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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Keeton Corrections, Inc.—Costs

File: B-293348.3

Date: October 25, 2004

John G. DeGooyer, Esq., and David T. Ralston, Esq., Foley & Lardner, for the protester.

Tracey L. Printer, Esq., Federal Bureau of Prisons, for the agency.

Henry J. Gorczycki, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request that GAO recommend the amount in protest costs the successful protester should be allowed to recover is denied where the claim was filed with the contracting agency more than 60 days after protester's counsel received a protected copy of the protest decision; protester's filing of a request for reconsideration did not toll the period for filing its claim, and there is no evidence of a compelling reason beyond the control of the protester which prevented the protester from timely filing the claim.

DECISION

Keeton Corrections, Inc. requests that we recommend the amount it should be allowed to recover from the Department of Justice, Federal Bureau of Prisons (BOP), for filing and pursuing its protest in Keeton Corrections, Inc., B-293348, Mar. 4, 2004, 2004 CPD ¶ __. In that decision, we sustained Keeton's protest against BOP's award of a contract to provide a residential Comprehensive Sanction Center in Nashville, Tennessee, and we recommended, among other things, that BOP reimburse the protester's cost of filing and pursuing its protest. In this regard, citing the requirement in our Bid Protest Regulation, 4 C.F.R. § 21.8(f)(1) (2004), our decision directed as follows: "The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly with the agency within 60 days of receiving this decision." Keeton Corrections, Inc., *supra*, at 12.

We dismiss the request because the protester did not file its certified claim for costs within 60 days of receipt of our decision.

On March 4, 2004, counsel for Keeton received a protected copy of our decision. The decision sustained Keeton's protest solely on the basis that the source selection decision was unreasonable because, under the most important evaluation factor of past performance, the source selection authority relied upon inaccurate information about the protester's and awardee's records of past performance in selecting the awardee's higher-priced proposal. Keeton Corrections, Inc., supra, at 6-8. Our decision also considered, and rejected, the protester's other protest arguments, including its assertion that the agency's consideration of evidence of ownership of facilities was inconsistent with the stated evaluation criterion and thus improper. Id. at 11.

On March 12, Keeton requested reconsideration of our decision solely on the basis of the propriety of considering ownership of facilities as an evaluation criterion. On March 31, our Office denied the request for reconsideration on the basis that the protester had made precisely the same argument in its protest as it was making in its request for reconsideration; our Office had considered the argument in the protest; and the mere repetition of the same argument did not provide a basis for Keeton to prevail in its request for reconsideration. Keeton Corrections, Inc.-Recon., B-293348.2, Mar. 31, 2004.

On May 26, 83 days after receiving our decision sustaining its protest, Keeton submitted its claim for costs to BOP. BOP denied Keeton's claim on the basis that the protester had failed to submit its claim within the 60-day period established by regulation, and this claim for costs followed.

Keeton asserts that its request for reconsideration tolled the 60-day period for filing its claim that commenced upon its receipt of our initial decision. According to Keeton, the 60-day period began anew with our Office's decision on the request for reconsideration.

Our Bid Protest Regulations require that in the event that our Office recommends that an agency should reimburse a protester for the costs of filing,

[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.

4 C.F.R. § 21.8(f)(1). Consistent with the intent of our Regulations to have protest matters resolved efficiently and quickly, the 60-day timeframe for filling claims with the contracting agency was specifically designed to avoid the piecemeal presentation of claims and to prevent unwarranted delays in resolving such claims. That timeframe affords protesters ample opportunity to submit adequately substantiated certified claims. A protester's failure to initially file an adequately supported claim in

a timely manner results in forfeiture of a protester's right to recover costs. Aalco Forwarding, Inc., et al.—Costs, B-277241.30, July 30, 1999, 99-2 CPD ¶ 36 at 4; HG Properties A. L.P., B-277572.8, Sept. 9, 1998, 98-2 CPD ¶ 62 at 2.

Neither our regulations nor our prior decisions recognize an exception to the 60-day filing requirement based simply on the fact of a request for reconsideration having been filed. While our Office has indicated that we may consider an untimely claim for good cause, we have construed the term to mean that some compelling reason beyond the control of the protester prevented the protester from timely filing the claim. Continental Maritime of San Diego, Inc.—Costs, B-249858.5, Dec. 17, 1993, 93-2 CPD ¶ 323 at 2; Test Sys. Assocs., Inc.—Costs, May 3, 1993, 93-1 CPD ¶ 351 at 2. Here, there is no evidence that Keeton could not have filed within the required time period a documented, substantiated claim for the costs of filing and pursuing the protest that we had sustained. Not only did Keeton's request for reconsideration not prevent the protester from timely filing its claim, the request for reconsideration did not even call into question the basis upon which we sustained the protest and thus our recommendation of protest costs. Moreover, we note that when Keeton received our decision denying its request for reconsideration on March 31, Keeton still had 33 days within which to file its cost claim. Keeton has offered no explanation as to why it did not have sufficient time after receiving our decision denying its request for reconsideration to complete and timely file its claim with the agency. In these circumstances, we decline to recommend that the agency pay the claimed costs.

Anthony H. Gamboa
General Counsel