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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Intermarkets Global--Costs

**File:** B-400660.14

**Date:** July 2, 2014

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GAO, participated in the preparation of the decision.

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### DIGEST

1. Protester seeking to recover the costs of filing and pursuing its protest may not be reimbursed for hours that an employee reportedly spent on the protest where protester fails to submit sufficient evidence to establish the rate of compensation for the employee.
  2. Where protester does not document time spent on issues for which the recovery of protest costs has been recommended, agency reasonably used a page count to determine the percentage of time allocable to the recoverable issues.
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### DECISION

Intermarkets Global (IMG), of Amman, Jordan, requests that we recommend reimbursement of the costs it incurred in successfully pursuing its protest with respect to request for proposals (RFP) No. SPM300-08-R-0061, issued by the Department of Defense, Defense Logistics Agency (DLA), for the supply of a full service food line in Kuwait, Iraq, and Jordan.

We recommend that IMG be reimbursed \$54,889.61 in protest costs (of \$771,260.73 requested).

### BACKGROUND

On April 26, 2010, IMG filed an initial protest with our Office challenging DLA's award of the food service contract to Anham FZCO, LLC. IMG asserted that the agency failed to perform a price realism evaluation; unreasonably evaluated technical proposals (focusing primarily on IMG's own evaluation); failed to conduct a

risk assessment; and made an unreasonable best value determination. IMG subsequently filed a supplemental protest in which it asserted that the agency improperly evaluated Anham's responsibility; failed to provide it with meaningful discussions; unreasonably evaluated Anham's technical proposal; and unreasonably evaluated IMG's technical and past performance proposals.

Following a hearing, GAO conducted an outcome prediction alternative dispute resolution (ADR) conference in which the cognizant GAO attorney indicated that GAO likely would sustain the protests on the basis that the agency's price realism determination with respect to Anham's proposal was unreasonable. We subsequently dismissed the protests as academic based on DLA's determination to take corrective action. B-400660.4 et al., July 22, 2010.

IMG then filed a request that it be reimbursed for the costs it incurred in filing and maintaining its protest. On June 20, 2011, we issued a decision recommending reimbursement of IMG's protest costs insofar as they related to price realism and the related challenges to Anham's technical proposal. We further concluded that IMG was not entitled to recover the costs of its protests insofar as they challenged the evaluation of either Anham's or IMG's responsibility and past performance, the conduct of discussions, the evaluation of IMG's technical proposal, or the best value determination. We advised IMG to submit a certified claim for its protest costs to the agency within 60 days of receiving our decision.

On August 17, IMG tendered a certified claim for its protest costs to the agency, requesting reimbursement of \$771,260.73, including \$73,680.73 for outside counsel, and \$697,580 for the time IMG employees spent working on the protest. IMG's attorney submitted a list of hours with dates and times that his firm worked on the protest, and general descriptions of the work that was performed. The attorney asserted that 60% of the hours it submitted should be attributed to the price realism and related technical evaluation issues for which the recovery of costs was recommended. IMG's attorney requested that it be paid at a rate of \$212.85 per hour. For the IMG employees, IMG submitted a list of dates and hours with a general description of the work performed on the protest for five employees. IMG claimed an amount for each date for each employee, but did not explain how it calculated the rates of pay.

DLA reviewed the claim, and on September 1, asked IMG to explain why 60% of its hours should be attributed to the issues for which costs were recommended. DLA also requested that IMG provide cost data to support the claimed hourly rates for its in-house employees. IMG responded on March 21, 2012, explaining that it believed it spent 60% of the claimed hours on the price realism and related technical issues. IMG did not provide any documentation to support its position. With respect to the hourly rates of the IMG employees, IMG provided a chart which included, for each of the five employees: a monthly and yearly base rate of pay; certain bonuses; social security and health benefits; various

monetary allowances; 15% overhead and 25% general and administrative rates; and a monetary sick day allowance. The total annual compensation was divided by 1,800, the number of annual hours worked by IMG employees. A factor of 1.41 was then used to convert the Jordanian dinar to American dollars.

On May 4, 2012, DLA asked IMG to provide further documentation for the salaries of its in-house employees. IMG responded on June 9, with letters of employment which showed the base salary, documentation of a salary increase, and statements showing certain bonuses paid in 2010 and 2011 for 5 employees.<sup>1</sup> On October 1, DLA proposed to settle IMG's claim for \$57,590.89, including \$47,255.90 (fees and expenses) for outside counsel, and \$10,334.99 for the time spent on the protest by IMG employees. In arriving at this figure, DLA accepted the requested hourly rate of \$212.85 for outside counsel.<sup>2</sup> With respect to IMG's employees, DLA computed hourly rates based on the salary documentation that IMG provided. The agency also determined not to reimburse IMG for certain hours that it believed were not spent in pursuit of the protest. Finally, the agency determined that 41.26% of the hours spent in pursuit of the protest should be allocated to the price realism and related technical evaluation issues for which costs were awarded. DLA derived this figure by calculating the percentage of pages submitted by the protester in the course of the protest that addressed these issues.

On February 8, 2013, IMG responded to the settlement claim with additional support for its claimed hourly salaries for its in-house employees, and again argued that it should recover 60% of the hours worked on the protest. On April 5, DLA affirmed its earlier settlement offer. On September 17, IMG requested that our Office determine the amount of costs it should be awarded.

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<sup>1</sup> Four of the five employees for whom IMG submitted compensation data worked on the protest. It is unclear why IMG submitted compensation data for the fifth employee since he was not reported to have worked on the protest. IMG did not submit any compensation data for a sixth employee, the chief executive officer (CEO), who was reported to have also worked on the protest.

<sup>2</sup> This amount is based on the \$150.00 per hour that successful protesters (other than small businesses) are permitted to recover in attorney's fees, adjusted by the consumer price index for urban consumers, U.S. city average, all items. See 31 U.S.C. § 3554(c)(2). The agency does not object to reimbursing IMG's attorneys at \$212.50 per hour, and we agree that this rate is appropriate here. See Department of the Army; ITT Federal Services International Corp.--Costs, B-296783.4, B-296783.5, Apr. 26, 2006, 2006 CPD ¶ 72 at 2.

## DISCUSSION

### Hours Attributable to Price Realism and Related Technical Issues

The documentation submitted by IMG does not allocate the hours between the price realism and related technical evaluation issues for which reimbursement was recommended and the other issues raised in the protest. IMG asserts that 60% of the hours spent on the protest are related to the price realism and related technical evaluation issues, but the protester has not furnished documentation associating specific hours with specific issues. The agency asserts that 41.26% of the claimed hours should be allocated to the recoverable issues. The agency bases this percentage on the percentage of pages that were submitted by the protester during the course of the protest that discuss the price realism and related technical evaluation issues. We think the agency's approach is reasonable.

A protester seeking to recover its protest costs must submit evidence sufficient to support its claim that those costs were incurred and are properly attributable to filing and pursuing the protest. Stocker & Yale, Inc.--Claim for Costs, B-242568.3, May 18, 1993, 93-1 CPD ¶ 387 at 4. In circumstances where information submitted to support a claim is not detailed enough to establish how much of the claimed amount was incurred in pursuit of the successful protest issues, we have recognized that using a page count method is a reasonable means of determining this amount. ViON Corp.--Costs, B-256363.3, Apr. 25, 1995, 95-1 CPD ¶ 219 at 3-6. Given the absence of more probative evidence from IMG, it was reasonable for the agency to use a page count to determine the amount of the claimed hours attributable to the price realism and related issues. In these circumstances, we accept the agency calculation that 41.26% of the hours that were otherwise spent in pursuit of the protest should be allocated to the issues for which recovery was recommended.

### Outside Counsel

IMG requests reimbursement for 539.1 hours of attorney time. We agree with the agency that a total of 11.5 of these hours were not expended in pursuit of the protest. First, IMG should not be reimbursed for 0.5 hours billed on May 10, 2010 to review a stay override. See The Pevar Company--Claim for Costs, B-242353.3, Sept. 1, 1992, 92-2 CPD ¶ 144 at 8, (hours spent in pursuing federal court review of decision not to suspend performance are not in pursuit of GAO protest). IMG also should not be reimbursed for 11 hours that were billed between July 23, 2010, and September 19, 2010, described by IMG as related to the corrective action the agency was taking. (For example, IMG describes 2.4 hours on July 30 as: "Conducted legal research re contract performance during corrective action phase.") In this regard, IMG's protest was dismissed on July 22. A protester generally cannot be reimbursed for hours expended after our decision is issued.

Bush Painting, Inc.--Claim for Costs, B-239904.3, Aug. 16, 1991, 91-2 CPD ¶ 159 at 4.<sup>3</sup> Accordingly, IMG should be reimbursed \$46,334.84 in attorneys' fees, calculated as follows: 539.1 claimed hours minus 11.5 disallowed hours equals 527.6 hours in pursuit of the protest, multiplied by .4126 (the percentage of hours attributable to the price realism and related technical issues), multiplied by \$212.85 (the attorney hourly rate) per hour.

IMG also requests reimbursement of \$4,832.45 for expenses incurred in pursuit of the protest. IMG should be reimbursed \$1993.87 for its expenses in pursuing the protest (\$4,832.45 multiplied by .4126, the percentage of time attributable to the price realism and related technical issues).

In total, IMG should recover \$48,328.71 (\$46,334.84 in attorneys' fees plus \$1,993.87 in expenses) for its protest costs as incurred by outside counsel.

#### Protester Company Personnel

##### Rate of Reimbursement

IMG requests reimbursement for the time spent by five employees working on the protest: NAA (Senior Vice President, Business Development); HAK (Business Development, Manager); AQ (Office Staff, Business Development); HAA (Kuwait Office Manager); and RS (Chief Executive Officer (CEO)). In response to the agency's request that IMG document the employees' rate of pay, IMG provided documentation to support the base salaries and certain bonuses paid to four employees who worked on the protest. IMG did not submit any documentation to support the CEO's rate of pay.

Based on the information submitted, IMG may not be reimbursed for any hours that the CEO worked on the protest. Where, as here with respect to the CEO, a protester seeking to recover the costs of filing and pursuing its protest fails to submit sufficient evidence to establish the rate of compensation for an employee, the protester may not be reimbursed for hours that employee spent on the protest. Solutions Lucid Group, LLC--Costs, B-400967.2, Oct. 1, 2009, 2009 CPD ¶ 198 at 3.

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<sup>3</sup> There are exceptions to this rule, which include a reasonable amount of time to review the decision, Blue Rock Structures, Inc.--Costs, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190 at 6; hours expended in filing a request for entitlement to costs, see T Square Logistics Services Corp., Inc., B-297790.6, June 7, 2007, 2007 CPD ¶ 108 at 10; and hours spent pursuing a claim for costs where there is an unreasonable delay by the agency in settling the claim. Baine Clark Company, Inc.--Costs, B-401172.4, July 7, 2010, 2010 CPD ¶ 135 at 3.

With respect to the remaining four employees, for purposes of reimbursement we accept the rates calculated by the agency based on the documentation IMG submitted for the employees' base salary and bonuses paid in 2010.<sup>4</sup> Based on the agency calculations using the documentation provided by IMG, the four company employees should be reimbursed at the following hourly rates: NAA-\$94.14; HAK-\$25.32; AQ-\$16.60; and HAA-\$54.61.<sup>5</sup>

#### Number of hours to be reimbursed

IMG claims reimbursement for company employee hours that were expended in pursuit of the protest beginning on April 15, 2010. IMG's debriefing was provided on April 22, 2010, and IMG's protest was filed with our Office on April 26. IMG may not be reimbursed for any hours on or before the date of the debriefing, or for one hour spent on April 24 to advise firms that other counsel had been selected. The cost of looking for protest issues and deciding whether to protest are not hours spent in pursuit of the protest. University of Dayton Research Institute--Costs, B-296946.7, Oct. 23, 2006, 2006 CPD ¶ 155 at 4.

IMG's protest was dismissed on July 22, 2010. IMG may not be reimbursed for company employee hours claimed after that date, see Bush Painting, Inc.--Claim for Costs, supra, with the exception of 1 hour for NAA on July 23 discussing the recovery of costs; 1 hour for NAA on July 27 to review our decision; and 1 hour for NAA on July 28, related to its pursuit of a recommendation for reimbursement of protest costs.

We also find that the following company employee hours were not spent in pursuit of the protest and that, accordingly, IMG may not be reimbursed for them: hours claimed for May 4 through May 12, related to the stay override and obtaining an

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<sup>4</sup> For example, with respect to NAA, the documentation that IMG submitted demonstrated that for the time period in question (2010), he received an annual salary of 53,450 Jordanian dinar, and bonuses of 23,735 dinar, for a total salary of 77,175 dinar. The documentation further showed that to this figure, 4,810 dinar was added for social security (9% of the base salary), and 3,858.75 dinar for medical benefits (5% of the total salary). To this total figure of 85,844.25 dinar, the agency added overhead of 15% (12,876.64 dinar), and G&A of 25% (21,461.06 dinar), for a total of 120,181.95 dinar. This amount was divided by 1800 hours for an hourly salary of 66.77 dinar. A conversion factor of 1.41 was then applied to convert the Jordanian dinar to American dollars resulting in an hourly salary of \$94.14.

<sup>5</sup> DLA initially could not determine which information submitted applied to HAA. After the claim was submitted to our Office the issue was clarified, and based on the information submitted for salary and bonus, the agency determined that HAA should be paid at the rate of \$54.61 per hour. Agency Submission, Feb. 4, 2014, at 4 n.7.

injunction at the Court of Federal Claims, see The Pevar Company--Claim for Costs, supra; hours on June 2, 3, 5, 8, and 9, reportedly working on supplemental protest issues, where the supplemental protest was previously filed on June 1 (ten days after the date when the agency provided evaluation documents to the protester), no additional supplemental protest was filed, and the agency had not yet submitted its report on the supplemental protest so that comments on the report were not yet due; hours on June 8, and 9, researching the agency report which was submitted on May 27, since comments on the agency report were due and were submitted on June 7, so that it does not appear that any additional research related to the agency report was required; hours on June 17, locating and sending counsel a letter to Secretary Gates; June 18, reviewing letters to Secretary Gates; and hours on July 22 through July 25 and July 28 for reportedly corresponding with counsel about possible agency actions, information release, and allowing Anham to perform the contract.

In sum, after deleting the hours not appropriately allocated to this protest effort, the IMG employees (other than the CEO, for whom recovery is disallowed) claim the following number of hours in pursuit of the protest: NAA-227.5 hours; HAK-116.5 hours; AQ-82.5 hours; and HAA-111 hours, for a total of 537.5 hours. However, as discussed below, we find that these hours were excessive.

In this regard, protesters are entitled to recover costs attributable to hours spent if they were reasonably necessary to the protest effort, and not excessive. Fritz Cos., Inc.--Costs, B-246736.7, Aug. 4, 1994, 94-2 CPD ¶ 58 at 4-5. Our Office will examine the reasonableness of hours claimed to determine whether they exceed, in nature and amount, what a prudent person would incur in pursuit of his or her protest. Waterfront Technologies, Inc.--Costs, B-401948.19, Mar. 19, 2012, 2012 CPD ¶ 115 at 4. For example, we have denied requests for reimbursement where billing records show that multiple attorneys performed duplicative work, and did not demonstrate a need for such efforts. See Fritz Cos., Inc.--Costs, supra; Armour of Am., Inc.--Claim for Costs, B-237690.2, Mar. 4, 1992, 92-1 CPD ¶ 257 (where the hours spent by the protester's attorneys on researching and writing were excessive and we disallowed one-fourth of those hours). We have also denied claims for reimbursement where the protester's employees duplicate each other's time. CNA Industrial Engineering, Inc.--Costs, B-271034.2, Nov. 20, 1997, 97-2 CPD ¶ 149 at 7.

Here, as noted above, IMG employees spent 537.5 hours in pursuit of the protest (not including the disallowed CEO hours), while its attorneys spent 527.6 hours. It appears from the record, however, that many of the hours expended by IMG employees duplicated hours spent by IMG's attorneys. For example, the protester's employees and its attorneys each spent more than 20 hours working on the supplemental protest, work that we believe should have been primarily performed by the attorney. This is especially true given that much of the record was covered by a protective order so that the protester's employees could not have access to

much of the documentation and briefs concerning the challenged evaluation judgments. In these circumstances, a prudent person would have relied on its attorney to do this work, and thus many of the hours claimed for IMG employees unreasonably duplicate work performed by IMG's attorney. See Fritz Cos., Inc.--Claim for Costs, supra, at 7; CNA Industrial Engineering, Inc.--Costs, supra, at 7.

Accordingly, having determined that the hours claimed for IMG's employees were excessive, we disallow 50% of the 537.5 hours spent in pursuit of the protest hours as excessive. Of the remaining hours, we accept the agency's calculation that 41.26 percent were allocable to the price realism and related technical issues for which protest costs are recommended for recovery. In total, IMG should recover \$6,560.90 for the time spent by its own employees as follows:

| Employee | Hours in Pursuit of Protest | 50% of Hours in Pursuit of Protest | Hours on Recoverable Issues (.4126) | Hourly Rate | Total for Employee |
|----------|-----------------------------|------------------------------------|-------------------------------------|-------------|--------------------|
| NAA      | 227.5                       | 113.75                             | 46.93                               | \$94.14     | \$4,418.30         |
| HAK      | 116.5                       | 58.25                              | 24.03                               | \$25.32     | \$608.54           |
| AQ       | 82.5                        | 41.25                              | 17.02                               | \$16.60     | \$283.53           |
| HAA      | 111                         | 55.5                               | 22.9                                | \$54.61     | \$1,250.53         |

In sum, we recommend the recovery of protest costs in the amount of \$54,889.61, including \$46,334.84 in attorney's fees, \$1,993.87 in expenses for outside counsel, and \$6,560.90 for IMG employees.

The request for a recommendation for reimbursement is granted, in part.

Susan A. Poling  
General Counsel