



Decision

Matter of: High Noon Unlimited, Inc.--Costs

File: B-417830.3

Date: July 1, 2020

Dr. George B. Inabinet, III, High Noon Unlimited, Inc., for the protester.
Major Will A. Schmitt, United States Marine Corps, 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 reimbursed a particular amount for the costs associated with filing and pursuing its protest is dismissed as untimely where protester failed to file its request within 10 days of being advised that the agency would not participate in further discussions concerning the amount of the claim.

DECISION

High Noon Unlimited, Inc., requests that we recommend that it be reimbursed \$22,841.95 by the United States Marine Corps for the costs associated with filing and pursuing its successful bid protest in *High Noon Unlimited, Inc.*, B-417830, Nov. 15, 2019, 2019 CPD ¶ 387.

We dismiss the request.

High Noon's protest concerned the award of a contract under request for proposals No. M67854-19-R-1549, issued by the agency for a quantity of rifle magazine pouches. In our decision sustaining the protest, we concluded that the agency had misevaluated the awardee's product, and recommended that it reevaluate proposals and make a new source selection decision. We also recommended that the agency reimburse High Noon the costs associated with filing and pursuing its protest and advised the protester to submit its certified claim for costs, detailing the time spent and the costs incurred, directly to the agency within 60 days after receipt of our decision.

On January 7, 2020, High Noon submitted its claim to the agency. The claim was comprised of three invoices that High Noon had prepared, one each for its chief executive officer, its chief operations officer, and its director of sales and government

sales. Agency Report (AR) exh. 1, High Noon's Certified Request for Costs.¹ The record shows that, after receiving High Noon's request, the agency asked for additional information from the firm in support of its claim. Specifically, the agency requested that the firm provide the agency with objective evidence to support the hourly rates claimed, such as corporate payroll records, W-2 forms, or tax records, as well as a breakdown of tax, insurance and fringe benefit rates. AR, exh. 3, Letter from the Agency to High Noon, Jan. 22, 2020.

The record shows that the parties engaged in a back-and-forth email dialog for some period of time. The gist of this dialog amounts to High Noon asking the agency to provide it with the "federal rule or rules" supporting the agency's request for additional information, and the agency responding that its request was based on the decisions of our Office pertaining to the payment of claims for bid protest costs. AR, exhs. 4-10.

On February 21, the contracting officer wrote a letter to High Noon, denying the firm's request in its entirety, except for the filing fee of \$350 that High Noon had been required to pay in connection with the filing of its protest in our Office's electronic procurement docketing system (EPDS).² AR, exh. 11, Contracting Officer's Final Decision Letter to High Noon, Feb. 22, 2020. The contracting officer's letter was titled "Contracting Officer's Final Decision regarding High Noon's Request for Costs" and stated that the basis for her denial was the firm's repeated failure to provide the requested documentation. *Id.* In that letter, the contracting officer specifically stated that the agency would not participate in further discussions regarding High Noon's request for costs. *Id.* at 3.

Notwithstanding the representation by the contracting officer to the effect that the agency would not participate in further discussions concerning High Noon's claim, High Noon sent yet another letter to the agency dated March 6. AR, exh. 12, Email and Letter from High Noon. In that letter, High Noon once again outlined its understanding of the correspondence to date, and once again reiterated its request for the agency to provide "supporting documents" that would require High Noon to provide the agency with the requested information. *Id.*

By email dated March 25, the contracting officer reiterated her earlier position, namely, that the agency would not participate in further discussions with High Noon regarding its claim for protest costs. AR, exh. 15, Email from the Contracting Officer to High Noon.

¹ The amount of the three invoices totals \$22,871.95. These same three invoices also were submitted to our Office in connection with High Noon's current request. This amount is slightly higher than the amount the firm referenced in its letter to our Office, which stated that it made a request to the agency in the amount of \$22,841.95. We presume that this is a typographical error in the letter to our Office.

² In connection with its grant of the EPDS filing fee, the agency requested that High Noon provide it with a copy of the receipt from EPDS.

On March 30, counsel for the agency sent yet another email to High Noon, with a copy to the GAO attorney handling the original bid protest, reiterating for a third time the position taken by the contracting officer on February 21 that the agency previously had advised High Noon that it would not participate in further discussions with the firm concerning its claim. AR, exh.17, Email from Agency Counsel to High Noon, Mar. 30, 2020. By letter dated April 1, High Noon filed its claim with our Office.

We dismiss the request as untimely. Our Bid Protest Regulations contain strict requirements regarding the time for filing a request with our Office where the protester and agency cannot agree about the amount of a protester's claim for bid protest costs. Specifically, our regulations provide as follows:

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, but such request shall be filed within 10 days of when the agency advises the protester that the agency will not participate in further discussions regarding the amount of costs.

4 C.F.R. § 21.8(f)(3)

As noted, in the contracting officer's final decision regarding High Noon's request for costs, she specifically stated: "MCSC [Marine Corps Systems Command] will not participate in further discussions regarding High Noon's request for costs." AR, exh. 11, Contracting Officer's Final Decision Letter to High Noon, Feb. 22, 2020, at 3. This language in the contracting officer's letter sets out *verbatim* the language in our regulation, and effectively served as notice to High Noon that the 10-day period during which to file its request to our Office had begun to run as of February 21, the date of the contracting officer's letter. High Noon did not file its request with our Office until April 1, more than 10 days after being thus notified by the agency. Accordingly, its request to our Office is untimely, and not for our consideration.³

As a final matter, we point out that High Noon's failure to provide the agency with the requested information largely is a problem of the protester's own making. The agency repeatedly advised the protester that the information being

³ High Noon appears to suggest that it was not put on notice by the contracting officer's February 21 letter because, prior to that time, its representatives had been communicating with agency counsel rather than the contracting officer. However, there is no basis to suggest that the contracting officer lacked authority to render a final decision on High Noon's claim, or that the notice that the agency would not participate in further discussions with the firm provided by the contracting officer was anything other than a final determination from the agency on High Noon's outstanding claim with the agency.

requested was information required by decisions of our Office, but the firm failed to provide the information. AR, exhs. 5, 7, 9, Correspondence from the Agency to High Noon.⁴

A review of the numerous, publicly available decisions of our Office clearly demonstrates that the information requested by the agency is precisely the type of information necessary for a protester to substantiate the hourly rates claimed. See, e.g., *AeroSage, LLC--Costs*, B-416381.6, Mar. 13, 2019, 2019 CPD ¶ 107 (burden of providing adequate documentation to support amount claimed rests on the protester); *Solutions Lucid Group, LLC--Costs*, B-400967.2, Oct. 1, 2009, 2009 CPD ¶ 198 (claim for costs denied where protester failed to provide adequate, objective evidence of time spent pursuing protest, and rates of compensation claimed); *Galen Medical Associates, Inc.--Costs*, B-288661.6, July 22, 2002, 2002 CPD ¶ 114 (in order to substantiate an employee's actual rate of compensation, protester must submit objective evidence of the rate, such as corporate payroll records, W-2 forms or tax records).

The record here shows that High Noon failed to provide adequate information in support of its claim, even though the agency attempted to advise the firm of the information that would be necessary to substantiate its claim for protest costs. Thus, even if we were to consider High Noon's request on the merits, we would have no basis to recommend that it be reimbursed the amount it has claimed.

The request is dismissed.

Thomas H. Armstrong
General Counsel

⁴ Even in its filings with our Office, High Noon failed to provide the required documentation.