: August 18, 2003

Michael C. Poliner, Esq., Poliner & Luks, for the protester.

Maura C. Brown, Esq., Department of Veterans Affairs, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that protest costs be reimbursed is denied, even though agency took corrective action in response to the protest, where record does not establish that the protest was clearly meritorious.

DECISION

LSL Industries, Inc. requests that we recommend that it be reimbursed the costs of filing and pursuing its protest against the Department of Veterans Affairs' (VA) rejection of its samples under a "sources sought" notice, and the resultant issuance of a request for quotations only to [DELETED], with respect to a blanket purchase agreement for urinary drainage bags.

We deny the request.

The "sources sought" notice, published on VA's Federal Business Opportunities (VA FedBizOps) website on March 8, 2002, requested that potential offerors submit samples and detailed product literature for a number of medical/surgical items, including urinary drainage bags, for evaluation under stated criteria for each item.

LSL submitted samples of a urinary drainage bag. On September 26, 2002, after being advised that its product did not meet several of the stated criteria in the notice, LSL filed an agency-level protest challenging the finding of noncompliance and asserting, among other things, that the drainage bags submitted by [DELETED] did not meet the following criterion: "17. Anti-Reflux Device or Chamber (Does Not Allow Liquid to Flow Back Up Catheter Tubing and Allow Unimpeded Flow of Liquid to Bag)." VA FedBizOps Notice, Criterion No. 17. According to LSL, the [DELETED] bags "do not have an anti-reflux device that prevents liquid back flow," and this could be shown

by turning the bags upside down when filled with liquid. LSL Agency-Level Protest, Sept. 26, 2002, at 2.

VA denied LSL's agency-level protest, and on December 16 LSL filed a protest with our Office in which it reiterated several of its arguments, including its claim that the [DELETED] urinary drainage bags did not meet the anti-reflux criterion. In support of this argument, LSL asserted that the product literature for the [DELETED] models in question, copies of which it furnished with its protest, did not include a claim that the devices prevented any backflow. VA responded in its January 14 report to our Office that its evaluation had been based on "simulated actual use, product literature and established clinical experience"; that a medical/surgical user group had appropriately determined LSL's urinary drainage bag to be unacceptable; and that the evaluation of the [DELETED] models indicated that they prevented liquid backflow. Agency Report, Jan. 14, 2003, at 4, 9, Declaration of Chairperson of Medical/Surgical User Group.

In its January 27 comments on the agency report, LSL narrowed its protest to its allegation that VA had improperly relaxed the anti-reflux criterion. In this regard, LSL distinguished between systems (such as that offered by LSL) that have a valve that prevents liquid from flowing back up the catheter, and systems (such as that offered by [DELETED]) that have anti-reflux chambers that serve as a housing for dripping, but nevertheless allow liquid to flow back up the catheter tubing. LSL Comments, Jan. 27, 2003, at 2.

VA responded in a supplemental report that there was no requirement for a valve but, instead, only a requirement for a "device or chamber" in which no liquid flowed back up the catheter tubing. In this regard, VA reported that it had undertaken a simulation of actual clinical use, in which the bags were filled with 8 ounces of water, tilted horizontally, and raised to or above the level of the drainage tubing several times to simulate possible reversal of the gravitational flow, so as to determine whether fluid would reflux back into the tube. According to the agency, while it "would have rejected any drainage bag that allowed liquid to flow back up the catheter tubing," in fact no backflow occurred with any of the submitted bags and thus all were determined to meet this criterion. Supplemental Agency Report, Feb. 3, 2003, Second Declaration of Chairperson of Medical/Surgical User Group. The agency recognized that reflux could be forced in any system through the application of "abnormal and excessive pressure," but affirmed the position that the tests conducted by the agency simulated "actual use," and that the products tested did not allow fluid to back up into the tubing. Id.

In its response (dated February 11), LSL further clarified its position on anti-reflux chambers. According to the protester, there are three types of drainage bags. First, there are bags that do not provide any specific protection against the backflow of liquid from the bag. Second, there are bags with anti-reflux chambers that

provides some protection against backflow, but will allow liquid to flow unimpeded back through the catheter tubing in many circumstances. These bags contain a feature known in the industry as a “chamber,” which is a small cavity within the drainage bag. . . . [T]he chamber will catch very small amounts of back flow, which is helpful for inadvertent errors that are immediately rectified. Should the error last more than a second or two, however, the chamber will fill up with urine. Once the chamber is filled, the drainage bag is no different than a drainage bag with no protection at all—at that point, the liquid will flow unimpeded back into the catheter tube and into the bladder.

LSL Comments, Feb. 11, 2003, at 2-3. Finally, according to LSL, there are bags that contain a mechanical valve considered to be an “anti-reflux device,” which closes when the flow reverses itself, thus preventing any backflow regardless of how long the bag is in a reverse flow position.

In support of its position, LSL furnished with its February 11 comments a copy of an e-mail in which a [DELETED] sales representative differentiated between two types of [DELETED] urinary drainage bags: (1) bags, as selected by VA, that have an anti-reflux chamber, and (2) bags with a MonoFlo anti-reflux valve. According to the e-mail, “[t]he anti reflux valve (MonoFlo) does not allow the backflow of urine into the tubing. The anti reflux chamber does not prevent such backflow.” LSL Comments, Feb. 11, 2003, attach. LSL also furnished a sworn declaration from its president stating that, in response to an inquiry from LSL, a named nurse at [DELETED] had left a voice-mail message addressing the difference between [DELETED] drainage bags with anti-reflux chambers, such as the bag selected by VA, and [DELETED] bags with anti-reflux devices. According to LSL, the [DELETED] nurse stated that while an anti-reflux chamber prevents urine backflow into the drainage tube, it does not prevent all reflux. The [DELETED] nurse, according to LSL, stated that with an anti-reflux device there should not be any backflow. As for VA’s test, which confirmed compliance with the anti-reflux criterion, LSL suggested that it may have been flawed because (1) VA had not sufficiently filled the urinary drainage bags with liquid, and/or (2) the bags were not elevated above the drainage tubing for a sufficiently long period of time.

By letter of February 20, VA advised our Office that it had confirmed with [DELETED] the contents of the [DELETED] e-mail furnished by LSL, and specifically confirmed with [DELETED] that there could be reflux with [DELETED] selected bag, which has an anti-reflux chamber. VA advised that it would cancel the procurement and issue a new “sources sought” notice. After our Office dismissed the protest based on VA’s determination to take corrective action, LSL filed this request for a declaration of entitlement to protest costs.

Under the Competition in Contracting Act of 1984, our Office may recommend that protest costs be reimbursed only where we find that an agency’s actions violated a

procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (2000). Our Bid Protest Regulations provide that, where the contracting agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(e) (2003). This does not mean that costs should be reimbursed in every case in which an agency decides to take corrective action; rather, a protester will be reimbursed its costs where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. Griner's-A-One Pipeline Servs., Inc.--Entitlement to Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41. A protest is "clearly meritorious" when a reasonable agency inquiry into the protester's allegations would show facts disclosing the absence of a defensible legal position. Department of the Army--Recon., B-270860.5, July 18, 1996, 96-2 CPD ¶ 23 at 3. The mere fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. Spar Applied Sys.--Declaration of Entitlement, B-276030.2, Sept. 12, 1997, 97-2 CPD ¶ 70 at 5.

Here, we conclude that there is no basis for recommending that LSL be reimbursed its protest costs because the protest was not, in our view, clearly meritorious. First, the protester conceded in its February 11 comments that the terms "device" and "chamber" were understood in the industry to have separate, distinct meanings, with only the term "device" meaning a valve. LSL Comments, February 11, 2003, at 5. Thus, while LSL essentially argues in its protest that anti-reflux chambers do not prevent liquid from flowing back up the catheter tubing, and thus cannot satisfy the anti-reflux criterion, the "sources sought" notice's reference to an "Anti-Reflux Device or Chamber" indicated that bags with either a valve or an anti-reflux chamber indeed would meet the agency's needs. Further, the record indicates that VA based its determination of [DELETED] compliance with the anti-reflux criterion, in part, on a simulation of actual clinical use, in which no backflow occurred with any of the tested bags. It was only in LSL's February comments on the agency report that the agency was presented for the first time with information clearly calling into question the determination that there would be no reflux with the selected bags; specifically, these comments included information from representatives of the manufacturers of the selected bags indicating that there could be reflux even where the bag included an anti-reflux chamber. In these circumstances, we find no basis for concluding that the agency had failed to undertake a reasonable inquiry into the protester's initial allegations that would have shown facts disclosing the absence of a defensible legal position. The fact the agency ultimately came to the position, as a result of the new information presented by the protester, that bags with an anti-reflux chamber would not meet its needs may have justified the VA's taking corrective action, but it does not establish that selection of such bags initially was unlawful. We conclude that the

agency did not unduly delay its decision to take corrective action in the face of a clearly meritorious protest.

The request for a recommendation that costs be reimbursed is denied.

Anthony H. Gamboa
General Counsel