U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Public Properties, LLC--Costs

File: B-419414.3

Date: July 6, 2022

Robert C. MacKichan, Esq., Gordon Griffin, Esq., Hillary J. Freund, Esq., and Adam T. Adcock, Esq., Holland & Knight LLP, for the protester.
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DIGEST

Request for recommendation that agency reimburse a greater portion of the protester's costs than the agency has agreed to pay is denied because the agency reasonably rejected the claimed costs as not associated with proposal preparation.

DECISION

Public Properties, LLC, of Washington, D.C., requests that our Office recommend that it be reimbursed certain additional costs associated with preparing its proposal in response to request for lease proposals (RLP) No. 7NV2126, issued by the General Services Administration for the lease of premises in the Carson City, Nevada metropolitan area to be used by components of the United States Geological Survey and United States Department of Agriculture. Following an earlier decision from our Office sustaining Public Properties' protest challenging the award of the lease to PMMC, Ltd. and recommending reimbursement of proposal preparation and protest costs, Public Properties submitted its certified claim for such costs to the agency. The agency agreed to pay $94,253.04 of this claim, and our decision here addresses only the disputed portion of the claim, as detailed below.

We deny the request.

BACKGROUND

In October 2020, after conducting a competition, the agency executed a 20-year lease with PMMC. After being notified of the agency's source selection decision, Public Properties filed a protest with our Office, arguing that the awardee's proposal should

have been found technically unacceptable because its proposed property was in a 100-year floodplain, in contravention of the solicitation requirements. Also, Public Properties challenged the agency's evaluation of offerors' price proposals, and argued that the agency failed to adequately document its technical evaluation of proposals. We sustained Public Properties' protest allegation relating to the agency's floodplain determination, concluding that the record reflected the agency failed to assess the potential impacts resulting from a portion of the awardee's offered property lying within a 100-year floodplain prior to making award, as required by the solicitation. We also sustained Public Properties' challenge to the agency's documentation of its technical evaluation, finding that the record was "bereft of any assessment of whether offerors' proposals met the . . . solicitation requirements," leaving our Office "unable to determine whether the agency's technical evaluation of proposals was reasonable." *Public Properties, LLC*, B-419414, B-419414.2, Feb. 9, 2021, 2021 CPD ¶ 78 at 7-8.

We noted in our decision, that the awarded lease contract did not include a termination for convenience clause, and, in the absence of such a clause, we ordinarily do not recommend termination of an awarded lease, even if we sustain a protest and find the award improper. *Public Properties, LLC*, *supra* at 10-11. We instead recommended that the protester be reimbursed the costs associated with preparing its proposal in response to the RLP, as well as the costs associated with filing and pursuing its protest with our Office, including reasonable attorneys' fees. *Id.* at 11.

Subsequent to our decision, Public Properties timely submitted its certified claim to the agency, detailing the firm's claimed time spent and costs incurred in connection with preparing its proposal and filing and pursuing its protest. Public Properties' claim included total proposal preparation costs of $165,297.51 and total protest costs of $70,771.88, for a total claim of $236,069.39. Cost Claim exh. A, Public Properties' Agency-Level Claim at 1-2. After negotiations between the agency and Public Properties, the agency agreed to pay $44,948.77 in proposal preparation costs and $49,304.27 in protest costs, for a total amount of $94,253.04. Cost Claim at 3 n.1. Following receipt of the agency's decision, Public Properties filed a claim with our Office seeking $75,000 in addition to the payment amount already agreed to by the agency, for a total claim amount of $169,253.04.[1]

The additional $75,000 in costs sought by Public Properties are out-of-pocket expenses the firm paid to secure a purchase agreement and to hold open an option to purchase the real property offered for lease in its proposal. Public Properties represents that, prior to submission of its lease proposal, it made an initial payment of $50,000 to secure a purchase agreement for the property offered for lease in its proposal. Cost Claim at 4; exh. B, Purchase and Sale Agreement (P&S Agrmt.) at 1 § 4(a); exh. C, Deposit Statements (Stmts.) at 1. While the source selection process was ongoing, Public Properties made three additional payments of $15,000 each and two further payments

[1] Public Properties request to our Office does not seek reimbursement of $66,816.35 in costs included in its initial claim to the agency but not included in the payment amount agreed to by the agency.

of $30,000 each to continue to hold open the purchase option. Cost Claim at 5; exh. B, P&S Agrmt. at 3-4 § 6(d); exh. C, Deposit Stmts. At 2-3, 5, 7, 9. Throughout the course of the procurement, Public Properties explains that it made a total of $155,000 in payments to secure and hold open the purchase option. Cost Claim at 5. After learning that it was not the successful offeror, Public Properties was able to recover $80,000 of these payments, but the remaining $75,000 was not refundable. *Id.*; exh. C, Deposit Stmts at 10.

DISCUSSION

Our Office's authority is limited to recommending that a protester be reimbursed the costs associated with bid or proposal preparation. 31 U.S.C. § 3554(c)(1)(B); *GOV Nat'l Healthcare Drive, LLC--Costs*, B-419258.4, Oct. 7, 2021, 2021 CPD ¶ 339 at 6. Section 31.205-18(a) of the Federal Acquisition Regulation (FAR) defines bid and proposal costs as costs incurred in preparing, submitting, and supporting bids and proposals on potential government contracts. Our decisions have previously explained that recovery of bid or proposal preparation costs is limited to expenses incurred in the preparation of the proposal itself. *Sodexho Mgmt., Inc.--Costs*, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 7. Expenses compensable as proposal costs are those in the nature of researching the requirements or specification, examining the cost or price factors, and preparing draft and actual proposals and proposal revisions. *Id.*; *Power Sys.--Costs*, B-210032.2, Mar. 26, 1984, 84-1 CPD ¶ 344 at 2. Further, when, as here, a firm includes in its claim for proposal preparation costs an out-of-pocket expense, in addition to providing sufficient documentation of the amount and purpose of the expense, it must show how the expense relates to the proposal preparation process. *Sodexho Mgmt., Inc.--Costs, supra* at 27.

The agency does not dispute that Public Properties incurred the costs in question; nor does the agency take issue with the adequacy of the documentation Public Properties submitted in support of its claim for the costs. *See generally* Agency Response to Cost Claim (Ag. Resp.). Rather, the sole question before our Office is whether the costs incurred were associated with bid or proposal preparation.

Public Properties argues that it reasonably incurred the costs of securing and holding open an option to purchase the real property offered for lease in its proposal as required by the solicitation. Cost Claim at 5-6. In support of its argument, Public Properties points to the following provision in the solicitation:

> Offeror shall also submit with its offer the following:
>
> If the Offeror does not yet have a vested interest in the Property, but rather has *a written agreement to acquire an interest, then the Offeror shall submit a fully executed copy of the written agreement with its offer, together with a statement from the current owner that the agreement is in full force and effect and that the Offeror has performed all conditions precedent to closing*, or other form of documentation satisfactory to the

> LCO [lease contracting officer] prior to award. *These submittals must remain current.* The Offeror is required to submit updated documents as required.

Id., *citing* Agency Report (AR), Exh. A, RLP at 17.[2] Public Properties contends that the solicitation's use of the word "shall" made entering into the purchase and sales agreement--and payment of fees thereunder to hold open the purchase option--mandatory proposal submission requirements. Cost Claim at 6.

In response, the agency contends that Public Properties' costs to secure a purchase agreement and to hold open an option to purchase the property offered in its lease proposal were incurred in anticipation of, or to qualify for, a contract award, and, thus, are not compensable as proposal preparation costs. Agency Response to Cost Claim (Ag. Resp.) at 2-3. For the reasons set forth below, we agree.

Our Office has not had occasion to address the specific type of cost claimed here--*i.e.,* payments to secure and hold open an option to purchase real property offered for lease to the government in response to an RLP. Our decisions have explained, however, that "[o]fferors may incur substantial costs in anticipation of, or in the course of, competing for a contract, without those costs thereby becoming proposal preparation costs." *Stocker & Yale, Inc.--Costs*, B-242568, B-242568.3, May 18, 1993, 93-1 CPD ¶ 387 at 5.

In support of its position, the agency cites to our decision in *Stocker*, in which, subsequent to our issuance of a decision sustaining Stocker's underlying protest, we denied a claim for costs incurred in connection with the firm's efforts to have its product included on a qualified products list (QPL) from which the solicited goods would be procured. *Stocker & Yale, Inc.--Costs*, *supra* at 4. Stocker argued that it should be reimbursed approximately $79,660 in QPL-related costs because having its product included on the QPL was necessary to compete for the contract at issue. *Id.* In our decision, we noted that, while necessary to compete for the contract at issue, the QPL-related costs were not incurred solely for that contract. *Id.* Rather, Stocker still obtained value from its expended costs because future solicitations might be issued for products on the QPL, and Stocker would now be eligible to compete for those procurements. *Id.*

As relevant here, we found that even assuming for the sake of argument that Stocker incurred the QPL-related costs solely for the procurement at issue in that case, "categorizing those costs as proposal preparation costs would be inappropriate" notwithstanding that Stocker viewed the costs as "integral to the submission of the offeror's bid and its ability to win the contract" because the costs nonetheless fell "outside the scope of the ordinary meaning of the term 'proposal preparation.'" *Stocker*

[2] The references in this paragraph to the AR are to the report filed by the agency during the original protest.

& Yale, Inc.--Costs, *supra* at 5. We concluded that despite the fact that the agency had made an improper award in the protested procurement, it did "not change the proper categorization of Stocker's costs, nor [did] it render the agency liable to reimburse Stocker for any of the company's costs other than proposal preparation costs and protest pursuit costs." *Id.* Moreover, we explained "the fact that Stocker may have been planning to recoup its QPL-related costs as part of the contract price [was] without relevance," as Stocker was entitled to reasonable proposal preparation and protest pursuit costs, not to its contract price. *Id.* at 5.

In further support of its decision to deny the claimed cost, the agency points to a decision from the U.S. Court of Federal Claims (COFC)--*Couture Hotel Corporate v. United States*, 138 Fed. Cl. 333 (2018). While decisions of the COFC are not binding on our forum, we find the court's decision in *Couture* instructive here. In *Couture* the plaintiff alleged that it purchased and renovated a hotel near Nellis Air Force Base (AFB) "in order to participate in the off-base lodging business for visitors to the base when on-base Nellis Lodging [was] not able to accommodate all visitors."[3] *Couture supra*, 138 Fed. Cl. at 336. The plaintiff maintained that "it 'understood and expected' that if its hotel met Nellis AFB's requirements for off-base lodging and passed an inspection, Nellis Lodging would enter in a Memorandum of Understanding (MOU) with plaintiff, 'enabling [plaintiff] to compete with other hotels for off-base lodging business for Nellis AFB." *Id.* The plaintiff represented that "in order to secure the MOU for the off-base lodging business, it 'purchased the Hotel [in question] for $9,534,151.96' and 'made modifications to the Hotel property in order to comply with the Nellis AFB requirements . . . expending $1,238,848.72.'" *Id.* The plaintiff contended that, subsequent to the renovations of its hotel, "Nellis Lodging refused to enter into an MOU, claiming that Nellis AFB 'was not adding any new facilities to [its] MOU listing at [that] time.'" *Id.* The plaintiff then filed suit at the COFC seeking bid preparation and proposal costs of $2,732,836.43, which constituted the cost of purchasing the hotel, less the amount plaintiff received from the hotel's subsequent sale (at a loss), and $1,238,848.72 for the costs plaintiff incurred in modifying the property to meet the MOU requirements. *Id.* at 336.

The COFC dismissed the plaintiff's claim as being time-barred under the U.S. Court of Appeals for the Federal Circuit's holding in *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007). *Couture supra* at 340. In addition, the COFC found "that to the extent plaintiff's bid protest claim challenging Nellis Lodging's refusal to enter into an MOU with plaintiff [was] not barred, plaintiff [was] not entitled to the costs it [sought] in any event" because "[t]he costs plaintiff incurred in acquiring and renovating the hotel [were] not bid preparation costs." *Id.* at 341. The plaintiff argued that the costs "were necessary because the MOU was a 'mandated step' in order to participate in Nellis Lodging's procurement process for off-base lodging services." *Id.* The COFC noted, however, that "bid preparation costs are the costs incurred to prepare a bid and not those incurred in anticipation of receiving the contract." *Id.* The COFC concluded that

[3] Nellis Lodging is a non-appropriated fund instrumentality. *Couture supra*, 138 Fed. Cl. at 336 n.1.

the costs incurred by the plaintiff were "costs incurred in anticipation of or to qualify for a contract award" and, as such, were "not recoverable bid preparation expenses." *Id.* at 342. Specifically, the COFC found that the "plaintiff's costs of purchasing and renovating the hotel in question [were] in the nature of damages and would not be recoverable under [the COFC's] bid protest jurisdiction as bid preparation and proposal costs," even if the plaintiff's claim was not time-barred. *Id.*

Public Properties attempts to distinguish its claim from the situation in *Couture*, first, by pointing to the RLP, which Public Properties' maintains "mandated that the offeror provide some mechanism of demonstrating control or an option to purchase the property." Cost Claim at 6. Second, Public Properties contends that it incurred only those costs reasonably necessary to meet the RLP requirement--*i.e.*, the costs of securing and holding open an option to purchase the property--rather than actually purchasing the property, as the plaintiff in *Couture* did. *Id.*at 7. Public Properties acknowledges that if it had bought the property offered for lease in its proposal it "would have expended more than was required by the RLP and would also have obtained something of value for its expenditure." *Id.* Instead, Public Properties maintains, it "incurred the minimum costs possible to maintain a compliant proposal, and now has nothing of value to show for that expenditure." *Id.*

While we agree that the purchase option costs incurred by Public Properties are more reasonable as compared to the costs of purchasing and renovating a hotel incurred by the plaintiff in *Couture,* the reasonableness of Public Properties' costs is not the relevant question. Rather, the relevant question is whether the out-of-pocket expenses incurred by Public Properties are related to proposal preparation. Based on the facts here, we find that, similar to the situations in *Stocker* and *Couture*, the costs of securing and holding open the option to purchase the proposed real property were costs incurred in anticipation of or to qualify for award. Additionally, as in *Stocker*, while Public Properties views the costs as integral to the submission of its proposal and ability to win the contract, the costs nonetheless fall outside the scope of the ordinary meaning of the term "proposal preparation" (*e.g.,* costs in the nature of researching the requirements of a specification, examining the cost or price factors, and preparing draft and actual proposals and proposal revisions). Thus, the expenses are not recoverable as proposal preparation costs.

The request is denied.

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