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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Eastern Forestry & Tree Service, Inc. -- Costs

File: B-411848.3

Date: July 20, 2017

Donna Harter for the requester.

Evan C. Williams, Esq., Department of the Army, for the agency.

Frank Maguire, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for a recommendation of reimbursement of protest costs is denied in substantial part where the claim is excessive overall, suffers from a pervasive lack of contemporaneous documentation, and is based on documentation that does not clearly establish the amount and nature of the costs that the requester claims.

DECISION

Eastern Forestry and Tree Service, Inc. (Eastern Forestry), of Spring Grove, Virginia, requests that our Office recommend that the Department of the Army reimburse it in the amount of \$49,097.48 for the costs of filing and pursuing its protest in Eastern Forestry & Tree Service, Inc., B-411848, Nov. 9, 2015, 2015 CPD ¶ 348. Agency Report (AR), exh. 5, Third Claim,¹ Jan. 7-8, 2016.

We deny the claim in part and dismiss it in part.

BACKGROUND

In its protest, filed on July 31, 2015, Eastern Forestry asserted that the solicitation (IFB No. W91QF5-15-B-0007) for landscaping services at Ft. Lee, Virginia, did not provide sufficient time to respond to a late amendment and did not effectively communicate with bidders regarding the time for submission of bids. On

¹ As set forth below, this decision addresses Eastern Forestry's third claim for costs filed with the Army, supplementing and superseding its first and second claims.

November 9, 2015, we sustained the protest, finding that the Army did not provide sufficient time for submission of bids after a substantive amendment of the solicitation. We recommended, among other things, that the protester be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester was directed to submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of the decision. 4 C.F.R. § 21.8(f)(1).

On December 14, 2015, Eastern Forestry submitted to the Army a certified claim for \$80,461. AR, exh. 1, First Claim. Contrary to our explicit direction noted above, however, this claim included only a statement of the dollar amount of the claim, with no detailing and certification of the time expended and costs incurred.

On December 22, 2015, the CO denied the initial claim, finding:

Eastern Forestry's certified claim simply requests a lump sum amount without an explanation of the costs incurred by whom and for what tasks, the applicable rates or any supporting documentation. Your initial submission contains insufficient detail for the Army to adequately access the reasonableness of the claimed costs.

AR, exh. 2, First Claim Denial, at 1-2. The CO instructed Eastern Forestry to submit a revised claim. Id.

On December 26, 2015, Eastern Forestry submitted revisions to its claim, resulting in an increased total of \$86,559.50. AR, exh. 3, Second Claim. This revised claim included a spreadsheet with three columns: Date, Description, and Hours. AR exh. 3A. The dates ranged from July 29, 2015, to December 24, 2015. The work descriptions were general and did not describe the specific work done or the particular personnel involved. For example, the descriptions included "Worked on Protest," "Eastern Forestry Response to Agency," "Response to Agency Motion to Dismiss," "Preparing Certified Claims," and "Claims Review and Submittal." Id. The spreadsheet set forth total amounts for attorney costs, administrative costs, Contract Consultant/Manager costs, and President and Project Manager (PM) costs. Id. An attachment, AR exh. 3B, included information from the website Salary.com regarding "median annual Program Manager salary" in the Petersburg, VA, area and information from the website PayScale.com regarding the "average salary" of a contracts manager and a company president.

The CO responded on December 30, 2015, denying the revised claim. AR, exh. 4, Second Claim Denial. The CO asserted that the revised claim was "not properly certified as required" and lacked "adequate specificity and data to assess and support the reasonableness of the claimed costs." Id. at 1-2. The CO also pointed to certain "unclear" issues in Eastern Forestry's cost claim, including:

The number of individuals involved in the pursuit of the protest, how *each* individuals' [sic] work performed relate to the protest, actual costs associated with hourly rates and fees of individuals involved, and what work was actually accomplished during the claimed hours of work.

Second Claim Denial at 2 (emphasis in original).

The CO noted that Eastern Forestry's claimed salaries were based on market rates, but should have been based on actual rates of compensation, plus reasonable overhead and fringe benefits. Id., citing John Peebles—Claim for Costs, B-233167.2, Apr. 5, 1991, 91-2 CPD ¶ 125 at 3. He requested that Eastern Forestry "provide a certified claim with further detail, data and/or proof" regarding, inter alia, individuals that contributed to the pursuit of the protest, actual cost of hourly wage/compensation for each individual, actual administrative costs, and attorney costs. Id. In addition, the CO advised that the Army would deny Eastern Forestry's claim for 49 hours spent pursuing its claim before the contracting agency. Id.

On January 7 and 8, 2016, Eastern Forestry submitted its third claim, consisting of an undated "Employment Agreement" with the Eastern Forestry contract consultant, employee "pay stubs" for the Eastern Forestry President and Vice President for November – December, 2016,² a "Wage Statements" document setting forth weekly hours and wages for the President and Vice President, and a revised costs spreadsheet. AR, exh. 5, Third Claim. This revised claim was for a total of \$49,097.48. The revised claim was not certified.

The CO found that this revised claim, except for amounts totaling \$850, was not payable for various reasons, including that the claimed amounts were not certified, were not adequately documented, were based on mathematical errors, were based on "after-the-fact" approximations, were not incurred for purposes of pursuing the protest, were incurred on days when protest activities were not required, and/or the amounts lacked substantiating documentation. AR, exh. 6, CO Final Decision, March 17, 2016, at 2-8.

Eastern Forestry subsequently requested that our Office recommend that the Army reimburse it for its claim.

² The CO would ultimately find that all of these pay stubs, with the exception of two (pay week of November 6-12, 2015), were "irrelevant because they cover periods after the protest was resolved." CO Final Decision at 9.

DISCUSSION

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. The amount claimed may be recovered only to the extent that the claim is adequately documented and is shown to be reasonable; a claim is reasonable if, in its nature and amount, the costs do not exceed those that would be incurred by a prudent person in pursuit of a protest. Galen Med. Assocs., Inc.--Costs, B-288661.6, July 22, 2002, 2002 CPD ¶ 114 at 2.

Further, a protester seeking to recover the costs of pursuing its protest must submit sufficient documentation to support its monetary claim. John Peeples--Claim for Costs, B-233167.2, supra, at 3. Although we have recognized that the requirement for such documentation may sometimes entail certain practical difficulties, we do not consider it unreasonable to require a protester to document in some detail the amount and purposes of activities associated with the claimed effort and establish that the claimed hourly rates reflect the concerned individuals' actual rates of compensation. Ervin & Assocs.--Costs, B-278850.2, Aug. 1, 1999, 99-2 CPD ¶ 23 at 4. Ultimately, the burden is on the protester to submit sufficient evidence to support its claim; that burden is not met by general, inadequately-supported statements that particular costs have been incurred. Premiums & Specialties, Inc. – Costs, B-410247.2, June 5, 2015, 2015 CPD ¶ 175 at 3.

In its revised claim, Eastern Forestry asks to be reimbursed for 307.5 hours of work on the part of three individuals to pursue the earlier protest. Specifically, Eastern Forestry seeks reimbursement for 115.5 hours of work by Eastern Forestry's President (at \$200 or \$175 per hour), 77 hours of work by its Program Manager (at \$150 per hour), and 115 hours of work by its Contract Consultant/Manager (at \$80 per hour). Eastern Forestry also requests reimbursement of \$2,650 in attorney's fees. The CO, in his final decision, determined that Eastern Forestry's claim was sufficient to support the reimbursement of \$850 in protest costs. CO Final Decision at 8. We see no basis to disagree with the CO's conclusion about the adequacy of the claim to support the reimbursement of this \$850 in costs, and we will not consider these costs further.

Turning to the remaining portion of the claim, i.e., Eastern Forestry's request for an additional \$48,197.98, we see no basis to recommend reimbursement of any portion of the remaining claim. Our rationale is set forth below.

Initially, we note that the claim for 307.5 hours of work appears to be excessive. As the CO notes, this amount was incurred "to produce 10 pages of pleadings on a protest that involved a single legal issue." CO Final Decision at 6. As a result, the CO concluded that these hours and charges were "excessive on their face."

Further, as discussed below, Eastern Forestry's claim suffers throughout from a near total lack of contemporaneous documentation, and the subsequently produced documentation upon which Eastern Forestry relies does not clearly establish the amount and nature of the expenses that Eastern Forestry claims. See CO Final Decision at 5-6.

Regarding the amounts claimed for the requester's Contract Consultant/Manager, for example, the CO points out that "the only document that Eastern Forestry has provided to substantiate this cost is an undated 'Employment Agreement' which lacks any indicia of corporate reliability (corporate letterhead, seal, notary, etc.)."
CO Final Decision at 5. The CO also points out that, although the employment agreement sets the rate for the Contract Consultant at \$120 per hour, the spreadsheet submitted by Eastern Forestry is inconsistent with the employment agreement and identifies a rate of \$80 per hour, without explanation. Id. The CO asserts that the absence of any explanation for this disparity "makes it impossible for the agency to determine whether that rate is, in fact, reasonable." Id. The CO also points out that Eastern Forestry has not provided evidence that it "actually incurred any costs [attributable] to the Contract Manager" and notes that the employment agreement provides for payment "on completion of project," raising questions about Eastern Forestry's obligation to make such payments. Id.

Due to the absence of substantiating documentation, the CO excluded, in its entirety, any reimbursement for work performed by the Contract Consultant/Manager, a determination that we find to be reasonable. Here, as supporting documentation, Eastern Forestry provided only an undated "Employment Agreement," AR, exh 5, at 4, setting wages at \$120 per hour, patently inconsistent with Eastern Forestry's claim, which sets wages for the Contract Consultant/Manager at \$80 per hour. Revised Costs Spreadsheet. This ambiguous, undocumented claim plainly does not satisfy our requirements for reimbursement, set forth above.³

The CO also excluded, in substantial part, "all reimbursement for the President and Vice President/Program Manager," to the extent it had not "been substantiated by pay stubs, pay roll records or other documentation." CO Final Decision at 5. The CO concluded that hourly rates for these officers, contained in pay stubs (AR exh. 5

³ Many of these amounts found not reimbursable for lack of adequate documentation were also found not reimbursable under the CO's work-specific analysis, for reasons including math errors, absence of protest-related activities, and hours "worked" on days when protest activities were not required. CO Final Decision at 2-5. Since we find the CO's documentation analysis reasonable here, we need not address these additional reasons for denying this claim, all of which appear to be reasonable.

at 5-17) were not reliable and, instead, based his reimbursement decision on the “corporate salaries,” set forth in the Wage Statements document. Id. at 6; see AR, exh. 5, at 3. Further, the CO concluded that all of the pay stubs, with the exception of two (pay week of November 6-12, 2015) were “irrelevant because they cover periods after the protest was resolved.” Id. Based on this analysis, the CO concluded that the Army would only pay costs that had been “substantiated for the pay period of November 6, 2015 through November 12, 2015,” incurred on November 9, 2015. Id.

Eastern Forestry responds that it complied with all requests for documentation from the agency and asserts that it is an “S-Corp” which sometimes makes payments as “distributions” to its owners, rather than through payroll. Response to CO’s Final Decision at 3. While we recognize the dilemma faced by small entities, which may not have the extensive financial record-keeping system common to larger companies, we cannot exempt any entity from the requirement that claims to be paid with taxpayer money be supported by adequate documentary proof. Ervin & Assocs.--Costs, supra. (a protester must “document in some detail the amount and purposes of activities associated with the claimed effort and establish that the claimed hourly rates reflect the concerned individuals’ actual rates of compensation.”). Here, Eastern Forestry has not carried its burden of submitting sufficient evidence to support a large part of its claim.

Finally, Eastern Forestry claims \$3,770 for hiring an attorney on November 18, 2015, and for the attorney’s related costs. Costs Spreadsheet, Row 25; see AR, exh. 7, Response to CO Final Decision, at 1. The CO, however, points out that the attorney was retained after we issued our protest decision on November 9, 2015. CO Final Decision at 3. As a result, the CO maintains that these costs are not reimbursable, “because they were not incurred for the purpose of pursuing the protest,” id. at 3, which had already been completed.⁴ Eastern Forestry’s assertion that its attorney was to assist with the protest, Response to CO Final Decision at 1, is not supported by the record, since the attorney was hired nine days after resolution of the protest. See Response to CO Final Decision at 2. We find the CO’s disallowance of the \$3,770 claim to be reasonable here.

⁴ Although Eastern Forestry asserts that its attorney was “contacted” prior to the issuance of our protest decision, it offers no contemporaneous documentation whatsoever that any of these costs were incurred in pursuing the protest. See Response to CO Final Decision at 1. We also note that a November 18 letter from the law firm, AR exh. 5B, indicates that that firm was being retained “in an effort to collect monies owed to [Eastern Forestry] by the Department of the Army,” reflecting pursuit of a cost claim at the agency. While we can recommend reimbursement of costs of pursuing claims at our Office, we have no basis to recommend reimbursement for pursuing claims at the agency level. See, e.g., Celadon Laboratories, Inc.--Costs, B-298533.2, Nov. 7, 2008, 2008 CPD ¶ 208 at 8.

Accordingly, the request for a recommendation that Eastern Forestry be reimbursed \$48,197.98 in protest costs is denied. As set forth above, we dismiss the portion of the request related to the remaining \$850 in costs as there is no dispute between Eastern Forestry and the Army on this issue.

The request is denied in part, and dismissed in part.

Susan A. Poling
General Counsel