



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Test Systems Associates, Inc.--Claim for Costs

File: B-256813.6

Date: October 29, 1996

Joseph G. Lee, Esq., Carpenter, Bennett & Morrissey, for the protester.
Karen Gearreald, Esq., Department of the Navy, for the agency.
Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Claim for costs of reasonable attorneys' fees for filing and pursuing a successful protest is allowed for portion of fees related to prosecution of the bid protest at the General Accounting Office; fees related to other forums are not recoverable.
2. Costs for attorneys fees incurred for defending against Freedom of Information Act (FOIA) request by a competitor to the contracting agency for protester's proprietary information are not recoverable as costs of filing and pursuing successful bid protest where they are not related to prosecution of the protest.
3. Protester forfeited its right to recover the costs of corporate labor allegedly incurred as a result of filing and pursuing its protest at the General Accounting Office where the protester failed to file a proper claim concerning its corporate labor costs with the contracting agency detailing and certifying the time expended and costs incurred in connection with the protest within 60 days after receipt of the decision sustaining its protest.

DECISION

Test Systems Associates, Inc. (TSAI) requests that our Office determine the amount it is entitled to recover from the Department of the Navy for the costs of filing and pursuing its bid protest which we sustained in our decision Test Sys. Assocs., Inc., B-256813.5, Oct. 14, 1994, 94-2 CPD ¶ 153. TSAI has filed initial and supplemental claims for a total of \$143,728; the agency has offered to pay the firm \$19,971. We determine that TSAI is entitled to recover \$9,762.

FACTUAL AND PROCEDURAL BACKGROUND

On October 27, 1993, the agency issued request for proposals (RFP) No. N00189-93-R-0378, a total small business set-aside, for operational test program sets (automatic

test equipment) for Navy aircraft. After receipt of initial proposals, discussions, and receipt of best and final offers (BAFO), the Navy awarded the contract to TSAI on March 15, 1994 as the "greatest value" offeror.¹ On March 23, Dixon filed a protest with our Office against the award. On April 4, Dixon also filed suit in the U.S. District Court for the District of Columbia requesting declaratory and injunctive relief. Basically, Dixon alleged that TSAI was ineligible for award because the firm had checked the box in the RFP's Small Business Concern Representation (SBCR) clause that "not all supplies" would be manufactured or produced by a small business concern. On April 22, the Navy, on its own initiative, took "corrective action" and terminated TSAI's contract for the convenience of the government because of TSAI's miscertification in the SBCR clause; the agency notified TSAI of its intention to award the contract to Dixon on April 26. On April 29, TSAI filed its first protest (B-256813.3) with our Office alleging that the SBCR clause was fatally ambiguous and did not provide the agency with a basis for terminating its contract and rejecting its offer. In the meantime, Dixon chose not to withdraw the civil action in the U.S. District Court; TSAI, despite being advised by our Office to consider doing so, did not intervene in Dixon's court suit.

On June 3, our Office, after again notifying TSAI's counsel concerning the pendency of the District Court suit, dismissed TSAI's protest because the dispositive issue--which firm was entitled to award--was before the District Court, which had not requested an advisory opinion from our Office. On June 6, the contracting officer awarded the contract to Dixon. On June 16, TSAI filed suit in the same District Court which then had before it both suits concerning entitlement to award under the same procurement. On that same day, TSAI again filed a protest with our Office (B-256813.5--the basis for the present claim) in which it again contended that the Navy's SBCR clause was fatally defective and had misled the firm into miscertifying its intention of furnishing items manufactured by small business. The Navy issued a stop-work order to Dixon, and the District Court then requested our Office to furnish an advisory opinion on the matter.

By decision of October 14, 1994, our Office sustained TSAI's protest because we found that the Navy had used an outdated and defective SBCR clause which had been in general use prior to 1985, and which our Office had previously found ambiguous. See Mountaineer Leathers, Inc., B-218453, May 6, 1985, 85-1 CPD ¶ 505.

In response to our decision, Federal Acquisition Circular 84-16, May 30, 1986, clarified the SBCR clause to provide that the representation of the SBCR regarding the source of manufactured supplies referred to "end items" being acquired rather

¹D.K. Dixon & Company, Inc., another offeror, had proposed the lowest price of \$2.4 million; however, the agency found TSAI to have submitted the technically superior proposal at a price of \$2.7 million. The contracting officer, pursuant to a price/technical tradeoff decision, selected TSAI for award.

than the materials and supplies that became part of the end item--as TSAI had been misled to believe. Because the protest record contained allegations by Dixon and the agency that TSAI had proposed excessive large business effort in its technical proposal, we recommended in our decision that the agency refer the issue of TSAI's size status (including its technical proposal) to the SBA for a definitive determination of whether TSAI was legitimately a small business concern. We also recommended that following this determination by the SBA, the agency proceed with the award consistent with SBA's determination and award the contract to TSAI if it were found to be small. We also determined the firm to be entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees. See 4 C.F.R. § 21.6(d)(1) (1995).

The contracting officer then referred the question of TSAI's size status to the SBA regional office. By decision dated December 14, 1994, the regional office determined that TSAI was a small business. Dixon appealed this determination to the SBA's Office of Hearings and Appeals (OHA). While the appeal was pending, the agency terminated Dixon's contract for the convenience of the government on January 17, 1995. By decision dated June 6, 1995, OHA denied Dixon's appeal and upheld the small business status of TSAI. On June 16, the District Court dismissed both suits as "moot" because both awards had been terminated and an award to TSAI had not yet been made. The contract was ultimately awarded to TSAI in December 1995, and the firm is currently performing the contract.

In the meantime, TSAI filed its first claim for costs with the agency on December 1, 1994, and its supplemental claim by letters dated April 11 and 21, 1995. Subsequent negotiations to settle the matter were unsuccessful. TSAI, without the benefit of counsel, filed its first claim for costs with our Office on June 21, 1995. We requested a report from the agency, which was received on September 5. TSAI filed a supplemental claim with our Office on October 11, 1995, and its attorneys filed comments on the agency report during that same month. TSAI's claims consist almost entirely of a listing of hours and rates for attorneys and costs incurred by corporate personnel for various time and effort allegedly expended in this matter and for which TSAI claims reimbursement of costs.

ATTORNEYS' FEES

TSAI included claims for attorneys' fees for the period of April 1, 1994 to September 30, 1995, a period encompassing the Dixon protest, the Dixon court suit, the TSAI court suit, the bid protest, a Freedom of Information Act (FOIA) matter, the SBA proceedings both at the regional office and at OHA, preparation of the claim for costs and other matters. The hours of services billed are listed by the attorneys together with a brief explanation of the subject matter. Since our review shows that these legal services performed can easily be categorized and grouped,

we will first make a determination of the allowability of each category of services and then determine the costs that are allowable and payable.

District Court Litigation

The claim consists in large part of billable hours charged by the attorneys in defending against Dixon's suit and prosecuting TSAI's own suit. We give three examples of the attorneys' summaries:

June 9, 1994 "Draft and revise Complaint and Memorandum in support of request for temporary restraining order and preliminary injunction and supporting papers; research case law on irreparable harm and injunctions issued for procurement regulation violations as here." [5 hours]

June 20, 1994 "Travel to Washington for hearing before Court on TRO application; attend hearing on TRO application; telephone conference [and] further review of motion papers, complaint and file materials on TRO application." [8 hours]

June 24, 1994 "Telephone conference with U.S. Attorney's office, F. Haynes, regarding court's order on TRO application and other relief; review court's order; telephone conference with TSAI, A. Affa, regarding same." [.50 hours]

The agency disallowed all hours pertaining to the court litigation because our Office's authority to order reimbursement of costs is limited to costs of pursuing a bid protest, and does not extend to the costs of court litigation. We agree. Costs incurred in seeking relief from another forum are not reimbursable as protest costs under the Competition in Contracting Act of 1984 (CICA), which limits our bid protest jurisdiction, as well as our corresponding authority to recommend the payment of costs, to protests filed with our Office. 31 U.S.C. § 3554(c)(1)(A) (1988); Diverco, Inc.--Claim for Costs, B-240639.5, May 21, 1992, 92-1 CPD ¶ 460. We therefore disallow these costs.²

²The agency also disallowed all expenses incurred for attorneys' services for the lengthy size appeal proceedings before the SBA following the issuance of our decision on October 14, 1994. In its comments on the report, counsel for TSAI argues that the SBA costs should be reimbursed because "SBA review was a natural and necessary consequence of the GAO decision [recommending that the agency refer the question of TSAI's size status to the SBA]." However, the question of a firm's size is solely within the jurisdiction of the SBA, not our Office, see 4 C.F.R. § 21.3(m)(2) (1995), and, as stated above, we will not reimburse a firm's legal expenses incurred in connection with a matter in a different independent forum. We therefore disallow these costs. The agency also disallowed the cost of TSAI's

(continued...)

FOIA Costs

Dixon filed a FOIA request on May 3, 1994 to the Navy to obtain the statement and table of corporate experience which TSAI had submitted as part of its technical proposal. TSAI vigorously opposed this request and the controversy continued for 3 months, independent of protest filings. The matter subsequently became moot in August when TSAI's technical proposal was released to Dixon's counsel under a protective order issued by our Office. As the agency states, this FOIA request was made 6 weeks before TSAI filed its protest (B-256813.5). We see no connection between defending against a FOIA request from a competitor and the subsequent General Accounting Office proceedings. In short, defending against Dixon's FOIA request was not necessary or reasonably incurred for the filing and pursuit of the protest. See Tripp, Scott, Conklin & Smith-Claim for Costs, 72 Comp. Gen. 232 (1993), 93-1 CPD ¶ 414. This claim is denied in its entirety.

Claimed Reimbursement for Earlier Protests

TSAI seeks reimbursement for its attorneys' fees incurred in connection with its protest that was dismissed and the earlier Dixon protests. The short answer is that our Office sustained the bid protest filed by TSAI and docketed as B-256813.5 and the firm is entitled to be reimbursed for the cost of filing and pursuing this protest only—not for the costs incurred in connection with previously dismissed protests. We therefore find no merit to this claim for costs.³

²(...continued)

counsel's employment of a legal "expert in the field of government contracts [who] was required for specific interpretation" of the SBCR clause. The charge by the legal expert is for 16 hours of telephone consultations. The consultant's charge does not itemize the amount of time or the subject matter of the conversations. We disallow this cost item for the same reasons as discussed below concerning corporate labor costs claimed by the protester.

³TSAI's attorneys also billed a lump-sum item entitled "disbursements" (in TSAI's initial claim this item amounted to \$7,004). The agency states that without any explanation, it is unable to begin to determine how much of these "disbursements" are allocable to an allowable charge since the great majority of attorney charges were disallowed. We have reviewed the record and have confirmed that this record contains no breakdown or evidence of any amount of these disbursements allocable to TSAI's successful bid protest. Accordingly, for the reasons discussed below with respect to corporate labor (lack of documentary support), we also disallow these costs.

Calculation of Costs Allowable for Attorneys' Fees

The agency has identified, listed, and provided to TSAI all directly allocable hours that the agency determined were spent in connection with TSAI's successful bid protest. The agency then applied the hourly rate claimed by the partner (\$190) and the associate (\$145) and arrived at a total of \$10,544.50. TSAI has not rebutted these specific findings of allocable hours. Instead, in its comments, counsel for TSAI continues to argue that its claims for court litigation costs, costs for previously filed protests, and FOIA-related costs should be allowed. Based on this record, we see no persuasive reason to disturb the agency's basic determination that TSAI is only entitled to be reimbursed for attorneys' fees in the amount of \$10,544.50. However, we do make a minor adjustment to the agency's determination. The record shows that these costs allowed by the agency include 5.5 hours of attorneys' time (totaling \$782.50) for the costs of preparing and pursuing TSAI's claim with the agency after our decision was issued. Under our Regulations, where a protester and a contracting agency cannot reach agreement concerning a claim for costs, our Office may determine the amount and declare the protester to be entitled to the costs of pursuing the claim for costs before our Office. See 4 C.F.R. § 21.6(f)(2) (1995). We have no authority to recommend recovery of expenses incurred for pursuing the claim for costs at the agency level.⁴ After disallowing these costs, we determine that TSAI is entitled to be reimbursed for \$9,762 for reasonable attorneys' fees for the filing and pursuing of its successful protest.

CORPORATE LABOR

TSAI's initial claim for its internal corporate labor costs (corporate executive staff) amounted to \$63,744 for 1,039 labor hours for three individuals. The labor hours in the claim are presented on a weekly basis in a lump-sum total labor hours not identified with any individual. Additionally, the Navy states that the hours claimed are excessive and are not adequately supported. We agree. We give the following examples:

⁴In this regard, the protester claims expenses (attorney and corporate labor costs) for pursuing this claim in our Office. The purpose of our Regulations allowing protesters such recovery is to encourage agencies to expeditiously reach agreement with successful protesters on the quantum of recoverable costs. See American Imaging Servs., Inc.—Request for Declaration of Entitlement to Costs, B-246124.4, Dec. 30, 1992, 92-2 CPD ¶ 449. Where the agency's position in a cost dispute is reasonable, as we find it to be here, the protester is not entitled to the costs of challenging that position. See Stocker & Yale, Inc.—Claim for Costs, 72 Comp. Gen. 193 (1993), 93-1 CPD ¶ 387.

"6/26-7/2/94 GAO to Lee [TSAI's attorney] acknowledgment of protest. Lee requests GAO to provide TSAI all Dixon documents. [Corporate hours claimed: 27 hours]

"8/14-8/20/94 Research compromise settlement prior to GAO decision. [Corporate hours claimed: 20 hours]

"8/28-9/3/94 8/29 fax from Navy of GAC/TSAI's prop. Lee fax of TSAI's supplementary comments (requested by GAO). supplementary comments (requested by GAO). [Corporate hours claimed: 46 hours]"

We find that not only are these claimed expenses excessive on their face but they are also unsupported and lack any reasonable detail.⁵ The Navy agreed to pay a very small portion of these corporate in-house labor rates based on its "guesstimate" of reasonable hours despite the absence of any breakdown by individuals of the hours worked or any detailed explanation of item-by-item charges. We do not recommend that the Navy do so.

At the time of our decision and TSAI's filing of its claim with the agency, our Bid Protest Regulations provided that when we found that an agency should reimburse a protester for its costs of filing and pursuing its protest:

"[t]he protester shall file its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of the decision on the protest or the declaration of entitlement to costs. Failure to file the claim within such time shall result in forfeiture of the protester's right to recover its costs" 4 C.F.R. § 21.6(f)(1) (1995).

Claims for the reimbursement of expenses, at a minimum, must identify the amounts claimed for each individual expense, the purpose for which that expense was incurred, and how the expense relates to the protest. Diverco, Inc.—Claim for Costs, supra. In our view, TSAI's claim submission, with its bare general statements, without further explanations, breakdowns, or supporting documentation, provided completely insufficient detail for the agency to adequately assess the reasonableness of the claimed costs.

⁵Many of the hours claimed by TSAI for corporate labor concern the defense of Dixon's FOIA request and SBA matters. These are disallowed for reasons already explained.

The Regulations are clear--a protester that fails to comply with the claim filing requirement "shall" forfeit its right to be reimbursed its costs. TSAI fail to properly file a claim "detailing and certifying" its costs with the contracting agency concerning its corporate labor hours within 60 days after receipt of the decision sustaining its protest. See Test Sys. Assocs., Inc.--Claim for Costs, 72 Comp. Gen. 169 (1993), 93-1 CPD ¶ 351. Accordingly, TSAI forfeited its right to recover these costs, which, in any event, are completely unsupported. Accordingly, the claim for corporate labor hours is denied.

CONCLUSION

TSAI is entitled to recover \$9,762 for the costs of reasonable attorneys' fees related and allocable to the prosecution of its successful bid protest.

Comptroller General
of the United States