



Decision

Matter of: Moyle Real Estate & Development Company--Costs

File: B-404761.4

Date: March 27, 2012

Donald C. Schwenn, Moyle Real Estate & Development Company, for the protester. Antonio Robinson, Esq., Department of Agriculture, for the agency. Cherie J. Owen, Esq., Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Claim for costs is denied where protester failed to submit a timely, certified, adequately documented claim for costs to the agency.

DECISION

Moyle Real Estate & Development Company requests that we recommend the U.S. Department of Agriculture (USDA) pay Moyle \$208,461 for the costs Moyle asserts it incurred in connection with a proposal submitted in response to solicitation for offers (SFO) No. R9-10-04, for office space to house the Hiawatha National Forests Supervisors Office, and for the costs of filing and pursuing its protest in Moyle Real Estate & Development, B-404761.3, March 28, 2011. We dismissed the protest as academic on March 28, 2011, based on the agency's statement that it was taking corrective action in the procurement. Id.

We deny the request for reimbursement.

BACKGROUND

In February 2011, Moyle filed a protest in connection with the above-referenced solicitation, asserting that the agency failed to follow the solicitation's stated evaluation criteria and improperly awarded a lease to Snow Country Contracting. In response to Moyle's protest, the agency submitted an agency report. After reviewing the filings, the cognizant GAO attorney held an alternative dispute resolution (ADR) conference, in which she engaged in outcome prediction. She advised the parties that the protest appeared to be clearly meritorious.

More specifically, the GAO attorney advised the parties that the protest would likely be sustained because the record revealed that the agency's evaluation process resulted in a re-ordering of the weights assigned to the evaluation factors in the solicitation. The GAO attorney further advised that GAO and the Court of Federal Claims have both held that making offerors aware of the rules of the game in which they seek to participate is fundamental to fairness and open competition. Finlen Complex, Inc., B-288280, Oct. 10, 2001, 2001 CPD ¶ 167 at 10 (citing Dubinsky v. United States, 43 Fed. Cl. 243, 259 (1999)). GAO has held that withholding from offerors the relative weight that will be accorded to the various evaluation factors denies offerors one of the basic tools used to develop a responsive proposal. Finlen Complex, Inc., *supra*. Because the evaluation factors were not accorded the weight they were assigned in the solicitation, the GAO attorney advised that the agency's evaluation appeared to be unreasonable and not in accordance with the ground rules set forth in the solicitation.

With regard to potential remedies, the GAO attorney advised the parties that because the agency had indicated that the lease had already been awarded and did not contain a termination for convenience clause, GAO could not recommend termination of the awarded lease. See RKR, Inc., B-247619.2, Oct. 28, 1992, 92-2 CPD ¶ 289 at 4; Peter N.G. Schwartz Cos. Judiciary Square Ltd. P'ship, B-239007.3, Oct. 31, 1990, 90-2 CPD ¶ 353 at 11 (citing SWD Assoc., B-226956.2, Sept. 16, 1987, 87-2 CPD ¶ 256; Patio Pools of Sierra Vista, Inc.--Recon., B-228187.2, B-228188.2, Apr. 7, 1988, 88-1 CPD ¶ 345); see Shields & Dean Concessions, Inc.--Recon., B-292901.4, Mar. 19, 2004, 2004 CPD ¶ 71 at 5 (in the absence of a termination for convenience clause, the protester's only remedy was reimbursement of proposal preparation and protest costs, since CICA does not require a GAO recommendation that the government breach a contract); see also Johnson v. United States, 15 Cl. Ct. 169, 171-72 (1988) (holding that the Christian doctrine does not apply to allow the insertion of a termination for convenience clause into a lease of real property). Since no other remedy was feasible, our Office indicated that it would likely recommend that the agency reimburse the protester its proposal preparation costs and the costs of pursuing its protest.

Subsequently, the agency advised our Office that it was electing to take corrective action. Specifically, the agency stated that it intended to reimburse the protester its reasonable proposal preparation and protest costs. Because this was the only remedy available, we viewed the agency's corrective action as rendering the protest academic and, accordingly, we dismissed the protest. See DTV Transition Group, Inc.--Costs, B-401466.2, Apr. 7, 2010, 2010 CPD ¶ 84 at 1. GAO advised the protester that it must submit a certified claim for costs, detailing the time expended and costs incurred, directly to the agency within 60 days of receiving our decision dismissing the protest. Moyle Real Estate & Development, *supra*.

On May 24, fifty-seven days after the issuance of our decision dismissing the protest, the agency received Moyle's claim for \$208,270. The claim identified seven Moyle employees and a design firm that had participated in the preparation of the proposal

and/or protest. The claim was comprised of two lump-sum amounts: (1) \$140,000 for services performed by a design firm for “work done on the design of the proposed building, which includes the estimating cost, the re-design of the building to meet updated criteria as well as LEED [leadership in energy and environmental design] and much time spent in review”; and (2) \$68,270 for “proposal development,” “numerous reviews by multiple personnel” and “protest costs.” Agency Response, Exhibit 2, May 24 Claim for Costs, at 3. Beyond these two lump-sum amounts, there was no further breakdown of the costs incurred. That is, the claim did not identify the number of hours worked by any of the employees or when such work was performed. Rather, it contained only a summary phrase describing the nature of each employee’s involvement (for example, two employees performed “secretarial services”). Id. at 2-3. Further, the claim contained no information regarding any employee’s rate of compensation, nor any documentation supporting Moyle’s relationship with or obligation to the design firm. Finally, the claim was not certified. Id.

The agency responded to Moyle’s claim by letter dated June 1. The letter advised Moyle that its claim was inadequately documented, provided no basis for the agency to assess reasonableness, and required supplementation. Specifically, the letter stated that Moyle’s claim failed to identify the amounts claimed for each individual expense, the purpose for which each expense was incurred, and how the expense related to the protest or proposal. Agency Response, Exhibit 3, June 1 Agency Response to Cost Request, at 1. The agency further instructed Moyle that it needed to submit additional documentation including copies of the analysis performed by the design company and documentation to establish that the fees charged by the design company were within the range of what other firms would charge for such services; supporting records such as timesheets, calendars, expense reports, billing statements, and receipts; and documentation regarding the hourly rate of Moyle personnel. Id. The letter also noted that the protester’s claim referenced a different, previously cancelled solicitation, stated that costs associated with that solicitation were unallowable, and concluded that since the claim appeared to aggregate allowable and unallowable costs in manner that made it impossible to determine which portion was allowable, the entire claim must be disallowed. Id. at 1-2. The agency stated that, although the claim was denied, the agency might reconsider the claim if it were submitted with sufficient supporting documentation. Id.

On July 17, Moyle submitted a revised claim for \$208,461. For each of the seven Moyle employees, the protester furnished a log of time spent in connection with preparing the proposal or pursuing the protest. For example, for two dates in 2010, an employee charged a total of six hours for “review.” Agency Response, Exhibit 4, July 17 Claim for Costs, at 6. Similarly, for 2011, the same employee charged 22 hours for “protest review” in “Jan to April” with no further identification of the tasks performed or the date on which they were performed. Moyle claimed that the pay rates of the seven employees ranged from \$35 per hour to \$145 per hour, but provided no documentation supporting the claimed rates of compensation.

With regard to the design firm, Moyle furnished an invoice, dated May 13, 2011, which billed the protester for services including pre-construction design, engineering, estimating, consulting, and other services. Id. at 17. The invoice was accompanied by a list of tasks which identified services or meetings, the labor categories of employees involved, the number of hours charged for each labor category, and the billing rate for each labor category. For example, for the task “Site Drainage Analysis,” the bill reflected an entry of “10 hours @ \$95.00 = \$950.00” for “design engineer.” Id. at 18. The list did not contain any dates for the services performed and did not identify the specific employees filling any of the positions. The charges were totaled at the end of the list, but were then reduced to \$140,000, because “per agreement with [Moyle], fees [were] to be capped at \$140,000.” Id. at 26. Moyle’s June 17 submission still contained no certification regarding the accuracy of the time expended and the costs incurred.

The agency responded to Moyle’s revised claim by letter dated August 17. In its response, the agency noted that the revised claim still lacked adequate documentation to support the claimed costs, that the claim continued to include unallowable costs for work performed under a cancelled solicitation, and that the claim for costs remained uncertified. Agency Response, Exhibit 5, August 17 Agency Response to Revised Cost Request, at 1. With regard to the design firm expenses, the agency stated that the protester had failed to furnish any evidence that those costs had actually been paid or were required to be paid—without regard to the outcome of the cost claim negotiations. Id. Finally, the letter advised Moyle that its revised, uncertified claim was untimely since it was not submitted within 60 days of receipt of the GAO decision dismissing the protest. Accordingly, the agency denied Moyle’s revised claim in its entirety. Id.

On October 27, 2011, Moyle submitted its claim to our Office, seeking our recommendation that the agency pay Moyle its claimed costs.

DISCUSSION

Moyle contends that it has submitted adequate documentation to support the payment of its proposal preparation costs and the costs of pursuing its protest before GAO, and asks that we determine the amount to which it is entitled.

A recommendation from our Office that an agency reimburse a protester the costs of preparing its proposal, or filing and pursuing its protest, is not a blank check. International Program Group, Inc.—Costs, B-400278.4, B-400308.4, June 22, 2009, 2009 CPD ¶ 128 at 3. A protester seeking to recover the costs of pursuing a protest must submit sufficient evidence to support its claim. Id.; John Peeples—Costs, B-233167.2, Aug. 5, 1991, 91-2 CPD ¶ 125 at 3. At a minimum, claims for reimbursement must identify and support the amounts claimed for each individual expense (including cost data to support the calculation of claimed hourly rates for employees), the purpose for which that expense was incurred, and how the expense relates to the protest filed at our Office. International Program Group, Inc.—Costs, supra;

Maintenance & Repair--Costs, B-251223.4, June 24, 1994, 94-1 CPD ¶ 381; Diverco, Inc.--Costs, B-240639.5, May 21, 1992, 92-1 CPD ¶ 460. Further, the accuracy of the claims must be certified with regard to the time expended and the costs incurred. 4 C.F.R. § 21.8(f)(1).

GAO will recommend the payment of costs only where, prior to coming to our Office, the protester timely pursued a claim to the agency; that is, where the protester filed an adequately documented, certified claim with the agency within 60 days after receiving our recommendation that costs be paid. Al Long Ford--Costs, B-297807.2, Oct. 18, 2007, 2007 CPD ¶ 189 at 3; see 4 C.F.R. § 21.8(f)(1). While we do not believe that the 60-day timeframe should be applied in so harsh a manner that a protester receives no reimbursement merely because its initial, timely claim required some supplementation or elaboration, where the timely submission is of little or no value in supporting the claim, we will consider the claim untimely and regard it as forfeited. Al Long Ford--Costs, *supra*, at 4. We note in this connection that a protester's failure to file an adequately documented claim within the 60-day period may result in forfeiture of its right to recover costs even where the parties have continued to negotiate after the 60-day period expired. H.G. Prop. A, L.P.--Costs, B-277572.8, Sept. 9, 1998, 98-2 CPD ¶ 62 at 2-3.

Here, Moyle's initial, timely submission to the agency was so deficient as to be of essentially no value in supporting its claim. As previously noted, the submission failed to furnish any detail regarding the claimed employee hours or supporting the claimed rates of compensation; in addition, it failed to include any documentation demonstrating the protester's obligation to compensate the design firm. Moreover, even when given the opportunity to supplement its submission to the agency, Moyle's revised submission remained uncertified, continued to include unallowable costs for work performed under a different solicitation, continued to lack supporting documentation for the claimed rates of compensation, and still failed to include sufficient documentation demonstrating the protester's obligation to compensate the design firm.

Because the protester failed to submit a certified, adequately documented claim for costs to the agency, the claim for costs is denied.

Lynn H. Gibson
General Counsel