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Decision

Matter of: Obsidian Solutions Group, LLC--Costs

File: B-417134.3

Date: August 28, 2020

Milton C. Johns, Esq., and Jacqueline M-Koromah, Esq., Executive Law Partners, PLLC, for the protester.

Kristine Kassekert, Esq., and Christy Rivers, Esq., United States Marine Corps, for the agency.

Kenneth Kilgour, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's request for a recommendation that it be reimbursed a particular amount for the costs of filing and pursuing its protest is denied where the protester failed to file a legally sufficient claim with the contracting agency within the time required.

DECISION

Obsidian Solutions Group, LLC, of Fredericksburg, Virginia, requests that we recommend that the United States Marine Corps reimburse it \$34,777.37 for the costs of filing and pursuing its protest in *Obsidian Solutions Group, LLC*, B-417134, B-417134.2, Mar. 1, 2019, 2019 CPD ¶ 156.¹ In that decision, we sustained the protest that the agency unreasonably excluded Obsidian from a competition for a multiple-award indefinite-delivery, indefinite-quantity contract under request for proposals (RFP) No. M67854-19-R-7800.

We deny the request.

¹ Obsidian initially requested that our Office recommend that it be reimbursed \$44,198.65 for the costs of pursuing its protest--\$40,233.62 for legal fees and \$3,965.03 for Obsidian employee costs. As explained in greater detail later in this decision, Obsidian subsequently withdrew its request for reimbursement of the costs of its employees; it also reduced its request for legal fees by \$5,456.25. Protester's Reply to Agency Response to Request at 3. As a result, the amount that it is now asking us to recommend is \$34,777.37.

BACKGROUND

The solicitation was to procure services to support multiple programs under the umbrella name of Marine Air-Ground Task Force Training Support Services. The RFP required offerors to identify any actual or potential organizational conflicts of interest (OCI), including access to non-public information that would give the offeror an unfair competitive advantage. Agency Report, Tab 12, Conformed RFP at 74. The solicitation advised offerors that if the government determined that an OCI existed that could not be avoided, neutralized, mitigated, or waived, the contracting officer had the discretion to exclude potential offerors. *Id.* at 87. The solicitation further advised offerors that “the Contracting Officer may exclude an Offeror from the competition because of an appearance of an OCI in order to protect the integrity of the procurement system, even if no actual impropriety can be shown, so long as the determination is based on facts and not mere innuendo or suspicion.” *Id.*

The contracting officer excluded Obsidian from the competition, finding that an employee of a subcontractor had access to competitively useful non-public information. We found unreasonable the contracting officer’s conclusion, and, on March 1, 2019, we sustained the protest on that basis. We recommended that the agency make a new assessment of whether Obsidian should be excluded from the procurement consistent with our decision. We further recommended that the agency reimburse the protester the costs of filing and pursuing the protest. We noted that Obsidian’s certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of the decision.

On Friday, April 26, after close of business--within 60 days of receipt of our decision--protester’s counsel submitted a certified claim to the Marine Corps seeking reimbursement of \$44,405.42 for the costs of filing and pursuing its protest, including \$40,440.39 for attorneys’ fees and expenses. Email from Protester to Agency, Apr. 26, 2019, at 3-4. The remainder--\$3,965.03--was for Obsidian personnel. *Id.* at 5.

In May, the agency requested additional documentation, including Obsidian’s engagement letter and unredacted invoices, stating that the invoices provided did not reconcile with the reimbursement requested. (The engagement letter and unredacted invoices were never provided.) Obsidian responded to the agency’s request in June. The protester and agency exchanged several emails in July, when the efforts of the protester to deliver certain documents requested by the agency were hampered by technical difficulties. The agency advised Obsidian that the Marine Corps did not have sufficient information to determine whether the costs were fair and reasonable. Ultimately, the agency received the documents and, in return, advised the protester that heavy redactions would slow the review process.

In October, GAO asked the agency to “provide notice of whether it adopted GAO’s recommendation.” Electronic Protest Docketing System No. 36. Obsidian replied to the GAO minute entry, stating that the agency had adopted GAO’s recommendation with

regard to the procurement but not with regard to the reimbursement of the protester's claim for costs, which was still outstanding. See Protester's Chronology at 2-3.² In light of the protester's response, the agency did not respond to the minute entry. On June 11, 2020, Obsidian filed its request with our Office.

DISCUSSION

Obsidian requests that GAO recommend that the Marine Corps reimburse Obsidian for the costs of filing and pursuing its protest. Request at 1. Obsidian states that it timely submitted its certified claim, but advises that the parties "have been unable to reach agreement concerning the amount of costs to be paid within a reasonable amount of time." *Id.* Obsidian also requests the costs of pursuing its claim.

If GAO recommends that an agency reimburse a protester the costs of filing and pursuing a protest, the protester is required 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. Failure to file a timely claim could result in forfeiture of a protester's right to recover its costs. The protester and the agency are required to attempt to reach agreement on the amount of costs. 4 C.F.R. § 21.8(f)(1).

If the protester and the agency cannot reach agreement regarding the amount of costs within a reasonable time, the protester may file a request that GAO recommend the amount of costs to be paid. 4 C.F.R. § 21.8(f)(3). In such cases, GAO may recommend the amount of costs the agency should pay, and may, in some instances, recommend that the agency reimburse the protester the costs of pursuing its claim for costs before GAO. 4 C.F.R. § 21.8(f)(5).

The agency contends that GAO should deny or dismiss the protester's request for reimbursement and argues that Obsidian "failed to submit adequate documentation of its claim within the 60-day time frame prescribed by GAO's Bid Protest Regulations, or with any subsequent submission." Response at 4. As explained below, we find that Obsidian failed to submit an adequately documented claim, and we deny the request on that basis.

At the outset, we again note that while Obsidian initially requested reimbursement in the amount of \$3,965.03 for the time its own employees spent pursuing the protest, Obsidian subsequently withdrew its request for these costs. Reply to Agency Response at 1-2. Our decision thus focuses on Obsidian's request for the reimbursement of its attorneys' fees.

The Marine Corps rejected as unreasonable several specific Obsidian requests for reimbursement of attorneys' fees, asserting either that the fees covered attorney time not spent in pursuit of the protest or that the time entry was inaccurate. Response at 15-17. Challenged reimbursements included, for example, hours that may have

² The agency confirmed the accuracy of the chronology. Response to Chronology.

related to other contracts performed by Obsidian for the agency, and hours for a meeting with agency counsel that counsel denies attending. *Id.* at 16-17. Obsidian withdrew its request for all of that time. Reply to Agency Response at 2.

Obsidian asserts that GAO should recommend reimbursement of the remainder of the costs, “[g]iven that [Obsidian] has conceded cost requests where the Agency had substantive opposition” to the request. *Id.* at 4. While the protester conceded the merits of the agency’s rejection of several specific requests for reimbursement, Obsidian nevertheless failed to address other important agency concerns. The Marine Corps claims that the protester has “not provided any documentation to establish that the [attorneys’] rates charged or the rate increases were reasonable.” Response at 11. The agency also argues that the protester has improperly requested reimbursement for charges that Obsidian did not incur. *Id.* at 12-14. The Marine Corps further asserts that the heavily redacted invoices provided by Obsidian make it impossible for the agency to determine what costs were actually incurred, whether they are reasonable, and whether they were incurred in the pursuit of the protest. *Id.* at 15. While the protester’s withdrawal of certain reimbursement requests--discussed above--addressed and ameliorated some of the agency’s concerns, the Marine Corps has rejected the remainder of the claim because of unresolved concerns about the appropriateness of the requested reimbursement. See Agency Comments, Aug. 6, 2020.

It is well-settled that a protester’s failure to file an adequately documented claim within the allowed 60-day period may result in forfeiture of its right to recover costs, even when the parties have continued to negotiate after that period expired. *The Argos Grp., LLC--Costs*, B-406040.3, July 3, 2013, 2013 CPD ¶ 165 at 5; *Moyle Real Estate and Dev. Co.--Costs*, B-404761.4, Mar. 27, 2012, 2012 CPD ¶ 125 at 5; *H.G. Props. A, L.P.--Costs*, B-277572.8, Sept. 9, 1998, 98-2 CPD ¶ 62 at 2-3. It is also well-settled that the 60-day timeframe was specifically designed to avoid the piecemeal presentation of claims--as seen here--which necessarily results in unduly delaying their resolution. *Al Long Ford--Costs*, B-297807.2, Oct. 18, 2007, 2007 CPD ¶ 189 at 3; *REEP, Inc.--Costs*, B-290665.2, July 29, 2003, 2003 CPD ¶ 131 at 4.

The record, including Obsidian’s withdrawal of various reimbursement requests, provides ample evidence that the protester’s initial claim, submitted to the Marine Corps in April, 2019, was not adequately documented. The record further provides evidence that Obsidian’s claim to GAO, filed June 12, 2020, was also not adequately documented. Taking the record as a whole, we do not recommend that the Marine Corps reimburse the amounts now requested by Obsidian because the claim, presented in a piecemeal fashion, does not provide sufficient documentation to support the request.

The protester also requests that GAO recommend Obsidian be reimbursed the costs of pursuing its claim before our Office. Request at 4. Since we have not here recommended reimbursement of any part of this claim, we see no basis to recommend the costs of pursuing the claim. 4 C.F.R. § 21.8(f)(5). The protester’s request that we

recommend reimbursement of the costs of pursuing this claim before our Office is likewise denied.

The request is denied.

Thomas H. Armstrong
General Counsel