



Comptroller General  
of the United States

221105

Washington, D.C. 20548

## Decision

**Matter of:** Berkshire Computer Products, Inc.--  
Reconsideration

**File:** B-240327.4

**Date:** May 9, 1995

William F. Mazanec III, Esq., for the protester.  
Gregory H. Petkoff, Esq., Department of the Air Force,  
for the agency.  
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

### DIGEST

The General Accounting Office (GAO) will not reconsider a prior decision denying the protester's claim for costs for an unsalaried consultant and for an attorney based upon arguments or evidence that could have and should have been presented during GAO's initial consideration of the claim, and where the protester has not shown any errors of law or facts not previously considered that warrant reversal or modification of the decision.

### DECISION

Berkshire Computer Products, Inc. requests reconsideration of our decision in Berkshire Computer Prods., Inc.--Claim for Costs, B-240327.3, Dec. 30, 1994, 95-1 CPD ¶ 6, in which we determined the amount that Berkshire was entitled to recover from the Department of the Air Force for filing and pursuing its protest in Berkshire Computer Prods., B-240327, Oct. 31, 1990, 91-1 CPD ¶ 464.

We deny the request for reconsideration.

In our prior decision on Berkshire's cost claim, we disallowed the costs claimed for an unsalaried consultant, Ernest J. Parsons, and for an attorney. Regarding the costs claimed for Mr. Parsons, we found from the record before us that Mr. Parsons was not a salaried employee,<sup>1</sup> but that

<sup>1</sup>The General Services Board of Contract Appeals (GSBCA) also found in a protest of a different procurement during the same time frame as the protest filed in our Office that Mr. Parsons was not a salaried employee. See Berkshire  
(continued...)

the costs claimed appeared to be in the nature of sales commissions.<sup>2</sup> In this regard, there was no evidence in the record, despite our requests for additional information, that Berkshire agreed to pay or in any way incurred any actual costs in connection with Mr. Parsons's actions in the protest. Regarding the costs claimed for the attorney, there was also no evidence in the record, again despite our specific request for additional information, that Berkshire paid or was obligated to pay the attorney for any activities related to the protest.

Berkshire disagrees that it is not entitled to recover any costs claimed for Mr. Parsons. While Berkshire now admits that Mr. Parsons was not a salaried employee of Berkshire, it asserts that Mr. Parsons performed work for Berkshire on a "fee" basis. Accordingly, Berkshire asserts that we erred in concluding that the compensation paid to Mr. Parsons during the time relevant to the protest may have been in the nature of commissions.

Our Bid Protest Regulations require that a party requesting reconsideration show that our prior decision contains either errors of fact or of law or present information not previously considered that warrants reversal or modification or our decision. 4 C.F.R. § 21.12(a) (1995).

Berkshire's request for reconsideration does not satisfy that standard. The Air Force objected to the recovery of any costs claimed for Mr. Parsons on the basis that Mr. Parsons was not a salaried employee, but was likely a commissioned salesman. On April 4, 1994, we requested that Berkshire provide information in response to the agency's objections regarding the nature of Mr. Parsons's compensation in regard to the protest. Despite agreeing to respond to the agency's objections and later requesting an extension of time until April 20 to respond, Berkshire never provided any information or argument demonstrating that Mr. Parsons was not compensated on a commission basis or that Berkshire was obligated to pay Mr. Parsons for any services related to the protest. Ultimately, more than

---

<sup>1</sup>(...continued)

Computer Prods. v. Department of the Army, GSBICA No. 12228-P, Feb. 25, 1993, 93-2 BCA ¶ 25,856, 1993 BPD ¶ 59.

<sup>2</sup>A protester may not recover labor costs that are based upon commissions. See Ultraviolet Purification Sys., Inc.--Claim For Bid Protest Costs, B-226941.2, Apr. 13, 1989, 89-1 CPD ¶ 376; see also Gramco Computer Sales, Inc., GSBICA No. 9049-C (8940-P), Apr. 5, 1988, 88-2 BCA ¶ 20,691, 1988 BPD ¶ 57.

6 months after requesting the protester's response to the agency's objections, we decided Berkshire's cost claim based upon the record before us.

While Berkshire now claims that Mr. Parsons was compensated on a fee basis and that it has documentation to support this claim, this argument and any supporting evidence was not presented to us during our consideration of the claim, although it could and should have been. Berkshire asserts that the reason this evidence was not presented to us during our consideration of the claim was that its office manager left the firm's employment in "late summer of 1994," and the information "was in fact still being collated for submission." Even if this is true, this does not explain why this evidence was not provided to our Office by April 20 as requested or why Berkshire did not request an extension of time to respond.<sup>3</sup> We will not reconsider a prior decision based upon new arguments or evidence that could have and should have been raised at the time of our initial consideration of the protest or claim. Newport News Shipbuilding and Dry Dock Co.--Recon., B-221888.2, Oct. 15, 1986, 86-2 CPD ¶ 428. Consideration of late submitted evidence or arguments would undermine our ability to fairly and expeditiously decide protests and claims. Id.

Berkshire also disagrees with our determination that it is not entitled to recover any costs claimed for its attorney.<sup>4</sup> The Air Force objected that the attorney's asserted hourly rate was unreasonable and that there was no showing in the record that the attorney was actually paid or expected to be paid for the hours claimed to be incurred in relation to the protest. Despite our specific request that Berkshire respond to the agency's objections, Berkshire provided no information establishing the reasonableness of the attorney's claimed hourly rate or that Berkshire had paid or was obligated to pay the attorney for actions related to the protest. A protester seeking to recover


---

<sup>3</sup>We note that even according to Berkshire's explanation, its office manager left Berkshire's employ 3 months after the time Berkshire was requested to provide evidence responsive to the agency's objections.

<sup>4</sup>The attorney representing Berkshire in this request for reconsideration is not the same attorney for whom Berkshire claimed reimbursement of protest costs. The attorney for whom Berkshire claimed reimbursement of its protest costs did not enter an appearance on Berkshire's behalf during the protest or our consideration of its claim, although the record established that the attorney had represented Berkshire in a number of other protests before our Office and the GSBGA.

the costs of pursuing its protest must submit sufficient evidence to support its monetary claim. Data Based Decisions, Inc.--Claim for Costs, 69 Comp. Gen. 122 (1989), 89-2 CPD ¶ 538. While Berkshire now argues that this determination is "unjust," it does not show that we erred in any regard in concluding that Berkshire had failed to provide any information, in the face of the agency's objections, to establish the reasonableness of the claimed hourly rate or that Berkshire had incurred any actual legal costs related to the protest in question here.

The request for reconsideration is denied.

  
for Robert P. Murphy  
General Counsel