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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Al Long Ford--Costs

File: B-297807.2

Date: October 18, 2007

Ronald G. Acho, Esq., Cummings McClorey Davis & Acho, PLC, for the protester.
Vera Meza, Esq., U.S. Army Materiel Command, for the agency.
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General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's request for recommendation that it be reimbursed its proposal preparation and protest costs is denied where protester failed to submit an adequately documented claim in a timely manner and failed to make a reasonable attempt to reach an agreement with the agency prior to filing at Government Accountability Office.

DECISION

Al Long Ford (ALF) requests that we recommend that it recover \$477,051.31 from the U.S. Army Tank-automotive and Armaments Command for the costs of preparing the proposal that it submitted in response to request for proposals (RFP) No. W56HZV-05-R-D117 and for the costs of filing and pursuing its successful protest in Al Long Ford, B-297807, Apr. 12, 2006, 2006 CPD ¶ 68.

We deny the request.

In Al Long Ford, we sustained ALF's protest against the rejection of its proposal and the award of a contract for light utility trucks to American Equipment Company. We found that the agency should not have found ALF's delivery schedule high risk and recalculated it to the protester's prejudice without raising the matter with the protester in discussions. Because the agency had proceeded with performance and the trucks were urgently required, we did not recommend that discussions be reopened; instead, we recommended that the protester be reimbursed its proposal preparation costs. We also recommended that the agency reimburse ALF for the costs of filing and pursuing its protest. Our decision advised that, in accordance with our Bid Protest Regulations, 4 C.F.R. § 21.8(f) (2007), ALF needed to submit its

claim for such costs, detailing the time expended and the costs incurred, directly to the agency within 60 days after receipt of our decision.

ALF submitted a claim for a total of \$1,267,069.32 to the agency on May 31. The claim identified six ALF employees and a consultant who had participated in preparation of the proposal and furnished the total number of hours worked, a rate of compensation, and a total cost for each. The claim also identified “other” (i.e., telephone, travel, and printing) expenses incurred by each of the seven named individuals. The claim did not identify the dates on which the hours were worked or the nature of the tasks performed, nor did it include documentation supporting the claimed rates of compensation or establishing ALF’s obligation to compensate the consultant. In addition, the claim was uncertified.

The contracting officer responded to ALF’s claim by letter dated June 7. The letter advised ALF that its claim was inadequately documented and required supplementation. Specifically, the letter instructed ALF to furnish additional data establishing the number of hours worked by its employees on the proposal and protest and their hourly rates of compensation, data supporting its other claimed costs, details of its agreement with the consultant, and documentation detailing the time expended and work performed by the consultant. The letter also advised ALF that it needed to certify its claim.

On July 15, ALF submitted a revised claim certified by its chairman for a total of \$871,311.32. For five of the six ALF employees, ALF furnished schedules that identified, by date and by task, the number of hours spent on various general categories of proposal-related tasks (e.g., researching regulations, preparing specifications, and communicating with suppliers) and on preparation of the protest. For the sixth employee, ALF’s chairman, ALF furnished a schedule, which identified, by date, the total number of hours worked on various proposal preparation and protest-related tasks, but which did not furnish a breakdown of hours among the various tasks. ALF furnished no detail regarding the work performed by its employees (beyond identifying the general category of effort), and it furnished no documentation supporting the claimed rates of compensation.

With regard to the consultant, ALF furnished an invoice, dated July 12, 2006, which billed ALF for 1,090 hours of consulting services at a rate of \$250 per hour. The invoice was accompanied by a schedule similar to those furnished by the ALF employees above—that is, it identified, by date and general task category, the number of hours that the consultant had worked on various proposal preparation and protest-related tasks. The invoice was also accompanied by a letter from the consultant to ALF’s chairman, dated July 11, 2006, which purported to set forth the terms of an oral agreement that had been made between the two parties regarding the consultant’s compensation for services rendered in connection with the subject matter. The letter, which had been signed by ALF’s president (to confirm his agreement with its contents), stated that the parties had agreed that the consultant would receive a commission of 30 percent of the gross profit on any sale to TACOM,

and, in the event a sale was not made, the consultant would be reimbursed at his normal hourly rate of \$250, plus expenses.

After reviewing the revised ALF claim, the contracting officer concluded that it did not contain adequate documentation to support the claimed costs; as a consequence, on July 26, he asked the Defense Contract Audit Agency (DCAA) to perform an audit of the claim. The DCAA auditors questioned the amounts claimed on the grounds that they were inadequately documented. By letter dated November 27, 2006, TACOM notified ALF that it was denying its claim in its entirety. The letter noted that ALF had failed to demonstrate that its claimed rates of compensation for its employees reflected their actual rates of compensation (plus reasonable overhead and fringe benefits), and that it had failed to demonstrate that it had paid (or incurred a liability) for the consultant's time. On August 3, 2007, ALF requested that our Office make a recommendation as to the amount that it should recover from the agency.¹

ALF's request to our Office seeks compensation of \$204,557.31 for the six ALF employees and compensation of \$272,500 for the consultant. The request identifies hourly rates of compensation for the ALF employees that are substantially lower than the rates identified by ALF in its claim to the agency. The claimed rates for five of the six ALF employees are supported by documentation not previously furnished to the agency that demonstrates that they reflect the employees' actual rates of compensation (plus overhead and fringe benefits). For its sixth employee (ALF's chairman), ALF seeks a rate of compensation that greatly exceeds his actual rate of compensation. ALF maintains in this regard that its chairman's time is worth substantially more than his actual rate of compensation due to his involvement in multiple business and community activities.

We decline to recommend that TACOM reimburse ALF for any costs. We will recommend the amount that the agency should pay 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 claim with the agency within 60 days after receiving our recommendation that costs be paid. See 4 C.F.R. § 21.8(f)(1). The 60-day timeframe was specifically designed to avoid the piecemeal presentation of claims (which necessarily results in unduly delaying their resolution), while at the same time affording protesters an ample opportunity to submit adequately substantiated certified claims. REEP, Inc.—Costs, B-290665.2, July 29, 2003, 2003 CPD ¶ 131 at 4. To be considered adequately documented, a claim for

¹ Subsection (f)(2) of 4 C.F.R. § 21.8 provides that if the protester and the contracting agency cannot reach agreement within a reasonable time as to the amount of proposal preparation and/or protest costs that the protester should recover from the agency, our Office may, upon request of the protester, recommend the amount of costs that the agency pay.

reimbursement of employee compensation must include documentation establishing the number of hours worked and the purposes of the employees' efforts; in addition, it must demonstrate that the claimed hourly rates reflect the employees' actual rates of compensation plus reasonable overhead and fringe benefits. See W.S. Spotswood & Sons, Inc.--Claim for Costs, B-236713.3, July 19, 1990, 90-2 CPD ¶ 50 at 3. 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. REEP, Inc.--Costs, *supra*. 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, ALF's initial, timely submission to the agency was so deficient as to be of basically 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 ALF's obligation to compensate the consultant. Moreover, even when given the opportunity to supplement its submission to the agency, ALF never sought to overcome the second deficiency; that is, it never furnished the agency with documentation supporting its claimed rates of employee compensation--and, indeed, ultimately submitted documentation to our Office that clearly demonstrated that the initially claimed rates were substantially overstated.

In addition, we are not persuaded that prior to seeking a recommendation regarding cost recovery from our Office, the protester made a reasonable attempt to reach an agreement with the agency, as contemplated by our Regulations. As noted above, it was not until the protester sought a recommendation from our Office that it for the first time furnished documentation substantiating its claimed rates of employee compensation. By failing to furnish such documentation to the agency, ALF effectively eliminated the possibility of the two parties arriving at an agreement. We do not think that it is appropriate to permit a protester to seek a recommendation regarding cost recovery from our Office where it has not previously made a reasonable effort to reach an agreement with the agency.

Finally, we note with regard to ALF's claim for compensation for its consultant that there is no evidence in the record that ALF in fact paid the consultant during the 1-year period that elapsed between its receipt of the consultant's invoice and its filing with our Office. The fact that no payment has been made thus far leads us to question whether ALF is in fact obligated to compensate the consultant regardless of whether it recovers the consultant's costs from the government. We note in this connection that only if there is evidence of a non-contingent obligation by a protester to repay a subcontractor for its proposal preparation expenses will we

regard them as recoverable. See Boines Constr. & Equip. Co., Inc.--Costs, B-279575.4, Apr. 5, 2000, 2000 CPD ¶ 56 at 5.

The request is denied.

Gary L. Kepplinger
General Counsel