

S. Riback  
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Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Komatsu Dresser Company--Claim for Costs

**File:** B-246121.2

**Date:** August 23, 1993

Matthew S. Simchak, Esq., and Donald P. Arnavas, Esq., Wiley, Rein & Fielding, for the protester. Adam C. Striegel, Esq., General Services Administration, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protester's claim for reimbursement of estimated percentage of bid protest costs incurred in connection with winning protest issues is disallowed in part where record contains only post-protest affidavits and certification in support of claimed percentage, and there is no documentation showing that hours billed were in accordance with the estimated percentage.

2. Costs incurred by protester prior to filing protest at General Accounting Office (GAO) are reimbursable where costs in question were for attorneys' preliminary work in preparing GAO protest.

3. Costs incurred after issuance of General Accounting Office decision for other than counsel's reading and interpreting decision are not reimbursable.

4. Protester's attorneys' out-of-pocket expenses are not reimbursable where adequate documentation has not been provided to show the amount of each expense, the purpose of the expense, and its relationship to the protest.

5. Costs associated with pursuit of claim before General Accounting Office are not recoverable where record shows that agency proceeded expeditiously in responding to claim.

### DECISION

Komatsu Dresser Company requests that our Office determine the amount it is entitled to recover from the General Services Administration (GSA) for the costs of filing and pursuing its bid protest which we sustained in our decision

Komatsu Dresser Co., 71 Comp. Gen. 260 (1992), 92-1 CPD ¶ 202. We determine that Komatsu is entitled to recover \$40,143.60.

We sustained in part and denied in part Komatsu's protest challenging the terms of request for proposals (RFP) No. FCAS-S3-3810-1-N-10-8-91, issued by GSA to add vendors to its multiple award Federal Supply Schedule (FSS) for road clearing and cleaning equipment. Komatsu's protest challenged the RFP's requote provisions under which GSA conducted limited competitions exclusively among FSS vendors for acquisitions in excess of a specified maximum order limitation (MOL). Komatsu maintained as well that the inclusion of certain equipment under one of the RFP's special item numbers (SIN) was improper, and also that the agency improperly had increased the MOLs applicable to all of the SINS being solicited.

We sustained the protest on the first issue, holding that the requote provision violated the Competition in Contracting Act's (CICA) requirement that agencies provide all responsible sources an opportunity to submit competitive bids or proposals for the government's requirements in excess of the MOL. 41 U.S.C. § 253 (1988). We also found Komatsu's protest timely in response to an agency allegation that Komatsu had been required to file its protest under what was essentially a previous solicitation. We denied the remainder of the protest. We awarded Komatsu the costs of filing and pursuing its bid protest, including attorneys' fees, to the extent that those costs had been incurred in connection with its successful argument relating to the requote clause.<sup>1</sup>

Komatsu has been unable to reach agreement with GSA on the claim, and asks that we determine the amount of protest costs to which it is entitled. Komatsu's bid protest costs total \$89,341.09.<sup>2</sup> Of that amount, Komatsu claims \$8,730.45, as the cost of pursuing its claim in our Office, and 65 percent of the remaining amount (\$80,610.64), or \$52,396.91, as the cost of filing and pursuing its bid protest. This 65-percent figure represents the amount of its attorneys' effort Komatsu claims was incurred in

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<sup>1</sup>As discussed in detail below, this recommendation encompassed Komatsu's costs of defending against the agency's argument that the sustained requote clause issue was untimely raised.

<sup>2</sup>Komatsu's bills actually total \$89,596.09. However, our calculations show a mathematical error on Komatsu's part resulting in a \$255 overstatement of the firm's total bid protest costs.

pursuing the requote issue (and in establishing the timeliness of its protest in response to GSA's argument). Komatsu's claim therefore totals \$61,127.36

#### REASONABLENESS OF ATTORNEYS' HOURS

GSA maintains that the total attorney time billed for filing and pursuing the protest is excessive. More specifically, GSA maintains that 25 percent of the attorneys' hours billed in connection with Komatsu's protest of the requote arrangements clause and defense of the timeliness issue should be disallowed. GSA cites in support of this argument (1) the fact that Komatsu's protest letter "did not even cite one single case," indicating to GSA that the approximately 66 hours claimed for preparation of this letter were excessive; and (2) our decision in Armour of Am., Inc.--Claim for Costs, 71 Comp. Gen. 293 (1992), 92-1 CPD ¶ 257, where we disallowed 25 percent of the hours billed by counsel based on our view that they were excessive. According to GSA, the time billed by counsel for Komatsu is similarly excessive.

As stated in Armour, our Office will examine the reasonableness of the attorneys' hours claimed where the agency identifies specific hours as excessive and articulates a reasoned analysis as to why payment for those hours should be disallowed. Other than its specific objection to the 66 hours billed for preparation of the initial protest letter, GSA has not identified any particular hours as excessive or presented a reasoned analysis as to why certain hours should be disallowed. GSA's position is simply that the number of hours, judged on the basis of overall magnitude, is excessive.

We conclude that the 66 hours billed for Komatsu's initial protest are reasonable. The amount of time which a prudent attorney might be expected to spend gathering information from and meeting with the client and researching and writing a protest involving complex issues can be significant. The substantive legal question on which Komatsu prevailed in its protest was a matter not previously considered by our Office or any other forum. Our resolution of this issue was of significance to the entire procurement community, and affected procurement actions beyond the acquisition at issue in the case. See, e.g., Alban Engine Power Sys.--Request for Declaration of Entitlement to Costs, B-247614.2, Apr. 8, 1992, 92-1 CPD ¶ 354. Komatsu's protest also presented a novel procedural question, namely, whether a firm can timely protest terms appearing in an "open season" amendment after the deadline for offers under the original FSS solicitation has passed. In view of these considerations, we find that the 66 hours billed for preparation of the initial protest

are reasonable and should be included in the number of hours used to calculate Komatsu's entitlement.<sup>3</sup>

#### ALLOCATION OF FEES TO ISSUES

GSA also maintains that Komatsu's claim should be reduced since the firm did not adequately allocate the hours billed between the issues on which it prevailed (the requote arrangements clause and timeliness) and the issues which were denied (improper classification of equipment under the challenged SIN and improper raising of the maximum order limitation). According to GSA, since Komatsu has improperly aggregated allowable and unallowable protest costs, and since the record contains no other evidence regarding how the attorneys' time was divided, there is no way to determine how much time was spent on the various issues.

Komatsu responds that, although its attorneys did not keep records reflecting the precise number of hours spent on each issue, approximately 65 percent of their overall time was spent addressing the two successfully argued issues. Komatsu contends that this is a conservative estimate of the division of attorney time based on a review of the attorneys' billing immediately following receipt of our decision. In support of its position, Komatsu has submitted affidavits and a letter dated April 7, 1992, in which Komatsu's counsel certifies the 65-percent figure to the agency in accordance with our Bid Protest Regulations, 4 C.F.R. § 21.6(f)(1) (1993).

In Interface Flooring Sys., Inc.--Claim for Attorneys' Fees, 66 Comp. Gen. 597 (1987), 87-2 CPD ¶ 106, the first case in which we limited a firm's recovery of bid protest costs to the issues on which the protester had prevailed, we stated that, in order for the protester to recover its costs, its attorneys were responsible for "allocating and certifying to [the agency] the time charged among the issues in the

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<sup>3</sup>In Armour, we found that the hours claimed by the protester's attorneys were excessive for a number of reasons. For example, we agreed with the agency that the number of hours billed for the preparation of the initial letter of protest were excessive because the protest contained numerous untimely allegations, but did not contain either a discussion relating to the timeliness of the issues or an explanation of why we should consider the issues, even if untimely. In contrast, we do not find these or similar deficiencies in Komatsu's initial protest.

protest." We also have recognized, however, that it is not the practice of the legal profession generally to delineate the specific amount of time spent on a specific issue during the course of a legal proceeding. CBIS Federal Inc.--Claim for Costs, B-245844.5, May 18, 1993, 93-1 CPD ¶ 388; see also Kunz Const. Co., Inc. v. U.S., 16 Cl. Ct 431 (1989). Thus, while a firm which has been given a partial award of attorneys' fees runs the risk of a lower-cost award than might be justified had the firm segregated its costs according to the issues presented, it will not be barred from recovery of some part of the unsegregated costs. See Digital Equipment Corp., supra. The only question, therefore, is what amount of the total fees incurred may be reimbursed. This we will determine based on consideration of the available evidence. CBIS Federal Inc.--Claim for Costs, supra.

We think consideration of content--e.g., level of complexity--is the best starting point for reaching a fair estimate of the effort behind a protest argument. It is our judgment that while the requote clause issue was the single largest and, ultimately, most significant aspect of Komatsu's protest, there is no basis for finding that the requote clause issue was more complex--in terms of the time required to understand, research, and present the arguments--than the unsuccessful "SIN classification" and "raised MOL" arguments combined. Rather, it appears to us that the issues are relatively similar in complexity and importance to Komatsu, and that the effort involved in arguing them was comparable. GSA's description of its own effort in responding to the classification issue is persuasive in this regard. GSA points out, for example, that the classification handbooks and regulations which had to be researched for this issue are "arcane," and states that compiling and understanding the facts underlying the

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'This view is consistent with the general rule that, where a party is awarded attorneys' fees in connection with some, but not all of the issues involved in a case, it may only recover its fees to the extent that it has adequately documented the allocation of its fees between winning and losing arguments. See Hensley v. Eckerhart, 461 U.S. 424 (1983) (the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended by identifying the general subject matter of counsel's time expenditures); see also Digital Equip. Corp., GSBICA No. 9285-C(9231-P), Aug. 24, 1989, 89-3 BCA ¶ 22181, 1989 BPD ¶ 248 (it is counsel's responsibility to maintain records in a manner that will permit identification of distinct claims; where counsel does not do so, recovery is based on the board's judgment, and may be lower than the amount claimed).

classification issue was "time-consuming" so that GSA found it necessary to assign one attorney to work exclusively on that issue. Nothing in the record suggests that Komatsu's counsel approached the issues any differently.

We conclude that 50 percent is a fair estimate of the percentage of Komatsu's counsel's effort that was related to the requote clause issue. We also think 5 percent is a reasonable estimate of the effort related to the timeliness of the requote clause issue. Komatsu therefore is entitled to reimbursement of 55 percent of the total allowable attorneys' fees incurred.

#### PRE-FILING COSTS

GSA argues that Komatsu's claim improperly includes attorneys' fees for work performed prior to the filing of Komatsu's protest in our Office. According to GSA, these fees were incurred during Komatsu's consideration of a possible agency-level protest and are designated in the attorneys' billing sheets as hours incurred in connection with a GSA protest. In all, these charges cover 19.75 hours of attorneys' time, for a total of \$4,947.50.

While as a general rule the costs of filing and pursuing an agency-level protest are not reimbursable (since such costs are not incurred in connection with a protest to our Office), Techniarts Eng'g--Claim for Costs, 69 Comp. Gen. 679 (1990), 90-2 CPD ¶ 152, Komatsu has adequately shown that the costs in question were related to its General Accounting Office (GAO) protest. Komatsu did not file an agency-level protest, and the record contains affidavits from the protester's attorneys stating that all costs for which the firm seeks reimbursement were incurred in pursuit of its protest to our Office. While two of the attorneys' billing entries contain the phrase "GSA protest," the balance of the entries refer to a protest "against" the GSA solicitation. Given that Komatsu did not protest to GSA, and the absence of evidence that it considered doing so, we think the "GSA protest" reference most likely referred to the protest of the GSA solicitation. Substantiated prefiling costs associated with the preparation of a GAO protest are reimbursable. Diverco, Inc.--Claim for Costs, B-240639.5, May 21, 1992, 92-1 CPD ¶ 460. We conclude that these prefiling costs should be reimbursed, and we have included them in determining the dollar amount of Komatsu's award of 55 percent of its attorneys' fees.

#### POST-DECISION COSTS

GSA argues that Komatsu's claim improperly includes attorneys' fees incurred after we issued our decision on

February 19, 1992. According to GSA, since all of the hours in question are for services performed after the issuance of our decision, they cannot properly be considered as costs incurred by Komatsu in filing and pursuing its protest. These charges are for 32.75 hours of attorneys' time, for a total of \$5,723.75.

We largely agree with GSA, and disallow payment for 30.25 of the 32.75 hours claimed. The record shows that 2.5 hours were spent by Komatsu's attorneys on February 20, 1992, reading and interpreting our decision; payment for this post-decision time is proper, as noted above. Bay Tankers, Inc.--Claim for Bid Protest Costs, B-238162.4, May 31, 1991, 91-1 CPD ¶ 524. Accordingly, Komatsu is entitled to reimbursement for these hours, and we have included them in calculating the dollar value of Komatsu's award of 55 percent of its attorneys' fees.

Of the remaining 30.25 disallowed hours, an additional 2.25 hours were used to read and interpret our decision, and to perform initial research in connection with Komatsu's cost claim with GSA. The costs associated with obtaining counsel's advice in reading and interpreting our decision appear duplicative of the 2.5 hours found reimbursable above, and are not segregated from the costs of research for the cost claim with GSA. The costs of filing and pursuing a GAO bid protest do not include costs associated with pursuing a claim for those costs with the contracting agency. The Pevar Co.--Claim for Costs, B-242353.3, Sept. 1, 1992, 92-2 CPD ¶ 144; Ultraviolet Purification Sys., Inc.--Claim for Bid Protest Costs, B-226941.3, Apr. 13, 1989, 89-1 CPD ¶ 376. Under these circumstances, the 2.25 hours are disallowed. Omni Analysis--Claim for Bid Protest Costs, 69 Comp. Gen. 433 (1990), 90-1 CPD ¶ 436. Another 28 hours (of the 30.25 disallowed hours) were related to pursuit of Komatsu's claim for protest costs with GSA, and for that reason are not reimbursable.

#### OUT-OF-POCKET EXPENSES

Komatsu claims 65 percent of \$2,648.14 for its attorneys' out-of-pocket expenses (\$1,721.29)<sup>5</sup> for telephone calls, facsimile transmissions, photocopying, postage and courier services, travel-related expenses, and computer assisted legal research. GSA objects to the payment of these expenses on the grounds that they are not adequately documented. In this regard, all of these expenses are presented in a billing statement from Komatsu's attorneys

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<sup>5</sup>This amount is exclusive of \$459.20 claimed in out-of-pocket expenses for pursuit of Komatsu's claim at our Office which we discuss below.



which divides the expenses by category (for example, telephone calls), and lumps the expenses within each category into three time periods, October 1991, November 1991, or December 1991 to October 1992.

We disallow all of Komatsu's out-of-pocket expenses. Claims for out-of-pocket expenses must be supported by documentation which identifies the amount claimed, the purpose for which the expense was incurred, and how the expense relates to the bid protest. Diverco, Inc.--Claim for Costs, supra. GSA specifically challenged the adequacy of Komatsu's documentation as it related to the out-of-pocket expenses claimed in the protester's October 22 letter to our Office, and the firm provided no additional information (such as telephone bills or invoices for other expenses) to substantiate its claim. Under these circumstances, Komatsu has failed to adequately document these expenses. Id.

#### COSTS OF PURSUING CLAIM AT GAO

Finally, GSA objects to payment of the costs incurred by Komatsu in pursuing its claim with our Office. According to GSA, it actively pursued settlement of the claim, and Komatsu was the party which broke off settlement negotiations. GSA therefore maintains that it should not have to bear these costs.

Our Bid Protest Regulations, 4 C.F.R. § 21.6(f)(2), provide that we may declare a protester entitled to reimbursement of the costs of pursuing its claim before our Office. This provision is designed to encourage expeditious agreement between a successful protester and the contracting agency as to the quantum of recoverable costs. American Imaging Servs., Inc.--Request for Declaration of Entitlement to Costs, B-246124.4, Dec. 30, 1992, 92-2 CPD ¶ 449.

We decline to award Komatsu's costs of pursuing its claim in our Office. In this regard, we conclude that the agency's position during negotiations that several claimed costs were not reimbursable was reasonable; as already discussed, we have agreed with GSA that substantial portions of the claimed costs are not reimbursable. In view of this fact, and the fact that the parties did not spend a significantly long period of time negotiating the claim before submitting the matter to our Office, we cannot conclude that the agency failed to act expeditiously. We therefore disallow \$8,730.45, comprised of \$8,271.25 in attorneys' fees and \$459.20 in out-of-pocket expenses claimed for pursuit of the claim at our Office.

#### CONCLUSION



Of Komatsu's total bid protest costs of \$89,341.09, we disallow \$4,973.75 as impermissible post-decision costs, \$8,730.45 in costs associated with pursuing its claim before our Office, and \$2,648.14 as inadequately documented out-of-pocket expenses. Of the remaining amount (\$72,988.75), we allow 55 percent. By our calculations<sup>6</sup>, this amounts to \$40,143.60. We therefore find the protester entitled to this amount.

*Wilton A. Bowler*  
for Comptroller General  
of the United States

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<sup>6</sup>We calculate this amount as follows: 1.37 hours at \$300 per hours (\$411); 28.6 hours at \$295 per hour (\$8,437); 61.05 hours at \$290 per hour (\$17,704.50); 22.96 hours at \$210 per hour (\$4,821.60); 59.31 hours at \$140 per hour (\$8,303.40); .13 hours at \$95 per hour (\$12.35); and 6.05 hours at \$75 per hour (\$453.75).