Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Stocker & Yale, Inc.--Claim for Costs

File: B-242568.3

Date: May 18, 1993

Jay P. Urwitz, Esq., and Giovanna M. Cinelli, Esq., Hale and Dorr, for the protester.
Michele S. Pavlak, Esq., Defense Logistics Agency, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly found that costs incurred to obtain product's inclusion on a qualified products list are not reimbursable as proposal preparation costs.

2. Where a protester fails to make any effort to segregate unallowable costs from potentially allowable ones, the entire amount must be disallowed.

3. Unsupported claim is denied as to amounts which appear on their face to be excessive and where the reliability of the claim is placed in doubt by the protester's own contemporaneous documentation.

4. Where the agency's position in a cost dispute is reasonable, the protester is not entitled to the costs of challenging that position.

DECISION

Stocker & Yale, Inc. requests that our Office determine the amount it is entitled to recover from the Defense Logistics Agency (DLA) for the costs of preparing its proposal under request for proposals (RFP) No. DLA400-90-R-2009 and for the costs of filing and pursuing its protest in Stocker & Yale, Inc., 70 Comp. Gen. 490 (1991), 91-1 CPD ¶ 460. The RFP covers the acquisition of 61,000 wristwatches.

We sustained Stocker's protest against award to Marathon Watch Company under the RFP because Marathon's proposal indicated that the offeror did not intend to comply with a jewel-bearing clause in the RFP, which constituted a material contract requirement. Because termination of

Marathon's contract was not feasible, we awarded Stocker the reasonable costs of preparing its proposal, in addition to the reasonable costs of filing and pursuing its protest. We subsequently denied Stocker's request that we reconsider this relief and recommend termination of the improperly awarded contract, and we did not find Stocker entitled to the costs incurred for its request for reconsideration. Stocker & Yale, Inc.--Recon., B-242568.2, Oct. 28, 1991, 91-2 CPD ¶ 379.

Stocker originally submitted its claim for costs, totaling $242,950.71, directly to the agency. Detailed documentation was submitted in support of that portion of the claim representing attorneys' fees and costs ($29,019.71). Documentation for the company's costs consisted of receipts for expenses and affidavits from seven company employees concerning each person's hourly rate and the number of hours expended on various activities.

The parties exchanged correspondence and held discussions in an ultimately unsuccessful effort to agree on the appropriate amount. On the basis of the detailed documentation regarding attorneys' fees and costs, the agency agreed to allow $23,688.75 for that portion of the claim, but challenged the remaining $5,330.96. The disallowed legal fees were associated with Freedom of Information Act (FOIA) requests, pursuit of alternative relief with the Department of Defense Inspector General, and contacts with congressional offices. Stocker subsequently conceded that these items are unallowable. In addition to these fees, certain costs incurred by Stocker's counsel were disallowed by the agency because they were not related to the pursuit of the protest, and Stocker has not contested that disallowance. As a result, the parties agreed that Stocker is entitled to $23,688.75 for legal fees and costs, and this amount remains undisputed.

At the close of the negotiations, the agency offered to pay $7,500 for Stocker's costs (in addition to the $23,688.75 for legal fees and costs), but Stocker rejected that offer. Stocker asks that our Office find it entitled to the entire $242,950.71 of its original claim to the agency. Stocker also requests that we declare it entitled, under 4 C.F.R. § 21.6(f)(2) (1993), to the costs of pursuing its claim for costs before our Office.

Before addressing the three key areas of dispute between the parties, we summarily deny two aspects of Stocker's claim. First, Stocker's claim here includes costs whose unallowability the company conceded during the course of the negotiations with the agency: $5,330.96 in legal fees and costs (explained above), $1,291 included in the claim for

the time company personnel spent on FOIA requests and congressional contacts, and $384 for the company's travel expenses incurred in a trip unrelated to the protest.[1] Stocker abandoned its claim for these items, not as part of an effort toward a compromise solution, but because they were unrelated to the protest and thus should never have been included in the company's claim. We deny the renewed claim for these items, totaling $7,027.46.[2] Second, although the agency did not raise the matter, we note that the individual numbers submitted by Stocker do not add up to the $242,950.71 of the original claim; instead, by our calculation, they total only $238,633.76. The additional $4,316.95 is wholly unsupported, and is therefore denied.

The agency raises three grounds for disputing Stocker's claim for the remaining $207,917.55.[3] First, the agency challenges $88,743.55 as outside the scope of proposal preparation expenses. Second, the agency challenges $47,163.70 because the component items contain unallowable costs and Stocker has not segregated those costs from potentially allowable costs. Finally, the agency contests $70,270 as unsupported and excessive. Because our analysis groups together the disputed elements of the claim somewhat differently than either party did, we identify each component specifically in the course of the relevant discussion.

UNALLOWABLE COSTS

As noted above, DLA challenges $88,743.55 as unallowable because the costs were not incurred in preparation of Stocker's proposal or in pursuit of the protest. This amount includes $79,660.17 incurred in satisfying the requirements for inclusion of Stocker's product on the relevant qualified products list (QPL); $6,783.38 in expenses which Stocker states were incurred during a trip to Switzerland and the United Kingdom in September and October

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[1]As the agency pointed out at the time, once Stocker conceded that the trip for which the $384 was incurred was unrelated to the protest, the company should have deducted all the expenses for that trip, totaling $405.50.

[2]This figure includes $405.50 for the expenses claimed for the trip which Stocker concedes was unallowable.

[3]We reach this amount by deducting the summarily denied claim for $7,027.46 and the agreed $23,688.75 in legal fees and costs from $238,633.76, the corrected total of the original claim.

1990 to negotiate with suppliers; $1,725 for time spent negotiating with DLA officials; and $575 for time spent in reports to Stocker's Board of Directors.

QPL-Related Costs

A significant portion of Stocker's claim represents costs which the protester states it incurred in connection with the company's efforts to have its product included on the relevant QPL. While Stocker's affidavits do not clearly distinguish QPL-related costs from others, the agency disallowed $79,660.17 under this rubric, and Stocker has not disputed that this amount represents qualification costs.

The RFP, issued on February 12, 1990, required that proposed products be authorized for inclusion on the appropriate QPL. The costs at issue purportedly cover the developing and testing of a wristwatch that would qualify on the QPL.

The agency does not dispute that Stocker incurred these costs, but takes the position that proposal preparation does not encompass work to ensure that a product is included on a QPL, and that the costs of that effort are, therefore, not proposal preparation costs. Stocker's response is that qualifying the company's product for the QPL was "integral to the submission of Stocker's bid and Stocker's ability to win the contract." Stocker argues that award of proposal preparation costs is designed to render the protester whole, and that the company would have recovered its QPL-related costs through the contract price if the agency had acted properly and awarded a contract to Stocker.

Our Regulations provide for reimbursement, in appropriate circumstances, of reasonable proposal preparation and protest pursuit costs. See 4 C.F.R. § 21.6(d). In general, a protester seeking to recover its proposal preparation costs must submit evidence sufficient to support its claim that those costs were incurred and are properly attributable to proposal preparation. See Patio Pools of Sierra Vista, Inc.--Claim for Costs, 68 Comp. Gen. 383 (1989), 89-1 CPD ¶ 374. The amount claimed may be recovered to the extent that it is adequately documented and is shown to be reasonable--that is, it does not exceed the amount which a prudent offeror would incur in preparing a proposal. Id.

We find that, at least in the factual context present here, the costs of developing and testing a product in order to qualify it for listing on a QPL do not fall within the scope of proposal preparation costs, and they are therefore not reimbursable. The fact that the QPL-related costs were necessary for a company competing for this contract does not

mean that those costs were incurred solely for this contract. Stocker has not argued that the investment represented by its QPL-related expenses was of value only in the preparation of this proposal, or that the investment has been rendered worthless by DLA's improper award to Marathon. Indeed, Stocker could not properly make such an argument, since DLA or another agency may in the future issue a new solicitation for wristwatches requiring that products offered be included on the same QPL.[4] This possibility reflects the fact that qualification for inclusion on a QPL is generally performed independently of any specific acquisition. Federal Acquisition Regulation (FAR) § 9.203(a). The fact that the QPL-related expenses which Stocker incurred will benefit the company in any future procurements involving the same QPL indicates that those expenses are not properly categorized as proposal preparation costs here.

Even if we assume, arguendo, that Stocker incurred the QPL-related costs solely for this procurement, categorizing those costs as proposal preparation costs would be inappropriate. Offerors may incur substantial costs in anticipation of, or in the course of, competing for a contract, without those costs thereby becoming proposal preparation costs. For example, a manufacturer of software hoping to win a contract to provide computer integration services might send its employees for retraining in computer integration to facilitate their writing of the proposal for that contract, and the company might borrow money in order to fund that retraining. As with Stocker's expenses here, the offeror could well view those costs as "integral to the submission of [the offeror's] bid and [its] ability to win the contract," but they nonetheless normally fall outside the scope of the ordinary meaning of the term "proposal preparation."

The fact that DLA made an improper award to Marathon does not change the proper categorization of Stocker's costs, nor does it render the agency liable to reimburse Stocker for any of the company's costs other than proposal preparation costs and protest pursuit costs. Equally, the fact that Stocker may have been planning to recoup its QPL-related costs as part of the contract price is without relevance. Pursuant to our Regulations, we declared Stocker entitled to

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[4]DLA has argued that the military specification relevant to the QPL was used in a prior solicitation under which Stocker competed for a contract. Stocker concedes that this is true, but counters that the earlier solicitation referred to a different aspect of the specification from that at issue here. Without resolving that dispute, we note that the record makes clear that the specification was plainly not unique to the RFP at issue here.

reasonable proposal preparation and protest pursuit costs, not to its contract price. Accordingly, we deny the claim for $79,660.17 in QPL-related costs.[5]

Other Unallowable Costs

DLA has also challenged other, more limited costs because they were not incurred in either preparation of the proposal or filing and pursuit of the protest. First, prior to the filing of the claim with our Office, DLA denied the allowability of $6,783.38 in travel expenses which Stocker states its chief operating officer incurred during a trip to Switzerland and the United Kingdom to establish relations and conduct negotiations with suppliers. DLA contended that these costs represent the ordinary costs of doing business, rather than proposal preparation costs. Stocker did not respond to the agency's argument, which we find reasonable.

In addition, we note that these travel expenditures purport to represent travel only to Switzerland and the United Kingdom, but the receipts and invoices submitted by Stocker cover travel to, and stays in, Germany and the Netherlands as well. Stocker has not claimed that travel expenses in the latter two countries were related to this procurement. Moreover, at least some of those expenses may be unallowable as unreasonable.[6]

Second, DLA challenges the claim for $1,725 for time spent negotiating with DLA officials. The agency contends that those negotiations concerned a matter other than this procurement. Stocker has not disputed DLA's position, and we take that to reflect a concession that the agency is correct.

Finally, DLA challenges the allowability of $575 for time spent providing reports to Stocker's Board of Directors.

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[5]The travel expenses at issue here ($10,915.17) may be nonreimbursable for another reason as well. While Stocker does not dispute the agency's treatment of those expenses as related to the QPL and the relevant specification, the expenses were incurred before the RFP was issued in February 1990. Yet, Stocker argues that "until the solicitation with [a revised military specification] was issued[,] no offeror could pre-qualify its product on the QPL." Accordingly, under Stocker's logic, no QPL-related or specification-related expenses could properly have been incurred prior to February 1990.

[6]For example, among the expenses for which reimbursement is sought are charges for a sauna and massage in a hotel in Munich.

DLA asserts that the reports appear to have been monthly over a 20-month period, but that, since there were only 15 months between issuance of the RFP and issuance of our Office's decision on the protest, the costs were allowable only for those 15 months. Accordingly, DLA allowed $1,725 (15/20, or 3/4) of these costs and disallowed $575 (the remaining 1/4). Stocker did not respond to the agency's analysis, which appears on its face to be plausible, and we therefore uphold the agency's position.

In sum, we find Stocker entitled to $1,725 of these costs, and deny $88,743.55 of the claim as outside the scope of proposal preparation and protest pursuit.

COST ITEMS WHICH INCLUDE UNALLOWABLE COSTS

DLA challenges $47,163.70 of the claim because each item within that sum contains at least some costs which are clearly unallowable, but which Stocker has not segregated from potentially allowable costs. For example, DLA contests the claim for the cost of 16 hours of the chief operating officer's time which is alleged to have been spent "travel[ing] to Washington, D.C. to discuss this procurement with Stocker's attorneys, government procurement officials, and Congressional staff," because Stocker concedes that costs incurred for time spent in meetings with congressional staff is not allowable, but has failed to separate out that time. The agency also contends that meetings with DLA personnel, to the extent that they are the "government procurement officials" at issue here, were unrelated to the procurement or occurred after our Office had issued its decision in the protest. Those costs are therefore unallowable, but Stocker has failed to break down the 16 hours to allow the agency to segregate the unallowable costs from any potentially allowable ones.

Similarly, DLA challenges the claim for costs representing 35 hours of the chief operating officer's time spent "read[ing] and review[ing] the solicitation, the bid and bid preparation documents, legal and financial statements related to the bid, and legal documents related to the protests filed at General Accounting Office" and 213 hours of the company's president's time spent in "activities concerned with all protests related to this procurement[,] i.e.[,] correspondence, telephone, technical research, discussions and meetings with [Stocker] personnel, attorneys and congressional staff." The agency challenges these two items because the 213-hour item contains costs for meetings with congressional staff, which Stocker concedes are unallowable; and both items include costs incurred in connection with "protests," while costs are reimbursable here only as to one protest. DLA argues that, because

Stocker has not segregated out the unallowable items from any allowable ones, each part of the claim containing both allowable and unallowable items must be denied.

Stocker has neither demonstrated that the items challenged by DLA do not contain unallowable costs, nor made any effort to separate the unallowable costs from other, potentially allowable ones. Instead, it contends that it has submitted adequate documentation and explanation for its claimed costs. Stocker focuses on the fact that the company is small and does not maintain detailed time records, and insists that, since whatever records are available have been produced, those records should be deemed adequate. In support of this argument, Stocker points to decisions from our Office finding that contemporaneous records are not necessary to establish entitlement to costs. See, e.g., Data Based Decisions--Claim for Costs, 69 Comp. Gen. 122 (1989), 89-2 CPD ¶ 538.

As a general rule, where a protester has aggregated allowable and unallowable costs into a single claim and we cannot tell from the record before us what portion of the claim is allowable and what portion is unallowable, the entire amount must be disallowed, even though we recognize that some portion of the claim may be properly payable. Armour of Am., Inc.--Claim for Costs, 71 Comp. Gen. 293 (1992), 92-1 CPD ¶ 257.[7]

The issue is not, as Stocker would have it, whether contemporaneous records are required to support a cost claim. Instead, the issue is whether Stocker has segregated plainly unallowable costs from potentially allowable ones.

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[7]In contrast, where the record provides a basis to estimate the allowable proportion of the costs, those costs are properly reimbursable. Thus, in another decision issued by our Office today, CBIS Fed., Inc.--Claim for Costs, B-245844.5, May 18, 1993, 93-1 CPD ¶ ___, allowable costs needed to be segregated from unallowable ones where we had awarded protest costs as to one issue but not as to others. Although protester's counsel in that case had produced documentation with the level of detail ordinarily found in attorneys' billing statements, that level of detail did not provide a basis to segregate the time (and therefore the costs) by issue. Because the costs in dispute were attorneys' fees incurred in pursuit of the protest, our Office was able to review the pleadings to estimate the proportion of the attorneys' effort devoted to the issue for which costs had been awarded. In the instant case, however, the disputed costs were incurred by Stocker personnel, not counsel, and the record before us provides no basis to estimate the proportion of those costs which is allowable.

Stocker is not required to produce contemporaneous documentation to support that segregation, and the agency did not ask for it. Indeed, as explained above, DLA agreed to pay certain costs (for the time spent in reporting to the Board of Directors) without contemporaneous documentation, based solely on Stocker's post-protest submissions. However, the agency properly refused to pay costs which lumped together allowable and unallowable items, and Stocker made no effort--such as through additional affidavits--to segregate out the unallowable costs, despite the repeated opportunities it was given to do so.

Stocker relies on our decisions showing flexibility concerning the documentation required to support a claim, and attempts to use those decisions to defend aspects of the claim here where the lack of documentation is not the problem. Thus, where Stocker's attorneys' contemporaneous records indicate only a 1.3-hour meeting with Stocker, the company executives cannot rely on the absence of their own contemporaneous records to claim more than 1.3 hours for this same event. Contemporaneous documentation of the meeting exists--it simply contradicts the company executives' claim.

In addition, while Stocker does not claim that it has the right to be reimbursed for any protest costs other than those incurred in pursuit of the one sustained protest, the plain language of its employees' affidavits indicates that costs associated with other protests are included in the claim.[8] Those costs are unallowable, not because they are unsupported by contemporaneous documentation, but because they were not incurred in the filing and pursuit of the only protest for which Stocker was awarded costs.[9]

We note that, where the record made it possible for the agency to segregate allowable costs, it did so on its own initiative and despite Stocker's failure to cooperate in this regard. For example, while DLA points out that

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[8]Stocker does request that we declare it entitled to the costs of pursuing its cost claim. As explained below, we deny Stocker's request and any such costs are nonreimbursable.

[9]Stocker clearly incurred costs from other protest proceedings, such as the request for reconsideration and this claim for costs, for which no finding of entitlement to protest costs was made. Stocker has made no effort to separate the allowable costs (those associated with the sustained protest) from those which are clearly unallowable (those associated with other protest proceedings related to this procurement).

Stocker's counsel's records indicate that the attorneys spent less time conferring with Stocker than Stocker claims to have spent conferring with its attorneys, the agency concedes the reimbursability of the 1.3 hours which Stocker's counsel's records indicate were spent in meetings between Stocker and counsel. This time represents a total of $339.30 for the two senior Stocker personnel. The agency has also conceded the allowability of all travel expenses associated with those meetings (despite the fact that only a small fraction of the meeting time was shown to be reimbursable), and we find Stocker entitled to these travel expenses, totaling $967.

Accordingly, we find that Stocker is entitled to $1,306.30 for these items, and we deny the claim for $47,163.70 because we cannot identify or reasonably estimate the allowable portion.[10]

UNSUPPORTED AND EXCESSIVE COSTS

DLA also challenges a significant portion of the claim, $70,270, as unsupported and excessive. DLA argues that these items represent unreasonable amounts of time for the activities involved: reviewing the FAR clauses and other portions of the RFP, and working on the company's proposal under an RFP that required little more than filling in

[10]Specifically, we disallow on this basis the following items: of the chief operating officer's time, the claim for all but 1.3 hours of 16 hours alleged to have been spent in meetings in Washington (because of the inclusion of time spent in meetings with congressional staff and the lack of support for the time allegedly spent with counsel) and 35 hours spent reviewing documents including those related to the "protests" filed with our Office (because of the inclusion of costs incurred for proceedings other than the sustained protest); of the president's time, the claim for all but 1.3 hours of 85 hours claimed for meetings with counsel and government procurement officials (because of the inconsistency with the attorneys' record of the time spent in the meetings) and 213 hours on activities related to "all protests related to this procurement" (because of the inclusion of costs associated with other protests). We also disallow 36 hours spent by the operations manager engaged in activities including QPL-related matters (which, as explained above, are unallowable) and 207 hours that the company's executive secretary spent on "all protests related to this procurement" (again, because of the inclusion of costs associated with other protests).

blanks.[11] In addition, DLA's report to our Office identifies dozens of instances where Stocker's contemporaneous telephone and correspondence logs indicate that time spent by Stocker employees was unrelated to proposal preparation and pursuit of the protest at issue here. DLA's challenge to the claim is thus based on a combination of the alleged excessiveness of the time spent on the various activities and the evidence in the record that the time claimed covers activities which fall outside the scope of proposal preparation and protest pursuit costs.

Stocker's response is simply to repeat that the company is small and does not maintain detailed time records. In the protester's view, because all available records have been produced, they must be deemed adequate.

While it is true, as Stocker contends, that contemporaneous records are not required to show entitlement to costs, as stated above, a protester seeking to recover its bid or proposal preparation costs or the costs of pursuing its protest must submit sufficient evidence to support its monetary claim, and recovery is possible only where the claim is adequately documented and shown to be reasonable.

Here, we find reasonable DLA's concern that Stocker's claim is excessive. That concern is heightened, because, for the specific areas where corroboration is possible, individual items have proven to be unsupported. For example, while at no point do Stocker's employees' affidavits identify the

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[11]Specifically, DLA challenges the claim that the chief operating officer spent 80 hours "conferr[ing] with [the president] and other senior staff to discuss, review, and modify the bid proposal." Of Stocker's president's time, DLA challenges 60 hours spent "determining price proposal for bid"; 50 hours for "reviewing and revising costs for bid, including calculating cost returns and analyzing cost ratios"; 105 hours for "meetings with bid proposal technical and administrative team to prepare bid"; 35 hours for "reviewing FAR clauses"; 110 hours for "prepar[ing] memorandum and records of bid proposal and price structure"; and 50 hours "editing final proposal presented." Similarly contested are 25 hours that Stocker's operations manager claims to have spent "read[ing] and analyz[ing] contract specifications"; and 261 hours that the company's marketing manager claims to have spent "reviewing government solicitation" (45 hours), "reading and preparing all bid documents responsive to the solicitation, including preparing documents for senior company officials' signatures prior to presentation" (95 hours), and "meetings and conferences with technical and administrative personnel regarding all aspects of government bid" (121 hours).

year (much less a more specific time period) during which they are alleged to have spent the time at issue, the receipts produced in support of the travel expense claims reveal that those costs were incurred before the RFP was issued. Moreover, Stocker has failed to respond to the agency's allegation that Stocker's telephone and correspondence logs indicate that a substantial amount of the time claimed involved nonreimbursable activities, such as a separate protest before our Office, a FOIA request, and claim preparation.

In addition, while we recognize that contemporaneous documentation is not always available, Stocker has failed to support even those items for which, if valid, at least some corroborating evidence or explanation should be available. Thus, if the company's president spent 110 hours "prepar[ing] memorandum and records of bid proposal and price structure," one could reasonably expect that the protester could produce the memorandum and records as evidence of this substantial effort.[12] Furthermore, during the course of negotiations with DLA, Stocker deducted $1,291 from the company's claimed costs for unallowable costs, but has never explained how it arrived at such a precise figure, nor has it identified the individuals whose time was presumably reduced to account for the correction.

As explained above, all claims for costs are subject to the test of reasonableness. We will not award costs which appear to be excessive or otherwise unreasonable. See, e.g., Armour of Am., Inc.--Claim for Costs, supra. Here, Stocker has presented a cost claim that appears excessive on its face; the affidavits offered as the sole support for the claim are so lacking in detail as to be meaningless; and the protester's own contemporaneous documents cast doubt on the reliability of the claim. Thus, the record provides no basis to estimate the proportion of the claimed costs which is allowable. In these circumstances, DLA acted reasonably in refusing to accede to the claim.

Obviously, we recognize that Stocker did incur costs in preparing its proposal. Rather than deny the entire balance of the claim, we find that Stocker is entitled to the total

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[12]We note that, as with other parts of the claim, the president's affidavit does not specify which memorandum and records are at issue nor when they were prepared. The agency requested an explanation for this item, but Stocker provided none. If the reference is to documents developed to support the cost claim itself, they do not fall within the scope of proposal preparation or protest costs, and they are not allowable. As explained below, Stocker is not entitled to the cost of pursuing its claim for costs.

of $7,500 that DLA indicated during the negotiations was a reasonable sum for preparation of the proposal and assistance in the filing and pursuit of the protest. This amount subsumes the $3,031.30 for which we have found a specific basis for entitlement, as detailed above.

COSTS OF PURSUING THE CLAIM

Finally, we deny Stocker's request that we declare it entitled to the costs of pursuing this claim. The purpose of our regulation allowing protesters such recovery, 4 C.F.R. § 21.6(f)(2), is to encourage agencies to expeditiously reach agreement with successful protesters on the quantum of recoverable costs. See American Imaging Servs., Inc.--Request for Declaration of Entitlement to Costs, B-246124.4, Dec. 30, 1992, 92-2 CPD ¶ 449. Where the agency's position in a cost dispute is reasonable, as we find it to be here, the protester is not entitled to the costs of challenging that position.

CONCLUSION

Based on the analysis set forth above, we find that Stocker is entitled to $7,500 for the company's proposal preparation and protest pursuit costs and $23,688.75 for its attorneys' fees and costs, for a total of $31,188.75.

Milton J. Socolar

Acting Comptroller General
of the United States