

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Waterfront Technologies, Inc.--Costs

File: B-401948.19

Date: March 19, 2012

Janice H. Kaufmann for the protester.
Herman J. Narcho, Esq., Department of Labor, for the agency.
Jonathan L. Kang, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Reimbursement of a successful protester's costs for the work performed by its employees in pursuing the protest is denied where the protester's supporting information regarding those costs shows that the obligation to pay the employees for their efforts in pursuit of the protest is subject to a contingency arrangement such that the employees would only be paid if the protest costs are actually recovered from the government, and where the protester has not paid its employees.

2. Reimbursement of a successful protester's costs, including legal fees, is denied where the protester expressly refuses to segregate its costs between the meritorious and non-meritorious protest issues, as required by the prior GAO recommendation, despite requests by the procuring agency and GAO to provide this information.

DECISION

Waterfront Technologies, Inc., of Baltimore, Maryland, requests that our Office recommend that the Department of Labor (DOL) reimburse its claimed costs of filing and pursuing its protest of the award of a contract to 21st Century Technologies, Inc., of Austin, Texas, under request for proposals (RFP) No. DOL099RP20703 for Enterprise Information Technology Services to support the Office of Foreign Labor Certification (OFLC). Our Office previously recommended that the agency reimburse the protester's reasonable costs of pursuing one aspect of its protest, which resulted in corrective action by the agency; this decision addresses the appropriate level of reimbursement for the protester. As discussed below, we conclude that none of the protester's claimed costs merit reimbursement.

BACKGROUND

The RFP was issued on June 29, 2009, and sought proposals to provide support to OFLC's enterprise-level labor certification program (formerly titled the iCERT Visa Portal System). RFP, Statement of Work ¶ 1.1. As relevant here, following a number of earlier awards and protests, Waterfront filed a protest with our Office on September 20, 2010, challenging the award to 21st Century; this protest was docketed as B-401948.13.¹ The protester challenged DOL's evaluation of Waterfront's past performance and technical proposal, and the evaluation of 21st Century's price.

Although Waterfront filed protest B-401948.13, pro se, the protester subsequently retained outside counsel to represent it in the protest. Our Office issued a protective order for the protest, received and reviewed the protester's outside counsel's application for access, and admitted him to the order. Waterfront's outside counsel received from DOL documents covered by the protective order, and submitted comments on the agency report on behalf of the protester.

On November 18, the Government Accountability Office (GAO) attorney assigned to the protest conducted "outcome prediction" alternative dispute resolution (ADR), during which the attorney expressed his view that GAO would likely sustain Waterfront's protest regarding the agency's evaluation of 21st Century's price. Specifically, the GAO attorney advised that the record showed that the agency had not conducted a price realism evaluation, as required by the solicitation. The GAO attorney also advised that the protester's challenges to the evaluation of its past performance and technical proposal did not appear to have merit. The agency subsequently advised our Office that it would take corrective action by conducting a price realism evaluation of the offerors' proposals; based on this notice, we dismissed the protest on November 24.

On December 7, Waterfront filed a request for a determination of entitlement to its protest costs; this request was docketed as B-401948.16.

On January 24, 2011, DOL advised Waterfront that it had completed the corrective action and affirmed the award to 21st Century. On February 9, Waterfront filed a protest, pro se, of the reaffirmed award, again challenging the agency's evaluation of past performance, technical proposals, and price; this protest was docketed as B-401948.17. Prior to providing its report on this protest, DOL advised that it would again take corrective action to further address concerns regarding the agency's

¹ For the history of this procurement and the prior protests, see Waterfront Techs., Inc.--Protest and Costs, B-401948.16, B-401948.18, June 24, 2011, 2011 CPD ¶ 123.

price realism analysis; based on the agency’s notice, we dismissed the protest on March 14. On March 18, DOL advised Waterfront that it had affirmed the award to 21st Century.

On March 21, Waterfront filed a protest (again, pro se), which was docketed as B-401948.18. On June 24, 2011, our Office denied Waterfront’s protest of the award to 21st Century. Waterfront Techs., Inc.--Protest and Costs, supra, at 16. In the decision, we also agreed with Waterfront that DOL had unreasonably delayed in taking corrective action in response to the protester’s challenge to the evaluation of the offerors’ proposed prices in B-401948.13. Id. at 18. We recommended that DOL pay Waterfront the reasonable costs incurred “with regard to the clearly meritorious issue of the evaluation of the awardee’s price.” Id.

On July 15, Waterfront submitted its request for costs to DOL. Waterfront requested reimbursement of its costs for work performed by two Waterfront employees and Waterfront’s outside counsel in the amount of \$95,400 as follows:

	HOURS CLAIMED	RATE REQUESTED	COSTS REQUESTED
EMPLOYEE 1	337	\$150/hour	\$50,550
EMPLOYEE 2	262	\$150/hour	\$39,300
OUTSIDE COUNSEL	37	\$150/hour	\$5,550
TOTAL	636		\$95,400

Request for Costs, July 15, 2011, attach., Timeline and Hours Chart, at 3.

On August 17, DOL denied Waterfront’s request for costs, stating that the documentation submitted by the protester was inadequate. Specifically, the agency states that the protester’s request sought reimbursement of all of its costs for B-401948.13, and that the documentation did not segregate the costs as directed in our decision. Agency Denial of Cost Request (Aug. 17, 2011) at 3, citing Waterfront Techs.--Protest and Costs, supra, at 18. The agency requested that our Office provide guidance as to the appropriate amount for reimbursement. Based on the agency’s and protester’s request that we resolve the dispute concerning the appropriate level of costs for reimbursement, we docketed Waterfront’s request for costs as B-401948.19.

DETERMINATION OF COSTS

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys’ fees, if, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious

protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. 31 U.S.C. § 3554(c)(1)(A) (2006); Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2011); KNAPP Logistics Automation, Inc.-Protest and Costs, B-404887.2, B-404887.3, July 27, 2011, 2011 CPD ¶ 141 at 4. Where, as here, our Office recommends that an agency pay a protester's costs, but the protester and agency cannot agree on the appropriate level of reimbursement, our Office may, at the request of the protester, recommend an appropriate amount. 4 C.F.R. § 21.8(f).

A protester seeking to recover its protest costs must submit sufficient evidence to support its monetary claim; our Office will base our decision for a cost claim upon the facts and circumstances of that claim. CourtSmart Digital Sys., Inc.--Costs, B-292995.7, Mar. 18, 2005, 2005 CPD ¶ 47 at 2. The requested amount may be recovered to the extent that the claim is adequately documented and is shown to be reasonable; a claim is reasonable, if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the pursuit of a protest. E&R, Inc.--Costs, B-255868.2, May 30, 1996, 96-1 CPD ¶ 264 at 2. A recommendation that an agency pay a protester's costs is intended to relieve protesters with valid complaints regarding a procurement of the burden of vindicating the public interest which Congress seeks to promote through the bid protest process; it is not intended as a reward to prevailing protesters or as a penalty imposed upon the government. Diverco, Inc.--Costs, B-240639.5, May 21, 1992, 92-1 CPD ¶ 460 at 3.

As discussed below, we conclude that none of the protester's claimed costs merit reimbursement by the agency.

Protester's Use of a Contingent Fee Arrangement

First, we address the arrangement under which Waterfront states that its two employees were to be compensated. As outlined in the chart above, Waterfront claims that its employees worked 599 hours pursuing the protest, and seeks reimbursement at a rate of \$150 per hour for a total of \$89,850. We conclude that none of these requested costs are reimbursable because the protester has not demonstrated that they were actual expenses incurred by Waterfront.

During our resolution of this cost claim, our Office asked Waterfront a number of questions regarding its cost claim and the supporting documentation provided. As relevant here, we asked the protester to explain why it sought reimbursement for its employees at the rate of \$150 per hour, which is, under most circumstances, the maximum rate permitted for reimbursement for legal fees of outside counsel.² Email from GAO to Waterfront, Aug. 30, 2011.

² We note that the statutory limit of \$150 per hour for outside counsel does not apply to small businesses, such as Waterfront. 31 U.S.C. § 3554(c)(2) (2006). The
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In response, Waterfront argued that the rate was justified because the customary billing rates for these employees exceeds \$150 per hour. Waterfront Response to GAO, Sept. 6, 2011, at 3. We then advised Waterfront that customary billing rates cannot be used if they were not actually incurred by a protester. Email from GAO to Waterfront, Sept. 7, 2011. As our cases have held, a protester may not recover profit on its employee's time in filing and pursuing protests, and therefore claimed rates must be based upon actual rates of compensation paid to employees, plus reasonable overhead and fringe benefits, and not market rates that include profit as an element. See International Program Group, Inc.--Costs, B-400278.4; B-400308.4, June 22, 2009, 2009 CPD ¶ 128 at 3; SKJ & Assoc., Inc.--Costs, B-291533.3, July 24, 2003, 2003 CPD ¶ 130 at 3; W.S. Spotswood & Sons, Inc.--Costs, B-236713.3, July 19, 1990, 90-2 CPD ¶ 50 at 3.

In response to our Office's request for actual salary data for the relevant time period, Waterfront claimed that the annual salary for one of its employees was \$190,000, which yields a rate \$91.35 per hour (based on a 2,080-hour year), and that the annual salary for the second employee was \$176,000, which yields an hourly rate of \$84.62 per hour (also based on a 2,080-hour year). Waterfront Response to GAO, Sept. 29, 2011, at 2. The protester further stated that its indirect cost rate was 87.5 percent, and that when applied to the salary rates, yields hourly rates in excess of \$150 per hour for each employee.³ Id. In a subsequent response, however, the protester acknowledged that neither employee had been paid by Waterfront since 2009. Waterfront Response to GAO, Oct. 12, 2011, at 3. Additionally, tax filings provided by Waterfront confirm that the company did not pay either employee a salary or any other compensation during the period covered by protest B-401948.13. Id., attach., W-2 and W-3 forms.

Instead, Waterfront for the first time disclosed that, on August 27, 2010, one day after receiving a post-award debriefing from DOL, Waterfront entered into agreements with the two employees to represent the company in the bid protest that we docketed as B-401948.13. These agreements, which the protester first provided to our Office on October 12, 2011, state that the employees would receive "deferred pay" for working on the protests. Id., attachs., Agreement Between Waterfront and Employee One, Aug. 27, 2010, at 1; Agreement Between Waterfront and Employee Two, Aug. 27, 2010, at 1. The agreements also stated that the deferred compensation would be paid under the following circumstances: "In the case that

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invoice for protester's outside counsel, however, states that Waterfront was billed at a rate of \$150 per hour. Outside Counsel Invoice, Dec. 30, 2010, at 1-2.

³ The protester subsequently revised its claimed indirect cost rate to 100 percent. Waterfront Response to GAO, Oct. 12, 2011, at 3.

this 2nd protest is successful, [Waterfront employee] will [be] compensated within 10 days of Waterfront being paid for the associated protest costs by the Department of Labor.” Id., attaches., Agreement Between Waterfront and Employee One, Aug. 27, 2010, at 2; Agreement Between Waterfront and Employee Two, Aug. 27, 2010, at 2.

The issue for our review here is whether the contingent nature of the compensation agreements between Waterfront and its employees provides a valid basis for reimbursement of its protest costs.

Our Office has held that it is appropriate to recommend reimbursement of a protester’s costs that are incurred under certain types of contingent fee arrangements. Such arrangements are proper where the contingency is based on a successful outcome for the protest, and where the protester is responsible for paying the full costs upon that successful outcome. See Boines Constr. & Equip. Co., Inc.--Costs, B-279575.4, Apr. 5, 2000, 2000 CPD ¶ 56 at 7; E&R, Inc.--Costs, supra, at 3-4.

In contrast, our Office has held that reimbursement is not proper where the protester does not demonstrate that it is obligated to pay the costs regardless of whether they are recovered from the government. In this regard, an obligation to pay costs that is contingent upon recovery from the government may not be properly reimbursed. See Solutions Lucid Group, LLC--Costs, B-400967.2, Oct. 1, 2009, 2009 CPD ¶ 198 at 4-5 (request for recommendation of reimbursement is denied where the protester’s obligation to pay its consultant was contingent on a determination by GAO that the protester was eligible for reimbursement of the consultant’s fees); TRS Research--Costs, B-290644.2, June 10, 2003, 2003 CPD ¶ 112 at 4 (request for recommendation of reimbursement is denied where the protester does not demonstrate that it was liable to pay the legal fees cited in the request); Galen Med. Assocs., Inc.--Costs, B-288661.6, July 22, 2002, 2002 CPD ¶ 114 at 5-6 (request for recommendation of reimbursement is denied where correspondence between the protester and its outside counsel indicated that there was not a firm obligation to pay the legal fees). This requirement reflects our statutory obligation to recommend reimbursement of only those costs actually incurred by a protester. A protester’s costs cannot be reasonably viewed as having been incurred in pursuit of the protest where the protester is liable to pay them only in the event the protester is paid by the government. Additionally, the absence of a firm liability to pay costs gives rise to a concern that a protester would be incentivized to overstate its costs, as it is only liable to pay the costs actually reimbursed by the government.

Here, Waterfront provided our Office with copies of the agreements with its employees to compensate them on a “deferred pay” basis. These agreements provided that the employees “will be compensated within 10 days of Waterfront being paid for the associated costs by the Department of Labor.” Agreement

Between Waterfront and Employee One, Aug. 27, 2010, at 2; Agreement Between Waterfront and Employee Two, Aug. 27, 2010, at 2. The agreements do not state that Waterfront is obligated to pay the employees in the event that payment is not made by the government; rather, the plain language of the agreement states that the employees will be paid upon Waterfront's receipt of funds from the agency.

On this record, we conclude that Waterfront has not provided evidence that it incurred costs in pursuit of its successful protest with regard to the compensation of its employees. For this reason, we deny the protester's request for reimbursement of the costs of employee one and employee two.⁴

Refusal to Segregate Costs

Next, we address Waterfront's refusal to segregate its costs, for its own employees and the legal fees for its outside counsel, between the meritorious and non-meritorious protest issues. As discussed above, Waterfront's initial request did not identify the costs relating to the single meritorious issue identified in our decision. Although during the course of our consideration of this claim, a representative of our Office again requested that Waterfront identify the costs related to the meritorious issue, the protester again refused to do so.⁵ Waterfront Response to GAO, Sept. 6, 2011, at 1-3.

As discussed above, a protester seeking to recover its protest costs must submit sufficient evidence to support its monetary claim. CourtSmart Digital Sys., Inc.--Costs, supra. Our Office has held that where we recommend that a protester be reimbursed for only the meritorious arguments raised in a protest, the protester is obligated to segregate the costs associated with the meritorious arguments from the non-meritorious arguments. See Parmatic Filter Corp.--Costs, B-285288.5, Aug. 27, 2001, 2001 CPD ¶ 148 at 3. Where a protester has aggregated allowable and unallowable costs into a single claim and we cannot determine from the record

⁴ In contrast to the contingency agreement regarding payment arrangement with its own employees, there is no indication that the protester's obligation to pay its outside counsel was subject to a contingency. Instead, we assume that Waterfront is obligated to pay outside counsel is for the full amount of \$5,550, and has or will do so.

⁵ To the extent that Waterfront disagrees with our recommendation for reimbursement of only the costs associated with the meritorious issue identified in its protest, the protester did not seek reconsideration or modification of the remedy within 10 days of the decision, as required under our regulations. 4 C.F.R. § 21.14(a). Thus, any challenge to the requirement to segregate the costs relating to the meritorious and non-meritorious protest issues is untimely.

what portion is allowable and not allowable, the entire claim will be disallowed. See Maintenance & Repair--Costs, B-251223.4, June 24, 1994, 94-1 CPD ¶ 381 at 4.

Here, in light of the protester's express refusal to comply with the repeated requests that it segregate its costs, as required in our previous decision, we conclude that none of protester's claimed costs should be reimbursed. This conclusion applies to the legal fees for protester's outside counsel, and is an additional basis to deny the protester's claimed costs for its two employees.

Reasonableness of Claimed Hours

We finally note that the number of hours claimed for the Waterfront employees appears to be excessive. For example, the protester's November 2, 2010, comments on the agency report were filed by its outside counsel under a protective order issued by our Office, and were based, in part on materials (including the basis for the one successful protest issue) that were subject to the protective order and were not therefore unavailable for review by the protester. Waterfront's outside counsel states that he worked 15.5 hours preparing this 18-page document. Outside Counsel Invoice, Dec. 30, 2010, at 1. Despite these facts, the two Waterfront employees claimed to have worked 170 hours preparing the comments over the course of 12 calendar days. We think that the record regarding these and other hours cited in the request for costs raise questions as to the reasonableness and thus the allowability of the claimed costs.

The request for costs is denied.

Lynn H. Gibson
General Counsel