



## Decision

**Matter of:** Voith Hydro, Inc.--Costs--Reconsideration

**File:** B-416243.5

**Date:** January 31, 2020

---

David T. Ralston Jr., Esq., Frank S. Murray, Esq., and Micah Tal Zomer, Esq., Foley & Lardner LLP, for the protester.

Theresa Hampson, Esq., Department of the Army, for the agency.

Michael P. Grogan, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

### DIGEST

Request for reconsideration of prior decision denying a request for reimbursement of cost claim, in part, is granted where the requesting party has shown that our decision contains errors that warrant modification of that decision.

---

### DECISION

Voith Hydro, Inc. (Voith), of York, Pennsylvania, requests that our Office reconsider our decision in [Voith Hydro, Inc.--Costs](#), B-416243.4, Jul. 30, 2019, 2019 CPD ¶ 272, in which we recommended that Voith be partially reimbursed for its claimed costs in filing and pursuing its protest challenging request for proposals No. W912EF-17-R-0004, issued by the Department of the Army, Corps of Engineers (Corps), for the design, supply, and installation of turbines in several hydroelectric generator units at the McNary Lock and Dam Powerhouse located near Umatilla, Oregon. Voith argues that our decision erred by denying its request related to certain protest costs, as well as denying the protester's costs for filing a request for reimbursement of protest costs.

We grant the request for reconsideration.

### BACKGROUND

On April 9, 2018, Voith protested the award of a contract to Alstom Renewable US, LLC (Alstom), of Greenwood Village, Colorado, for the design, supply, and installation of turbines in 14 hydroelectric generator units at the McNary Lock and Dam Powerhouse. Voith's protest alleged that the agency unreasonably evaluated aspects of the technical proposals and the past performance submitted by Voith and Alstom, and that the Corps'

price realism analysis and best-value tradeoff decision were flawed. Protest (B-416243.1) at 24-41. Subsequent to the receipt of the agency report, Voith filed a timely supplemental protest challenging additional aspects of the agency's evaluation of technical proposals and past performance, while also raising new challenges to the agency's best-value tradeoff decision. Supp. Protest (B-416243.2) at 4-122.

After development of the full protest record, which included the filing of an agency report, the above-referenced supplemental protest, a supplemental agency report, and the protester's and intervenor's comments, the Corps submitted a request for "outcome prediction" alternative dispute resolution (ADR), which the assigned GAO attorney agreed to provide. During the course of that ADR, the GAO attorney advised the parties that our Office would likely sustain Voith's protest on the basis that certain aspects of the agency's evaluation of technical proposals and its evaluation of past performance were unreasonable, that the agency failed to conduct a price realism analysis as required by the solicitation, and that the source selection authority's best-value tradeoff was not supported by the underlying evaluation record.

In response to the ADR, the Corps informed our Office that it intended to reopen the procurement by conducting a comparative analysis of proposals with attention to technical proposals, reevaluating past performance, performing a price realism analysis based on the language in the solicitation, and making a new best-value determination. Corrective Action Notice, July 3, 2018, at 1-2. Based on the agency's proposed corrective action, our Office dismissed Voith's protest as academic. Voith Hydro, Inc., B-416243; B-416243.2, July 9, 2018 (unpublished decision) at 1-2.

On July 23, 2018, Voith filed its request for entitlement with our Office.<sup>1</sup> Request for Reimbursement of Costs at 1; 4 C.F.R. § 21.8(e). After the Corps indicated it did not object to reimbursement of the protester's reasonable protest costs, our Office dismissed the request as academic. Voith Hydro, Inc., B-416243.3, Aug. 29, 2018 (unpublished decision) at 1. Voith submitted its certified claim for reimbursement of protest costs, in the amount of \$120,618.74, to the Corps on October 24, 2018. Req. for Costs, exh. 1, Certified Cost Claim, at 1-60. This claim included \$22,091.92 for work performed in July and August 2018, described as: reviewing the agency's proposed corrective action, reviewing our Office's decision dismissing Voith's protest as academic (B-416243; B-416243.2), and preparing and pursuing its request for GAO's recommendation for reimbursement of its costs. Id. at 30-36.

The agency responded on November 20 by proposing to pay \$75,729.25 of the total amount requested, explaining that this amount represented "fair compensation for efforts by a prudent protester on the issues that GAO deemed likely to succeed." Req. for Costs, exh. 2, Response to Certified Claim, at 7. Because the parties were unable

---

<sup>1</sup> For the purposes of this decision, we refer to the protester's request that it be reimbursed the costs for filing and pursuing its protest, pursuant to 4 C.F.R. § 21.8(e), as the protester's request for entitlement.

to reach agreement on the amount of reimbursement, Voith filed a request for quantum on March 4, 2019.<sup>2</sup> Req. for Costs at 1; 4 C.F.R. § 21.8(f).

On July 30, 2019, our Office recommended that the Corps reimburse Voith \$98,526.82 of its total claim for \$120,618.74. Voith Hydro, Inc.--Costs, supra at 1. We concluded that the requester's unsuccessful protest challenges were interwoven with its meritorious ones, making them non-severable. Id. at 3-5. In addition, we found that the agency had failed to establish that the number of attorney hours claimed by Voith were unreasonable. Id. at 5-6.

In that same decision, we declined to recommend that Voith be reimbursed the remaining \$22,091.92 it requested. Id. at 7. In setting aside this portion of the claim, we concluded that Voith should not be reimbursed the costs for its pursuing its request for entitlement and the costs for pursuing its request for quantum. Specifically, because the Corps acted reasonably and promptly in negotiating Voith's claim, we declined to recommend reimbursement of those costs incurred by Voith "in pursuit of its request for a recommendation of protest costs and costs associated with pursuing its claim." Id.

On August 8, Voith timely filed this request for reconsideration of our decision.

## DISCUSSION

Voith contends that our decision erred where we declined to recommend reimbursement of the \$22,091.92 incurred by Voith in July and August of 2018. Req. for Reconsideration at 1. In this regard, Voith contends that a portion of these costs should have properly been viewed as related to its pursuit of the protest. Id. at 21-22. Voith argues that the remainder of these costs include the costs for its subsequent request for entitlement, generally. Id. at 23-27. Voith maintains that our Office should have recommended reimbursement of these costs, as well, since GAO's prior decisions have established that a requester may be properly reimbursed for the costs it incurs in pursuing such a recommendation from our Office under 4 C.F.R. § 21.8(e) of our Bid Protest Regulations. Id.

By contrast, Voith explains that it did not include the amount for pursuing its quantum claim in its request, and argues that GAO erred when it concluded that the amount it was seeking included such costs. Id. at 3-4. Voith also clarifies that it does not dispute our decision's conclusion that Voith should not recover its costs for pursuing its request for quantum, stating that it "does not request reconsideration of GAO's July 30, 2019 determination that Voith is not entitled to reimbursement of the costs of filing and pursuing the cost claim itself" under 4 C.F.R. § 21.8(f). Id. at 4.

---

<sup>2</sup> For the purposes of this decision, we refer to the protester's request that our Office recommend the amount of costs to be reimbursed, pursuant to 4 C.F.R. § 21.8(f), as the protester's request for quantum.

Under our Bid Protest Regulations, to obtain reconsideration, a requesting party either must demonstrate that our prior decision contains errors of fact or law, or present new information not previously considered that would warrant reversal or modification of our earlier decision. 4 C.F.R. § 21.14(a); Bluehorse Corp.--Recon. B-413929.2, B-413929.4, May 16, 2017, 2017 CPD ¶ 149 at 4. Voith's request meets this standard for reconsideration.

Our decision denying Voith's claimed costs in the amount of \$22,091.92, "for fees and services its attorneys rendered in pursuit of its request for a recommendation of protest costs and costs associated with pursuing its claim" was mistaken in two respects. Voith Hydro, Inc.--Costs, supra at 7. First, our decision mistakenly concluded that Voith's request for \$22,091.92 included costs associated with Voith's pursuit of its request for quantum.

The record shows that the protester had not identified any costs associated with pursuing its request for quantum in its claim before our Office, presumably, because the costs claim dispute was ongoing. Rather, as noted above, the \$22,091.92 amount at issue reflects costs incurred for reviewing the agency's proposed corrective action, reviewing our decision dismissing Voith's protest as academic (B-416243; B-416243.2), and preparing and pursuing its request for entitlement. Req. for Costs, exh. 1, Certified Cost Claim, at 30-36. Our Office has concluded that such costs are properly associated with pursuing a protest. See T Square Logistics Services Corp., Inc.--Costs, B-297790.6, June 7, 2007, 2007 CPD ¶ 108 at 11. The agency did not dispute these costs, but instead, disputed the yet to be determined costs that the agency understood Voith to be pursuing for seeking a recommendation from our Office on its quantum claim, pursuant to 4 C.F.R. § 21.8(f). See Agency Response to Req. for Costs, March 18, 2019, at 9 (objecting only to reimbursement for severable protest grounds, excessive hours billed, and reimbursement of Voith's "costs or fees for bringing this fee dispute to the GAO for recommendation.").

Second, our Office applied the incorrect legal standard when we concluded that Voith should not recover the costs of filing its request for entitlement. Specifically, our decision concluded that the protester should not be reimbursed the costs it incurred "in pursuit of its request for a reimbursement for protest costs" on the basis that the Corps acted "reasonably and promptly in negotiating Voith's claim before the matter was submitted to our Office." Voith Hydro, Inc.--Costs, supra, at 7.

The proper legal standard for reviewing the question of whether a protester should recover its costs for filing a request for entitlement with our Office is whether the protester made a timely request for such costs, and whether the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Competition in Contracting Act of 1984, 31 U.S.C. § 3554(c)(1)(A); 4 C.F.R. § 21.8(e). Thus, when such a request is timely, and the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, a protester's costs incurred for the time it expended in filing a request for entitlement, generally, under 4 C.F.R. § 21.8(e), are properly

recoverable.<sup>3</sup> T Square Logistics Services Corp., Inc.--Costs, *supra*, at 11; see National Opinion Research Center--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3.

In contrast, a protester's pursuit of the costs of filling a request for quantum with our Office--as opposed to whether it should be reimbursed any amount at all--can only be recovered where the protester shows that the agency unreasonably delayed consideration of the claim or otherwise failed to give the claim reasonable consideration. Galen Med. Assocs., Inc.--Costs, B-288661.6, July 22, 2002, 2002 CPD ¶ 114 at 7-8; Blue Rock Structures, Inc.--Costs, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190 at 7. Thus, our decision erred where it used the standard applicable to a protester seeking its costs in pursuit of its request for quantum to Voith's request for a recommendation that it be reimbursed any amount at all.

In conclusion, Voith timely filed its request for entitlement, and the Corps did not object to the request. The record shows that Voith's claimed costs for July and August 2018 concern hours properly associated with the pursuit of its protest (*i.e.*, the time it spent reviewing the agency's proposed corrective action, reviewing our dismissal decision, and preparing and pursuing its request for entitlement). Req. for Costs, exh. 1, Certified Cost Claim, at 30-36. Accordingly, regardless of whether the Corps acted reasonably and promptly in negotiating Voith's request for quantum, the costs at issue, here, are properly reimbursable and generally not otherwise in dispute. Thus, Voith should be reimbursed for its claimed costs for July and August 2018.

We reverse our prior decision that did not recommend that the Corps reimburse Voith for its full claimed amount. As a result, we recommend reimbursement in the amount of \$120,618.74.<sup>4</sup>

The request for reconsideration is granted.

Thomas H. Armstrong  
General Counsel

---

<sup>3</sup> As noted above, the agency did not dispute the protester's entitlement to protest costs under 4 C.F.R. § 21.8(e). See Voith Hydro, B-416243.3, *supra*.

<sup>4</sup> Voith also argues that our decision improperly calculated the amount we recommended be deducted from Voith's claim. Req. for Reconsideration at 22-23. Because we find that no deduction was warranted, we need not address this alleged error.