



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tripp, Scott, Conklin & Smith--Claim for Costs

File: B-243142.5

Date: June 2, 1993

Garry W. Johnson, Esq., and Michele K. Feinzig, Esq., for the protester.
Kenneth A. Markison, Esq., and John P. Opitz, Esq., Department of Housing and Urban Development, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Claimant may recover costs of filing and pursuing General Accounting Office protest to the extent they are documented and were reasonably incurred in pursuing the protest.
2. Costs incurred in filing and appealing agency's denial of Freedom of Information Act request are disallowed where request and associated costs were incurred after the filing of protest to the General Accounting Office (GAO) and the information requested was not necessary nor reasonably incurred for the filing and pursuit of the protest.
3. 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.
4. Under Bid Protest Regulations in effect at the time the protester filed its protest, the protester is not entitled to recover the costs of pursuing its claim for protest costs.
5. A protester may not recover profit on its own employees' time in pursuing the protest as awarded costs of pursuit of protest.

DECISION

Tripp, Scott, Conklin & Smith requests that our Office determine the amount it is entitled to recover from the Department of Housing and Urban Development (HUD) for its costs of filing and pursuing its protest in Tripp, Scott, Conklin & Smith, B-243142, July 9, 1991, 91-2 CPD ¶ 36.¹

After initially filing its claim for protest costs with HUD, Tripp, Scott submitted a claim for protest costs to our Office on June 23, 1992, explaining that HUD refused to consider the claim. The agency subsequently reconsidered its position, and, on September 14, HUD advised our Office and Tripp, Scott that HUD was willing to pay reasonable protest costs. We dismissed Tripp, Scott's initial claim for costs on November 16, 1992, since the matter was being negotiated between the parties. Tripp, Scott, Conklin & Smith--Claim for Costs, B-243142.4, Nov. 16, 1992, 92-2 CPD ¶ 345. The parties were unable to reach an agreement concerning the amount Tripp, Scott is entitled to be reimbursed for its costs, and Tripp, Scott has requested that we determine the amount of its entitlement pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.6(f)(2) (1993).

PROTEST COSTS

Tripp, Scott, a law firm that competed for award under the RFP, claims reimbursement for \$6,850.61 in protest costs as set forth in two billing statements (No. 2 and No. 3) provided by the protester which include costs allegedly related to the firm's employees' services and related expenses in filing and pursuing the protest. HUD has reported to our Office that its review of the claim shows that much of Tripp, Scott's claimed costs are not allowable costs; HUD believes Tripp, Scott is only entitled to \$2,491.72 in claimed fees for its employees' actions in filing and pursuing the protest.

A protester seeking to recover the costs 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. Data Based Decisions, Inc.--Claim for Costs, 69 Comp. Gen. 122 (1989), 89-2 CPD ¶ 538.

¹See the above cited case and Department of Hous. and Urban Dev.--Recon., B-243142.3, Sept. 18, 1991, 91-2 CPD ¶ 257, for a discussion of the underlying decision.

Freedom of Information Act (FOIA) Costs

HUD objects to the reimbursement of Tripp, Scott's fees allegedly incurred in connection with the firm's FOIA request and its appeal of HUD's denial of the request. HUD contends that since the request was sent on February 25, 1991, and the protest was filed by Tripp, Scott on February 28, without the firm having yet received the agency's March 6 rejection of the request, the information requested and costs incurred were not necessary to or otherwise related to the pursuit of the protest. Tripp, Scott's billing statements list costs for the FOIA-related services beginning on March 12, reflecting work performed for its appeal to HUD in response to the agency's denial of its FOIA request. In that letter, Tripp, Scott explained that it sought all the offerors' proposals to evaluate whether the offerors' proposed approaches required the services of an attorney under Florida law. In its protest, Tripp, Scott alleged that the services required by the RFP necessitated the services of an attorney under Florida law. Tripp, Scott also requested a copy of the offerors' proposals under the RFP pursuant to the discovery provisions of our Bid Protest Regulations.

A total of 8.85 hours, dated throughout March, April, and July, has been claimed regarding FOIA work; Tripp, Scott's claim includes 6.65 hours at a rate of \$120.00 (\$798), and 2.2 hours at a rate of \$50 (\$100), for a total of \$898.² These costs, however, were incurred after Tripp, Scott's protest was filed, and were unnecessary to the filing and pursuit of the protest. Although part of the information requested by the protester in its FOIA request, regarding the apparent awardee's proposal, was reviewed by our Office in preparation of our protest decision, that information was provided by the agency, as required by our then current Bid Protest Regulations, 4 C.F.R. § 21.3(i) (1990), in its report responding to the protest. The FOIA request and associated costs were therefore unnecessary, and the bulk of the request (i.e., for all of the other offerors' proposals in addition to the awardee's) was not related to the firm's pursuit of its protest of the award. The only portion of the FOIA request which is arguably relevant to the protest, the awardee's proposal, does not give rise to proper, allowable protest costs. The request for this information was clearly redundant of the document production requirements of our Regulations under which the contracting agency was

²Our numbers differ slightly from HUD's calculations of the protester's FOIA and other costs based upon adjustments regarding the precise hours and rates of services furnished by Tripp, Scott in its comments to the agency report. HUD does not object to the claimant's adjustments.

already required to provide the proposal. These claimed FOIA costs were not reasonably incurred for the firm's pursuit of the protest and are therefore disallowed. See Bush Painting, Inc.--Claim for Costs, B-239904.3, Aug. 16, 1991, 91-2 CPD ¶ 159.

Work Performed After Issuance of GAO Decision; Work Unrelated to Protest

Tripp, Scott claims monetary reimbursement for its employees' services performed in July, after the issuance of our Office's July 9 decision sustaining the protest. The protester may not recover the cost of the 5.3 hours claimed for this work (3.05 hours at \$120 per hour, and 2.25 hours at \$50 per hour, for a disallowance of \$478.50) since these costs were incurred after our decision was reached and, consequently, were not incurred in pursuit of the protest. Id; Princeton Gamma-Tech, Inc.--Claim for Costs, 68 Comp. Gen. 400 (1989), 89-1 CPD ¶ 401.

HUD claims that additional hours listed by the protester for services performed in July and September, after the issuance of the protest decision, should not be allowed since they were unrelated to the protest or the agency's request for reconsideration of the decision. We have reviewed these entries on the protester's billing statements and agree with HUD that the type of services described for these dates, including, for example, further research on the merits of the protest (where the record was closed and the protests in fact had already been decided by our Office) and the protester's damages or entitlement to relief after the decision was issued, are not recoverable as costs related to the pursuit of the protest. Tripp, Scott reports that these services were billed as follows: 8.75 hours were billed at a rate of \$50 per hour (\$437.50), and 2 hours were billed at \$120 per hour (\$240), for a total disallowance of these charges of \$677.50.

Expenses

Tripp, Scott's billing statements include a list of expenses purportedly related to its pursuit of the protest which are identified by date (February through September) and dollar amount claimed; only minimal descriptions of the expenses are provided. For instance, the costs are identified as "telecopy charge," "photocopies," "Federal Express," and "phone calls - long distance." HUD objects to the payment of any of these costs because the protester's insufficient documentation of the purpose of each expense fails to show that they are related to its pursuit of the protest. In

response to the agency's objections, Tripp, Scott states that it:

"should not be required to have to further describe its expense entries simply because HUD feels it is necessary, when the expense entries reflected on Statement No. 2 and on Statement No. 3 appear the way [Tripp, Scott] always tracks its expenses."

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. Diverco, Inc.--Claim for Costs, B-240639.5, May 21, 1992, 92-1 CPD ¶ 460. Tripp, Scott has not provided any further explanation or documentation of its billing for these claimed expenses (e.g., the firm has not presented any telephone bills or shipping receipts), despite HUD's challenge to the lack of documentation. 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, 68 Comp. Gen. 506 (1989), 89-1 CPD ¶ 572. Tripp, Scott's failure to substantiate these expenses with proper documentation as to their alleged relationship to the protest, especially in light of the agency's objections to the lack of documentation, warrants the disallowance of the claimed expenses, in the amount of \$268.61.

Costs Incurred After Issuance of the Decision on HUD's Request for Reconsideration of the Original Decision; Costs Incurred in Pursuit of Claim for Costs

Tripp, Scott's statement No. 3 includes charges for its employees' services performed on September 16, regarding the preparation of the firm's claim for costs filed that date with HUD, and from September 20 through October 30, regarding the September 18 decision issued by our Office denying HUD's request for reconsideration on the original decision. These services, in the claimed amount of \$970.50 are not recoverable by the protester since they relate to its claim for costs and were not otherwise incurred in the pursuit of the protest or reconsideration request. Tripp, Scott is not entitled to amounts claimed for pursuing its award of bid protest costs. Under our Bid Protest Regulations applicable at the time Tripp, Scott filed its protest, 4 C.F.R. § 21.6(f)(2) (1990), protesters were not entitled to costs associated with the pursuit of a claim for protest costs.

See Armour of Am., Inc.--Claim for Costs, 71 Comp. Gen. 293 (1992), 92-1 CPD ¶ 257.

Allowable Rates for Protester's Employees' Services in Pursuit of the Protest

Tripp, Scott, a law firm, represented itself in its protest of the award of a contract for which Tripp, Scott itself had competed. The protester has submitted billing statements reflecting the services provided by its employees in pursuit of the protest. HUD contends that these rates include profit which is not allowable. 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. Thus, a protester may not recover profit on its own employees' time in filing and pursuing its protest. Diverco, Inc.--Claim for Costs, supra. The record supports the agency's determination to pay the employees' allowable costs less the recovery of profit.

Tripp, Scott requests a total of \$6,850.61 in alleged protest costs; based upon our above discussion, subtracting each of the above stated disallowances from the total claimed amount (including the disallowances regarding FOIA, post-decision work and work unrelated to the protest, expenses and costs regarding the firm's claim), Tripp, Scott's adjusted costs based on its billing rates would equal \$3,557.50 (\$6,850.61 minus \$3,293.11 in disallowances). As HUD points out, adjusting this amount to eliminate profit, as discussed above, results in the amount of costs the protester is reasonably entitled to receive from HUD--\$2,846 (20 percent of \$3,557.50 is \$711.50, representing the unallowable profit objected to by HUD; \$3,557.50 minus \$711.50 is \$2,846).

³Regulations applicable to protests filed after April 1, 1991, were amended to provide that the costs associated with the pursuit of a claim are allowable under the cost-award provision of CICA in appropriate circumstances. 4 C.F.R. § 21.6(f)(2) (1991). We have not applied this provision retroactively.

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In light of the foregoing, we determine that Tripp, Scott is entitled to \$2,846 as the cost of filing and pursuing its bid protest.


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