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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Parmatic Filter Corporation--Costs

File: B-285288.5

Date: August 27, 2001

Claude P. Goddard, Jr., Esq., Wickwire Gavin, for the protester.
Vera Meza, Esq., Department of the Army, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office (GAO) will not recommend the protester's recovery of the costs of filing and pursuing its protest in excess of the amount that the procuring agency found reasonable, where the protester failed to provide sufficient information establishing that the costs claimed related to the issues upon which Parmatic prevailed in its protest, where GAO in its protest decision recommended the recovery of only those protest costs related to the issues upon which the protester prevailed, and where the protester failed to establish that the hours claimed should otherwise be recovered.

DECISION

Parmatic Filter Corporation requests that our Office recommend the amount it should recover from the Department of the Army for the costs of filing and pursuing its protest in Parmatic Filter Corp., B-285288, B-285288.2, Aug. 14, 2000, 2000 CPD ¶ 185.

In our August 2000 decision, we sustained in part and denied in part Parmatic's challenge to the Army's award to Hunter Manufacturing, Inc. for filters and filter canisters. Specifically, we found that the agency unreasonably and unequally evaluated the two firms' proposals under the solicitation's quality factor and sustained Parmatic's protest on this basis. We specifically denied, however, the majority of Parmatic's protest grounds, including Parmatic's objections to the agency's evaluations under the technical, small business participation, and past performance evaluation factors. We recommended that the agency reevaluate proposals, conduct discussions if appropriate, and make a new source selection decision. We also recommended "that the agency reimburse the protester its

reasonable costs of filing and pursuing the protest bases that were sustained, including attorneys' fees." Parmatic Filter Corp., supra, at 19-20.

On October 12, 2000, Parmatic submitted a claim for \$103,331.10 to the Army for its protest costs, which consisted of attorneys' fees of Parmatic's outside counsel, costs incurred by in-house personnel, and out-of-pocket expenses incurred by outside counsel and in-house personnel. Documentation supporting the claim was also provided. This documentation, however, showed that Parmatic was requesting reimbursement for all of its protest costs including those associated with issues that we denied, notwithstanding our recommendation in the protest decision.

The Army requested that Parmatic identify, in accordance with our protest decision, the costs incurred pursuing the protest issues that we sustained. Parmatic refused to segregate its claimed costs between those incurred for the issues which were sustained and those incurred pursuing the issues that were denied, stating to the Army that the issues were not severable. On March 23, 2001, in the face of Parmatic's refusal to provide the requested breakdown, the Army decided that Parmatic was entitled to be reimbursed \$28,739.82 for its protest costs. This reflected the agency's judgment as to amount of time and expenses Parmatic's counsel and personnel should have reasonably incurred pursuing the protest issues that were sustained.¹

Parmatic requested that our Office recommend the amount of protest costs that the firm should recover, asking that we find it entitled to \$103,331.10, the entire amount of costs and expenses the firm states it incurred pursuing all of the protest grounds. After obtaining a response from the Army, we conducted an alternative dispute

¹ The Army did not question the reasonableness of the attorneys' hourly billing rates or Parmatic's personnel's claimed salaries, but questioned the application of a high manufacturing overhead rate in the cost claim to Parmatic's personnel (the protester's president, contracts manager, contracts administrator, and program manager), who were not involved in manufacturing and whose salaries were included in Parmatic's general and administrative cost pool. In determining what amount should be reimbursed, the Army, using the analysis of the Defense Contract Audit Agency of Parmatic's indirect costs, computed and applied a substantially lower overhead and fringe rate to these employees' costs. Parmatic complains, citing a number of our decisions, that it is entitled to recover the burdened salary associated with its in-house personnel. This argument, however, does not recognize that the Army did apply an indirect rate to Parmatic's claimed salary costs, albeit a significantly lower indirect cost rate than that claimed by Parmatic. While Parmatic asserts that only its claimed indirect rates can be used to resolve the cost claim, we note that Parmatic's documentation does not show that the firm recalculated its claimed indirect rates to remove the salaries of the personnel at issue from the indirect cost pool, so as to prevent the double recovery of these costs.

resolution conference in an effort to settle this claim. During this conference, we confirmed that, as stated in our protest decision, Parmatic's cost reimbursement should be limited to those costs incurred pursuing the sustained protest issues. We informed the protester that the record before our Office did not sufficiently establish the costs related to the successful protest issues. The parties stated that they would reopen negotiations concerning Parmatic's cost entitlement, and Parmatic agreed to provide further information identifying the costs and expenses it asserted were incurred pursuing the protest issues on which we sustained its protest.

On May 29, Parmatic submitted to the agency "a proposal for settling the referenced cost claim based on a segregation of costs associated with [the firm's] successful and unsuccessful grounds of protest." Letter from Parmatic to Army (May 29, 2001) at 1. In this letter, Parmatic sought reimbursement of \$88,625.08 for its protest costs. The letter included a breakdown of counsel and in-house personnel time by date and included for each date a general description of the tasks performed. (For example, for June 14, Parmatic claimed a total of 12 hours for four in-house personnel for "analysis of government documents; draft response comments. Brief counsel so he has sufficient information to effectively pursue Parmatic's case," *id.* at 4, which could be compared to Parmatic's original claim for 16 hours on that date for these individuals.)² Parmatic and the Army were unable to agree on the amount Parmatic should be reimbursed for its protest costs.

Under the Competition in Contracting Act of 1984, as amended, 31 U.S.C. § 3554(c)(1) (1994), our Office may recommend that the protester be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees, where we find that a solicitation or the 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 Science, Inc.--Costs, B-228501.3, June 19, 1989, 89-1 CPD ¶ 572 at 3. A protester seeking to recover the cost of pursuing its protest must submit sufficient evidence to support its monetary claim. The amount claimed may be recovered to the extent that the claim is adequately documented and is shown to be reasonable; a claim is reasonable, if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in pursuit of the protest. Berkshire Computer Prods., Inc.--Costs, B-240327.3, Dec. 30, 1994, 95-1 CPD ¶ 6 at 2.

Parmatic believes that it is entitled to be reimbursed for its costs of pursuing all its protest grounds. However, as the Army noted, we expressly limited Parmatic's reimbursement of protest costs to the protest grounds that were sustained. Much of

² On June 16, Parmatic filed a 22-page supplemental protest, the majority of which dealt with issues that we denied in our protest decision. On June 23, Parmatic filed its comments on the agency's report; Parmatic's comments also primarily dealt with issues that we ultimately denied in our decision.

what Parmatic argued during the course of the protest concerned issues that we specifically denied in our decision. To the extent that Parmatic believes that its reimbursement of protest costs should not be limited to the issues upon which it prevailed, this is an untimely request for modification of our decision and will not be considered now. Accordingly, as stated in our decision on the protest, Parmatic should only be reimbursed the reasonable costs that relate to the issues upon which it prevailed.

Parmatic nevertheless argues that it is entitled to be reimbursed the bulk of its total incurred protest costs because “there were many tasks that had to be accomplished regardless of whether any protest ground proved to be successful.” Letter from Parmatic to Army (May 29, 2001) at 1. Although this may be true, it was Parmatic’s obligation here to segregate the costs relating to issues upon which it prevailed, and to identify and establish the reasonableness of costs that are common to both the sustained and denied issues. Parmatic failed to do that here.

From our review of the record, including Parmatic’s May 29 claim settlement proposal, we find that Parmatic still has not submitted sufficient evidence establishing the reasonableness of the amount (\$88,625.08), which the firm now claims for its costs of pursuing its successful protest grounds. That is, this document does not establish that the time claimed either relates only to the issues upon which the firm was successful or are reasonable costs that Parmatic would have been forced to incur regardless of the issue or issues pursued. Rather, the document only generally describes tasks performed on a particular date and simply lists, without explanation, the number of hours Parmatic had originally claimed for each entry, the number of hours in its “revised proposal,” and the size of the adjustment. This does not provide the Army or our Office any basis to judge the reasonableness of Parmatic’s revised claim.

Moreover, the amount of hours claimed in the May 29 proposal appear to be unreasonable when compared to the gross hours originally claimed for pursuing all of the protest grounds. That is, of the 307.9 hours Parmatic originally claimed were incurred by its in-house personnel pursuing all of the protest grounds, Parmatic asserts in its May 29 proposal that 254.7 hours of in-house personnel time are related only to the issues upon which it was successful or are reasonable common costs; in other words, it claims that only 53.2 hours relate to the protest grounds that were denied. Similarly, Parmatic’s counsel originally claimed 206 hours of time pursuing all of the protest grounds, and claimed in the May 29 proposal that 175.65 hours were incurred pursuing only the issues sustained or were common costs. Given that most of Parmatic’s protest arguments and pleadings related to the protest issues that we denied, we would not have expected Parmatic to claim that only approximately 20 percent of the total hours claimed related to the denied issues. Parmatic’s claimed hours in its May 29 proposal do not on their face appear reasonable.

Given Parmatic’s failure to provide sufficient information to allow us or the Army to segregate its claimed protest cost to the issues upon which Parmatic prevailed in its

protest, we find no basis to question the reasonableness of the Army's determination that Parmatic should receive \$28,739.82 for its protest costs.³ Accordingly, we recommend that the protester recover \$28,739.82 for its protest costs and expenses.

Anthony H. Gamboa
General Counsel

³ We question, as did the Army, Parmatic's request for reimbursement of the more than 50 in-house personnel hours related to preparing for, traveling to, and "attending" the 1-day protest hearing that we conducted. Prior to the hearing, we had notified Parmatic's counsel that the in-house personnel could not attend the hearing, which was conducted under a protective order, and that we did not contemplate receiving (and did not receive) their testimony. Although Parmatic argues that the personnel were needed to be available for consultation by Parmatic's counsel, we agree with the agency that incurring the cost of those personnel's time and travel was not reasonable; if any consultation with them had been needed, it could have been accomplished by telephone. In any event, Parmatic has not provided information for the in-house personnel detailing the amount of time that Parmatic's counsel and in-house personnel consulted during the hearing concerning issues relating to the sustained portion of the protest. Parmatic also questions the agency's failure to allow the total claimed hours of counsel for the hearing and the preparation therefor. However, contrary to Parmatic's assertion, the hearing also encompassed issues that were denied. Given Parmatic's failure to appropriately break out its costs for the sustained issues we have no basis to question the Army's determination in this regard or its overall determination as to the amount of attorneys' hours that were allocable to the sustained portion of Parmatic's protest. Similarly, while Parmatic challenges the Army's cost determination insofar as it disallows a portion of 1 day's claimed in-house costs, noting that these hours were "indisputably" associated with the sustained issues, the record shows that these particular costs were actually mixed in with other in-house costs that were related to denied issues; thus, this provides no basis to object to the agency's determination.