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## Decision

**Matter of:** Barbaricum LLC--Costs

**File:** B-416728.4

**Date:** January 29, 2020

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### DIGEST

Protester's request for a recommendation for the reimbursement of costs of defending against the agency's request for reconsideration is granted where protester incurred additional expense in responding to the request, and where the request for reconsideration failed to identify errors of fact or law in our prior decision and repeated previously-made arguments which our Office considered and rejected.

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### DECISION

Barbaricum LLC, of Washington, D.C., requests that our Office recommend reimbursement by the Department of the Air Force of Barbaricum's costs of defending against an Air Force request for reconsideration of a prior decision sustaining a challenge filed by Barbaricum of an Air Force task order for opinion research services, as well as the costs of pursuing this request.

We grant the request.

### BACKGROUND

This request for reimbursement of costs relates to an underlying decision of our Office sustaining Barbaricum's challenge to the Air Force's issuance of a task order under a request for quotations (RFQ) using Federal Supply Schedule procedures set forth in Federal Acquisition Regulation (FAR) subpart 8.4. While portions of the protest were denied, we sustained Barbaricum's contention that the agency unreasonably evaluated the awardee's quotation as technically acceptable. Barbaricum LLC, B-416728,

B-416728.2, Dec. 3, 2018, 2019 CPD ¶ 153. Specifically, our prior decision noted that the RFQ set out express requirements for vendors' staffing plans, and the record provided no basis to conclude that the agency reasonably evaluated the awardee's quotation as technically acceptable in this area. Id. at 8-9. We reached this conclusion after noting that there was a significant disparity between the awardee's proposed labor hours and the labor hours currently used to perform the effort (and reflected in the independent government estimate of costs). Id. In that decision, we also recommended that the Air Force reimburse Barbaricum the costs associated with filing and pursuing its protest, including reasonable attorneys' fees, pursuant to our Bid Protest Regulations at 4 C.F.R. § 21.8(d)(1). Id. at 10. A detailed description of the underlying facts in that procurement is set forth in the initial decision. Id. at 2-5.

The Air Force filed a timely request that our Office reconsider the initial decision; we denied that request. Department of the Air Force, B-416728.3, Mar. 20, 2019, 2019 CPD ¶ 111. Of relevance here, the Air Force argued that its underlying solicitation "did not allow" the agency to consider the extent of the awardee's staffing. Id. at 5, citing Reconsideration Request at 2. The reconsideration decision rejected this contention and noted that our prior decision had rejected the contention as well. Id. at 6. In addition, the reconsideration decision concluded that the agency had not established that the underlying decision had been based on an error of fact or law requiring that the decision be reversed or modified. Id. at 6-7.

Barbaricum filed this request on March 27, 2019.

## DISCUSSION

Barbaricum requests that GAO recommend reimbursement of its costs of defending against the agency's request for reconsideration, as well as the costs of filing this request. Since our earlier decision sustaining Barbaricum's underlying protest already recommended that the Air Force reimburse the costs of pursuing the protest, those costs are not at issue here.

When we have sustained a protest and recommended the reimbursement of protest costs, and when the agency then asks us to reconsider our decision, the costs attendant to the protester's response may be reimbursable. Security Consultants Grp., Inc.--Costs, B-293344.6, Nov. 4, 2004, 2004 CPD ¶ 228 at 5-6, citing Department of the Navy--Modification of Remedy, B-284080.3, May 24, 2000, 2000 CPD ¶ 99 at 4; Pacific Northwest Bell Tel. Co., Mountain States Bell Tel. Co.--Claim for Bid Protest Costs, B-227850.3, June 6, 1988, 88-1 CPD ¶ 527 at 2. We may also recommend that a protester be reimbursed the cost incurred in filing and pursuing a request to be reimbursed. Security Consultants Grp., Inc.--Costs, supra, at 6.

Here, GAO denied the agency's request for reconsideration, finding that the request failed to identify any errors of fact or law in our prior decision and repeated previously made arguments which our Office considered and rejected. The agency nevertheless asserts that our Office should dismiss this request for costs, arguing that the request is

legally and factually insufficient, and that the request is untimely at this juncture. As set forth below, we disagree with both assertions.

The Air Force first argues that Barbaricum's request for reimbursement of costs for defending against the agency's request for reconsideration is legally insufficient because GAO's Bid Protest Regulations do not provide authority for GAO to recommend that the agency reimburse those costs. Agency Response to Request for Costs (Response) at 1, citing 4 C.F.R. § 21.8(e). Our Bid Protest Regulations state that, "[i]f GAO determines that a solicitation, proposed award, or award does not comply with statute or regulation, it may recommend that the agency pay the protester the costs of: [ ] Filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees." 4 C.F.R. § 21.8(d)(1).

Here, as in prior decisions, we view the protester's successful defense against an agency's request for reconsideration, in essence, as a continuation of the underlying bid protest process warranting the reimbursement of costs incurred in continuing to defend the initial protest. See Security Consultants Grp., Inc.--Costs, supra; Department of the Navy--Modification of Remedy, supra. This approach is consistent with the underlying purpose of the Competition in Contracting Act (CICA) and our Regulations relating to the reimbursement of protest costs, which is to relieve protesters of the financial burden of vindicating the public interest as defined by Congress in the Act. Dep't of the Navy--Modification of Remedy, supra, at 6.

In this regard, the bid protest process, as mandated by CICA, "was meant to compel greater use of fair, competitive bidding procedures 'by shining the light of publicity on the procurement process, and by creating mechanisms by which Congress can remain informed of the way current procurement legislation is (or is not) operating.'" Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1104 (9<sup>th</sup> Cir. 1988), quoting Ameron, Inc. v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 984 (3<sup>rd</sup> Cir. 1986). When an agency elects to continue the protest process by requesting reconsideration--as is its right--the protester also has a right to defend its underlying protest result. When the protester's defense is successful, the same public interest of relieving protesters of the financial burdens of vindicating the public interest is served by application of the same reimbursement principles. As a result, we conclude those same reimbursement principles apply.

In further support of its request, the Air Force argues that the protester's request is legally insufficient because GAO's decision denying the Air Force's request for reconsideration did not include a recommendation that the agency reimburse the protester the costs of defending against the reconsideration request. Thus, the Air Force argues that the protester's request is not simply a request for a recommendation for reimbursement, but "in reality is a request to modify the GAO's decision." Response at 2, citing Savannah Cleaning Sys., Inc.--Request for Modification of Remedy, B-415817.2, Apr. 23, 2018, 2018 CPD ¶ 149. Again, we disagree. Barbaricum is requesting a recommendation for the reimbursement of costs, not a modification of any prior decision. The prior decision did not address the question of reimbursement of

costs, and thus this request cannot be termed a request to modify, or change, a prior remedy.

The agency cites Savannah Cleaning to support its argument that the request for reimbursement is not legally sufficient. In Savannah Cleaning, the agency had already taken delivery of the procured goods during the course of the protest, and prior to the issuance of our decision. In sustaining the protest, GAO therefore recommended that the protester be reimbursed its quotation preparation costs, as well as the costs of filing and pursuing its protest. Savannah Cleaning Sys., Inc.--Request for Modification of Remedy, B-415817.2, Apr. 23, 2018, 2018 CPD ¶ 149 at 2. Upon receipt of the decision, the protester sought modification of that remedy. Instead of reimbursement of its costs (for preparing its quotation and pursuing the successful protest), the protester asked that GAO recommend that the agency return the procured items and make a new award or resolicit the requirement. Id. GAO declined to modify its recommendation. Here, unlike in Savannah Cleaning, Barbaricum does not request that GAO recommend that the agency alter its intended corrective action in any way. Rather, the protester requests that GAO recommend that the agency reimburse Barbaricum the costs of defending against the agency's request for reconsideration. In sum, the protester's request is not rendered legally insufficient for any of the reasons addressed above.

Next, the agency argues that Barbaricum's request for reimbursement is untimely. Response at 2. The agency asserts that, in other cases where GAO has recommended that protesters be reimbursed the costs of defending against an agency request for reconsideration, that request has come from the protester in its response to the agency's reconsideration request. Id., citing Department of the Navy--Modification of Remedy, supra; Pacific Northwest Bell Tel. Co., Mountain States Bell Tel. Co.--Claim for Bid Protest Costs, supra.

In Department of the Navy--Modification of Remedy, GAO declined the agency's request that we modify our recommendation. The factual background of that decision explains that GAO had sustained the underlying protest and recommended that the agency reimburse the protester its costs of pursuing the protest. Department of the Navy--Modification of Remedy, supra. The agency did not request that GAO reconsider the decision to sustain the protest, but requested that we delete the recommendation that the protester be reimbursed for pursuing the protest. GAO declined to do so and also recommended that the agency reimburse the protester the costs of "defending against the [agency's] request for modification of remedy." Id. at 4. The decision does not indicate that the protester requested such a recommendation in defending against the agency's request. See id. Moreover, as discussed below, such a request by the protester is not a prerequisite for GAO to make such a recommendation.<sup>1</sup>

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<sup>1</sup> While Barbaricum argued that its request is consistent with our decision in Security Consultants Grp., Inc.--Costs, the Air Force contends that the facts in that case can be distinguished from the facts here. In Security Consultants, the agency withdrew its request for reconsideration, which the Air Force noted "obviate[d] the need for a merits-

The Air Force also cites Pacific Northwest Bell Tel. Co. in support of the agency's timeliness contention because, in the Air Force's view, GAO only recommends reimbursement of the costs of defending against an agency's request for reconsideration when the protester makes that request in its response to the agency's reconsideration request. In Pacific Northwest Bell Tel. Co., GAO sustained the underlying protest without recommending the reimbursement of costs. Pacific Northwest Bell Tel. Co., Mountain States Bell Tel. Co., B-227850, Oct. 21, 1987, 87-2 CPD ¶ 379. The agency then requested reconsideration of that decision. We denied that request, and we did so without recommending that the protester be reimbursed its costs of pursuing its initial protest or of defending against the agency's request for reconsideration. See Pacific Northwest Bell Tel. Co., Mountain States Bell Tel. Co.--Reconsideration, B-227850.2, Mar. 22, 1988, 88-1 CPD ¶ 294 at 7. The protester then requested that we recommend that it be reimbursed both of those costs, and we did so.<sup>2</sup> Pacific Northwest Bell Tel. Co., Mountain States Bell Tel. Co.--Claim for Bid Protest Costs, supra.

There is no merit to the agency's assertion that the protester's request for reimbursement is untimely because the protester's defense of the agency's request for reconsideration did not include a contemporaneous request for reimbursement, or because our decision answering the agency's reconsideration request did not address the matter. We have established no such timeliness rule. Likewise, the fact that we did not recommend the reimbursement of costs when denying the Air Force's request for reconsideration does not preclude us from making such a recommendation here.

## RECOMMENDATION

In our view, the protester's efforts on both of these fronts are in furtherance of vindicating the public interest as defined by Congress in CICA. Department of the Navy--Modification of Remedy, supra. As a result, we recommend that the Air Force reimburse Barbaricum its costs, including reasonable attorneys' fees, of defending against the agency's request for reconsideration. We also recommend that the agency

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based decision that would also contain GAO's recommendation for relief." Response at 1. In contrast, the agency argues, GAO here issued a merits-based decision denying the Air Force's request for reconsideration, and that decision did not contain the recommendation that the protester now seeks. As discussed in the text of the decision here, we find no support in our decisions for the agency's argument that the protester's request is untimely.

<sup>2</sup> For the record, in the course of the Pacific Northwest Bell protests, GAO twice passed on opportunities to recommend the reimbursement of costs, and the record contains no evidence that the protester requested either reimbursement until after GAO denied the agency's reconsideration request. Nevertheless, GAO recommended the reimbursement of reasonable costs incurred with respect to the initial protest and the agency's request for reconsideration. We view the result here to be consistent with that precedent.

reimburse Barbaricum its costs of filing and pursuing this request. Barbaricum's certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f).

The request for a recommendation for reimbursement of costs is granted.

Thomas H. Armstrong  
General Counsel