



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Boines Construction & Equipment Co., Inc.--Costs

File: B-279575.4

Date: April 5, 2000

John I. Hulse IV, Esq., Hulse & Wanek, for the protester.
Jud E. McNatt, Esq., Department of Housing and Urban Development, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office (GAO) does not recommend reimbursement of bid preparation costs incurred by protester's subcontractor where protester fails to establish that it has paid or has committed to pay the subcontractor's costs.
2. Where protester fails to demonstrate that hourly rates claimed for its employees are based upon actual rates of compensation plus overhead and fringe benefits, its claim for reimbursement of the time spent by its employees in preparing its bid is denied.
3. GAO recommends reimbursement of protester's legal expenses associated with pursuit of its protest where it demonstrates that it is ultimately responsible for payment of the attorneys' fees.

DECISION

Boines Construction & Equipment Company, Inc. requests that we recommend that it recover \$15,246.78 from the Department of Housing and Urban Development (HUD) for bid preparation costs under invitation for bids (IFB) No. B-FTW-00041, and for the costs of filing and pursuing its protest in Boines Constr. & Equip. Co., Inc., B-279575, June 29, 1998, 98-1 CPD ¶ 175, recon. den., Department of Hous. and Urban Dev.--Recon., B-279575.2, Nov. 4, 1998, 98-2 CPD ¶ 105. We recommend that Boines recover \$4,404.12.

In Boines Constr. & Equip. Co., Inc., we sustained Boines' protest of the award of a contract to Pierce Foundations, Inc. for the demolition of vacant buildings and related site work at the Hillcrest Home Apartments public housing project in Larose,

Raceland, and Thibodaux, Louisiana. We found that Pierce's low bid was late and thus should not have been considered. We recommended that HUD terminate its contract with Pierce, if feasible, and award to Boines as the next low bidder, if Boines' bid was otherwise responsive and Boines was found responsible; in the event that termination of the contract with Pierce was not feasible due to the extent of contract performance, we recommended that HUD instead pay Boines its bid preparation costs. We also recommended that HUD pay Boines the costs of filing and pursuing its protest, including reasonable attorneys' fees.

On July 10, HUD requested reconsideration of our decision. By letter dated August 27, Boines requested that we modify our recommendation to include payment of lost profits. By letter dated August 28, the agency notified us that it had suspended action on our recommendation until its request for reconsideration had been decided, and that due to the status of performance (the demolition work by Pierce being approximately 90 percent complete), the only possible corrective action in the event its request for reconsideration were denied (and our decision sustaining Boines' protest affirmed) would be payment of the protester's bid preparation and protest costs. By separate decisions dated November 4, Department of Hous. and Urban Dev.--Recon., *supra*, and Boines Constr. & Equip. Co., Inc.--Recon., B-279575.3, Nov. 4, 1998, we denied HUD's request for reconsideration and Boines' request for modification of our recommendation.

Boines submitted a certified claim for costs to the agency on January 4, 1999. Boines claimed bid preparation costs totaling \$11,369.55 (\$10,085.00 for 217 hours of labor by five employees, \$221.27 for miscellaneous expenses such as blueprints and copying, and \$1,063.28 for travel) and attorney's fees of \$3,828.35. Boines supported its bid preparation cost claim with schedules summarizing by date and employee name, the number of hours worked, the tasks performed, and the hourly rate of compensation. Three of the five individuals listed in the schedule (for whom a total of 105 hours of labor were claimed) were employees of Hamp's Construction, Boines' intended subcontractor, rather than Boines itself. In an affidavit accompanying the claim, the presidents of Boines and Hamp's explained that the two companies had collaborated in preparing the bid.¹ The presidents of Boines and

¹The presidents of the two companies explained the arrangement between them as follows: "In analysis of the bid plans and specifications, visits to the three (3) sites in question, attendance at pre-bid meetings, performance of quantity takeoffs and estimating prices[,] obtaining of subcontractor prices, and calculating final bid prices, Boines had entered into a verbal subcontract with Hamp's Construction, L.L.C. (Hamp's) whereby Boines, as general contractor, was to perform job cost estimating and bid preparation in conjunction with Hamp's, over all job supervision, inspection, asbestos removal, trucking, and furnishing of machines for demolition. Hamp's was to provide personnel to assist in job cost estimating and bid preparation, performance of demolition and hauling." Certification of Status of Parties and Bid Preparation Process, Jan. 4, 1999, ¶ 2.

Hamp's further attested that the hourly rates that they were claiming for their employees were "the usual and customary rates utilized by them in this area, and [were] commensurate with the rates utilized by these companies in bidding upon and performing Section 8-A work in this area." Id. at ¶ 6.

By letter dated January 26, HUD asked Boines to furnish it with evidence that the hours listed for each of the individuals on its claim were actually expended on this project. Boines responded by letter dated February 25, noting that since no job was ongoing at the time the bid was prepared, no project logs or daily logs or daily reports had been kept in the course of preparing the bid. Boines argued that its compilation of hours worked ought to be accepted despite the fact that it could not be supported with contemporaneous documentation because it was prepared "by the actual persons involved in the bid preparation, the persons making the site visits, and incurring the individual expenses." Letter from Protester's Attorney to GAO and HUD at 1 (Feb. 25, 1999).

By letter dated March 8, Boines submitted additional documentation supporting its claim, including a number of "Daily Worksheets" for one of the Hamp's employees and "Daily Time Slips" for the two Boines employees.

On July 1, HUD notified Boines that it was unwilling to pay a significant portion of its claim. HUD refused to pay the bid preparation costs incurred by Hamp's since Hamp's was not the successful protester and no contemporaneous evidence had been furnished demonstrating that Boines intended to reimburse Hamp's for its bid preparation costs and was thus liable for these costs. Letter from HUD to Protester's Attorney at 2 (July 1, 1999). HUD also refused to pay the attorney's fees claimed by the protester since they had been billed to Hamp's rather than Boines, leading the agency to conclude that the attorney had been retained by Hamp's rather than Boines.

Further, the agency refused to pay Boines for the full number of hours that it claimed for its own employees. The agency opined that the 100-plus hours reflected as spent by Boines' employees seemed excessive, "especially in view of the fact that Hamp's was apparently going to do the demolition portion of the job and had provided two individuals [who claimed to have worked 100-plus hours themselves] to furnish the cost estimating for this, the primary part of the effort." Id. at 4 Moreover, according to HUD, other bidders for the job had reported that it took them 40-50 hours to prepare their cost estimates and complete their bids for the job. HUD also noted that the documentation submitted by the protester did not adequately support its claimed hours. The agency observed, in this regard, that Boines had produced "Daily Time Slips" for its employees after reporting to the agency that no project or daily logs or daily reports had been kept in the course of preparing the bid, leading the agency to surmise that these documents had been created after the fact in response

to its request.² Id. at 5. In sum, the agency concluded that Boines' inability to support its claimed hours was a deficiency that it could not overlook in view of the fact that the total hours claimed considerably exceeded what it considered reasonable for the effort. The agency did recognize that some amount of time had been expended in preparation of Boines' bid, however, and offered, "in the spirit of compromise," to reimburse Boines for 50 hours of its employees' time. Id.

A final major problem with Boines' claim noted by the agency was that Boines had not established that the hourly rates at which it was seeking reimbursement for its employees' time were based upon their actual rates of compensation, plus reasonable overhead and fringe benefits, as opposed to what the agency referred to as "market rates." The agency indicated that it would not reimburse Boines for the 50 hours offered above until the hourly rates had been substantiated.

By letter dated July 9, Boines expressed its disagreement with the agency's findings and asked that we declare it entitled to the full amount of its claim.

BID PREPARATION COSTS

As previously noted, Boines seeks to recover \$11,369.55 in bid preparation expenses: \$10,085.00 for labor (by employees of both Boines and Hamp's), \$221.27 for miscellaneous expenses, and \$1,063.28 for travel.

Bid Preparation Costs Incurred By Hamp's

We have allowed a protester to recover the bid preparation costs incurred by its potential subcontractor in only one limited circumstance--where the costs were incurred by the subcontractor as part of a joint effort with the protester, participating fully in the bid preparation process, and not limiting its role to merely providing a quotation for certain work under the solicitation. TMC, Inc.--Claim for Costs, B-230078.2, B-230079.2, Jan. 26, 1990, 90-1 CPD ¶ 111 at 2-3. See also The Pevar Co.--Claim for Costs, B-242353.3, Sept. 1, 1992, 92-2 CPD ¶ 144 at 7. Consistent with the Competition in Contracting Act of 1984, before recommending that the protester recover bid preparation costs incurred by its potential subcontractor from the contracting agency, we will require evidence of an obligation by the protester to repay such costs regardless of whether or not they are recovered from the government. In this regard, under 31 U.S.C. 3554(c)(1) (1994), we are authorized to recommend that the contracting agency pay bid preparation costs to an "appropriate interested party." In our view, it is implicit in this provision that the costs to be recovered be the costs of the "interested party." See A-1 Movers of Am., Inc., et al.--Costs, B-277241.31, Aug. 2, 1999, 99-2 CPD ¶ 24. As defined in 31 U.S.C. 3551(2), an

²In subsequent correspondence, the protester never disputed the agency's assertion that these documents had been generated after the fact, leading us to conclude that the agency was correct in so surmising.

“interested party” is an “actual or prospective bidder or offeror.” Under this definition, the interested party is the protester, not its potential subcontractor even if it participates in preparing the protester’s bid. Accordingly, only if there is evidence of an obligation by the protester to repay the subcontractor for its bid preparation costs regardless of whether the protester ultimately recovers those costs from the government can we conclude that the costs are those of an interested party, as required by CICA.³

Here, Boines represents that it will reimburse Hamp’s only to the extent that it-- Boines--recovers costs from the government. Specifically, Boines states that it and Hamp’s have agreed that

as to any amounts recovered on the appeal to the General Accounting Office . . . Boines will reimburse itself for the labor and costs which it expended through its own forces, and will reimburse Hamp’s for the labor and costs which Hamp’s employees expended in the course of preparing the bid, going to the site visits, traveling, etc.

Letter from Protester’s Attorney to GAO at 1 (Oct. 1, 1999).⁴ Such a contingent obligation is not sufficient to warrant recovery by Boines of bid preparation costs incurred by Hamp’s. See Systemhouse Fed. Sys., Inc., GSBICA 9446-C, 89-2 BCA ¶ 21,773. As a consequence, we do not recommend that Boines recover those costs.

Boines’ Bid Preparation Costs

A protester seeking to recover the costs of preparing a proposal or bid must submit sufficient evidence to support its monetary claim. John Peeples--Claim for Costs, B-233167.2, Aug. 5, 1991, 91-2 CPD ¶ 125 at 3. The amount claimed may be recovered to the extent that it is adequately documented and shown to be reasonable. Maintenance and Repair--Claim for Costs, B-251223.4, June 24, 1994, 94-1 CPD ¶ 381 at 3-4. Although we recognize that the requirement for documentation may sometimes entail certain difficulties, we do not consider it unreasonable to require a protester to document in some manner the amount and purposes of its employees’ claimed efforts and to establish that the claimed hourly rates reflect the employees’

³To the extent that our decision in TMC, Inc.--Claim for Costs, supra, is inconsistent with this conclusion, it will no longer be followed.

⁴ Boines furnished this statement in response to the following request for clarification from our Office dated September 29:

Has Boines agreed to reimburse Hamp’s for its bid preparation costs?
If so, please describe the terms of the agreement.

actual rates of compensation plus reasonable overhead and fringe benefits. W.S. Spotswood & Sons, Inc.--Claim for Costs, B-236713.3, July 19, 1990, 90-2 CPD ¶ 50 at 3.

Despite requests by both the agency and our Office for documentation substantiating that the rates of compensation claimed by Boines for its employees reflect the employees' actual rates of compensation, plus reasonable overhead and fringe benefits, Boines has not documented the claimed rates. The only evidence in the record concerning rates of employee compensation is the attestation by Boines' president, cited above, that the rates claimed are "the usual and customary rates utilized by them in this area, and are commensurate with the rates utilized by these companies in bidding upon and performing Section 8-A work in this area." This statement does not establish that the claimed rates reflect the employees' actual rates of compensation, plus reasonable overhead and fringe benefits; it does not exclude the possibility that the rates include profit. A protester may not recover profit on its employees' time in preparing a bid. Id. at 3-4; John Peeples, supra, at 3. Since Boines has not submitted evidence demonstrating that the hourly rates claimed for its employees are based upon actual rates of compensation plus overhead and fringe benefits, its claim for reimbursement of the time spent by its employees in preparing its bid is denied.

With regard to the other bid preparation expenses claimed by Boines, we recommend that it be reimbursed \$200 for four copies of blueprints and \$21.27 in copying expenses. We also find that it is entitled to \$554.50 for the travel expenses (i.e., automobile mileage, meals, airfare, and taxicab fare) incurred by its employees in preparing and delivering its bid.⁵

⁵We find that the claimant is entitled to recover the following travel expenses: \$73.50 for the 210 miles driven by Boines' president to visit the job site on January 19 (the agency having stated on page 3 of its letter to the protester dated December 10, 1998 that it accepted the rate of 35 cents per mile used by the protester in calculating the expense of travel in personal vehicles); \$7.50 for lunch and \$15 for dinner for Boines' president and another Boines' employee visiting the site on January 19; \$49 for the 140 miles driven by a Boines employee to attend the pre-bid conference on January 20, and \$7.50 for the employee's lunch that day; \$56 for the 160 miles traveled by a Boines employee to visit the site on January 26; \$59.50 for the same employee to drive round-trip to the same site on February 5; \$222 for a plane trip from New Orleans to Dallas for a Boines employee to deliver the bid and attend the bid opening; \$28 for cab fares for this employee; and \$14 for two meals consumed by the employee while traveling. See Armour of Am., Inc.--Claim for Costs, B-237690.2, Mar. 4, 1992, 92-1 CPD ¶ 257 at 9 (airfare, meals, and taxicab fare are recoverable travel expenses); The Pevar Co.--Claim for Costs, supra, at 9 (automobile mileage is recoverable).

(continued...)

ATTORNEY'S FEES

Boines seeks reimbursement of \$3,828.35 for time spent and expenses incurred by its attorney in pursuing its protest. In support of its claim for attorney's fees, the protester has submitted itemized statements from the attorney detailing the dates that he worked on the matter, the particular task performed, and the number of hours worked.

HUD objects to payment of the attorney's fees on the grounds that bills from the law firm representing the protester were addressed to Hamp's rather than Boines, leading agency representatives to surmise that the legal expenses were incurred by the former rather than the latter. The agency argues that if the legal fees were paid by the subcontractor, they are not reimbursable.

The president of Boines explains that while the legal bills for work performed with regard to the protest were "carried on the law firm account under 'Hamp's Construction,' [which had an ongoing relationship with the firm], a separate file designation was entered as 'Boines/HUD Appeal/Hillcrest Homes' and Boines knew and understood that all such bills, time and costs entered on that account were chargeable to Boines, and would be the full responsibility of Boines, even if no monies were recovered by way of the HUD appeal." Affidavit of Michael Boines, Aug. 27, 1999, at 1-2.

We think that Mr. Boines' sworn statement adequately addresses the objection raised by the agency and demonstrates that payment of the attorney's fees is ultimately the responsibility of Boines. Under such circumstances, we recommend that the protester recover these costs. See Research Dynamics, Inc. v. Department of the Air Force, GSBICA 13455-P, 13598-C, 96-2 BCA ¶ 28448. Moreover, the amount of time spent by the attorney in pursuing the protest and his rate of compensation (\$125/hour) both appear reasonable. Accordingly, we recommend that Boines recover its attorney's fees in the amount of \$3,628.35.⁶

CONCLUSION

(...continued)

We deny recovery of any of the other travel expenses claimed since they were incurred by employees of Hamp's.

⁶From the amount claimed by the protester, we have excluded \$200 for 1.6 hours of the attorney's time spent preparing Boines' claim for costs to the agency since the costs of filing and pursuing a bid protest at the General Accounting Office do not include costs associated with pursuing a claim for those costs with the contracting agency. Aztec Dev. Co.--Claim for Costs, B-270275.2, Feb. 13, 1997, 97-1 CPD ¶ 73 at 4.

We recommend that Boines recover a total of \$4,404.12, consisting of \$775.77 in bid preparation expenses and \$3,628.35 in protest costs (i.e., attorney's fees).

Comptroller General
of the United States