

Decision

Matter of: A-1 Movers of America, Inc. et al.--Costs

File: B-277241.31

Date: August 2, 1999

Thomas M. Auchincloss, Jr., Esq., and Brian L. Troiano, Esq., Rea, Cross & Auchincloss, for the protester.
Ramon Morales, Esq., Department of the Army, for the agency.
Adam Vodraska, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protesters' request for recommendation that they be reimbursed for protest costs is denied where the protesters' attorneys fail to adequately document that the claimed attorneys' fees and expenses are costs of the protesters.

DECISION

A-1 Movers of America, Inc. and 38 other firms request that we recommend the amount they should be reimbursed by the Military Traffic Management Command (MTMC), Department of the Army, for filing and pursuing their protests in Aalco Forwarding, Inc., et al., B-277241.16, Mar. 11, 1998, 98-1 CPD ¶ 75.¹ In that decision,

¹The firms requesting costs are: A-1 Movers of America, Inc.; A-1 Moving & Storage, Inc.; Able Forwarders, Inc.; A. Arnold & Son Transfer & Storage Co., Inc.; Art and Paul Moving and Storage; Associated Forwarding, Inc.; Associated Storage & Van, Inc.; Carlyle Van Lines, Inc.; Carrier Transport Int'l, Inc.; Coastal Moving Co., Inc.; Conrad Group, Inc.; Davidson Transfer & Storage Co., Inc.; Denoyer Bros. Moving & Storage Co.; Door to Door Moving & Storage Co.; Exhibit Transport, Inc.; Ferriss Warehouse & Storage; Fogarty Van Lines, Inc.; Horne Storage Co., Inc.; Lynn Moving & Storage, Inc.; A.D. McMullen, Inc.; Mid-State Moving & Storage, Inc.; Movers Unlimited, Inc.; Nilson Van & Storage; Northwest Consolidators, Inc.; Ogden Transfer and Storage Co.; OK Transfer & Storage, Inc.; Pan American Van Lines, Inc.; Riverbend Moving & Storage, Inc.; Royal Forwarding, Inc.; Sells Service, Inc.; South Hills Movers, Inc.; Stanley's Transfer Co., Inc.; Starck Van Lines, Inc.; StarTrans Int'l, Inc.; Stearns Forwarders, Inc.; Stearns Moving & Storage of Kokomo, Inc.; Von der

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we sustained the protests by these and other protesters against the partial small business set-aside of request for proposals (RFP) No. DAMT01-97-R-3001.²

We deny the request.

The RFP is for a pilot program that reengineers the Department of Defense's current interstate and international program for shipping and storing the personal property of its military service members and civilian employees. As amended, the solicitation sought proposals to service 53 designated traffic channels (origin state-to-destination region), 27 of which were partially set-aside for exclusive small business participation (amounting to 12 percent of the traffic volume).

The solicitation, as issued, was the subject of numerous protests by these and other protesters, as were subsequent amendments to the RFP. Among the protest allegations was the contention that the RFP's partial set-aside was not an economic production run or reasonable lot, as required, and that the solicitation was not properly divided into set-aside and non-set-aside portions and was otherwise ambiguous in this regard.

On March 11, 1998, we sustained the protests of the RFP's partial set-aside. We found that the partial set-aside did not ensure an economic production run or reasonable lot of shipments for small business concerns, as required by Federal Acquisition Regulation (FAR) § 19.502-3(b). Specifically, the set-aside did not meaningfully consider the impact of the relatively small number of shipments available on many of the set-aside channels or the significant obligations, such as committed daily capacity, imposed on small business contractors by the solicitation. We recommended that the agency reexamine its partial set-aside under the criteria of FAR § 19.502-3, and make the appropriate determinations and adjustments. In sustaining the protests, we further recommended that the protesters be reimbursed the reasonable costs of filing and pursuing their protests, including reasonable attorneys' fees, allocable to the partial set-aside issue.³

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Ahe Van Lines, Inc.; Wainwright Transfer Co. of Fayetteville, Inc.; and Weathers Bros.

²The other protesters also requested that we recommend the amount they should be reimbursed for filing and pursuing their protests of the partial set-aside. We are addressing their cost claim separately.

³In response to our decision, the agency decided to eliminate the previous partial set-aside and to designate 17 of the high volume channels as 100-percent small business set-asides. The protesters then challenged this revised set-aside, contending that MTMC failed to establish that all of the set-aside channels constituted economic

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On May 7, 1998, within 60 days of receipt of our decision, the protesters' attorneys submitted a certified claim to MTMC seeking reimbursement of \$69,828.14 in attorneys' fees and \$3,550.21 in expenses. To support the claimed fees and expenses, the protesters' attorneys submitted an "abstract" for each pleading or document that involved the sustained issue. The abstract identified the issues addressed by the pleading or document; the date on which the work was performed; the attorneys involved; a brief description of the work; the number of hours expended; and the total amount of attorney time. Where a pleading or document involved issues other than the partial set-aside, the attorneys allocated the amount of their fees and expenses to the sustained protest issue on the basis of the percentage of pages of each submission devoted to the partial small business set-aside issue. Each abstract also identified out-of-pocket expenses (such as duplicating, messenger, telephone, express delivery, and postage expenses) incurred in connection with the particular pleading or document, although these expenses were not allocated proportionally to the sustained protest issue. The protesters' attorneys did not provide any other supporting information, such as copies of their actual bills to the protesters.

The contracting officer denied the claim on November 23 for the reason that the request was not properly substantiated. The protesters' attorneys then asked that the contracting officer provide additional information regarding the denial of the claim. On January 12, 1999, the contracting officer reiterated her earlier denial of the claim. The contracting officer noted, among other things, the failure of the protesters' attorneys to substantiate the time they expended and their out-of-pocket expenses by providing copies of paid client billings, memorandums of telephone conversations, invoices, minutes and memorandums of meetings, copies of paid invoices, or receipts of bills paid. The contracting officer also found that the attorneys failed to submit a copy of the retainer agreement with each protester with which she could evaluate and verify whether some of the claimed expenses were properly the responsibility of the protesters.

On January 28, the protesters requested that our Office determine the amount they should be reimbursed.

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production runs or reasonable lots, and that the set-aside decision lacked a reasonable basis. In Aalco Forwarding, Inc., et al., B-277241.20, B-277241.21, July 1, 1998, 98-2 CPD ¶ 1, recon. denied, B-277241.26, Jan. 6, 1999, 99-1 CPD ¶ 1, we denied these protests of the RFP's revised set-aside, finding that the new set-aside determination was not a partial set-aside of the entire procurement under the applicable regulation but a total set-aside of each restricted channel. We concluded that the set-aside had a reasonable basis and was in accord with the applicable regulation governing total set-asides, FAR § 19.502-2, which does not require a total set-aside to constitute an economic production run or reasonable lot.

We will not consider requests for a recommendation for reimbursement of costs where the protester fails to document its claim to the contracting agency. See Custom Prod. Mfg., Inc.--Recon., B-235431.8, July 21, 1995, 95-2 CPD ¶ 40 at 3. Where, as here, attorneys' fees are sought to be recovered, evidence from the attorneys involved must be submitted, including, for instance, copies of bills from the attorneys listing the dates the services were performed and the hours billed to the protester. Custom Prod. Mfg., Inc.--Costs, B-235431.7, May 9, 1995, 95-1 CPD ¶ 236 at 3. We have reviewed the documentation submitted by the protesters' attorneys here, which consists of the abstracts of attorneys' fees and expenses for each pleading or document that dealt with the partial set-aside issue, and we find this evidence insufficient to support the protesters' claim.

While the attorneys' fees and expenses claimed may have been incurred in "representing the interests of the small business protesters," Statement of Thomas M. Auchincloss, Jr., Esq., May 7, 1998, at 2, there is no evidence that these fees and expenses were ever actually billed to the protesters.⁴ In this regard, the protesters have not responded to the agency's contention that an industry trade association, the American Moving and Storage Association (formerly the American Movers Conference), actually sponsored the protests; on the contrary, the record is devoid of any unequivocal statement by the attorneys that their costs were billed to or paid by the actual protesters. In light of this unrebutted contention, and in the absence of any written retainer agreements or other evidence that the protesters were obligated in any way to pay the firm for the costs incurred in pursuing the protest, the failure of the protesters' attorneys to disclose their billings and any financing arrangement that may have existed prevents us from determining whether the costs in question are properly considered those of the protesters. Without such evidence, we cannot rule out the possibility that the protesters might recover costs they did not incur.

Accordingly, we deny the request that our Office recommend that the protesters recover the costs claimed here.

Comptroller General
of the United States

⁴The protesters' attorneys have not addressed the agency's position that they failed to adequately document the claim with copies of client billings but stated that, even if the agency had originally asked for such information, "we would have advised that certain of the items are subject to the attorney-client and attorney-work product privileges and would not have been disclosed even if they existed." Claim for Costs at 8.