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Decision

Matter of: Harmonia Holdings Group, LLC--Costs

File: B-417475.7

Date: July 21, 2020

W. Brad English, Esq., Emily J. Chancey, Esq., and Michael W. Rich, Esq., Maynard Cooper & Gale, PC, for the protester.

Caleb A. Pearson, Esq., Department of Agriculture, for the agency.

April Y. Shields, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for recommendation that agency reimburse a greater portion of protester's costs for attorneys' fees than the agency has agreed to pay (*i.e.*, that the agency reimburse the costs without application of the statutory cap at 31 U.S.C. § 3554(c)(2)) is denied where, although the protester was small at the time it received its Federal Supply Schedule contract, the record shows that prior to the time the protester submitted its quotation for this task order, and prior to the time it filed its protest, the protester certified in the System for Award Management that it was no longer a small business under the size standard for the protested procurement; therefore, for purposes of this review, we do not view the protester as a small business, and its costs are subject to the statutory cap on hourly rates for attorneys' fees that can be reimbursed for successful large business protesters.

2. Request for recommendation that agency reimburse a greater portion of protester's costs for consultant fees than the agency has agreed to pay is denied where the record shows that the consultant advised only on issues that were dismissed for failure to state a valid basis; therefore, there is no basis for our Office to recommend the reimbursement of any of the consultant fees.

DECISION

Harmonia Holdings Group, LLC, of Blacksburg, Virginia, requests that we recommend reimbursement, in the amount of \$73,554.00, for its protest costs incurred in its challenge to the issuance of a task order to AttainX, Inc., of Fairfax, Virginia, under request for quotations No. 12639519Q0036, issued by the Department of Agriculture, Animal and Plant Health Inspection Service, for information technology services.

Following our Office's earlier decision sustaining the protest and recommending payment of the costs of filing and pursuing the protest, Harmonia submitted a certified claim for such costs to the agency.

We deny the request.

BACKGROUND

Of relevance here, the agency issued the subject solicitation on November 19, 2018, as a total small business set-aside pursuant to Federal Acquisition Regulation (FAR) subpart 8.4 to vendors holding contracts under General Services Administration, Federal Supply Schedule (FSS) No. 70 (Information Technology). The solicitation was issued under the corresponding size standard of North American Industry Classification System (NAICS) code 541511 (custom computer programming services). While Harmonia held a small business contract under FSS No. 70, Harmonia certified on December 3, 2018, that it was no longer a small business under NAICS code 541511.¹

After the agency received and evaluated quotations in early 2019, the agency selected AttainX for award. Harmonia then filed its first protest with our Office on April 11, 2019, challenging various aspects of the agency's evaluation of quotations and award decision. The agency took corrective action, which included reevaluating the quotations, and we dismissed the protest as academic. *Harmonia Holdings Grp., LLC*, B-417475, B-417475.2, May 10, 2019, at 1 (unpublished decision). After the agency completed its corrective action, the agency again selected AttainX for award.

On June 17 and 28, Harmonia filed a protest and a supplemental protest with our Office challenging various aspects of the agency's source selection process, including the agency's cost/price evaluation, past performance evaluation, assessment of technical weaknesses to the protester's quotation, and best-value tradeoff decision. On September 23, our Office sustained several of Harmonia's protest grounds; of relevance here, we also dismissed some of Harmonia's challenges to the agency's technical evaluation for failure to state a valid basis of protest. Our decision included the recommendation that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. *Harmonia Holdings Grp., LLC*, B-417475.3, B-417475.4, Sept. 23, 2019, 2019 CPD ¶ 333.

On November 15, Harmonia submitted its claim for costs to the agency. After the parties attempted to come to an agreement as to reimbursement, without success, Harmonia then filed this request for a recommendation for reimbursement of its protest costs with our Office. Harmonia's total certified claim, as originally submitted to the agency, amounted to \$78,438.50. Request for Recommendation of the Amount of

¹ Specifically, Harmonia submitted this certification in the System for Award Management as part of the annual representations and certifications required by the FAR. See FAR 52.219-1; see *also* Agency's Response, exh. A, Report Certification for Harmonia (2018-2019), Dec. 3, 2018, at 9.

Costs, attach. B, Certified Claim, Nov. 15, 2019, at 1. After submission of its claim, Harmonia elected to reduce its fees by \$4,884.50, resulting in a revised claim of \$73,554.00 for our Office to consider. Request for Recommendation of the Amount of Costs, Dec. 30, 2019, at 4 n.2; Amended Certified Claim for Attorneys' Fees, Mar. 11, 2020, at 1-2.

DISCUSSION

Harmonia asks our Office to recommend that the agency reimburse it \$73,554.00, including: \$54,767 in attorneys' fees; \$18,437 in consultant fees; and the \$350 GAO bid protest filing fee. This amount reflects Harmonia's protest costs without application of the cap on legal fees found at 31 U.S.C. § 3554(c)(2). Harmonia also requests that our Office recommend that it be reimbursed for the costs of pursuing this request for costs. Request for Recommendation of the Amount of Costs at 4; Amended Certified Claim for Attorneys' Fees, Mar. 11, 2020, at 1-2.

The agency offered to settle Harmonia's claim for the amount of \$30,103.47, calculated by applying the rates applicable to other-than-small businesses under 31 U.S.C. § 3554(c)(2), in addition to the \$350 filing fee. Agency's Response, Jan. 14, 2020, at 1; see also Request for Recommendation of the Amount of Costs, attach. C, Agency's Response to Harmonia's Certified Claim, Dec. 19, 2019, at 1-2; Agency's Response to Amended Certified Claim for Attorneys' Fees, Mar. 13, 2020, at 1.

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.

Attorneys' Fees

Harmonia asks to be reimbursed for \$54,767 in attorneys' fees, calculated at 187.4 hours billed at rates ranging from \$175 to \$460 per hour, and including the above-described reduction of \$4,884.50.² Request for Recommendation of the Amount of Costs at 4; Amended Certified Claim for Attorneys' Fees, Mar. 11, 2020, at 1-2.

² The basis of the reduction amount has not been explained in the record. On March 10, 2020, our Office requested Harmonia provide "[c]ertified documentation for calculating this reduction and Harmonia's revised claim in the amount of \$73,554.00," which did not appear in the record. GAO Notice of Request for Document Production,

The agency does not dispute the number of hours billed, but argues that Harmonia should be subject to the statutory cap on attorneys' fees of \$150 per hour for large businesses under 31 U.S.C. § 3554. In this regard, the agency argues that, although Harmonia was issued the solicitation when it held a small business FSS No. 70 contract, Harmonia certified that it was no longer a small business under NAICS code 541511, the specific corresponding size standard applicable to this procurement, prior to the time it submitted its quotation, and prior to the time it filed its protest with our Office. Agency's Response at 1. In other words, the agency contends that "Harmonia, as a party to the protest, is other than a small business and as a result is subject to the statutory cap on attorneys' fees." *Id.* at 3.

In response, the protester claims that it should not be subject to the statutory cap on attorneys' fees for several reasons. Harmonia claims that its "certifications have no effect on Harmonia's status as a small business for the procurement at issue"; and that, "even if those certifications were determinative of Harmonia's status, it would still qualify as a small business" because, among other things, it "certified that it qualified as a small business concern under a number of NAICS [c]odes," apart from NAICS code 541511, the one applicable to the protested procurement. Request for Recommendation of the Amount of Costs at 4. Harmonia also contends that "[t]he question before the GAO is a narrow one: whether Harmonia was a small business concern by law at the time the solicitation was issued." Protester's Response to Agency's Response, Jan. 24, 2020, at 1. In this regard, Harmonia points out that it held a small business FSS No. 70 contract at the time the solicitation was issued and that "[t]he contracting officer did not request a new size certification in the solicitation or during discussions with offerors." Request for Recommendation of the Amount of Costs at 4.

Our Office has previously considered the legislative history of the statutory cap on attorneys' fees. See *Public Commc'ns Servs., Inc.--Costs*, B-400058.4, June 25, 2009, 2009 CPD ¶ 131. By way of background, in 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), which amended certain parts of the Competition in Contracting Act of 1984 (CICA), including, as relevant here, the provisions concerning reimbursement of protest costs. Since the enactment of FASA, CICA imposes a cap on legal fees for large businesses of \$150 per hour; the cap, however, does not apply to small businesses. 31 U.S.C. § 3554. As we previously noted, the Senate specifically amended the proposed cap to reflect policy considerations for small businesses, and the report from the House of Representatives advised the following:

The conferees also note that this provision would entitle a small business concern to recover "reasonable attorneys' fees" in appropriate cases. The

Mar. 10, 2020, at 1. In response, Harmonia provided its revised claim and stated, without further explanation, that its reduction was "due to Harmonia's counsel reduction of the fees charged in" one of its invoices. Protester's Response to GAO Request for Document Production, Mar. 11, 2020, at 1.

conferees expect the Comptroller General to be vigilant in reviewing attorneys' fees to ensure that they are reasonable.

Public Commc'ns Servs., Inc.--Costs, supra, at 6 (quoting H. Rep. No. 103-712 § 1403; internal citations omitted).

The final statutory language regarding the cap was enacted as follows:

(2) No party (other than a small business concern (within the meaning of section 3(a) of the Small Business Act)) may be paid, pursuant to a recommendation made under the authority of paragraph (1)--

(A) costs for consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government; or

(B) costs for attorneys' fees that exceed \$150 per hour unless the agency determines, based on the recommendation of the Comptroller General on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

Pub. L. No. 103-355, 108 Stat. 3243, at 3289; 31 U.S.C. § 3554(c)(2).

This provision, in defining a small business, refers to the Small Business Act, which in turn refers to the Small Business Administration (SBA) for establishing detailed size standards and issuing regulations "by which a business concern may be determined to be a small business concern for the purposes of this chapter or any other Act." 15 U.S.C. § 632(a)(2)(A). The SBA's regulations, however, do not address the specific situation at hand--that is, whether GAO should recommend that a company be reimbursed as a small business after the firm has certified that it is no longer a small business under the size standard for a procurement prior to submitting a quotation, and prior to filing a protest challenging that procurement.³

In the absence of specific language, we think the appropriate measure for cost claim purposes is to consider the protester's size status at the time it files its protest with our Office. We note that the provision for the statutory cap on attorneys' fees specifically refers to payment to a "party," thus indicating the status of a business when it becomes

³ We recognize that the Small Business Act gives the SBA, not our Office, the conclusive authority to determine matters of small business size status for federal procurements. 4 C.F.R. § 21.5(b)(1); *Mark Dunning Indus., Inc.*, B-405417.2, Nov. 19, 2013, 2013 CPD ¶ 267 at 5. Under these circumstances, however, we view the question before our Office as not a size determination, but rather a cost claim matter within our responsibilities under CICA. In any event, as noted below, the regulations do not address the issue here.

a “party” to a protest. 31 U.S.C. § 3554(c)(2). We also note that this consideration is consistent with the award of fees in federal courts--under the Equal Access to Justice Act (EAJA), a party may recover an award of attorneys’ fees if it meets certain size and net worth caps at the time of filing its case. See 5 U.S.C. § 504 (“at the time the adversary adjudication was initiated”), 28 U.S.C. § 2412 (“at the time the civil action was filed”); see, e.g., *Hyperion, Inc. v. United States*, 118 Fed. Cl. 540, 544 (2014) (eligibility of a prevailing plaintiff for an award of attorneys’ fees and expenses pursuant to the EAJA). While the language in CICA is not identical, we think the approach taken by the federal courts provides a good guideline for addressing the issue. See, e.g., *A1 Procurement, JVG--Costs*, B-404618.2, Apr. 4, 2012, 2012 CPD ¶ 139 (noting where our conclusions on a cost claim are consistent with federal courts under an analogous fee-shifting statute).

Moreover, because the provision in CICA--like the provisions in the EAJA--is an express limitation on payouts from the public fisc, this statute must be strictly construed. See, e.g., *Ardestani v. I.N.S.*, 502 U.S. 129, 137 (1991) (finding that the EAJA “renders the United States liable for attorney’s fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States.”); *Chiu v. United States*, 948 F.2d 711, 722 (Fed. Cir. 1991) (Claims Court improperly adjusted hourly rate upward for increase in cost of living which included time periods after legal services were performed, stating that “the ambiguity as to whether the statutory authorization for [cost-of-living adjustments] to the EAJA fee rate includes post-performance time periods which constitute delay until receipt of a fee award must be resolved in favor of the sovereign.”).

Turning then to the language of the SBA regulations, we note that 13 C.F.R. § 121.404 states that “[i]f a business is small at the time of offer for the Multiple Award Contract, it is small *for each order issued against the contract*, unless a contracting officer requests a new size certification in connection with a specific order.” (emphasis added). That regulatory provision is by its terms limited to the issuance of additional orders; it does not by its terms state that the business will remain qualified as a small business for purposes of entitlement to a higher rate of attorneys’ fees under 31 U.S.C. § 3554(c)(2). The provision in CICA, as discussed above, is more naturally read as turning on whether a party is qualified as a small business at the time of the administrative proceeding--*i.e.*, at the time of the protest.

Here, Harmonia certified on December 3, 2018--well before it submitted its quotation or filed its protest with our Office--that it was no longer a small business under NAICS code 541511, the size standard for the procurement that it protested. Yet Harmonia asserts that its “certifications have no effect on Harmonia’s status as a small business for the procurement at issue”; and that, “even if those certifications were determinative of Harmonia’s status, it would still qualify as a small business” because, among other things, it “certified that it qualified as a small business concern under a number of NAICS [c]odes.” Request for Recommendation of the Amount of Costs at 4. In other words, Harmonia asks our Office to disregard its certifications or, in the alternative, to

consider only its certifications as a small business in industries unrelated to the protest in which it prevailed. We decline to adopt a rule that any successful protester may avoid the general cap on the hourly rate for reimbursement of attorneys' fees by relying on its status as a small business under procurements in any other industry.

Harmonia also contends that "[t]he question before the GAO is a narrow one: whether Harmonia was a small business concern by law at the time the solicitation was issued." Protester's Response to Agency's Response at 1. We do not view the issue at hand so narrowly; the fact that Harmonia held a small business FSS No. 70 contract at the time the solicitation was issued is not the determinative factor here. Harmonia further points out that "[t]he contracting officer did not request a new size certification in the solicitation or during discussions with offerors."⁴ Request for Recommendation of the Amount of Costs at 4. The propriety of the agency's actions during the procurement do not supersede our Office's responsibilities under CICA.

Our Office takes seriously--and in the words of the FASA conference report, is "vigilant" in fulfilling--our responsibility to evaluate the reasonableness of a successful protester's request for reimbursement of attorneys' fees. *Public Commc'ns Servs., Inc.--Costs, supra*, at 7. Here, we think that the appropriate measure for applying the statutory cap on attorneys' fees is the size status of the protester at the time of filing its protest. In our view, vigilance in evaluating the reasonableness of these requests for public funds is not served by permitting an entity that has certified in the System for Award Management that it is no longer small, to benefit from a statutory provision designed to aid small businesses in pursuing protests before our Office. We also view an entity's small business status in other industries, *i.e.*, under other, unrelated NAICS codes, irrelevant to the issue of whether it may be excepted from the cap on attorneys' fees following a protest of a procurement for which it has certified that it is, in fact, no longer small.

We recognize that, in most cases, a firm will retain the same size status both at the time it is competing for a procurement and at the time of a protest of that procurement.

⁴ Specifically, Harmonia argues that, "[u]nder the long term contracting rules, Harmonia is 'small for each order issued against the contract, unless a contracting officer requests a new size certification in connection with a specific order.'" Request for Recommendation of the Amount of Costs at 3-4, *citing* 13 C.F.R. § 121.404(a)(1)(i). As discussed above, this regulatory provision by its terms is limited to the issuance of task orders under a multiple-award contract--and it can be overridden at any instance if a contracting officer requests that a firm recertify its size status for a particular order. Moreover, the regulation at issue does not state that a firm will remain qualified as a small business for purposes of entitlement to a higher rate of attorneys' fees under 31 U.S.C. § 3554(c)(2). *See also* 15 U.S.C. § 632(a)(2)(A) (providing that the Administrator of the SBA may issue regulations "by which a business concern may be determined to be a small business concern for the purposes of this chapter or any other Act").

When the record shows that a firm's size status has changed from small to not small during the procurement, however, we conclude that it is appropriate for our Office to consider the firm's size status at the time it files its protest with our Office.

As noted above, the agency does not contest the number of hours billed by Harmonia for its work on this protest. Thus, the amount Harmonia requests in excess of the amount calculated by applying the \$150 statutory cap to the 187.4 hours of attorney time is denied.⁵

Consultant Fees

Harmonia also asks to be reimbursed for \$18,437.00 in consultant fees, calculated at 20.6 hours billed at a rate of \$895.00 per hour. Harmonia retained a technical consultant to "assist counsel for the protester in analyzing the technical information furnished in response to this protest." Notice of Admission to Protective Order, B-417475.3, B-417475.4, July 24, 2019, at 2, *citing* Consultant Application at ¶ 5(d). The agency argues that Harmonia should be subject to a cap on the reimbursement of consultant fees for the reasons discussed above and as previously interpreted by our Office. Agency's Response at 5, *citing Department of the Army; ITT Fed. Servs. Int'l Corp.--Costs*, B-296783.4, B-296783.5, Apr. 26, 2006, 2006 CPD ¶ 72 (reimbursement of protest costs associated with use of consultant is limited to highest rate of pay for a federal employee (GS-15, step 10), even where consultant billed at higher rate). In our view, the record provides no basis for us to recommend the reimbursement of any of the consultant fees.

In its protest, Harmonia raised several arguments regarding the agency's technical evaluation. As noted above, Harmonia's protest followed an earlier protest that was resolved by a round of corrective action in which the agency reevaluated proposals and made a new award decision. In the protest at issue here, Harmonia raised arguments based on the agency's initial, pre-corrective action technical evaluation. Indeed, in its comments on the agency report, Harmonia continued to press, and provided a two-and-a-half page declaration from the consultant to support, these arguments that failed to state a valid basis of protest. See Protester's Comments, B-417475.3, B-417475.4, July 29, 2019, at 12; see also Protester's Comments, B-417475.3, B-417475.4, July 29, 2019, attach. A, Declaration of Consultant, July 26, 2019.

While our decision sustained some of Harmonia's arguments regarding the agency's technical evaluation, we dismissed several of its arguments. Specifically, we dismissed Harmonia's arguments regarding the assessment of a technical weakness (for Azure migration)--which were based only on the pre-corrective action technical evaluation, and

⁵ Harmonia, in its filings to our Office, did not raise the question of whether "an increase in the cost of living or a special factor" should justify a higher fee than the statutory cap on attorneys' fees. See 31 U.S.C. § 3554(c)(2)(B). Therefore, we need not address this question.

which were the only arguments for which Harmonia's consultant provided input. In this regard, our decision stated:

We have considered, and rejected, all of Harmonia's assertions about other weaknesses not specifically addressed below. As a representative example, Harmonia alleges that the agency improperly assigned a weakness to Harmonia's quotation for being "weak on Azure migration" (*i.e.*, the brand name for Microsoft's cloud system). . . . The record shows that, after the agency took corrective action in response to Harmonia's first protest, this weakness was no longer assessed in Harmonia's quotation. Because this alleged weakness does not appear in the contemporaneous record, we dismiss Harmonia's complaints in this regard for failure to state a valid basis of protest. 4 C.F.R. § 21.1(c)(4), (f).

Harmonia Holdings Grp., LLC, supra, at 21 n.26.

In short, the issues that we dismissed were based on a technical evaluation that was superseded by the agency's previous round of corrective action. Those issues--the only issues on which its consultant worked--were dismissed for failure to state a valid basis of protest. In our view, the recovery of protest costs in this instance would result in an unjust cost recovery and exceed those that would be incurred by a prudent person in pursuit of a protest. *See, e.g., Galen Med. Assocs., Inc.--Costs*, B-288661.6, July 22, 2002, 2002 CPD ¶ 114 at 2 (finding a claim for costs to be excessive and noting that "a claim is excessive where the time expended exceeds what a prudent person familiar with the issues in the case and some knowledge of the federal procurement system should have reasonably needed to identify and research the applicable law and regulations in order to adequately respond to the agency's arguments"), *citing Chant Eng'g Co., Inc.--Costs*, B-274871.4, Apr. 28, 1999, 99-1 CPD ¶ 79 at 2-3. Under these circumstances, we find no basis to recommend the reimbursement of the consultant fees.

Costs of the Claim

As a final matter, Harmonia asks to be reimbursed the costs of filing and pursuing its cost claim. Our Bid Protest Regulations, 4 C.F.R. § 21.8(f)(5), provide that we may recommend a protester be reimbursed for the costs of pursuing its claim at our Office. This provision is designed to encourage the agency's expeditious and reasonable consideration of a protester's claim for costs. *E&R, Inc.--Claim for Costs*, B-255868.2, May 30, 1996, 96-1 CPD ¶ 264 at 6 (citing predecessor regulation). We will recommend payment of such costs only if it is shown that the agency unreasonably delayed consideration of the protester's claim or otherwise failed to give the claim reasonable consideration. *Blue Rock Structures, Inc.--Costs*, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190 at 7. Here, the record establishes that the agency acted reasonably and promptly in negotiating Harmonia's claim before the matter was submitted to our Office. Under the circumstances, the agency's handling of Harmonia's claim does not provide a

basis for us to recommend the reimbursement of the costs of filing and pursuing this claim at our Office.

CONCLUSION

In sum, we deny the protester's request that GAO recommend reimbursement of the requested amount of protest costs that is in excess of the amount the agency has already agreed to pay.

Thomas H. Armstrong
General Counsel