



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: System Studies & Simulation, Inc.--Costs

File: B-409375.5

Date: May 8, 2015

Jon D. Levin, Esq., Maynard Cooper & Gale, PC, for the protester.
Lieutenant Colonel Brian J. Chapuran, and Major Nancy J. Lewis, Department of the Army, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that protester be paid a particular amount in protest costs is denied where protester failed to diligently pursue its claim and improperly aggregated allowable and unallowable costs in a manner that precludes Government Accountability Office from differentiating between allowable and unallowable costs.

DECISION

System Studies & Simulation, Inc. (S3) requests that we recommend the amount it should be reimbursed by the Department of the Army for filing and pursuing its protest in System Studies & Simulation, Inc., B-409375.2, B-409375.3, May 12, 2014, 2014 CPD ¶ 153.

We deny the request.

BACKGROUND

In its protest, S3 challenged the award of a contract to M1 Support Services, LP, under request for proposals (RFP) No. W911SO-13-R-0003, issued by the Department of the Army for advanced instructor pilot support services. S3 argued that the Army materially changed its requirements after evaluation and award of the contract, such that it was required to solicit revised proposals on the basis of its revised requirements. S3 also challenged the Army's evaluation of M1's proposal.

We sustained S3's protest, finding that the agency had awarded a contract for requirements that were materially different from the requirements it had solicited. We recommended that the agency amend or reissue its solicitation to reflect its actual requirements. We further recommended that the agency solicit, obtain and evaluate proposals in response to its revised requirements, and that it make a new source selection decision based on the proposals received.¹ Finally, we recommended that the agency pay S3 the costs associated with filing and pursuing its protest, including reasonable attorneys' fees.

On July 11, 2014, S3 submitted a certified claim to the agency in the amount of \$97,407.22. That amount included attorneys' fees of \$75,585.60, as well as \$21,821.62 in proposal preparation costs. Agency Response to Cost Claim, exh. 3, S3's Claim, July 11, 2014. The agency considered the protester's claim and, by letter dated September 15, offered to reimburse S3 \$22,559.63 in costs associated with S3's filing and pursuit of its protest. Agency Response to Cost Claim, exh. 2, Contracting Officer's Final Decision Concerning S3's Claim.

The protester did not respond to the agency's proposed settlement. After a period of more than four months, on January 23, 2015, the agency sent an e-mail to the protester asking its intentions with respect to the agency's September 15 proposed settlement. Agency Response to Cost Claim, exh. 6. The protester did not respond to the agency's inquiry. Instead, by letter dated January 27, the protester submitted a request to our Office asking our Office to recommend that it be reimbursed \$66,078.62 in attorneys' fees.

DILIGENT PURSUIT

As an initial matter, the agency requests that we deny S3's request because the firm failed to diligently pursue its claim. In this connection, the agency points out that, despite it having offered S3 an amount in settlement of its request on September 15, 2014, S3 did nothing to pursue its claim for over four months.

We agree with the agency that S3 failed to diligently pursue its claim. Our Bid Protest Regulations contemplate prompt resolution of protest matters, including claims for protest costs; accordingly, we require protesters to diligently pursue such claims. Holloway & Co., PLLC--Costs, B-311342.5, July 6, 2009, 2009 CPD ¶ 146 at 2-3. Here, the record shows that the agency made a final settlement offer to S3 on September 15, 2014. That offer expressly invited S3 to contact the contracting officer should the firm have any questions concerning the agency's settlement offer. Agency Response to Cost Claim, exh. 2, Contracting Officer's Final Decision Concerning S3's Claim, at 4. Notwithstanding the contracting officer's invitation to

¹ We dismissed S3's allegations relating to the agency's evaluation of M1's proposal as academic in light of our recommended corrective action.

answer any questions that S3 might have concerning the agency's settlement offer, the record shows that S3 did nothing--either to arrange for payment of the amount offered by the agency, or to file its claim in our Office--for a period of more than four months.

S3 suggests that it was the agency that failed to take any action after sending S3 its September 15 letter. In this connection, S3 contends that the agency failed to request a purchase order from the firm, failed to remit payment to the firm, and failed to provide a timetable for making the proposed payment to S3. However, the record shows that it was S3 that failed to take any action by, at the very least, advising the agency that it either accepted or rejected the proposed settlement offer. Simply stated, S3 took no action of any sort in response to the agency's offer for a period of more than four months, notwithstanding that, by filing its request with our Office, it apparently now has rejected the agency's proposed settlement offer. Cf. Holloway & Co., PLLC--Costs, supra. (following agency's proposed settlement offer, claimant requested that agency reconsider the amount of its proposed offer and agree to the amount originally requested by the claimant). Under the circumstances, we conclude that S3 failed to diligently pursue its claim. See Aalco Forwarding, Inc., et al.--Costs, B-277241.30, Jul. 30, 1999, 99-2 CPD ¶ 36 at 5 (GAO agreed with agency conclusion that the protester failed to diligently pursue its claim for costs when the protester did not respond for more than three months after the agency sought additional supporting information for the claim).

AGGREGATION OF ALLOWABLE AND UNALLOWABLE COSTS

In addition to the considerations discussed above, we also note that S3's claim, along with the supporting documentation submitted to our Office, improperly aggregates allowable and unallowable costs, and we cannot determine from the record presented which costs are allowable and which costs are unallowable. In this connection, where a claim aggregates allowable and unallowable costs into a single claim, and we cannot determine from the record what portion is allowable and what portion is unallowable, the entire claim is unallowable. REEP, Inc.--Costs, B-290665.2, July 29, 2003, 2003 CPD ¶ 131 at 5.

Here, the record presented to our Office includes allowable and unallowable costs, but there is no way for our Office to distinguish the allowable from the unallowable costs. For example, S3 states in its letter presenting the claim to our Office as follows: "S3 requested payment of attorneys' fees in the amount of \$75,585.60. S3 concedes that the attorneys' fees were calculated in error. Accordingly, S3 requests fees in the amount of \$66,078.62." S3 Request for Costs, Jan. 27, 2015, at 3 n.1.

S3 has not provided any explanation of the basis for its representation that the attorneys' fees were calculated in error. For example, it does not explain whether the number of hours or the hourly rate used to calculate the original claim were

erroneous, or whether the amount originally claimed included costs that were unallowable for one reason or another. Further, in support of the claim, S3 has presented only the original attorneys' invoices presented to S3 by its counsel that were used to calculate the apparently erroneous original amount of the \$75,585.60 claim. We therefore cannot distinguish the allowable costs from costs that S3 itself concedes are unallowable.

The record also independently reflects that S3's claim aggregates allowable and unallowable costs. For example, S3's claim included costs associated with an earlier protest filed by the firm on December 23, 2013. Agency Response to Cost Claim, exh. 3, S3's Claim, July 11, 2014, at 4-10. That protest was resolved by corrective action on the part of the agency before the agency was required to file a report, and we dismissed it by decision dated January 15, 2014. S3 filed its subsequent protest with our Office on January 31, 2014. Nonetheless, S3's billing throughout the period beginning on December 10, 2013, and extending through January 31, 2014, does not clearly differentiate the costs associated with its December 2013 protest--costs that are unallowable--from the costs associated with its January 2014 protest--costs that may be allowable. Thus, we cannot differentiate the allowable costs from the unallowable costs from the record before our Office.

S3's claim also aggregates costs that do not appear to be associated with any activities related to S3's protests in our Office with costs that may be allowable. For example, S3's claim includes a billing entry for 9.8 hours on January 10, 2014 with the following description of services provided: "Draft response to Motion to Dismiss; meet with Ms. [A] and Mr. [B] regarding same; . . . discuss strategy regarding possible filing at Court of Federal Claims with [Mr. C and Mr. D]; discuss same with Mr. [B] and Ms. [A]." . Agency Response to Cost Claim, exh. 3, S3's Claim, July 11, 2014, at 9. Any amounts billed in connection with a strategy session relating to a possible filing at the Court of Federal Claims clearly would not be allowable in connection with S3's claim for costs incurred in pursuing its protest at our Office. However, because S3 appears to have aggregated those unallowable costs with what appear to be allowable costs, we cannot distinguish the allowable costs from the unallowable costs based on the record before our Office.

The protester's claim includes other items clearly unrelated to its protest in our Office that appear to have been aggregated with costs that may be associated with its protest, and therefore allowable. For example, it includes a February 6-7, 2014 billing entry for 4.5 hours for responding to a "Sigmatech" protective order application and responding to a motion for dismissal filed by the intervenor. Agency Response to Cost Claim, exh. 3, S3's Claim, July 11, 2014, at 9. Sigmatech was not a party to S3's protest, and, although the intervenor did file a motion for partial dismissal, it was filed on February 12, subsequent to the timeframe identified in S3's billing statement. While some portion of these costs arguably may be associated with S3's pursuit of its protest (those associated with responding to the intervenor's

motion to dismiss), those costs would not include responding to an unrelated protective order issue, and--even if otherwise allowable--would not have been incurred on the dates identified. On the record before us, we cannot distinguish those costs that may be allowable from those that are unallowable.

Finally, the record includes billing entries totaling 24.5 hours during the period from April 2-11, 2014 that are identified only as "Advise and work on protest issues" "Receive and review GAO Decision" and "analyze cost payment cases." Agency Response to Cost Claim, exh. 3, S3's Claim, July 11, 2014, at 21. However, the parties' final submissions in connection with S3's protest were filed on April 1, 2014 (prior to the timeframe identified in the billing statement), and our decision was not issued until May 12, 2014 (subsequent to the timeframe identified in the billing statement). Although these entries include costs that may be allowable (those associated with analyzing cost cases and those associated with reviewing our decision), those costs either are aggregated with costs that clearly are unallowable, or were not incurred on the dates identified.

In sum, we conclude that S3 failed to diligently pursue its claim. We also conclude that the claim as presented aggregates allowable and unallowable costs, and that, on the record before our Office, we cannot distinguish the allowable and unallowable costs. We therefore deny S3's request that we recommend it be reimbursed costs associated with filing and pursuing its protest in its entirety.

The request is denied.

Susan A. Poling
General Counsel