Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Aalco Forwarding, Inc., et al.--Costs

File: B-277241.30

Date: July 30, 1999

Alan F. Wohlstetter, Esq. and Stanley I. Goldman, Esq., Denning & Wohlstetter, for the protesters.
Col. James F. Quinn and Ramon Morales, Esq., Department of the Army, for the agency.
Adam Vodraska, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protesters' claim for costs is denied where the protesters failed to file a legally sufficient claim with the contracting agency within the time required and to diligently pursue the matter by responding to the agency's subsequent request for additional information only after the agency denied the claim 3 months after requesting the information.

DECISION

Aalco Forwarding, Inc. and 56 other firms request that we recommend the amount they should be reimbursed by the Military Traffic Management Command (MTMC), Department of the Army, for filing and pursuing their protests in Aalco Forwarding, Inc., et al., B-277241.16, Mar. 11, 1998, 98-1 CPD ¶ 75.[1] In that decision, we sustained the protests by these and other protesters against the partial small business set-aside of request for proposals (RFP) No. DAMT01-97-R-3001.[2]

We deny the claim.

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[1] The names of the other firms are listed in our decision, Aalco Forwarding, Inc., et al.--Recon., B-277241.26, Jan. 6, 1999, 99-1 CPD ¶ 1 at 1-2 n.1.

[2] The other protesters also requested that we recommend the amount they should be reimbursed for filing and pursuing their protests. Their cost claim will be the subject of a forthcoming decision.

The RFP is for a pilot program that reengineers the Department of Defense's current interstate and international program for shipping and storing the personal property of its military service members and civilian employees. As amended, the solicitation sought proposals to service 53 designated traffic channels (origin state-to-destination region), 27 of which were partially set-aside for exclusive small business participation (amounting to 12 percent of the traffic volume).

The solicitation, as issued, was the subject of numerous protests by these and other protesters, as were subsequent amendments to the RFP. Among the protest allegations was the contention that the RFP's partial set-aside was not an economic production run or reasonable lot, as required, and that the solicitation was not properly divided into set-aside and non-set-aside portions and was otherwise ambiguous in this regard.

On March 11, 1998, we sustained the protests of the RFP's partial set-aside. We found that the partial set-aside did not ensure an economic production run or reasonable lot of shipments for small business concerns, as required by Federal Acquisition Regulation (FAR) § 19.502-3(b). Specifically, the set-aside did not meaningfully consider the impact of the relatively small number of shipments available on many of the set-aside channels or the significant obligations, such as committed daily capacity, imposed on small business contractors by the solicitation. We recommended that the agency reexamine its partial set-aside under the criteria of FAR § 19.502-3, and make the appropriate determinations and adjustments. In sustaining the protests, we further recommended that the protesters be reimbursed the reasonable costs of filing and pursuing their protests, including reasonable attorneys' fees, allocable to the partial set-aside issue.[3]

On May 6, 1998, within 60 days of receipt of our decision, the protesters' attorneys submitted a certified claim to MTMC seeking reimbursement of $52,923.28 for the

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[3] In response to our decision, the agency decided to eliminate the previous partial set-aside and to designate 17 of the high volume channels as 100-percent small business set-asides. The protesters then challenged this revised set-aside, contending that MTMC failed to establish that all of the set-aside channels constituted economic production runs or reasonable lots, and that the set-aside decision lacked a reasonable basis. In Aalco Forwarding, Inc., et al., B-277241.20, B-277241.21, July 1, 1998, 98-2 CPD ¶ 1, we denied these protests of the RFP's revised set-aside, finding that the new set-aside determination was not a partial set-aside of the entire procurement under the applicable regulation but a total set-aside of each restricted channel. We concluded that the set-aside had a reasonable basis and was in accord with the applicable regulation governing total set-asides, FAR § 19.502-2, which does not require a total set-aside to constitute an economic production run or reasonable lot. Id. at 8-9. We later denied the protesters' request for reconsideration in Aalco Forwarding, Inc., et al.--Recon., supra.

costs of filing and pursuing the protests, consisting of $51,787.14 in attorneys' fees and $1,136.14 in attorneys' out-of-pocket expenses (copies, postage, courier service, and faxes). The protesters' attorneys allocated the amount of their fees to the sustained protest issue on the basis of the percentage of pages of each submission (protests and comments) devoted to the small business set-aside issue. Specifically, in their letter, the attorneys identified the relevant pages from each submission, calculated the resulting percentage of each submission devoted to the small business set-aside issue, and applied that percentage to the total attorneys' fees incurred in preparing each submission.[4] The attorneys did not allocate their claimed out-of-pocket expenses to the sustained protest issue. No other supporting information was provided.

MTMC responded to the protesters' claim on August 18 by requesting that the protesters' attorneys furnish supporting information and explanations. Among other things, the agency requested a detailed breakdown of the attorneys' hours, as well as copies of billing statements and receipts for out-of-pocket expenses. MTMC denied the protesters' cost claim on November 23, noting that the protesters had failed to respond to the agency's August 18 request for additional substantiation of the claim.

In a December 2 letter to the contracting officer, the protesters' attorneys objected to the denial of the protesters' claim. The protesters' attorneys stated that MTMC had not established any deadline for a response and that they delayed responding while they awaited our decision on their request for reconsideration of their protests of the RFP's revised set-aside. As had been earlier requested by the agency, the protesters' attorneys provided additional substantiation of the protesters' claim, including a breakdown of their legal fees, as well as copies of the bills for legal services and receipts for out-of-pocket expenses.

On January 12, 1999, the contracting officer responded by reiterating the agency's position that the protesters had failed to submit an adequately detailed claim to the agency within 60 days of receipt of the decision, as required by our Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1) (1999). On January 27, the protesters requested that our Office determine the amount they should be reimbursed. The agency objects to the protesters' claim for costs. The agency asserts that the protesters failed to file a timely and adequately supported claim, as required, and failed to properly segregate costs to the issue upon which we recommended reimbursement of the protest costs.

Our Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1), provide that when we find that an agency should reimburse a protester for its appropriate costs:

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[4] The protesters' attorneys arrived at the total attorneys' fees for each submission by multiplying the total number of hours incurred by each attorney in preparing that submission by the attorney's hourly rate.

> [t]he protester shall file its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of GAO's recommendation that the agency pay the protester its costs. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs.

Consistent with the intent of our Regulations to have protest matters resolved efficiently and quickly, the 60-day timeframe for filing claims with the contracting agency was specifically designed to avoid the piecemeal presentation of claims and to prevent unwarranted delays in resolving such claims. HG Properties A, L.P.--Costs, B-277572.8, Sept. 9, 1998, 98-2 CPD ¶ 62 at 2. That timeframe affords protesters ample opportunity to submit adequately substantiated certified claims. Test Sys. Assocs., Inc.--Claim for Costs, B-244007.7, May 3, 1993, 93-1 CPD ¶ 351 at 4. Failure to initially file an adequately supported claim in a timely manner results in forfeiture of a protester's right to recover costs, irrespective of whether the parties may have continued to negotiate after the 60-day period expired. HG Properties A, L.P.--Costs, supra, at 2-3. The claim for reimbursement of costs must, at a minimum, identify the amount claimed for each individual expense, the purpose for which that expense was incurred, and how the expense relates to the protest. W.S. Spotswood & Sons, Inc.--Claim for Costs, B-236713.3, July 19, 1990, 90-2 CPD ¶ 50 at 3. Where, as here, attorneys' fees are sought to be recovered, evidence from the attorneys involved must be submitted, including, for instance, copies of bills from the attorneys listing the dates the services were performed and the hours billed to the protester. Custom Prod. Mfg., Inc.--Claim for Costs, B-235431.7, May 9, 1995, 95-1 CPD ¶ 236 at 3, recon. denied, B-235431.8, July 21, 1995, 95-2 CPD ¶ 40.

Here, the record shows that the protesters' initial claim submission provided insufficient detail for the agency to adequately assess the reasonableness of the claimed costs. Rather than submitting a complete, detailed breakdown of the expenses incurred, the protesters' attorneys simply claimed an amount based on the total number of attorney hours they allocated to the sustained issue, plus the listed out-of-pocket expenses. The letter from the protesters' law firm did not provide an itemized accounting of these expenses, such as listing the specific services performed by dates of performance and numbers of hours. The initial claim also failed to include copies of any billing statements sent to clients for attorneys' fees or out-of-pocket expenses or copies of any receipts. Further, while, as a basis for allocating the attorneys' fees, the letter identified certain pages of each submission as related to the small business set-aside issue, that identification was inadequate, since the protest involved various issues related to the small business set-aside, only one of which was sustained. The letter also failed to allocate the claimed out-of-pocket expenses to that issue. Accordingly, we find the claim submitted on May 6, 1998 insufficient to support the protesters' claim for attorneys' fees and costs. Because the protesters failed to file a legally sufficient cost claim within the time required under 4 C.F.R. § 21.8(f)(1), they forfeited their right to recover their costs. See HG Properties A, L.P.--Costs, supra.

Moreover, despite MTMC's request, the protesters failed to supplement their defective claim by providing the required claim information until December 1998, 9 months after we issued our decision on the protest. It was only then--after their claim had been denied by the agency because of the protesters' failure to provide the requested supporting information--that the protesters provided a more itemized breakdown of their costs upon which the agency could arguably begin to assess the reasonableness of their claim. We recognize that the agency took 3 months to consider and then respond to the initial claim by requesting additional information from the protesters. Nonetheless, in requesting this information, the agency told the protesters that "[s]ubject to your submission of additional information and supporting documentation, we believe we should be able to reach a prompt settlement of your request [for costs]." Letter from Mr. Morales to Mr. Wohlstetter (Aug. 18, 1998). Although the protesters state that "[w]e were encouraged by Mr. Morales' indication that we should be able to reach a prompt settlement," they did not respond until more than 3 months later, and only after the agency denied their claim because of their failure to properly support their claim as requested.[5] Claim for Costs at 3.

It is incumbent on a protester to diligently pursue its claim if it wishes to avail itself of a remedy from our Office. Custom Prod. Mfg., Inc.--Recon., supra, at 3. We view the protesters' failure to respond to the agency's reasonable request for additional supporting information until after the claim was denied as significantly contributing to the failure to reach agreement with the agency on the amount of the claim within a reasonable time and as a failure to diligently pursue the matter. Indeed, but for the agency's denial of the claim 3 months after requesting the additional supporting information from the protesters, the protesters presumably would have waited even longer to respond, if at all. While the agency did not establish a deadline for a response from the protesters, the agency reasonably could have expected a prompt response in attempting to agree on the amount of costs. Without so responding, the protesters unnecessarily delayed the consideration of their claim and the possibility of agreement with the agency on the amount within a reasonable time. Where, as

[5] The protesters state that they delayed their response because they were awaiting our decision on their pending request for reconsideration of our subsequent (July 1, 1998) decision denying the protests of the revised set-aside. Although that subsequent decision, and the ensuing reconsideration request, involved the agency's implementation of our recommendation from the March 11 decision, they did not relate to the costs awarded in that decision which are at issue here. Had we, on reconsideration, reversed our subsequent decision denying the protests of the revised set-aside, we would have recommended a separate and additional award of costs for filing and pursuing those protests. Accordingly, the protesters' purported reliance on their then-pending request for reconsideration does not provide a basis for their failure to respond to the agency's request for additional support of their claim for costs.

here, the protesters' actions deprived the agency of a meaningful opportunity to review an adequately supported cost claim within a reasonable time, we decline to recommend that the agency pay the claimed costs.

The claim is denied.

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of the United States