



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: TRESP Associates, Inc.--Costs

File: B-258322.8

Date: November 3, 1998

Timothy B. Mills, Esq., Christy L. Gherlein, Esq., Patton Boggs, for the protester.
Richard S. Blakely, Esq., Department of Energy, for the agency.
Sylvia Schatz, Esq., David A. Ashen, Esq., and John M. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Attorneys' fees need not be allocated between protest issue that was sustained and issues that were not addressed in decision where all issues were related to the same core allegation, which was sustained; since issues not addressed were not distinct and severable from the sustained issue, attorneys' fees related to those issues are reimbursable.
2. Costs of filing and pursuing a bid protest do not include costs associated with pursuing claim with contracting agency.
3. Costs of pursuing claim at General Accounting Office are not reimbursable where record shows that agency proceeded expeditiously and reasonably in responding to claim.
4. Out-of-pocket expenses are reimbursable (except for meal expense) in full, since they relate to pursuit of protest as a whole, rather than to specific issues.

DECISION

TRESP Associates, Inc. requests reimbursement in the amount of \$58,346.83, as its costs of filing and pursuing its protest, which we sustained in our decision, TRESP Assocs., Inc.; Advanced Data Concepts, Inc., B-258322.5, B-258322.6, Mar. 9, 1995, 96-1 CPD ¶ 8.

We recommend that TRESP be reimbursed \$39,755.26.

We sustained TRESP's protest challenging the Department of Energy's (DOE) award of a contract to Chew & Associates, Inc. (CAI) under request for proposals (RFP) No. DE-RP03-93SF19686, for technical and management services, on the basis that the agency had failed to recognize that TRESP had addressed and eliminated in its

best and final offer (BAFO) many of the weaknesses identified by DOE during discussions, and that the evaluation therefore was unreasonable. However, we denied TRESP's protest that DOE's award to CAI gave rise to an actual or apparent conflict of interest, and we did not address several other protest grounds related to the evaluation (since we already had sustained the protest on the first ground). We recommended corrective action and reimbursement of TRESP's protest costs. TRESP has been unable to reach agreement with DOE on the claim, and asks that we recommend the amount of protest costs which should be reimbursed by DOE.

PRE-DECISION ATTORNEYS' FEES

TRESP claims reimbursement for \$34,801.08 (236.19 hours) in attorneys' fees incurred prior to issuance of our decision and with respect to issues other than the conflict of interest issue. TRESP Letter of June 27, 1996 at 2; TRESP Letter of May 29, 1995 at 10 and Exhibits 2-7. TRESP argues that its reimbursement should include fees related to the evaluation issues not addressed in our decision, since they arose out of the same common core of facts and law as the sustained issue--the flawed evaluation process. DOE argues that TRESP is entitled to reimbursement only for the time spent by the firm's attorneys on the single contention sustained in the protest--that the evaluation was unreasonable as DOE failed to recognize that TRESP had addressed and eliminated in its BAFO many of the weaknesses identified by the agency during discussions.¹ Based on DOE's review of the billing records submitted by TRESP's counsel, DOE determined that only 24 percent of the hours claimed was spent on the sustained issue. DOE Report of March 7, 1996 at 10.

As a general rule, we consider a successful protester should be reimbursed the costs incurred with respect to all issues pursued, not merely those upon which it prevails. Price Waterhouse--Claim for Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 3. In our view, limiting recovery of protest costs in all cases to only those issues on which the protester prevailed would be inconsistent with the broad, remedial congressional purpose behind the cost reimbursement provisions of the Competition in Contracting Act of 1984. 31 U.S.C. § 3554(c)(1)(A) (1994). On the other hand, we have limited the award of protest costs to successful protesters where a part of their costs is allocable to a protest issue which is so clearly

¹TRESP also argued that (1) DOE's discussions with TRESP were inadequate because the agency failed to point out the weaknesses in its BAFO; (2) DOE improperly evaluated CAI's proposed BAFO cost; (3) DOE improperly downgraded TRESP's proposal on the basis of unstated evaluation factors; and (4) the source selection decision accorded more weight to the business proposal than was permitted under the evaluation factors set forth in the RFP, and was based on personal preference and not the stated evaluation factors.

severable as to essentially constitute a separate protest. Interface Flooring Sys. Inc.--Claim for Attorneys' Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106 at 2-3.

In this case, TRESP raised several significant issues concerning the conduct of discussions, evaluation of proposals, and resulting source selection decision. The protester established that the source selection was unreasonable because DOE failed to recognize that TRESP had addressed and eliminated in its BAFO many of the weaknesses identified by the agency during discussions. In our view, the fact that TRESP did not prevail on every allegation related to its basic assertions that the evaluation and source selection were unreasonable makes reimbursement of costs no less appropriate; rather, since the successful and unsuccessful contentions share a common core of facts and are based on related legal theories, they cannot reasonably be viewed as a series of discrete claims. Accordingly, since the issue upon which we sustained the protest is not readily severable from those we did not address, we conclude that TRESP is entitled to protest costs of \$34,801.08 in attorneys' fees incurred prior to issuance of our decision. Main Bldg. Maintenance, Inc.--Costs, B-260945.6, Dec. 15, 1997, 97-2 CPD 163 at 5.

POST-DECISION ATTORNEYS' FEES

DOE also disputes TRESP's claim of \$11,327.50 for attorneys' fees incurred after issuance of our decision on March 9 (but not in connection with pursuing its claim at our Office). TRESP Letter of June 27, 1996 at 3-4. Of the 76 hours of post-decision attorneys' time claimed, DOE disallowed costs for 67.25 hours--59 hours were disallowed (DOE disallowed \$8,932.50, but TRESP's bills show that the actual total for this item is only \$8,667.50; our calculations thus are based on this amount) as relating to pursuit of the claim with the agency, not the protest; DOE has not addressed the remaining 8.25 disallowed hours. DOE allowed costs for 8.75 hours (\$1,345). DOE Report of March 7, 1996 at 12-14; TRESP Letter of June 27, 1996 at 3-4; TRESP Letter of February 6, 1996 at Exhibit I; TRESP Letter of May 29, 1995 at Exhibits 7-9.

We conclude that DOE properly disallowed payment for 62.75 of the 76 hours claimed. The 59 attorney hours properly were disallowed, since costs associated with pursuing a cost claim with the contracting agency are not recoverable as protest costs. Komatsu Dresser Co.--Claim for Costs, B-246121.2, Aug. 23, 1993, 93-2 CPD ¶ 112 at 7. Regarding the 8.25 hours that the agency does not address, only a portion was properly disallowed. The record shows that 3 hours (\$600) were spent by a partner on March 10 reviewing the GAO decision, discussing the decision with the client and an associate, and commencing preparation of the cost claim. TRESP Letter of May 29, 1995 at Exhibit 7. In addition, the record shows that .75 hours (\$150) were spent by the partner on May 10 reviewing DOE correspondence on the destruction of protected documents in accordance with our protective order and discussing with DOE the next round of BAFOs on the

procurement. Id. at Exhibit 9. As a general rule, where a protester has aggregated allowable and unallowable costs in a single claim, such that we cannot tell from the record before us what portion is unallowable, the entire amount must be disallowed even though some portion of the claim may be properly payable. Armour of Am., Inc.--Claim for Costs, B-237690.2, Mar. 4, 1992, 92-1 CPD ¶ 257 at 8. TRESP has not delineated, and the record does not show, what portion of the 3 hours was spent reviewing our decision (allowable), and what portion was spent commencing preparation of its cost claim with the agency (not allowable). Similarly, there is no indication of the portion of the .75 hours spent reviewing DOE's correspondence on the destruction of documents (allowable as relating to the administration of our protective order) and the portion spent discussing the next round of BAFOs (not allowable, since not related to pursuit of the protest). As we cannot determine what portion of these costs is allowable, we find that the agency properly disallowed the claimed costs for the 3.75 hours (\$750). However, we find no basis for disallowing the remaining 4.5 (of the 8.25 unexplained) hours.

We conclude that TRESP should be reimbursed \$1,910 for its post-decision legal fees not related to pursuing its claim at our Office.

ATTORNEYS' FEES RELATED TO PURSUING CLAIM AT GAO

TRESP requests reimbursement of \$9,137.50 in attorneys' fees related to pursuit of its claim at our Office. TRESP Letter of June 27, 1996 at 4. Under our Bid Protest Regulations as applicable to this matter, 4 C.F.R. § 21.6(f)(2) (1995), we may recommend that a protester be paid 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 at 2. As discussed above, we conclude that the agency's position during negotiations that a substantial portion of the claimed costs was not reimbursable was correct. Since, in addition, there is no evidence of undue delay on the part of the agency, there is no basis for recommending reimbursement of these attorneys' fees.

OUT-OF-POCKET EXPENSES

TRESP claims \$3,080.75 in legal expenses incurred for telephone calls, facsimile transmissions, meals/petty cash, photocopying, local transportation, travel-related expenses, postage and courier services, client travel, computer-assisted research, and secretarial overtime. TRESP Letter of June 27, 1996 at 3. DOE maintains that, since TRESP failed to document whether the expenses were incurred on the sustained issue, TRESP should be allowed to recover only 24 percent of the unsegregated expenses--that is, the percentage of the attorneys' time spent on the sustained issue--after deduction of \$36.57 in meal expenses and certain expenses

DOE considers associated with the denied conflict of interest issue. DOE Report of March 7, 1996 at 15-16.

As noted by the agency, the cost of meals is not reimbursable. ViON Corp.--Claim for Costs, B-256363.3, Apr. 25, 1995, 95-1 CPD ¶ 219 at 6; Princeton Gamma-Tech, Inc.--Claim for Costs, B-228052.5, Apr. 24, 1989, 89-1 CPD ¶ 401 at 4. However, we find that the remainder of the claimed expenses is allowable, since the bills sent to TRESP show that the expenses were related to TRESP's protest. In this regard, expenses--such as travel, courier expenses and postage--generally relate to pursuit of the protest as a whole. ViON Corp.--Claim for Costs, supra, at 7. For example, the cost of attorney and client travel to a hearing ordinarily would involve the same cost whether or not the hearing addressed ultimately unsuccessful protest grounds in addition to successful grounds. We conclude that TRESP should be reimbursed \$3,044.18 (\$3,080.75 minus \$36.57 in meal expenses) for out-of-pocket expenses.

CONCLUSION

Of the claimed \$58,346.83, we recommend that DOE reimburse TRESP \$39,755.26 in protest costs.

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