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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: L-3 Communications Corporation, Ocean Systems Division--Costs

File: B-281784.5

Date: February 17, 2004

Donald E. Sovie, Esq., Brian M. Russ, Esq., and Amy E. Owens, Esq., Crowell & Moring, for the protester.

Valencia L. Bowers, Esq., and Andrew C. Saunders, Esq., Department of the Navy, Naval Sea Systems Command, for the agency.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation for reimbursement of protest costs is denied for failure to diligently pursue claim where protester failed to contact agency for nearly 3 years regarding resolution of previously filed claim and, despite failure to resolve the claim within a reasonable period with the agency, protester did not diligently pursue its request for resolution by General Accounting Office.

DECISION

L-3 Communications Corporation, Ocean Systems Division, requests that we recommend the amount it should be reimbursed by the Department of the Navy for filing and pursuing its protest in L-3 Communications Corp., Ocean Sys. Div., B-281784.3, B-281784.4, Apr. 26, 1999, 99-1 CPD ¶ 81.

We deny the request.

This claim arises from L-3's protest of the agency's evaluation of proposals and source selection under request for proposals No. N00024-98-R-6207, issued by the Department of the Navy, Naval Sea Systems Command, for the design and production of Omnibus Towed Array Systems. By decision of April 26, 1999, we sustained the protest in part, due to improprieties in the agency's cost realism evaluation of L-3's proposal. We recommended in that decision that the agency conduct discussions and request revised cost proposals. We also recommended that the protester be reimbursed the costs of filing and pursuing the protest, including attorneys' fees. The protester was directed to submit to the contracting agency,

within 60 days of receiving our decision, its detailed claim of the time expended and costs incurred in pursuing its protest. See Bid Protest Regulations, 4 C.F.R. § 21.8(f) (2003). L-3 submitted its claim to the agency on June 22, 1999, within the 60-day period; that claim sought a total of \$374,322 in protest costs from the Navy.

On or about November 2, 1999, the Navy reported to L-3 that an audit of the claim revealed that the vast majority of the costs were unreasonable or unallowable. In the interest of settling the matter promptly, the agency extended a counteroffer to the protester for \$129,835 in protest costs. L-3 did not respond to the agency's offer. On February 24, 2000, the agency instructed L-3 to respond by March 3 by either accepting the agency's counteroffer, submitting its own counteroffer, or withdrawing its claim.

On March 10, the agency received a rebuttal from L-3 to the agency's November 2 counteroffer; the protester contended that the counteroffer and cost calculations were unrealistic and unreasonable (particularly regarding the agency's reduction of the firm's claimed labor hours). L-3 acknowledged that the agency's counteroffer had been based on a government audit of L-3's claim, but did not request a copy of the audit report. In its letter, L-3 stated that it would accept \$355,600 in settlement of its claim.

On April 21, the Navy informed L-3 that its March 10 submission failed to provide additional support for its claim; the firm's counteroffer of \$355,600 was considered unacceptable. The agency informed the protester that it did "not desire to provide [L-3] with another counteroffer at this time," and that "once [L-3] has provided [the agency] with a realistic settlement offer, we will attempt to bring this issue to quick closure." Contracting Officer's Letter, Apr. 21, 2000, at 2.

On May 11, L-3 responded by submitting a new counteroffer to the agency in the amount of \$254,323, again disputing the agency's initial—and unchanged—calculation of allowable labor hours. By letter of June 23, the agency notified the protester that its May 11 counteroffer was insufficiently supported; once again, the agency invited a revised claim from the protester. By letter of July 12, L-3 told the agency only that it "acknowledges receipt of the [agency's June 23] letter and will prepare and submit a response." L-3 Letter, July 12, 2000. The agency, however, did not hear from L-3 again regarding this claim for almost 3 years, until April 10, 2003.

By letter of April 10, 2003, the protester told the contracting officer that it would accept the settlement offer made by the Navy on November 2, 1999, more than 3 years earlier. By letter of April 18, the agency refused payment on the claim due to L-3's failure to adequately document the full amount of its initial claim and the firm's failure to diligently pursue it. L-3 questioned the agency's position by letter of May 28; the agency affirmed its denial of the claim on June 20. Again, on July 2, L-3 asked the agency to reconsider its position; the agency issued its refusal to do so on July 30. On October 6, the protester filed its request with our Office for a recommendation of costs. The agency asks that we deny L-3's request, since the firm

had not diligently pursued the claim with the agency or diligently pursued resolution by our Office.

Under the Competition in Contracting Act of 1984, as amended, 31 U.S.C. § 3554(c)(1) (2000), our Office may recommend that a protester be reimbursed the costs of filing and pursuing a protest, including reasonable attorneys' fees, where we find that a solicitation or award of a contract does not comply with statute or regulation. This is to relieve parties with valid claims of the burden of vindicating the public interests that Congress seeks to promote. Hydro Research Sci., Inc.--Costs, B-228501.3, June 19, 1989, 89-1 CPD ¶ 572 at 3. A protester seeking to recover the costs of pursuing its protest, however, must timely submit evidence supporting the reasonableness of its monetary claim to demonstrate that payment of the claim with government funds is justified. See TRS Research--Costs, B-290644.2, June 10, 2003, 2003 CPD ¶ 112 at 3. Consistent with the intent of our Bid Protest Regulations to have protest matters resolved efficiently and quickly, the protester must diligently pursue a claim for protest costs. See Aalco Forwarding, Inc., et al.--Costs, B-277241.30, July 30, 1999, 99-2 CPD ¶ 36 at 4-5. If the parties cannot reach agreement within a reasonable time, our Office may, upon request of the protester, recommend the amount of costs the agency should pay. See 4 C.F.R. § 21.8(f)(2). Failure to timely pursue a claim may result in forfeiture of the right to recover protest costs. Id.

Here, although the protester filed its claim with the agency in a timely fashion, the protester failed to continue pursuit of the claim for an extended period of time, nearly 3 years. Further, the 3-year delay followed more than a year of unsuccessful negotiations between the protester and agency. L-3 has provided no reasonable explanation for its failure to continue diligent pursuit of the claim either with the agency or our Office. Rather, L-3 states that it chose to hold the claim in abeyance during the 3-year period while it discussed separate cost matters with the agency (regarding defective pricing issues related to a different procurement) in the hopes of reaching a settlement of both those costs and the requested protest costs here. There is nothing in the record, however, that suggests that the agency had contemplated resolution of the protest cost claim during the defective pricing discussions conducted on the separate procurement, or that L-3 had conveyed its alleged hopes for a joint settlement of the matters. Similarly, there is nothing in the record to show that the agency was unreasonable in concluding that L-3's lack of pursuit of the claim for almost 3 years indicated an abandonment of the claim by the protester.

As with L-3's handling of its claim with the agency, the record also shows a lack of diligence by L-3 in pursuing its claim with our Office. Our Bid Protest Regulations contemplate prompt resolution of protest matters, including the resolution of claims for protest costs. As stated above, a protester may file a request for resolution of a claim by our Office where the parties cannot reach agreement within a reasonable period of time. Here, however, the record shows that L-3 should have known at least by June 23, 2000, following the third rejection by the agency of L-3's claimed costs,

that although the parties had negotiated over the course of a year, no agreement could be reached between them. In fact, as early as in its May 11 counteroffer, L-3 indicated to the agency an intention to pursue the claim with our Office. Waiting almost 3 years from that date to do so, however, has caused an unwarranted delay in the overall protest process. In short, the firm failed to diligently pursue its claim both with the agency and our Office. Accordingly, its request for a determination of reimbursable costs is denied.¹

Anthony H. Gamboa
General Counsel

¹ In its comments on the agency's response to its current request, L-3 contests portions of the government audit of its claim, a copy of which was provided with the agency's response. We consider these arguments untimely as L-3 knew of the audit as early as November 1999, yet did not seek a copy of the audit report at, or since, that time. Our protest process does not contemplate consideration of a protester's piecemeal presentation of arguments that should have and could have been pursued much earlier in the protest process. See Automated Med. Prods. Corp., B-275835, Feb. 3, 1997, 97-1 CPD ¶ 52 at 2-3.