



Decision

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Matter of: GOV Services, Inc.--Costs

File: B-414226.3

Date: February 26, 2018

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Erin V. Podolny, Esq., Department of Health and Human Services, for the agency.

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DIGEST

1. Request for recommendation that agency reimburse a greater portion of protester's costs than the agency has agreed to pay is denied in part where protester seeks costs that were not included in our Office's earlier-issued costs recommendation and where the protester seeks protest costs that were not timely submitted to the agency.

2. Request for recommendation that agency reimburse a greater portion of protester's costs than the agency has agreed to pay is granted in part where the protester reasonably demonstrates the portion of disputed costs that can be allocated to allowable costs.

DECISION

GOV Services, Inc., a small business of Falls Church, Virginia, requests that we recommend reimbursement, in the amount of \$12,863.75,¹ for its protest costs incurred in its challenge to the issuance of purchase order No. HHSN263201700048P. The purchase order was issued to Akima Support Operations (ASO), an Alaska Native Corporation of Anchorage, Alaska, by the Department of Health and Human Services, National Institutes of Health (NIH), for janitorial services at NIH campuses in Maryland. Following our Office's earlier decision recommending the payment of the costs of pursuing the protest, GOV Services submitted a certified claim for such costs.

¹ GOV Services' total certified claim amounts to \$29,176.25. Because NIH has agreed to pay \$16,312.50 of this claim, our decision addresses only the remainder, i.e., the disputed portion of the protester's certified claim.

We grant the request in part and deny it in part.

BACKGROUND

This request for a recommendation on the amount of protest costs to be reimbursed is the latest in a series of challenges brought by several protesters to the actions taken by NIH relating to the award of various contracts for janitorial services at NIH campuses in Maryland.

On February 2, 2015, NIH awarded contract No. HHSN263201500012I for janitorial services to East West, Inc., a firm that is not a party to this protest.² The procurement was conducted under the Small Business Administration's (SBA) section 8(a) program. On September 29, 2016, while East West was performing the janitorial services, the agency awarded contract No. HHSN263201700002I to ASO for the requirement. Following a protest filed by East West, which our Office docketed as B-412719.5, the agency announced it would take corrective action and that it would suspend or terminate the award to ASO until it had implemented the corrective action. We subsequently dismissed East West's protest as academic.

On November 25, before NIH's corrective action had been completed, GOV Services filed its own protest of the award of contract HHSN263201700002I, which our Office docketed as B-412719.6. In a December 16 filing made during that protest, NIH announced that it had issued an "emergency" sole-source purchase order, purchase order No. HHSN263201700048P, on November 25, 2016, to ASO for the janitorial services.³

On December 20, GOV Services filed a timely supplemental protest in the B-412719.6 proceeding, challenging the issuance of the purchase order to ASO. Because the supplemental protest challenged a purchase order issued by NIH under a different contract vehicle, our Office considered the supplemental protest to be a distinct and new protest and therefore docketed it as B-414226.1.

On December 21, our Office dismissed the B-412719.6 protest as premature since NIH had not yet implemented its promised corrective action with respect to the HHSN263201700002I contract. See GOV Servs., Inc., B-412719.6, supra. Our

² The facts included in this background section are summarized from our Office's decisions in two prior protest proceedings: GOV Servs., Inc.--Costs, B-414226.2, June 26, 2017, 2017 CPD ¶ 197 and GOV Servs., Inc., B-412719.6, Dec. 21, 2016 (unpublished decision).

³ Our Office subsequently found that the record supported the protester's contention that the agency had deliberately created this "emergency." GOV Servs., Inc.--Costs, supra, at 11. Additionally, our decision noted that the purchase order in question was dated November 23, 2016. Id. at 12.

decision found that GOV Services' protest "anticipates improper action that has not yet taken place." Id. at 2.

The B-414226.1 protest proceeded forward, with the agency submitting an agency report on January 23, 2017, and the protester providing comments on February 2. On February 10, NIH advised our Office and the protester that it had "identified an error in the procurement process," namely that its justification and approval "was not executed in full accordance with [Federal Acquisition Regulation] Part 6." GOV Servs., Inc.--Costs, supra, at 8. Accordingly, NIH stated that it would terminate the purchase order awarded to ASO on or about February 15, 2017, and award a new sole-source contract to ASO under the SBA's section 8(a) program.

On February 21, based upon the agency's notice of corrective action, we dismissed the B-414226.1 protest as academic. See GOV Servs., Inc., B-414226.1, Feb. 21, 2017 (unpublished decision). On March 2, GOV Services filed a request for a recommendation that it be reimbursed its costs incurred in the B-414226.1 bid protest in the amount of \$28,985. GOV Services subsequently clarified that it intended this request to be treated as a request for a recommendation on the reimbursement of protest costs pursuant to 4 C.F.R. § 21.8(e). March 7, 2017 Email from Protester's Counsel.

On June 26, our Office granted GOV Services' request. Specifically, we recommended that GOV Services be "reimbursed its reasonable costs incurred with respect to all issues pursued in the protest filed on December 20 (B-414226)." GOV Servs., Inc.--Costs, supra, at 13. We therefore instructed GOV Services to file its certified claim for costs pursuant to 4 C.F.R. § 21.8(f)(1) with the agency within 60 days. Id.

On July 18, GOV Services submitted a certified claim to NIH for protest costs in the amount of \$28,985. See July 18, 2017 Certified Claim at 1.⁴ These costs included attorneys' fees from the B-412719.6, B-414226.1, and B-414374 protests.⁵ See id. at 4-10. Following correspondence with the agency, the protester submitted a revised certified claim on September 20 for \$28,737.50. See September 20, 2017 Certified Claim at 5. The September 20 claim included further support for the claimed costs, and also removed those costs arising from the B-414374 protest. See id. at 3-5.

⁴ Page number citations to the July 18, September 20, and November 2 certified claims refer to the copies of these claims provided by the agency to our Office on January 3, 2018.

⁵ The B-414374 protest was filed by GOV Services on February 15, 2017, challenging the second sole-source award to ASO. Our Office denied the protester's challenge to this award on May 11. See GOV Servs., Inc., B-414374, May 11, 2017, 2017 CPD ¶ 143.

Following further correspondence, GOV Services submitted a revised certified claim to the agency on November 2, in the amount of \$30,290. See November 2, 2017 Certified Claim at 3. This total was calculated by excluding certain fees and by adding in fees from invoice No. 16901, an invoice paid by the protester for attorneys' fees incurred in March 2017. On November 24, NIH issued a final decision pursuant to 4 C.F.R. § 21.8(f)(2), agreeing to pay \$16,312.50 of the certified claim, but not agreeing to pay \$13,977.50. See NIH Final Decision on Costs.

On December 7, GOV Services filed the instant request with our Office on the amount of protest costs to be reimbursed, attaching a certified claim seeking reimbursement of \$29,176.25 in protest costs. This total includes the \$16,312.50 agreed to by the agency, plus a disputed amount of \$12,863.75.

DISCUSSION

GOV Services requests a recommendation that NIH pay the protester \$12,863.75 in disputed attorneys' fees incurred in pursuit of its protest challenging the agency's sole source award to ASO in November 2016. As an initial matter, the agency objects to paying the legal fees incurred by the protester in the B-412719.6 protest, which challenged NIH's proposed award of contract No. HHSN263201700002I to ASO. The agency argues that this protest was separate and distinct from the B-414226.1 protest, which challenged the agency's award of purchase order No. HHSN263201700048P. The agency additionally objects to paying an invoice that was submitted to NIH after the 60-day deadline for the protester to submit its certified claim. Lastly, the agency objects to paying certain costs, where the line item descriptions for such costs include redactions or include attorney time spent in connection with the B-412719.6 protest.

Our Bid Protest Regulations require a protester to file its claim for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days after receipt of GAO's recommendation that the agency pay the protester its costs. 4 C.F.R. § 21.8(f)(1). If the agency and the protester cannot reach agreement on such costs within a reasonable time, GAO may, upon request of the protester, recommend the amount of costs the agency should pay in accordance with 31 U.S.C. § 3554(c). Id. A protester seeking to recover its protest costs must submit evidence sufficient to support its claim that those costs were incurred, and are properly attributable to, filing and pursuing the protest. BAE Tech. Servs. Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3.

As an initial matter, NIH objects to the inclusion of the costs of pursuing the B-412719.6 protest in GOV Services' certified claim. The protester responds to this objection by arguing that, although the B-412719.6 and the B-414226.1 protests challenged different awards, the two protests were inextricably intertwined. In this regard, GOV Services asserts that the only reason it initially challenged the award of contract No. HHSN263201700002I, rather than purchase order No. HHSN263201700048P, was that the agency did not publicly announce its award of the purchase order. The protester

further points out that it would not have learned of the award of the purchase order, at all, had it not filed the B-412719.6 protest.

Because we find GOV Services' request for a recommendation on the costs of pursuing the B-412719.6 protest to be essentially an untimely request for reconsideration, we do not recommend the reimbursement of these costs. Our Bid Protest Regulations require a request for reconsideration to be filed not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. 4 C.F.R. § 21.14(b). Here, GOV Services filed a request with our Office on March 2, 2017, in which it requested a recommendation for the reimbursement of protest costs, including the costs incurred in connection with the B-412719.6 protest. See March 30, 2017 Resp. to Agency's Opp'n to the Award of Attorneys' fees, B-414226.2, at 1.

Our June 26 cost-recommendation decision, however, did not include a specific recommendation on the reimbursement of costs relating to the B-412719.6 protest. See generally, GOV Servs., Inc.--Costs, supra. Instead, our decision recommended reimbursement of "the reasonable costs incurred with respect to all issues pursued in the protest filed on December 20 (B-414226)." Id. at 13.⁶

Despite the fact that our decision did not recommend reimbursement for the costs of pursuing the B-412719.6 protest, GOV Services now requests that we recommend the reimbursement of these costs. We find this request, which was submitted more than four months after our June 26 cost-recommendation decision, to be an untimely request for reconsideration. See 4 C.F.R. § 21.14(b).

NIH additionally objects to paying an invoice (invoice No. 16901) for \$2,047.50 in attorneys' fees incurred by the protester in March 2017. In this regard, the agency notes that GOV Services did not submit this invoice until November 2, i.e., more than four months after our June 26 decision recommending the reimbursement of GOV Services' protest costs. The protester responds to this objection by noting that our Bid Protest Regulations do not mandate the rejection of these costs, and by pointing out that the late submission did not prejudice the agency.

In requiring that a claim for protest costs be submitted to the agency within 60 days of receipt of GAO's recommendation on the reimbursement of protest costs, our Regulations warn that "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). Although we have indicated that an untimely claim may be considered where good cause is shown, we have construed that term to mean that some compelling reason beyond the control of

⁶ While, as noted above, the December 20 protest was initially submitted as a supplemental protest in the B-412719.6 proceeding, our Office considered it to be a distinct and new protest and docketed it as B-414226.1. See GOV Servs., Inc.--Costs, supra, at 4 n.9.

the protester prevented it from timely filing the claim. SWR, Inc.--Protest & Costs, B-294266.2 et al., Apr. 22, 2005, 2005 CPD ¶ 94 at 8.

Here, GOV Services has not provided a compelling reason beyond its control for its late submission of invoice No. 16901. Accordingly, we do not recommend the reimbursement of this invoice.

Finally, NIH objects to six time entries, totaling \$6,558.75 in attorneys' fees, that were included on the legal invoices submitted by the protester. The agency contends that the descriptions of these time entries include redactions or include work performed on both the B-414226.1 and B-412719.6 protests. NIH argues that it is impossible to determine which portion of such line items represent allowable costs versus unallowable costs.

Based on the record before us, we disagree with the agency with regard to five of the six line items.⁷ In this regard, as part of its December 7 request for a recommendation on the amount of costs, the protester provided a table of the disputed cost line items. Request for Recommendation on Amount of Costs at 2. The table included additional detail on the disputed time entries, including which portion of the time entry represents time spent on the B-414226.1 protest versus the B-412719.6 protest. See id. The table also reduced the requested fees to remove the time spent on activities for which the description had been redacted. See id. GOV Services then certified a new claim that incorporated this reduction in the total claim amount. In light of this certification, and the breakout information found in the table, we find that the protester has reasonably demonstrated the portion of the five line items that represent allowable costs. This portion totals \$4,826.25.

RECOMMENDATION

In sum, we recommend that the agency reimburse GOV Services a total of \$4,826.25 in attorneys' fees, in addition to the costs NIH has previously agreed to pay. This sum represents the costs reasonably supported by the unredacted portions of the invoices submitted by the protester's counsel during their pursuit of the B-414226 protest. We

⁷ The table provided by the protester includes a reduction for line item 47 that subtracts the cost of a phone conference from the line item cost. However, the portion of the time entry description that has been redacted is an entry referring to an email, not a phone conference. Accordingly, we cannot determine whether the reduced amount accurately reflects the allowable cost portion of this line item. We therefore do not recommend that the agency reimburse this line item.

do not recommend reimbursement of the remainder of the disputed amount.

The protester's request that GAO recommend reimbursement of the amount of protest costs is granted in part and denied in part.

Thomas H. Armstrong
General Counsel