

**Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.**

FINDINGS AND RECOMMENDATIONS

Matter: Protest of Martin Resnik Construction Company

**Under Solicitation No. DTFA08-98-R-03206 – Claim for
Bid and Proposal Costs**

Docket No.: 99-ODRA-00126

Appearances:

For the Martin Resnik Construction Company, Inc.: William D. Wheelock, Esq., Popov, McCulloch & Cohan, LLP

For the Agency: Bradford Talamon, Esq., Office of the Assistant Chief Counsel, Western Pacific Region

INTRODUCTION

This matter involves a claim for bid and proposal ("B&P") costs by Martin Resnik Construction Company ("Resnik"). It arises from an Order of the FAA Administrator dated April 16, 1998 ("Final Order"), entered in the *Protest of Martin Resnik Construction, Inc.*, ODR A Docket Number 98-ODRA-00061 ("Protest"). The Protest, which was adjudicated at the FAA's Office of Dispute Resolution For Acquisition ("ODRA"), had alleged that the FAA's Western Pacific ("Region") improperly "down-selected" Resnik during the pre-qualification portion of a solicitation ("Solicitation") related to the construction of an ARSR-4 Radar site in a remote area of Arizona ("Project").

The ODRA had recommended, *inter alia*, that the Protest be sustained and that Resnik be "reimbursed reasonable bid and proposal costs that it incurred in preparing its response to the SIR...". See Findings and Recommendation at 13. The ODRA's Recommendation was adopted by the FAA Administrator in the Final Order. Thus, the only issue remaining to be resolved in this dispute concerns the B&P quantum. For the reasons set forth herein, the ODRA recommends an award to Resnik of B&P costs totaling \$6,308.48.

FINDINGS

The ODRA's Findings and Recommendation and the Administrator's Order entered in the Protest are incorporated herein by reference. The Solicitation commenced on November 12, 1997, when a screening information request ("SIR") announcement was published by the Region in the Commerce Business Daily ("CBD"). The SIR announcement also was posted on the Internet on November 14, 1997. The CBD and Internet announcements generally described the Project and provided specific information on the four factors that would be utilized by the Agency in evaluating the prospective offerors. The SIR was distributed in hard copy form to prospective offerors on December 2, 1997, during a mandatory visit to the Project site. The due date established for responses to the SIR was December 8, 1997. Resnik representatives attended the site visit on December 2 and Resnik timely submitted a response to the SIR.

On December 23, 1997, Resnik learned that it has not been selected to participate in the second round of the procurement process. It subsequently filed its Protest with the ODRA. Following the issuance of the Final Order sustaining the Protest, Resnik and the Region independently attempted to negotiate a mutually acceptable amount to be paid Resnik for the mandated B&P costs remedy. That process, which did not involve the ODRA, took place over a period of months. Ultimately, the parties jointly agreed to request the assistance of the ODRA in a non-binding effort to reach a voluntary settlement of the issue. The ODRA appointed a dispute resolution officer ("DRO") to serve as a neutral, to provide the parties with an evaluation of the merits of their respective positions on the issue and to attempt to facilitate settlement discussions. When those efforts did not prove fruitful, the parties agreed to submit this matter for adjudication by the ODRA to a final decision.

THE PARTIES' POSITIONS

Resnik contends that it began to prepare to respond to the SIR for the Project on November 20, 1997. It contends that most of the information that was necessary to prepare responses to the SIR was available to contractors, based on the CBD and Internet announcements, more than two weeks before the SIR was handed out in hard copy form. It therefore claims that it is entitled to compensation for work completed during the period beginning on November 20, 1997. It also claims that it should recover for its costs incurred subsequent to its response to the SIR. Resnik claims that a total of 218 hours were expended by its president, Mr. Martin Resnik. It claims an additional 91.7 hours of time for unidentified "office" work in connection with the matter; as well as a total of 32 hours of time expended by a Mr. Ruan. Mr. Resnik's time is billed at a claimed hourly rate of \$81.76. The unidentified "office" work and Mr. Ruan's work are billed at \$17.00 an hour. Based on the above rates and hours, Resnik seeks a total of \$19,926.58 in alleged B&P costs.

The Region disputes Resnik's claim on the basis that the entire claim is "grossly inflated" and "does not represent work performed by appellant solely in response to the SIR...." See Opposition at 3. The Region also has challenged the billing rate claimed by

Mr. Resnik. Finally, the Region claims that most of Resnik's claim cannot be properly be viewed as fitting within the definition of B&P costs.

DISCUSSION

It is well established that a litigant awarded bid and proposal costs must submit sufficient evidence in support of its claim; and that the claim itself must be reasonable, *i.e.*, it must not exceed the costs that would be incurred by a prudent person in preparation of its bid and proposal. *See Patio Pools of Sierra Vista, Inc.*, 89-1 Comp. Gen. 374 (1989).

A. The Appropriate Time Period

The Region asserts that most of the amounts claimed were incurred either prior to the issuance of the SIR or after Resnik has submitted its proposal to the Agency. It therefore asks that the ODRA eliminate from consideration all costs claimed by Resnik for the period before the SIR was distributed at the site visit, *i.e.*, all costs incurred prior to December 2, 1997; and all costs incurred after December 5, 1997, the date that Resnik responded to the SIR.

In the ODRA's view, the appropriate time period should run from when Resnik, after reviewing the CBD announcement, first began to prepare to respond to the SIR. That announcement, which is part of the record, contains sufficient information to have permitted a reasonable contractor to begin to prepare a response. Resnik's commencement of preparation work on about November 20, 1997 therefore was reasonable. However, as the Region suggests, the cut off date for the purposes of calculating bid and proposal costs in this matter should be December 5, 1997, *i.e.*, the date when Resnik submitted its response to the SIR. A review of the hours claimed by Resnik for that time period reveals a total of 73 hours of Mr. Resnik's time; 39 hours of unidentified "office" time, and 20 hours of Mr. Ruan's time.

Resnik seeks to recover for time expended after it submitted its response to the SIR, citing *Rockwell International Corp. v. United States*, 8 Cl. Ct. 662 (1985), for the proposition that bid and proposals costs are in the nature of restitution, which should be measured by the reasonable costs necessary to restore a contractor to a position that it would have occupied had it known, before expending its funds, that its proposal would not receive appropriate consideration. We believe that the general proposition stated in *Rockwell* is a sound one. However, it does not support the recovery sought by Resnik here. The fact remains that, because of Resnik's exclusion from the second round of the Solicitation process, it did not submit the detailed proposal required of the second round bidders. Its bid and proposal costs, therefore, were limited to its response to the SIR and the costs incurred in connection with the mandatory site visit.

Under these circumstances, any costs incurred by Resnik subsequent to the submission of its response to the SIR are dispute-related costs. There is a mechanism available for recovery of such costs pursuant to the Equal Access to Justice Act, 5 U.S.C. §504

("EAJA"). Resnik, in fact, made a separate EAJA claim as a prevailing party in the Protest. That claim was settled in direct negotiations between the parties.

B. The Appropriate Hourly Rates

The Region has not challenged the \$17.00 hourly rate claimed by Resnik for the unidentified "office" work and the time expended by Mr. Ruan. The Region has, however, challenged the hourly rate claimed for Mr. Resnik of \$81.76. Resnik has provided support for the hourly rate claimed in the form of year-end financial statements for the years 1995 through 1998. These reflect the company's net operating profits over the past few years. Resnik's formula utilizes these profit figures to arrive at an hourly rate of \$74.18 an hour for Mr. Resnik. Resnik then adds an additional \$6.94 hourly of compensation based on the results of a survey of the average additional compensation of owners of non-union construction companies. The resulting rates appear to the ODRA to be well within the range of reasonableness and to be adequately supported for purposes of a B&P claim. In cases such as this, there need only be sufficient documentation to enable a fair and reasonable approximation of the damages incurred. See, for example, *Electronics and Manufacturing Corporation v. United States*, 189 Ct.Cl. 237 (1981).

C. The Hours Claimed

The Region has not challenged the hours allegedly expended by Resnik for the period that the ODRA deems reasonable, *i.e.*, November 20, 1997 to December 5, 1997. The ODRA therefore finds that the hours claimed for that period for Mr. Resnik and for

Mr. Ruan are reasonable. However, the ODRA does not recommend payment of the costs claimed for the hours allegedly expended by unidentified "office" persons. Resnik has provided absolutely no documentation of the identities of the people involved, the work they performed in connection with this matter, or the salaries and benefits they have been paid by Resnik for the time period involved. Thus, there is no basis to evaluate the reasonableness of such costs.

RECOMMENDATION

Based on the above, the ODRA recommends the award of bid and proposal costs to Resnik of \$6,308.48, which is comprised of \$5,968.48 (73 hours X \$81.76/hr.) for Mr. Resnik's time; and \$340 (20 hours X \$17/hr.) for Mr. Ruan's time.

_____/s/_____

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Office of Dispute Resolution for Acquisition