



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** SWD Associates--Claim for Costs

**File:** B-226956.3

**Date:** September 1, 1989

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### **DIGEST**

Protester is not entitled to be reimbursed costs of preparing proposal and pursuing protest that were awarded by General Accounting Office (GAO) decision, which sustained the protest but did not recommend that the award be disturbed, where the protester subsequently sought to have award overturned in United States District Court and the court denied the protest.

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### **DECISION**

SWD Associates claims the costs of preparing a proposal and filing and pursuing a protest, including attorneys fees, that it was awarded in our decision in SWD Assocs., B-226956.2, Sept. 16, 1987, 87-2 CPD ¶ 256. That decision sustained SWD's protest of an award to the Bankers Building by the General Services Administration (GSA) under solicitation for offers No. GS-05B-14403 for leased office space in Chicago, Illinois.

We deny the claim and modify our prior decision to eliminate our award of SWD's protest costs.

Bankers was selected for award as the lowest priced offeror. In our decision of September 16, 1987, we sustained SWD's protest because we found GSA conducted improper post-best and final offer (BAFO) discussions with Bankers to remove exceptions taken in Bankers' BAFO to solicitation requirements covering the minimum termination notice and the occupancy date. We found the award to Bankers without reopening discussions violated Federal Acquisition Regulation (FAR) § 15.611(c) (FAC 84-16) since SWD was not offered an opportunity to submit a new BAFO. Although we sustained SWD's protest, we did not recommend that the award be disturbed, inasmuch as we found the government had no right to termination within the initial 5-year phase of the lease. However, since we found GSA unreasonably excluded SWD from

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the procurement because of the improper post-BAFO discussions, we awarded SWD the costs of preparing its proposal and filing and pursuing its protest, including attorneys fees.

On October 5, 1987, SWD filed suit in the United States District Court for the District of Columbia to enjoin performance of Bankers' contract pending a resolicitation of BAFO's from Bankers and SWD. SWD asked the court to accept our determination that GSA's conduct of post-BAFO discussions with Bankers was improper, but to reject our recommendation that the award not be disturbed. SWD argued that, contrary to our decision, GSA did have the right to terminate the lease because GSA had illegally deleted the mandatory termination for convenience clause from the Bankers' contract.

In its answer filed in response to SWD's complaint, GSA argued to the court that the post-BAFO communications with Bankers did not constitute "discussions," but rather were "clarifications," not requiring another round of BAFOs, and that our decision was erroneous in this regard. GSA also argued that it had no termination right under the lease.

On March 31, 1988, the district court granted GSA's motion for summary judgment and dismissed SWD's complaint. See SWD Assocs. Ltd. Partnership v. United States Gen. Serv. Admin., 34 CCF (CCH) ¶ 75,468 (D.D.C. Mar. 31, 1988). In so doing, the court agreed with GSA that the post-BAFO communications with Bankers were not a clear violation of the procurement regulations and declined to follow our Office's decision on this matter. The court therefore also agreed with GSA and our Office regarding the inappropriateness of terminating Bankers' contract. SWD did not appeal the district court decision.

On November 10, 1988, SWD submitted an invoice to GSA in the amount of \$82,127.10 representing its costs of proposal preparation on the solicitation and for filing and pursuing its protest, including attorneys fees. This invoice was based upon the award of such costs in our September 16, 1987, decision.

By letter dated January 12, 1989, GSA denied SWD's claim because SWD had filed suit subsequent to our decision awarding these costs and the district court decided that the post-BAFO communications, which were the underlying basis

for our cost award, were not a clear violation of procurement regulations. GSA asserts that since our Bid Protest Regulations provide that we will dismiss any protest where the matter involved has been decided on the merits by a court of competent jurisdiction and since, by SWD's initiative, this matter was decided in GSA's favor by a court of competent jurisdiction, GSA is no longer required to pay SWD its costs.

SWD protests GSA's failure to pay the awarded protest costs to our Office. SWD argues that although the court did not provide the relief it requested, the court decision did not purport to overrule or modify our decision--specifically the award of protest costs. SWD argues that the court only found there was no "clear and prejudicial" violation of law in the award, which it states is a far more lenient standard of review than that employed by our Office when it determined that the Bankers' award "does not comply with statute or regulation," such that the award of protest costs was warranted. See 31 U.S.C. § 3554(c)(1). That is, SWD argues that the court did not find GSA's post-BAFO communications complied with applicable regulations, and our decision on this point therefore remains binding on GSA with regard to protest costs.

We do not agree with SWD. Clearly there is an inconsistency between the conclusion reached in our prior decision and that reached by the court. The legal issue in both forums was the same: whether the agency's post-BAFO discussions with the awardee violated the procurement regulations. We concluded that prohibited discussions had occurred, while the court concluded there were only "trivial" clarifications. These different conclusions cannot logically be attributed to a difference in the standard of review applied by each of the forums. Although it is true that the court did not specifically comment on our award of costs to SWD, that award was based on our conclusion that a violation of the procurement regulations had occurred, a conclusion which the court rejected.

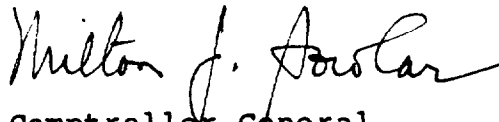
Under the circumstances, we agree with GSA that our award of costs should be modified. Since the court did not uphold SWD's protest, we find it inappropriate to award SWD protest costs.

SWD also argues that GSA's refusal to pay its protest costs constitutes an untimely request for reconsideration under our Bid Protest Regulations and thus should be rejected. We find no merit to this contention. Since it was SWD that elected the court action, GSA had no obligation to seek modification of our prior decision. Indeed, if GSA had made

such a request, we would have dismissed the matter when SWD filed this action in the district court. 4 C.F.R. § 21.9(a), § 21.12(c); Prince Georges Contractors, Inc., 64 Comp. Gen. 647 (1985), 85-2 CPD ¶ 11, aff'd, 64 Comp. Gen. 786 (1985), 85-2 CPD ¶ 195; Superior Eng'r. and Elec. Co., Inc.--Recon., B-224023.2, Mar. 20, 1987, 87-1 CPD ¶ 318.

Finally, SWD notes that GSA did not raise the issue of SWD's entitlement to protest costs in the district court action. However, we will not decide whether GSA was required to counterclaim for the protest costs in the district court, since that court's rules are for it and not this Office to decide.

Accordingly, SWD's claim for protest costs is denied. Our prior decision is modified to withdraw our award of these costs.



**Acting** Comptroller General  
of the United States