



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Federal Builders, LLC-The James R. Belk Trust--Costs

File: B-409952.3

Date: May 6, 2016

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Marilyn M. Paik, Esq., General Services Administration, for the agency.
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DIGEST

1. GAO recommends reimbursement of the costs of proposal preparation where, although the protest was sustained, there was no remedy available to the protester, including any further use of its proposal.
 2. GAO recommends reimbursement of the costs of filing and pursuing the supplemental protest--which asserted the claim on which the protest was sustained--as well as all subsequent attorneys' fees.
 3. GAO recommends that the protester be reimbursed the cost of pursuing its claim with GAO, where the agency had all of the information necessary to make an offer of settlement after the protester's initial claim but failed to do so until 10 months later, after the protester had filed its claim with the GAO.
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DECISION

Federal Builders, LLC-The James R. Belk Trust (Federal Builders), of Castle Rock, Colorado, requests that this Office recommend reimbursement of the costs Federal Builders incurred in preparing its proposal, and filing and successfully pursuing its protest, with respect to request for lease proposals (RLP) No. 3AZ0168, issued by the General Services Administration (GSA) on behalf of the Department of the Interior, Bureau of Land Management (BLM), for leased office and warehouse space, and pursuing this claim for reimbursement.

We grant Federal Builder's claim in part and deny it in part.

BACKGROUND

The RLP sought proposals for the lease of between 12,500 and 12,580 American National Standards Institute/Building Owners and Managers Association (ANSI/BOMA) Office Area (ABOA) square feet (SF) of contiguous space--a minimum of 9,100 ABOA SF of office and 3,400 ABOA SF of warehouse space--and 40,000 SF of attached wareyard space, as well as parking, in Lake Havasu City, Arizona. RLP § 1.02. Federal Builders was the incumbent lessor under a lease which expired on August 19, 2014. Agency Report (AR), Tab 3, BLM Supplemental Lease Agreement. The RLP specified a term of up to 20 years. RLP § 1.02. Award was to be made to the responsible offeror with the lowest-priced, technically acceptable offer. RLP § 4.03. The RLP provided that Davis-Bacon Act wage rates would apply “to all work (including shell and [tenant improvements] performed prior to the Government’s acceptance of the space as substantially complete,” if “the lessor proposes to satisfy the requirements of this lease through the construction of a new Building or the complete rehabilitation or reconstruction of an existing Building, and the Government will be the sole or predominant tenant.” RLP § 3.01 (applying Federal Acquisition Regulation clause 52.222-6, Davis-Bacon Act, to the defined work).

The government received two proposals, from Presidio Bay and Federal Builders, in response to the RLP. AR, Tab 46, Abstract of Offers. While the protester proposed the building currently occupied by BLM, Presidio Bay proposed a building in Lake Havasu City that included approximately 7,000 SF, but which Presidio Bay indicated would be expanded to meet the RLP requirements.

The agency evaluated both proposals as technically acceptable. GSA calculated the present value (PV) of Federal Builders’ proposed lease rate as \$19.95 per ABOA SF, or slightly more than the PV of Presidio’s lease rate of \$19.82 per ABOA SF. AR at 8 n.35 (noting the corrected calculation of Federal Builders’ lease PV); AR, Tab 34, PV Analysis, Presidio Bay, at 1. Accordingly, award was made to Presidio Bay as the firm offering the lowest-priced, technically acceptable proposal.

Federal Builders then protested the award to GAO, asserting that the agency’s evaluation of technical and price proposals was unreasonable, that the discussions were not meaningful, and that the agency engaged in disparate treatment of the offerors. See Protest, June 18, 2014. In its July 28 combined comments on the agency report and supplemental protest, the protester further alleged that the awardee failed to satisfy a material term of the RLP when it did not commit to paying Davis-Bacon wage rates with respect to the proposed expansion of its existing facility. See Comments on AR, July 28, 2014 at 10-11. Record development continued for nearly a month, into late August.

On September 26, we sustained the protest allegation that the agency had unreasonably found that the awardee had committed to pay Davis-Bacon wage

rates for the work that would be required to bring the awardee's proposed facility into conformance with the requirements of the solicitation. Federal Builders, LLC- The James R. Belk Trust, B-409952, B-409952.2, Sept. 26, 2014, 2014 CPD ¶ 285. We noted, however, that the lease, which had been awarded and signed by the agency and awardee, did not contain a termination for convenience clause, and that in the absence of a termination for convenience clause we ordinarily do not recommend termination of an awarded lease, even if we sustain the protest and find the award improper. Id. at 7. As a result, we did not see any basis to recommend lease termination, and, consequently, we recommended that the protester be reimbursed its proposal preparation costs, as well as the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester was required to submit its certified claim for such costs, detailing the time expended and costs incurred, directly with the agency within 60 days of receiving our decision. 4 C.F.R. § 21.8(f)(1).

DISCUSSION

The protester requests reimbursement of its proposal preparation costs, all of its protest-related legal fees, and the fees incurred in filing this claim for costs with GAO. The agency has agreed to reimburse the protester reasonable proposal preparation costs and the fees associated with the one meritorious challenge to the agency's technical evaluation on which the protest was sustained, but disputes the request to reimburse the protester for the legal fees associated with pursuing this claim for reimbursement. We consider each of these elements of the claim, in turn, below.¹

Proposal Preparation Costs

The protester seeks to recover \$48,851.68 as the reasonable costs of preparing its proposal. Claim at 2. Where our Office sustains a protest, we may recommend that the protester be reimbursed its costs of filing and pursuing a protest and preparing a proposal. 4 C.F.R. § 21.8(d). Although we normally do not recommend reimbursement of proposal preparation costs where a protester has a further opportunity for award, we may recommend reimbursement where, for instance, changed circumstances render no longer relevant a proposal that was previously submitted. See COBRO Corp., B-287578.2, Oct. 15, 2001, 2001 CPD ¶ 181 at 8-9. Here, because the awarded lease contains no termination clause, there is no relief available to the protester except reimbursement of its costs. In these circumstances, we recommend the reimbursement of the reasonable costs of

¹ The protester also requests reimbursement of \$7,746.92 for the "costs of filing and pursuing the protest (e.g., time spent by Federal Builders' Manager in assisting outside counsel in preparing and pursuing the protest)". Claim at 2. The agency has agreed to that request for reimbursement. Agency Reply at 3, n.2.

preparing the protester's proposal. The agency has offered to reimburse the protester \$47,242.00, the amount requested by the protester, less reimbursement for certain disputed travel expenditures. Agency Reply at 14.

Specifically, GSA contends that the attendance of the wife of Federal Builders' principal at the market survey--the initial meeting at the current leased facility between the agency and the protester--was unnecessary, and the agency thus requests that we not grant the protester's request that we recommend reimbursement of Federal Builders for her expenses. Agency Reply at 3-4. The agency notes in this regard that the wife is not an employee of Federal Builders and that the protester claims no reimbursement for her time. See Claim, Exh. 5, Letter from Agency to Federal Builders, Feb. 2, 2015 at 2. The protester asserts that the disputed amount of reimbursement, \$1,609.48, is reasonable, given that the protester is not asking for the reimbursement for the expenses incurred by the attendance of other Federal Builders employees at the market survey meeting, and that the principal's wife performed valuable services of notetaking. Protester's Comments, Sept. 18 at 8.

We agree with the agency that the protester has not shown that the wife's expenses are reimbursable. The manager's wife was not an employee of the firm, and the protester has sought no reimbursement for her time spent as a note taker, thus calling into question whether her presence at the meeting was a reasonable business expense. Further, the fact that the protester has not requested reimbursement of the expenses incurred by other individuals at the meeting in no way alters the fact that the protester has not shown that the wife's expenses were reimbursable. We therefore recommend that the agency reimburse the protester proposal preparation costs of \$47,242.00, that is the level of reimbursement agreed to by the agency, and the amount requested by the protester less reimbursement for expenses related to the manager's wife's attendance at the market survey meeting.

Attorneys' Fees Associated with Pursuing the Protest at GAO

The protester also requests reimbursement of all of its attorneys' fees in this matter, totaling \$231,796.64. The agency responds that the protester should be reimbursed only for the costs of pursuing the one issue on which we sustained the protest, the agency's unreasonable conclusion that the awardee had committed to meeting the solicitation requirement that it pay Davis-Bacon wage rates for expansion of its proposed facility. Agency Reply at 4-14.

We recommend that the protester be reimbursed the cost of filing its comments on the agency report and supplemental protest, as well as all subsequent attorneys' fees incurred. The allegation that the agency unreasonably concluded that the awardee had committed to paying Davis-Bacon wage rates--the issue on which the protest was sustained--was contained in the combined comments and supplemental

protest; rather than take timely corrective action, the agency continued to defend its evaluation, causing the protester to incur unnecessary attorneys' fees.

According to protest counsel's invoices to Federal Builders, the protester incurred legal fees of \$177,252.50 after the filing of the agency report. See Claim, Exh. 2. We therefore recommend that Federal Builders be reimbursed \$177,252.50--the cost of filing the supplemental protest containing the allegation on which the protest was sustained, as well as all of the fees incurred as a result of the agency's decision to continue the litigation rather than take corrective action. In addition, the agency has agreed that the protester is entitled to reimbursement for fees related to compliance with and admission to the protective order, and with filing a successful opposition to the agency's request for dismissal of the protest. See Agency Comments, Sept. 24 at 5, 7. The agency calculates the fees related to the protective order at \$709.60 and the protester does not dispute that calculation. See id. at 7-8. A review of invoices for June and July indicates that protest counsel billed the protester \$4,960 in fees to respond to the agency's unsuccessful motion for partial dismissal. In these circumstances, we recommend that Federal Builders be reimbursed a total of \$182,922.10 in attorneys' fees for filing and pursuing its protest at this Office.

Costs Associated with Pursuing the Claim

Pursuant to our Bid Protest Regulations, we may recommend that a contracting agency pay a protester the costs of pursuing its claim for reimbursement with our Office. 4 C.F.R. § 21.8(f)(2). This provision is intended to encourage the agency's expeditious and reasonable consideration of a protester's claim for costs. JAFIT Enters., Inc.--Claim for Costs, B-266326.2, B-266327.2, Mar. 31, 1997, 97-1 CPD ¶ 125 at 4. However, we will recommend payment of such costs only if it is shown that the agency failed to consider, or unreasonably delayed consideration of, the protester's claim. Blue Rock Structures, Inc.--Costs, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190 at 6.

Here, the protester submitted its claim for costs to the agency on November 6, 2014; that claim included, in part, the following: line item entries for all time spent and expenses incurred by Federal Builders and its consultants in preparing and pursuing its protest; detailed monthly invoices for outside counsel, Jones Day, that identified by attorney the time spent working on the protest; support for the reasonableness of Jones Day's hourly rates;² and line item entries for all time spent by Federal Builders in pursuit of the protest. Claim, Nov. 6, 2014, Exh. 2.

² Because Federal Builders is a small business, the Competition in Contracting Act does not cap the hourly reimbursement of its attorneys' fees incurred in pursuit of its GAO protest. 31 U.S.C. § 3554(c). GSA has not contested the hourly rates claimed by Jones Day.

On the principal issue of the reasonable amount of attorneys' fees to reimburse, the agency had all of the information necessary to make an offer of settlement to Federal Builders at the time the protester first submitted its certified claim to the agency, but the agency instead waited 10 months before making its offer. This delay is attributable to the agency. Further, the agency's initial offer of settlement of the legal fees portion of the claim that immediately preceded the protester's submission of its claim to this office was only \$4,000. Claim, Nov. 6, 2014, Exh. 14, Letter from Agency to Federal Builders, July 24, 2015 at 7. That offer was less than two percent of the amount that the protester had requested, and was considerably less than the amount (\$39,104.53) to which the agency itself agreed in the course of the subsequent negotiations to settle this claim. See Agency Comments, Sept. 24, 2015, at 10 (agreeing to reimburse protester \$39,104.53 for attorneys' fees for filing and pursuing the protest and supplemental protest).

In our view, the lengthy delay in the agency's initial offer of settlement of the legal fees and the disparity between the offer and what the agency later agreed should be reimbursed support the reasonableness of the protester's request for reimbursement of the attorneys' fees required to pursue the claim with this Office. We therefore recommend that the agency reimburse Federal Builders \$21,577.50 for the costs of pursuing its claim with GAO. See Email from Federal Builders to GAO, Oct. 26, 2015 (containing invoices for August and September); Email from Federal Builders to GAO, Nov. 9, 2015 (containing October invoice).

Conclusion

In sum, we recommend that the agency reimburse Federal Builders a total of \$259,488.52, including proposal preparation costs of \$47,242.00, \$182,922.10 in attorneys' fees for filing and pursuing the protest, \$7,746.92 for the time spent by Federal Builders' manager in assisting counsel in preparing and pursuing the protest, and \$21,577.50 for the costs of pursuing its claim for reimbursement.

Federal Builders' claim is granted in part and denied in part.

Susan A. Poling
General Counsel