



## Decision

**Matter of:** VION Corporation--Claim for Costs

**File:** B-256363.3

**Date:** April 25, 1995

C. Chad Johnson, Esq., Latham & Watkins, for the protester.  
Clarence D. Long III, Esq., Department of the Air Force, for  
the agency.

Tania L. Calhoun, Esq., and Christine S. 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 legal fees incurred in connection with winning protest issue is disallowed in part where record shows that claimant's estimated percentage of hours billed devoted to the successful protest issue, as well as to other tasks necessary to the pursuit of this protest issue, is overstated.
2. Protester's attorneys' out-of-pocket expenses are disallowed in part where record shows that claimant's estimated percentage of expenses attributable to the successful protest issue, as well as to other tasks necessary to the pursuit of this protest issue, is overstated.
3. Costs associated with the pursuit of the claim before the contracting agency are disallowed, as such costs are not included as the costs of filing and pursuing a General Accounting Office bid protest.
4. Costs associated with the pursuit of the claim before the General Accounting Office are disallowed where the record shows that the contracting agency's concerns about the claim were reasonable, and that it expeditiously responded to the claim in light of these concerns.

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**DECISION**

VION Corporation requests that our Office determine the amount it is entitled to recover from the Department of the Air Force for the costs of filing and pursuing its bid protest which we sustained in our decision VION Corp., B-256363, June 15, 1994, 94-1 CPD ¶ 373. We determine that VION is entitled to recover \$14,322.28.

We sustained in part and denied in part VION's protest challenging the terms of request for proposals (RFP) No. F19628-92-R-0078, issued by the Air Force for the procurement of central processing units and direct access storage devices for the Defense Information Services Organization. VION's protest challenged the RFP's requirement that upgraded central processing units be identified by the same serial number as the replaced equipment; its terms concerning changes in the prospective location of the equipment; its failure to consider environmental factors in the determination of the most probable life cycle cost; and the completeness of its technical evaluation factors.

We sustained the protest on the first issue, holding that the serial number requirement did not clearly express the agency's minimum needs and was unduly restrictive. The record showed that the requirement effectively prevented offerors from offering complete replacement of the central processing units, a result that was not intended by the agency. We denied the remainder of the protest. We awarded VION 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 serial number requirement.

VION has been unable to reach agreement with the Air Force on the claim, and asks that we determine the amount of protest costs to which it is entitled. VION's bid protest costs total \$36,493.50 for legal fees. Of that amount, counsel for VION claims \$16,109 as the cost of pre-decision attorneys' fees for efforts undertaken in pursuit of the successful protest ground and for what the claimant calls "generic" protest work; \$4,390.50 in post-decision legal fees, including pursuit of the claim before the Air Force; \$1,392.35 in out-of-pocket legal expenses; and \$3,703 as the cost of pursuing its claim before our Office--a total of \$25,594.85. Negotiations between VION and the Air Force resulted in an offer by the contracting agency to pay the claimant \$10,000. Dissatisfied with that settlement offer, VION requests that our Office determine the amount of its

entitlement pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1994).

#### PRE-DECISION LEGAL FEES

Counsel for ViON has documented its work by providing a list of the services performed in the protest by two attorneys, a partner and an associate, billing at a unitary rate of \$230 per hour, and two paralegal staff members, billing at \$105 per hour and \$90 per hour, respectively. This list includes the number of hours worked, as well as a description of services rendered as reproduced from the individual timesheets. For each task performed, the list identifies the total hours expended and by whom, and allocates those hours to one or both of two columns: one for hours expended on the unsuccessful protest issues, and the other for hours expended on both the successful protest issue and what the claimant terms "generic" protest work. That second column, which contains 68.8 attorney hours and 3 paralegal hours, is at issue here.

The first component of that column is the hours expended on the successful protest issue. Using the number of pages in each filing--the protest, comments, supplemental comments, and declarations--as a rough guide, ViON estimates that 55 percent of its total hours were expended in connection with the serial number issue and necessary background and procedural information; however, ViON requests reimbursement for only 50 percent of its total hours. The second component of the column is the hours expended on what ViON terms "generic" protest work: efforts that would be required by counsel to participate in any protest before the General Accounting Office (GAO). ViON considers "generic" protest work to include consulting with the client, filing statements in compliance with the protective order, reviewing third-party interventions, reviewing documents from all of the parties to the protest, and participating in telephonic conferences. For each of these tasks, ViON requests reimbursement for 100 percent of the hours expended. Because these hours are commingled into one column, it is not entirely clear which hours are attributable to the serial number issue and which are attributable to "generic" work.

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<sup>1</sup>We disagree with the Air Force's argument that ViON's claim is not valid because it was not certified, as ViON has now certified its claimed bid protest costs, and the Air Force fully considered ViON's claim, apart from the question of ViON's certification of its claim. Diverco, Inc.--Claim for Costs, B-240639.5, May 21, 1992, 92-1 CPD ¶ 460. See also Sterling Fed. Sys., Inc., 1991 GSBGA No. 10000-C (9835-P), July 3, 1991, 91-3 BCA ¶ 24160.

The Air Force maintains that ViON's entire claim for "generic" protest work must be rejected. The agency asserts that counsel for ViON has "thrown nearly everything it did into a common pot with the work spent on the serial number issue," and stated that the serial number issue and the "generic" work constituted 55 percent of the time expended. The Air Force also generally argues that the serial number issue was an ancillary one, and implies that, even as to that issue alone, ViON's 55 percent allocation is excessive.

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 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 Fed. Inc.--Claim for Costs, 72 Comp. Gen. 203 (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 Equip. Corp., supra.

We share the Air Force's concern that ViON's commingling of the hours expended on both the successful protest issue and the "generic" protest work does not allow for a clear distinction between the two categories on a task-by-task

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<sup>2</sup>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 (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).

basis.<sup>3</sup> As a practical matter, however, the tasks VION calls "generic" are subject to allocation between the successful and unsuccessful protest issues and, thus, VION would not be entitled to reimbursement for 100 percent of these hours even if we could make this clear distinction. Each of these "generic" tasks--reading the agency report, reviewing comments from interested parties, participating in telephonic conferences with respect to a given filing--necessarily involves consideration of both the successful and unsuccessful protest issues. Accordingly, the hours spent on "generic" tasks are subject to the allocation rate which we next discuss.

There are three exceptions to this determination. First, VION is entitled to reimbursement of 100 percent of the .9 attorney hours, a total of \$207, expended to comply with the protective order issued in this protest, as this effort would have been expended whether or not the unsuccessful protest issues were raised. Second, VION is not entitled to reimbursement for any of the .5 attorney hours, or \$105, expended to review the third-party intervention. That intervention/protest did not address the serial number issue at all and, in fact, was based entirely on an unsuccessful protest issue raised in VION's protest. See Digital Equip. Corp., supra. We have also excluded from our calculation the .5 attorney hour, expended on May 3, which was dedicated solely to the unsuccessful protest issues.

The question remaining 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. As stated above, VION asserts that 55 percent of its total efforts were devoted to the successful protest issue and necessary background and procedural information, but claims reimbursement for only 50 percent of its total efforts. To arrive at this percentage, the claimant used a page count of its filings. While the Air Force correctly asserts that the serial number issue was a minor one at the beginning of the protest, the issue became more significant as the information provided by the agency in its report and subsequent filing made it clear that the requirement was unduly restrictive. The comments

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<sup>3</sup>A protester seeking to recover the cost of pursuing its protest must submit sufficient evidence to support its monetary claim. Maintenance and Repair--Claim for Costs, B-251223.4, June 24, 1994, 94-1 CPD ¶ 381; Ultraviolet Purification Sys., Inc.--Claim for Costs, B-226941.3, Apr. 13, 1989, 89-1 CPD ¶ 376. The amount claimed may be recovered to the extent that it is adequately documented and shown to be reasonable. Patio Pools of Sierra Vista, Inc.--Claim for Costs, 68 Comp. Gen. 383 (1989), 89-1 CPD ¶ 374.

and supplemental comments clearly indicate the growing complexity and importance of the successful protest issue, and, in this case, a fair measure of the complexity of the issue is reflected by a "page count." However, acknowledging that such a measure is somewhat subjective, and that there will be differences in judgment as to what should be included, our page count of the filings shows that a more accurate allocation rate is 45 percent.

Accordingly, and with the exception of attorney hours expended to comply with the protective order and to review the third-party intervention, as well as the .5 attorney hour dedicated solely to the unsuccessful protest issue, all hours attributable to the pursuit of the protest prior to our rendering a decision (119 attorney hours, 2 paralegal hours at the \$105 per hour rate, and 4 paralegal hours at the \$90 per hour rate, a total of \$27,940, of which \$16,109 was claimed) are compensable in the amount of 45 percent, or \$12,573.

#### OUT-OF-POCKET EXPENSES

VION claims \$1,392.35 for legal expenses incurred for photocopying, telecopying, online research, messenger and delivery services, filing services, secretarial, and overtime expenses. The Air Force does not specifically challenge any of these expenses.

VION allocated most of its expenses to the same categories as the attorney hours worked on the proximate dates. Thus, for those dates on the list where attorney time was allocated entirely to the column for the serial number issue and "generic" tasks, all expenses are allocated to the successful protest issue and, thus, all expenses are claimed. For dates where attorney time was allocated equally between the serial number issue and the remaining issues, VION claims 50 percent of the hours billed.

For the same reasons discussed above, we decline to agree with VION that it is entitled to reimbursement of 100 percent of its expenses attributable to "generic" protest work. Accordingly, the following expenses, \$181.25 for telecopying, \$185.70 for photocopying, \$666.81 for on-line research, \$579 for secretarial double-time and overtime, and \$15.64 for telephone calls, a total of \$1,628.40, are subject to the 45-percent allocation rate, for a recovery of \$732.78. VION is entitled to reimbursement of all of its photocopying expenses associated with complying with the protective order, \$7.20, and none of its photocopying expenses associated with reviewing the third-party intervention/protest, \$5.10. We also disallow as a nonreimbursable expense the \$7.50 claimed for an April 12 meal allowance. Princeton Gamma Tech., Inc.--Claim for



Costs, 68 Comp. Gen. 400 (1989), 89-1 CPD ¶ 401; The Pevar Co.--Claim for Costs, B-242353.3, Sept. 1, 1992, 92-2 CPD ¶ 144.

For the remaining expenses, which are filing service fees and taxi or messenger services incurred for filing and serving of papers, we agree with VION that it is entitled to the total amount disbursed, \$376.80, as these expenses would have been incurred regardless of the protest issue.

#### POST-DECISION COSTS

VION's claim also includes 100 percent of the attorneys' fees incurred after we issued our decision on June 15, 1994. VION claims the 3.7 attorney hours spent by VION's attorneys discussing and reviewing our decision, on June 17 and June 24. While reimbursement of such costs is allowable, Bay Tankers, Inc.--Claim for Bid Protest Costs, B-238162.4, May 31, 1991, 91-1 CPD ¶ 524, VION is not entitled to reimbursement for 100 percent of these costs. It is inconceivable that counsel for the protester did not spend at least some of these expended hours discussing and reviewing the unsuccessful protest issues. As approximately 50 percent of our decision was devoted to the serial number issue and necessary background information, the claimant is entitled to reimbursement for 50 percent of these hours, for a total of \$425.50.

VION further requests reimbursement for 5.3 attorney hours and 22.1 paralegal hours spent in pursuit of its claim with the Air Force, for a total of \$3,539.50. However, 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. Manekin Corp.--Claim for Costs, B-249040.2, Dec. 12, 1994, 94-2 CPD ¶ 237; Komatsu Dresser Co.--Claim for Costs, B-246121.2, 93-2 CPD ¶ 112. As a result, these hours are not reimbursable.

#### COSTS OF PURSUING CLAIM AT GAO

VION requests reimbursement for 16.1 attorney hours spent in pursuit of its claim before our Office, for a total of \$3,703. VION points to the agency's failure to object to its claim prior to rendering a decision, as well as to the agency's apparent refusal to discuss the matter with the firm until VION complained to our Office, and argues that the Air Force has "used every opportunity to delay and frustrate VION's good faith efforts to pursue its request," and forced it to file this claim in our Office.

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. Manekin Corp.--Claim for Costs, supra; Komatsu Dresser Co.--Claim for Costs, supra; 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 VION's costs of pursuing its claim in our Office. In contravention of our regulations, VION's claim with the agency, filed on August 11, was uncertified. Further, as we have discussed, many of the agency's concerns were reasonable; the claimant's commingling of its hours expended on the successful protest issue and its "generic" protest work made it difficult to determine the merits of the claim; despite clear precedent to the contrary, VION claimed the costs of its pursuit of the claim before the contracting agency; and VION's estimated percentage for allocating between successful and unsuccessful issues was somewhat overstated. The agency issued its decision--and presumably its settlement--on September 26, and the claim was filed in our Office on October 4, 8 days later. In view of the fact that we have agreed with the Air Force that a significant portion of the claimed costs is not reimbursable, 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. See Manekin Corp.--Claim for Costs, supra. We therefore disallow the \$3,703 claimed for pursuit of the claim at our Office.

#### CONCLUSION

Of VION's claimed bid protest costs of \$25,594.85, we find the claimant entitled to recover \$12,780 in pre-decision legal fees; \$425.50 in post-decision legal fees; and \$1,116.78 in out-of-pocket expenses, a total of \$14,322.28.

/s/ James F. Hinchman  
for Comptroller General  
of the United States