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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Diverco, Inc.--Claim for Costs

File: B-240639.5

Date: May 21, 1992

Charles E. Raley, Esq., and Michael R. Hatcher, Esq., Israel and Raley, for the protester.

Michele A. Smith, Esq., Defense Logistics Agency, 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

1. A protester may not recover profit on its own employees' time in preparing its proposal as awarded costs of proposal preparation.
2. Costs incurred in filing and pursuing agency-level protests may not be reimbursed to the protester as protest costs in pursuit of protests filed with the General Accounting Office.
3. Cost of reviewing Freedom of Information Act response, after denial of an agency-level protest and in preparation of protests to the General Accounting Office (GAO), are allowable costs of pursuing GAO protests.
4. Costs incurred in seeking congressional assistance regarding grievances the protester may have with an agency's conduct during a procurement or a protest may not be reimbursed as protest costs under the Competition in Contracting Act of 1984.
5. Costs incurred in seeking injunctive relief in federal court from an agency's determination under the Competition in Contracting Act of 1984 (CICA) not to suspend performance of awarded contracts are not reimbursable under CICA as costs of pursuing a protest at the General Accounting Office.
6. Legal expenses claimed as costs of filing and pursuing a protest may only be recovered to the extent that they are adequately documented and show not only that they were incurred, but the purposes for which the costs were incurred and how they relate to the protest.

DECISION

Diverco, Inc. requests that our Office determine the amount it is entitled to recover from the Defense Logistics Agency (DLA) for its costs of proposal preparation under requests for proposals (RFP) Nos. DLA700-90-R-0437 (-0437) and DLA700-90-R-0211 (-0211) and for its costs of filing and pursuing its protests in Diverco, Inc.; Metalcastello S.R.L., 70 Comp. Gen. 146 (1990), 90-2 CPD ¶ 512.

Diverco originally protested to DLA that awards to Metalcastello under RFP Nos. -0437 and -0211 were improper because the awardee had not proposed domestically manufactured metal forgings as required by the solicitations. DLA denied Diverco's agency-level protests, and Diverco timely protested the awards to our Office.¹ Since DLA had authorized performance of the Metalcastello contract under RFP No. -0437, based on a determination that "urgent and compelling circumstances" would not permit awaiting our decision on Diverco's protest of this award, Diverco filed an action in the United States District Court for the District of Columbia, seeking temporary and preliminary injunctive relief against the agency's authorization of performance on that contract. The court denied the request for injunctive relief.

We sustained Diverco's protests that the awards to Metalcastello were improper because the RFPs required domestically manufactured metal forgings and the awardee's proposals indicated that the forgings would be done in a foreign country. Inasmuch as termination of Metalcastello's contracts, awarded under these RFPs, was not practicable,² we awarded Diverco its costs of proposal preparation and of filing and pursuing its protests, including reasonable attorneys' fees.

Diverco, as directed by our decision, submitted its claim for costs to the agency. The parties were unable to reach an agreement concerning the amount Diverco is entitled to be reimbursed for its costs, and Diverco has requested that we determine the amount of its entitlement pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.6(f)(2) (1992).

¹Diverco filed its agency-level protests pro se, and retained legal counsel to file the protests at the General Accounting Office (GAO) after the denial of its agency-level protests.

²The supplies sought by the RFPs were necessary to meet mission essential requirements for Desert Shield and Desert Storm.

The parties have submitted to us documentation and arguments concerning the amount to which Diverco is entitled.³ Diverco has submitted an itemized accounting of its claimed costs, listing for each attorney and employee the services performed, the dates of performance, and the claimed hourly rate, and a listing of claimed legal and company expenses (i.e., postage, copying, telephone, and Westlaw research expenses). Diverco has also provided monthly billing sheets for each of its lawyers, which further itemizes the services, hours and expenses incurred.

The protester requests reimbursement of \$43,169.79, consisting of \$1,078 in proposal preparation costs, and of \$42,091.79 in protest costs. We determine, as discussed below, that Diverco is entitled to recover \$19,315.10.

PROPOSAL PREPARATION COSTS

Diverco requests reimbursement of \$1,078 for its costs of proposal preparation. This consists of 9 hours for Diverco's president at \$100 per hour, 10 hours for the firm's government contract administrator at \$17.30 per hour, and \$5 for its expenses of mailing, copying and telephone. DLA only challenges the hourly rate claimed for Diverco's contract administrator, arguing that \$1.57 of the administrator's hourly rate represents profit, which the protester may not recover for its costs.⁴

A protester may not recover profit on its own employees' time in filing and pursuing its protest or preparing its proposal. W.S. Spotswood & Sons, Inc.--Claim for Costs, 69 Comp. Gen. 622 (1990), 90-2 CPD ¶ 50. The award of costs is intended to relieve protesters, with valid claims, of the burden of vindicating the public interest which Congress seeks to promote; it is not intended as a reward to prevailing protesters or as a penalty imposed upon the government. Id. Accordingly, we disallow that portion of the contract administrator's hourly rate that represents profit.

³Initially, DLA argued that we should deny Diverco's claim in its entirety because Diverco did not certify its claim to the agency. We disagree since Diverco has now certified its claimed proposal preparation and protest costs, including attorneys' fees and expenses, see Princeton Gamma-Tech, Inc.--Claim for Costs, 68 Comp. Gen. 400 (1989), 89-1 CPD ¶ 401, and DLA fully considered Diverco's claim, apart from the question of Diverco's certification of its claim.

⁴DLA does not challenge any other aspects of Diverco's claimed proposal preparation costs.

Thus, we find that Diverco is entitled to recover \$1,062.30 for its costs of proposal preparation. We calculate this amount by allowing Diverco the claimed costs for the time of its president (\$900), the claimed company expenses (\$5), and the claimed time of its contract administrator, less the portion of the claimed hourly rate that represented profit (\$157.30).

PROTEST COSTS

Diverco requests reimbursement of \$42,091.79 for its costs of filing and pursuing the protests. This amount consists of \$37,152.50 for attorneys' fees, \$2,838.71 for legal expenses, and \$2,100.58 for the protester's employees' time and company expenses.

DLA does not challenge the attorneys' claimed hourly rates or that the expenses and hours claimed for the attorneys and employees were not incurred. The agency, however, does object to some of the claimed costs, arguing that they were not incurred in pursuit of the protest at GAO, but relate to Diverco's agency-level protests, communications with a United States Senator, and the suit for injunctive relief in the United States District Court. The agency also contends that some of Diverco's claimed legal expenses are not adequately documented.

Agency-Level Protest Costs

DLA objects to the reimbursement of Diverco's claimed costs for its employees' time and expenses that were incurred in filing and pursuing the agency-level protests. Diverco argues that the agency-level protests were necessary and reasonable fact-finding efforts that were required to support its later GAO protests. In this regard, Diverco argues that its protests costs should not be disallowed simply because they were incurred prior to the date it filed its GAO protests.

It is true that a protester's recovery of its reasonable costs associated with the filing and pursuit of the protest at GAO are not disallowed simply because those costs were incurred prior to the date a protest was filed. See, e.g., Genasys Corp., GSBICA No. 8841-C, Mar. 27, 1987, 87-2 BCA ¶ 19,726, 1987 BPD ¶ 46 (pre-filing attorneys' fees incurred attending a debriefing and conferring with client are recoverable). Here, however, Diverco's claimed costs relate not to its GAO protests, but to its pursuit of its agency-level protests. The Competition in Contracting Act of 1984 (CICA) limits our bid protest jurisdiction, as well as our corresponding authority to award costs, to protests filed

with our Office,⁵ 31 U.S.C. § 3554(c)(1). Thus, we have not allowed reimbursement of costs incurred in connection with agency-level protests or in attempting to persuade the agency to take corrective action, and have only allowed costs associated with the pursuit of protests before GAO. See Techniarts Eng'g--Claim for Costs, 69 Comp. Gen. 679 (1990), 90-2 CPD ¶ 152; Princeton-Gamma Tech, Inc.--Claim for Costs, *supra*; see also R.J. Sanders, Inc.--Claim for Costs, B-245388.2, Apr. 14, 1992, 92-1 CPD ¶ ____.

Accordingly, we disallow \$221,25 of Diverco's claimed costs for employees' time and expenses that relate to the filing and pursuit of the agency-level protests.

Freedom of Information Act (FOIA) Costs

DLA argues that 5 hours of Diverco's president's time, which was incurred reviewing information Diverco received in response to a FOIA request and communicating this information to Diverco's attorneys, relate to Diverco's agency-level protests and are not reimbursable. We disagree.

These hours were incurred after the denial of its agency-level protests and resulted in the provision of information that was integral to Diverco's protest to our Office. Since the agency-level protests had already been denied, we consider such pre-filing costs to be fully in pursuit of the protest to GAO. See Genasys Corp., supra; cf. Bush Painting, Inc.--Claim for Costs, B-239904.3, Aug. 16, 1991, 91-2 CPD ¶ 159 (costs incurred in filing FOIA request 1 day prior to filing GAO protest are not reimbursable where the information requested was not necessary to pursue the protest). Accordingly, we find that Diverco is entitled to reimbursement of \$500 for the time it incurred reviewing the FOIA information.

Congressional Assistance Costs

DLA objects to the reimbursement of Diverco's attorneys' fees that were incurred in connection with seeking the assistance of a United States Senator. Diverco argues that these costs are reasonably related to the pursuit of its GAO protests because the Senator's assistance was sought in support of the protests and the "inquiries by [the] Senator . . . actually resulted in the agency's recognition of wrongdoing and accurate information ultimately being provided to GAO."

⁵Agency-level protests are a parallel bid protest mechanism, independent of GAO. 31 U.S.C. § 3556 (1988).

Our statutory bid protest authority encompasses an interested party's written objections to a federal agency's solicitation and proposed or actual contract award, 31 U.S.C. §§ 3551(1), 3552. Our Bid Protest Regulations set forth the detailed procedures to be followed when a protest is filed and establish certain procedural tools that are available to a protester, See 4 C.F.R. part 21. While a protester is free to petition a member of Congress regarding grievances the protester may have with an agency's conduct during a procurement or a protest, we do not consider such actions to be a part of the protest process established by CICA and provided for by our regulations. We therefore have declined to allow costs associated with seeking Congressional assistance. See Hydro Research Science, Inc.--Claim for Costs, 68 Comp. Gen. 506 (1989), 89-1 CPD ¶ 572; Ultraviolet Purification Sys., Inc.--Claim for Bid Protest Costs, B-226941.3, Apr. 13, 1989, 89-1 CPD ¶ 376.

Accordingly, we find that Diverco is not entitled to be reimbursed for its attorneys' fees associated with seeking the assistance of the Senator. From our review of the attorneys' monthly billing statements, we calculate that 12.75 hours of attorneys' time was incurred seeking congressional assistance, and we disallow \$3,063.75 of attorneys' fees associated with seeking this assistance.⁶

Federal Injunction Case Costs

DLA also objects to the reimbursement of Diverco's attorneys' fees and employee's time that were incurred in unsuccessfully filing and pursuing injunctive relief in the United States District Court. DLA contends that our award of protest costs includes only those costs directly associated with the protester's actions before the GAO. Diverco argues that the costs incurred in seeking injunctive relief was in furtherance of our consideration of its protests since Diverco sought only the court's review of DLA's determination not to stay contract performance in accordance with the CICA suspension provisions pending our decision in the protests.

⁶Diverco argues that some of the attorney fees were for the preparation of a "fact sheet" for presentation to the Senator and that this document was in fact a draft of the comments the protester filed on the agency's report. From our review of the relevant attorney's bill, we find that 2 hours were incurred on August 13 for the "fact sheet." Since the agency's report was not filed until September 21, the "fact sheet" could not have been a draft of the protester's comments that were filed on November 6, and, thus, we have disallowed these hours.

In our view, costs incurred in seeking relief from another forum are not reimbursable as protest costs under CICA. As noted above, CICA limits our bid protest jurisdiction, as well as our corresponding authority to award costs, to protests filed with our Office, 31 U.S.C. § 3554(c)(1). Here, Diverco, in addition to pursuing its protest remedy in our Office, sought collateral relief--an injunction--from a different forum. While we recognize that Diverco sought no "substantive" relief from the court and continued to pursue its ultimate protest remedy from GAO, the costs of unsuccessfully pursuing injunctive relief in federal courts cannot reasonably be considered costs of filing and pursuing a protest before GAO as contemplated by CICA. In this regard, we ascertain no meaningful difference between Diverco's court suit and its agency-level protest.

Accordingly, we find that Diverco is not entitled to be reimbursed for the time of its employees and for its attorneys' fees associated with seeking injunctive relief from the court. From our review of the record, we calculate that 3 hours of employee's time and 148.5 hours of attorneys' time were incurred seeking injunctive relief. Thus, we disallow \$300 in employee's costs and \$18,967.75 in attorneys' fees associated with seeking the injunctive relief with the court.

Legal Expenses

DIA argues that only \$610.74 (for Westlaw research charges) of the \$2,838.71 sought by Diverco for its legal expenses is reimbursable because Diverco has failed to document the remaining expenses, such as telephone calls, postage, copying, filing expenses, Federal Express, and couriers. Diverco contends that all of its claimed legal expenses are adequately documented in its itemized account of costs and monthly attorneys' bills. Claims for the reimbursement of expenses must identify the amounts claimed for each individual expense, the purpose for which that expense was incurred, and how the expense relates to the protest. Data Based Decisions, Inc.--Claim for Costs, 69 Comp. Gen. 122 (1989), 89-2 CPD ¶ 538.

Diverco's claim, as first submitted, lumped together all the claimed legal expenses on a monthly basis, with no further breakdown as to individual amounts claimed for each expense or how they relate to the protest. When further documentation was requested, Diverco's itemized account merely provided a total monthly figure identifying amounts claimed for each expense category. These itemized accounts apparently include expenses that relate to other legal work done for Diverco, since the total amount of legal expenses contained on these bills is much greater than the amount of legal expenses that Diverco seeks to recover as part of its

protest costs, with the exception of the Westlaw and copying costs for which the protester has provided further evidence (e.g., the Westlaw bill). Diverco has provided no further explanation or documentation of its billing for the other claimed costs, despite DLA's challenge of the documentation and our request that Diverco provide sufficient documentation to support its claim. See Data Based Decisions, Inc.--Claim for Costs, supra. Although we recognize that the requirement for documentation may sometimes entail certain practical difficulties, the burden is on the protester to submit sufficient evidence to support its claim, and that burden is not met by unsupported statements that the costs have been incurred. Hydro Research Science, Inc.--Claim for Costs, supra.

We find that Diverco has adequately documented and is entitled to recover \$1,552.54 of its legal expenses, consisting of \$610.74 for Westlaw research charges, which DLA accepted, and \$941.80 for copying costs.⁷ We do not find that the remaining legal expenses of \$1,286.17 have been adequately documented.

CONCLUSION

Based upon the foregoing, we find that Diverco is entitled to recover total costs of \$19,315.10 consisting of \$1,062.30 for proposal preparation costs and \$18,252.87 (\$15,121.00 for attorneys' fees, \$1,552.54 for legal expenses, and \$1,579.33 for the protester's employees' time and company expense) for protest costs.


for Comptroller General
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⁷Given the complexity and volume of the record in these protests, we accept the certified representation of Diverco's counsel that 4,709 copies were made in pursuing the protests. Also, the \$.20 per page copy charge appears reasonable, and the agency does not contend otherwise.