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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: REEP, Inc.--Costs

File: B-290665.2

Date: July 29, 2003

Gilbert J. Ginsburg, Esq., for the protester.

Lt. Col. Daniel K. Poling, Department of the Army, for the agency.

Scott H. Riback, Esq., and John M. Melody, 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 claim was presented to agency in an untimely, piecemeal fashion and aggregated allowable and unallowable costs.

DECISION

REEP, Inc. requests that we recommend the amount it should be reimbursed by the Department of the Army for filing and pursuing its protest in REEP, Inc., B-290665, Sept. 17, 2002, 2002 CPD ¶156.

We deny the request.

In REEP, Inc., supra, we held that the Army improperly awarded delivery orders under the awardee's Federal Supply Schedule (FSS) contract (for language training services), despite having actual knowledge that the same services were available from numerous other vendors--including the protester--under a different schedule covering the same services, apparently at lower prices. We recommended as corrective action that the agency reimburse REEP its costs of filing and pursuing the protest, including reasonable attorneys' fees.

By letter dated November 7, 2002, the protester submitted an uncertified claim for bid protest costs in the amount of \$72,961.25, and by facsimile dated November 8, it submitted a certification for the claim. The November 7 letter included a three-page spreadsheet that purported to tally costs incurred by certain of the protester's employees, as well as the legal fees and associated costs incurred by the protester's outside counsel for the months of November 2001 through October 2002. It also

included invoices purportedly tendered by the protester's outside counsel for legal fees incurred during the months of November 2001, and March, April, June, July, September and October 2002. Finally, the letter included a 2-page listing of activities performed by the protester's outside counsel for several days during September 2002. By and large, this listing did not describe the purpose of the activities but, rather, was limited to a description of the activity performed. (For example, the listing includes an entry for a ½-hour telephone call between the protester's outside counsel and one of its employees on September 10, but does not indicate the purpose or subject matter of the call.) In other instances, the listing included a generic description of the activity performed (such as drafting and revising a letter to our Office), but no indication of the subject matter of the activity or its relationship to the protest.

By letter dated November 15, the Army advised REEP that it did not consider the claimed costs properly for payment. The Army advanced numerous reasons for its position, including inadequate documentation, the apparent inclusion of costs that were not allowable for one reason or another, and the reasonableness of certain of the claimed costs.

By letter dated November 19, the protester's outside counsel advised the Army that REEP was reviewing the agency's November 15 letter and would comment on the agency's position "later." REEP's outside counsel also acknowledged that REEP had failed to furnish the Army with supporting materials for the claimed expenses for its outside counsel. Accordingly, the protester's outside counsel forwarded additional invoices that purportedly were tendered to the protester during the period of November 2001 to October 2002, as well as listings of the activities for which the costs were incurred. These listings, like the September 2002 listing discussed above, were principally limited to a description of the activity performed, with no description of the purpose of the activity or its relationship to the protest.

Thereafter, by letter dated December 10, the protester's outside counsel furnished the Army with information included in five exhibits. The first exhibit was a 3-page spreadsheet similar to the one previously submitted that purported to tally costs incurred by certain of the protester's employees, as well as the legal fees and associated costs incurred by the protester's outside counsel for the period of November 2001 through October 2002. In this exhibit, the total amount claimed was reduced to \$68,914.33, apparently because the protester had excluded an amount for the "cost of money" that had been included in its earlier spreadsheet. The second exhibit was a listing of staff hours purportedly expended by the protester's employees in pursuit of the protest; again, this included a description of the activities in which the employees engaged, but, as with the listings provided by REEP's outside counsel, the descriptions were limited to the activities themselves, and did not explain the purpose of the activity or its relationship to the protest.

The third exhibit was a resubmission of the materials relating to the activities of the protester's outside counsel (which also included additional materials for the months

of November and December 2002). The fourth exhibit was a chronology prepared by the protester describing various activities that REEP considered related to the protest. This chronology listed the dates of various occurrences that the protester deemed relevant to its claim, but did not include a detailed listing of the hours expended by the protester's employees and outside counsel. The fifth exhibit was a telephone log generated by the protester (as opposed to a contemporaneous billing statement from the protester's telephone service provider) listing calls purportedly made between November 2001 and July 2002 in connection with the protest.

By letter dated February 3, 2003 the Army advised REEP that it still did not consider its claim properly for payment. As in its previous letter, the Army advanced several arguments in support of its position, including inadequate documentation, the reasonableness and allowability of certain claimed costs, and the inclusion of costs incurred in connection with a different REEP protest, an agency-level protest and the preparation of several proposals. The agency also asserted in this letter that REEP had failed to present its claim in a timely manner.

By letter dated February 20, REEP conceded that it had included attorneys' fees in its claim that actually related to the filing and pursuit of another protest at our Office. REEP asserted that the amount in question was \$977.50. Thereafter, by letter dated March 5, REEP conceded that it had improperly included several other costs in its claim. Specifically, REEP presented revised materials that excluded the costs associated with pursuing an agency-level protest (\$4,131.02), preparing its claim (\$7,921.33), and preparing quotations responding to two requests for quotations (\$23,295). Its total claim after eliminating these amounts was \$34,681.03. REEP presented these deductions from its original claim in a lump-sum fashion and provided no documentation showing precisely which of its originally-claimed costs it was withdrawing. REEP also responded to certain of the assertions raised in the agency's February 3 letter; for example, REEP disagreed that it had improperly added general and administrative overhead (G&A) to its outside counsel's cost.

By letter dated April 8, the agency responded to REEP, outlining its views concerning the parties' continuing disagreement. The Army reiterated its timeliness objection, and continued to challenge the manner in which REEP allocated its costs between the two protests discussed above, the reasonableness and allowability of certain other costs, and REEP's application of G&A to its outside counsel's fees. REEP responded by letter dated April 16, agreeing that certain legal fees had been improperly included and reducing its claim by an additional \$1,810. Shortly thereafter, the parties concluded that the appropriate course of action would be to submit the matter to our Office for resolution.¹

¹ Since submitting the matter to our Office for resolution, REEP also sent another letter dated July 11 requesting that it be further reimbursed the costs associated with pursuing its claim. This letter did not state the amount of those costs or include

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We deny REEP's claim in its entirety because we agree with the Army that REEP did not present it in a timely manner. Our Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1) (2003), require protesters to file claims for protest costs within 60 days of receiving our recommendation that such costs be paid. This 60-day timeframe was specifically designed to avoid the piecemeal presentation of claims (which necessarily results in unduly delaying their resolution), while at the same time affording protesters an ample opportunity to submit adequately substantiated, certified claims. HG Properties A, L.P.--Costs, B-277572.8, Sept. 9, 1998, 98-2 CPD ¶ 62 at 2. A protester's failure to file an adequately documented claim within this 60-day period results in forfeiture of its right to recover costs, irrespective of whether the parties may have continued to negotiate after the 60-day period expired. Id. at 2-3. In this latter connection, a protester seeking to recover its protest costs must submit evidence sufficient to support its claim that those costs were incurred and are properly attributable to filing and pursuing the protest. Stocker & Yale, Inc.--Claim for Costs, B-242568.3, May 18, 1993, 93-1 CPD ¶ 387 at 4. Although we recognize that the requirement for documentation may sometimes entail certain practical difficulties, we do not consider it unreasonable to require a protester to document in some detail the amount and purposes of its employees' and attorneys' efforts and to establish that the claimed hourly rates reflect the employees' actual rates of compensation plus reasonable overhead and fringe benefits. W.S. Spotswood & Sons, Inc.--Claim for Costs, B-236713.3, July 19, 1990, 90-2 CPD ¶ 50 at 3. We do not believe that the 60-day timeframe should be applied in so harsh a manner that a protester receives no reimbursement merely because its initial, timely, claim required some supplementation or elaboration. Nonetheless, where the timely submission is of little or no value in supporting the claim, we believe that the claim should be rejected as untimely.

Here, the record shows that, while REEP tendered a claim within the 60-day period, that claim was eventually shown to be so riddled with errors and gaps as to be essentially worthless. As noted, the initial submission included only a summary spreadsheet purporting to show REEP's overall protest costs that did not include any information relating to the amount of time spent by its employees and attorneys or the nature of their activities; several summary invoices showing the amounts billed by REEP's outside counsel (also lacking entirely in detail); and a two-page listing of generic activities engaged in by the protester's outside counsel during 5 days in September immediately preceding the issuance of our decision. This

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documentation to support the claim. In any case, while we may recommend the payment of such costs as a means of encouraging an agency's expeditious and reasonable consideration of a protester's claim for costs, 4 C.F.R. § 21.8(f)(2) (2003); Pulau Elec. Corp.--Costs, B-280048.11, July 31, 2000, 2000 CPD ¶ 122 at 11, there is no indication here that the agency unreasonably delayed consideration of REEP's claim.

documentation does not meet the standard set forth above. Indeed, by its November 19 letter to the agency (submitted after the 60-day period had expired), REEP's outside counsel acknowledged as much, stating "with some embarrassment" that he had omitted, among other things, the backup materials to substantiate his outside counsel fees. Moreover, REEP did not even make an initial presentation of what it considered adequate documentation of the entire claim until December 10. Thereafter, in a series of protracted correspondence spanning a period of approximately 5 months, the protester attempted first to document, and thereafter to reduce, its claim in response to apparently legitimate concerns identified by the agency. This is precisely the piecemeal presentation of a claim that our Regulations are designed to avoid. Accordingly, we deny REEP's claim on grounds that REEP failed to timely submit an adequately documented claim.

We point out as well that, beyond its failure to submit a timely claim, the record shows that REEP included both allowable and unallowable costs in its claim. In this regard, where a protester has aggregated allowable and unallowable costs into a single claim, and we cannot determine from the record what portion of the claim is allowable and what portion is unallowable, the entire claim will be disallowed. Maintenance and Repair--Costs, B-251223.4, June 4, 1994, 94-1 CPD ¶ 381 at 4.

Here, there is no basis on the record before us to determine what portion of the claim is allowable and what portion is unallowable. For example, REEP's initial claim included costs associated with another protest that it had been simultaneously pursuing in our Office. REEP, Inc., B-290688, Sept. 20, 2002, 2002 CPD ¶ 158. By letter dated February 20, 2002, REEP initially conceded that its claim included attorneys' fees associated with that other protest in the amount of \$977.50. Thereafter, by letter dated April 16, REEP conceded that its claim still included attorneys' fees for the other protest, and offered to reduce its claim by an additional \$1,810. There is no way to determine from the documentation in the record whether REEP has completely eliminated the costs associated with the other protest.²

In addition, the claim includes costs associated with other protests filed by REEP during 2001, long before the protester knew its basis for protest and almost a year before we issued our decision. There is no way to determine from the record which of REEP's claimed costs relate to these other protests. REEP's claim also initially

² We note as well in this connection that REEP represented that its employees' costs did not include costs associated with the other protest. However, exhibit 2 to REEP's December 10 letter includes an entry for July 22 that attributes 10 hours of its employees' time to submitting rebuttal material on both protests to our Office.

included amounts associated with the preparation of several proposals; while the firm represented that it had removed these costs by letter dated March 5, there is no way, due to a lack of detail in the documentation, to determine from the record whether all such costs have been removed.

The request is denied.

Anthony H. Gamboa
General Counsel