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Decision

Matter of: Voith Hydro, Inc.--Costs

File: B-416243.4

Date: July 30, 2019

David T. Ralston Jr., Esq., Frank S. Murray, Esq., Micah Tal Zomer, Esq., and Krista Nunez, Esq., Foley & Lardner LLP, for the protester.

Theresa Hampson, Esq., Department of the Army, for the agency.

Young S. Lee, Esq., and Peter H. Tran, 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 than the agency has agreed to pay is granted in part where protester seeks costs relating to unsuccessful protest issues that were intertwined with the protester's successful protest grounds.

2. GAO recommends that protester's claim for attorneys' fees be reimbursed where the attorney hours charged are documented and reasonable, and the agency has not identified any specific hours as excessive or articulated a reasoned analysis as to why payment for such hours should be disallowed.

3. Request for recommendation to reimburse costs associated with pursuing a claim at our Office is denied where agency promptly considered the claim and gave it reasonable consideration.

DECISION

Voith Hydro, Inc., of York, Pennsylvania, requests our Office recommend that the Department of the Army, Corps of Engineers (Corps), reimburse Voith in the amount of \$120,618.74, for the costs of filing and pursuing its protest, which challenged request for proposals (RFP) No. W912EF-17-R-0004, for the design, supply, and installation of turbines in several hydroelectric generator units at the McNary Lock and Dam Powerhouse located near Umatilla, Oregon.

We recommend the Corps reimburse Voith \$98,526.82 out of its total claim of \$120,618.74.

BACKGROUND

On April 9, 2018, Voith protested with our Office the award of a contract to Alstom Renewable US LLC, of Greenwood Village, Colorado, for the design, supply, and installation of turbines in 14 hydroelectric generator units at the McNary Lock and Dam Powerhouse. Voith's protest alleged that the agency unreasonably evaluated aspects of the technical proposals and the past performance submitted by Voith and Alstom. Protest (B-416243.1) at 28-39. Voith also asserted that the Corps' price realism analysis and best-value tradeoff decision were flawed. *Id.* at 24-28, 39-41. Subsequent to receipt of the agency report, Voith filed a timely supplemental protest challenging additional aspects of the agency's evaluation of technical proposals and past performance, while also raising new challenges to the agency's best-value tradeoff decision. Supp. Protest (B-416243.2) at 4-122. On June 25, 2018, our Office requested additional development from the agency with regard to the agency's technical evaluation as it related to certain information provided to, and advice received from, a Corps subject matter expert. GAO E-mail (June 25, 2018) at 1.

After development of the full protest record, which included the filing of an agency report, the above-referenced supplemental protest, a supplemental agency report, and the protester's and intervenor's comments, the Corps submitted a request for "outcome prediction" alternative dispute resolution (ADR) to our Office. Corps E-mail (June 26, 2018) at 1. Our Office agreed to the request. During the course of that ADR, the GAO attorney advised the agency that GAO would likely sustain Voith's protest on the basis that certain aspects of the agency's evaluation of technical proposals and its evaluation of past performance were unreasonable; that the agency failed to conduct a price realism analysis as required by the solicitation; and that the Source Selection Authority's (SSA) best-value tradeoff was not supported by the underlying evaluation record. The GAO attorney recommended that the agency reevaluate technical and price proposals, along with past performance, and issue a new best-value tradeoff decision supported by the underlying evaluation record.

In response to the ADR, the Corps informed our Office that it intended to take corrective action by: conducting a comparative analysis of proposals with attention to technical proposals; reevaluating past performance; performing a price realism analysis based on the language in the solicitation; and issuing a new best-value determination. Corrective Action Notice at 1-2. Based on the agency's proposed corrective action, our Office dismissed Voith's protest as academic. Voith Hydro, Inc., B-416243; B-416243.2, July 9, 2018 (unpublished decision) at 1-2.

On July 23, 2018, Voith requested that our Office recommend that it be reimbursed the cost associated with filing and pursuing its protest. Request at 1. Our Office dismissed the request after the Corps indicated it did not object to reimbursement of the protester's reasonable costs. Voith Hydro, Inc., B-416243.3, Aug. 29, 2018 (unpublished decision) at 1. Voith submitted its certified claim for reimbursement of protest costs in the amount of \$120,618.74, to the Corps on October 24, 2018. Request for Costs (RFC), exh. 1,

Certified Cost Claim, at 1-60.¹ The agency responded on November 20, by proposing to pay \$75,729.25 of the total amount requested, which the Corps believed was “fair compensation for efforts by a prudent protester on the issues that GAO deemed likely to succeed.” RFC, exh. 2, Response to Certified Claim, at 68. Because the parties were unable to reach agreement on the amount, Voith filed the instant request with our Office on March 4, 2019. RFC at 1.

DISCUSSION

Voith asks our Office to recommend that it be reimbursed for the full amount of the cost of pursuing its protest, inclusive of costs incurred in pursuing the unsuccessful grounds that were raised. RFC at 16. Voith asserts its unsuccessful protest allegations were intertwined with its successful protest allegations and contends that both should be reimbursed. Id. at 16-25; Comments (B-416243.4) at 2-7. Voith also contends that full reimbursement of the claim is appropriate because the amount of attorneys and attorney hours it used to pursue its protest were reasonable, especially in light of the complexity of the underlying protest issues and because of reductions in hours that Voith already made. RFC at 25-28; Comments (B-416243.4) at 8-9. Finally, Voith requests that our Office recommend that it be reimbursed for the costs of pursuing its request for reimbursement. RFC at 28; Comments (B-416243.4) at 10-11.

In response, the Corps contends that it is not obligated to reimburse Voith for the full amount of the claim because it “does not fairly reflect the significant amount of attorney time spent on non-meritorious claims or the realistic effort needed to adequately pursue the protest claims.” Response to RFC at 4. The agency also objects to reimbursement for the costs Voith incurred pursuing its claim. Id. at 9.

Severability of Protest Costs

In response to Voith’s request that the Corps reimburse it for the costs it incurred in pursuing all of its protest allegations, irrespective of whether the protest allegation was successful or unsuccessful, Id. at 16-25; Comments (B-416243.4) at 2-7, the agency objects and requests that Voith’s claim be reduced by at least \$33,134.74. Response to RFC at 7; RFC, exh. 2, Response to Certified Claim, at 68. Specifically, the Corps asserts that Voith should only be entitled to reimbursement for those costs associated with protest grounds that our Office indicated would likely be sustained. Response to RFC at 5-7; RFC, exh. 2, Response to Certified Claim, at 62-66.

As a general rule, our Office recommends that a successful protester be reimbursed the costs incurred with respect to all the issues pursued, not merely those upon which it has

¹ Voith’s request for costs was submitted with an attachment consisting of four separate exhibits. To avoid confusion, this decision cites to the relevant exhibit page number(s) within the overall attachment, rather than to the page number(s) associated with each of the individual exhibits.

prevailed. The Salvation Army Cmty. Corrs. Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7; Blue Rock Structures, Inc.--Costs, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190 at 3. Limiting recovery of protest costs to only those issues on which the protester prevailed would be inconsistent with the broad remedial congressional purpose behind the cost reimbursement provisions of the bid protest provisions of the Competition in Contracting Act. The Salvation Army Cmty. Corrs. Program--Costs, supra; 31 U.S.C. § 3554(c)(1)(A). Consistent with this view, we generally consider all issues concerning the evaluation of proposals to be intertwined, and thus not severable, and therefore usually will recommend reimbursement of the costs associated with both successful and unsuccessful evaluation challenges. The Salvation Army Cmty. Corrs. Program--Costs, supra. In appropriate cases, however, we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues as to essentially constitute a separate protest. Burns & Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 3. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, our Office considers, among other things, whether the successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. Id.

As discussed above, Voith raised numerous protest allegations challenging multiple aspects of the agency's evaluation and award decision. As relevant here, Voith raised the following three arguments in challenging the agency's evaluation of technical proposals: (1) Alstom's technical proposal lacked the relevant fish passage experience required by the RFP to warrant an adjectival rating of outstanding; (2) Alstom's technical proposal should have been rejected because it proposed to outsource all the solicitation's work to a foreign entity over which Alstom had no control; and (3) the agency improperly evaluated the fixed-blade and adjustable-blade turbines offered by Alstom's technical proposal, and that the improper evaluation was used by the agency to justify its award decision. Comments (B-416243) at 18-21; Supp. Protest (B-416243.2) at 4-25, 69-84.

During the course of the ADR proceeding provided to the parties, the GAO attorney handling the matter advised that GAO would likely sustain the protest allegation challenging the agency's evaluation and comparative analysis, as they related to Alstom's fixed and adjustable-blade turbines, but that the other two protest grounds likely had no merit. The Corps argues that a reduction in reimbursement of Voith's claim is now appropriate because it believes that the two protest allegations that were not likely to be sustained shared no core facts or legal theories with the protest ground the GAO attorney indicated would likely be sustained. Response to RFC at 5-7; RFC, exh. 2, Response to Certified Claim, at 62-66.

We disagree. Here, the two unsuccessful protest grounds were not so clearly severable from the successful issue, as to essentially constitute a separate protest. For example, each of the allegations involved a challenge to the agency's evaluation of Alstom's technical proposal. See Comments (B-416243) at 18-21; Supp. Protest at 4-25, 69-85.

Because of the intertwined nature of the protester's challenges to the agency's evaluation, we see no basis to accept the agency's arguments to sever the recovery of costs related to distinct allegations regarding the technical evaluation. The Salvation Army Cmty. Corrs. Program--Costs, supra; Blue Rock Structures, Inc.--Costs, supra.

Number of Attorney Hours

Next, Voith contends that it should receive full reimbursement for all of the attorney hours it submitted in its certified claim to the agency. RFC at 25-28; Comments (B-416243.4) at 8-9. The Corps objects because it asserts that Voith's counsel expended an unusual amount of attorney time to advance its protest claims, and requests that costs be reduced by \$11,754.75. Response to RFC at 7-9; RFC, exh. 2, Response to Certified Claim, at 66-67. In this regard, the agency asserts that Voith's protest costs exceed those that would be incurred by a prudent person in pursuit of a protest. Response to RFC at 8.

Our Office will examine the reasonableness of attorney hours claimed to determine whether they exceed, in nature and amount, what a prudent person would incur in pursuit of his or her protest. Shaka, Inc.--Costs, B-405552.2, May 17, 2012, 2012 CPD ¶ 160 at 3; Price Waterhouse--Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 5. A recommendation that an agency pay a protester's costs is intended to relieve protesters with valid claims of the burden of vindicating the public interests which Congress seeks to promote; it is not intended as a reward to prevailing protesters or as a penalty imposed upon the government. W.S. Spotswood & Sons, Inc.--Costs, B-236713.3, July 19, 1990, 90-2 CPD ¶ 50 at 3. Our Office generally accepts the number of attorney hours claimed, unless the agency identifies specific hours as excessive and articulates a reasoned analysis as to why payment for those hours should be disallowed. Shaka, Inc.--Costs, supra; Pulau Elecs. Corp.--Costs, B-280048.11, July 31, 2000, 2000 CPD ¶ 122 at 6. An agency simply concluding that the hours claimed are excessive or suggesting there may be a duplication of effort is inadequate, by itself, to justify denying a claim for protest costs. Shaka, Inc.--Costs, supra; Pulau Elecs. Corp.--Costs, supra.

Here, the agency has not established that the number of attorney hours expended to pursue the protest was unreasonable. In fact, the agency simply concludes that the hours claimed are excessive because of the "sheer volume and duplication of legal analysis and argument contained in Voith's main briefings." RFC, exh. 2, Response to Certified Claim, at 66. In spite of this unsupported conclusion, the Corps' response to Voith's claim still failed to identify which of the specific detailed billing invoice entries was duplicative. Response to RFC at 1-10; RFC, exh. 2, Response to Certified Claim, at 62-93.

The Corps also argues that the hours claimed by Voith are unreasonable based on the excessive number of attorneys and attorney hours Voith's counsel expended in pursuit of the protest during May of 2018. RFC, exh. 2, Response to Certified Claim, at 66. In support of its position, the agency notes that Voith had up to four attorneys providing services during certain periods during May of 2018, where in some instances 30 hours

of attorney time were billed per day. Id. at 66. While the agency challenges the amount of hours billed, the Corps fails to explain why these amounts should be considered excessive. Response to RFC at 1-10; RFC, exh. 2, Response to Certified Claim, at 62-93.

Voith's certified claim to the agency requested reimbursement for a total of 490.8 hours of attorney work performed between March and August of 2018.² RFC, exh. 1, Certified Cost Claim, at 14-51. Of that total amount, Voith's counsel billed for 276.2 hours of time during the month of May.³ Id. at 36. While the number of hours billed during May account for over half of the total hours in Voith's claim, the agency's selective focus on this month ignores the fact that the agency report, submitted on May 8, triggered Voith's obligation to file comments and its supplemental protest allegations. Furthermore, the agency's administrative record was voluminous--it consisted of a 22-page legal memorandum, a 12-page contracting officer's statement, and a total of 37 exhibits, containing more than 3,000 pages of documents. Memorandum of Law (B-416243, B-416243.2) at 1-12; Contracting Officer's Statement (B-416243, B-416243.2) at 1-12; Agency Report Index (B-416243.1; B-416243.2) at 1-4.

Additionally, the Electronic Protest Docketing System (EPDS) record confirms that a significant amount of protest related activity took place in May. For example, during that month, comments were also filed by the intervenor and reviewed by Voith's counsel; Voith filed objections after reviewing the agency's response to its supplemental document request; and Voith filed redacted versions of its comments along with its supplemental protest. EPDS Docket (B-416243; B-416243.2) Entry 32; RFC, exh. 1, Certified Cost Claim, at 34; EPDS Docket (B-416243; B-416243.2) Entry 35; RFC, exh. 1, Certified Cost Claim, at 35; EPDS Docket (B-416243; B-416243.2) Entry 40; EPDS Docket (B-416243; B-416243.2) Entry 41. In light of the amount of activity Voith's attorneys were required to expend in pursuing the protest and the voluminous administrative record, we disagree that the number of attorney hours were excessive. Accordingly, we have no basis to recommend a reduction in costs without a reasoned analysis as to why the hours are excessive and should be disallowed.⁴ Shaka, Inc.--Costs, supra; Pulau Elecs. Corp.--Costs, supra.

² Voith's certified claim to the agency was submitted with what it describes as certain downward adjustments. RFC, exh. 1, Certified Cost Claim, at 3 n.1. Specifically, Voith asserts its certified claim stripped out time expended for tasks that were not related to the protest, reduced the number of attorney hours to account for learning curves, and removed time for administrative work performed by a paralegal along with a research librarian. Id.

³ According to Voith, during the month of May 2018, Voith's counsel billed for a total of 350 hours but requested reimbursement from the agency for 276.2 hours, to account for downward adjustments. RFC, exh. 1, Certified Cost Claim, at 36.

⁴ The agency also notes that although the fees incurred by Voith may be unremarkable for a large "Washington D.C. firm funded by a large corporate client, this is not an option (continued...)

Reimbursement of Pursuit of Cost Claim

Finally, Voith seeks reimbursement for services and fees associated with pursuing its claim at our Office. RFC at 28; Comments at 10-11. In this regard, Voith requests \$22,091.92 for fees and services its attorneys rendered in pursuit of its request for a recommendation of protest costs and costs associated with pursuing its claim.⁵ RFC, exh. 1, Certified Cost Claim, at 44-51.

We will only make a recommendation for reimbursement of costs associated with pursuing a claim at our Office if it is shown that the agency unreasonably delayed consideration of the claim, or otherwise failed to give it reasonable consideration. AeroSage, LLC--Costs, B-416381.6, Mar. 13, 2019, 2019 CPD ¶ 107 at 6.

Here, the record establishes that the Corps acted reasonably and promptly in negotiating Voith's claim before the matter was submitted to our Office. For example, after receiving Voith's initial certified claim on October 24, the Corps submitted its response shortly thereafter on November 20. Furthermore, and as discussed above, while we ultimately disagree with the agency's position that it should only be obligated to reimburse Voith \$75,729.25, the Corps' position was not unreasonable. Under the circumstances, the Corps' handling of Voith's certified claim was reasonable and expeditious and does not provide a basis for us to recommend the reimbursement of the costs of pursuing this claim at our Office.

RECOMMENDATION

We recommend that the Corps reimburse Voith \$98,526.82 out of its total claim of \$120,618.74. This amount represents the costs of pursuing all of Voith's legal

(...continued)

or even a typical scenario for other protesters around the country." Response to RFC at 8. This general allegation fails to identify which of the specific hours billed by Voith's counsel were excessive, and why they should be disallowed. Additionally, the agency provided no evidence to establish why the rates or fees that were billed by Voith's counsel were unreasonable, in light of the fact that Voith's claimed rates were consistent with the statutory cap on attorney's fees (adjusted for cost of living increases) imposed by the Competition in Contracting Act and the Federal Acquisition Regulation (FAR). 31 U.S.C. § 3554(c)(2)(B); FAR § 33.104(h)(5)(ii); See Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 41.

⁵ The invoice for fees and services rendered by Voith's counsel in July 2018, totaled \$13,488.97, while the invoice for August totaled \$8,602.95. RFC, exh. 1, Certified Cost Claim, at 44, 49. Our review of the details associated with these invoices confirms that the work performed by Voith's counsel during these two months was focused on obtaining reimbursement for its protest costs and not in pursuit of the underlying protest. Id.

challenges because we conclude that its unsuccessful challenges are intertwined with Voith's meritorious protest arguments. Moreover, we also find reasonable the number of attorney hours Voith used to pursue its protest. Finally, we do not recommend reimbursement of the remainder of the disputed amount, which represents those costs Voith incurred in pursuing its request for a recommendation for reimbursement of costs and its claim at our Office.

Voith'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