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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: T Square Logistics Services Corporation, Inc.–Costs

File: B-297790.6

Date: June 7, 2007

Richard B. Oliver, Esq., McKenna Long & Aldridge LLP, for the protester.
Michael J. O'Farrell, Jr., Esq., Department of the Air Force, for the agency.
Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's opposition to, and GAO's denial of, agency's request for "outcome prediction" alternate dispute resolution (ADR) cannot serve as basis to disallow otherwise reasonable protest costs.
2. Protest costs that GAO recommended be reimbursed need not be allocated between issue for which GAO attorney indicated during "outcome prediction" ADR that the likely outcome would be a sustained protest and the other issues raised by the protester, where the issues are interconnected and based on common factual underpinnings.
3. Agency's generalized objections to attorneys' hours in claim for protest costs do not provide basis to justify denying adequately documented claim showing claimed hours were reasonable and in pursuit of the protest.
4. Protester's costs incurred questioning agency's proposed corrective action prior to GAO's disposition of protest based on agency's proposed corrective action are allowable protest costs.
5. In situations where GAO recommends that protest costs be reimbursed, protester's costs of preparing request to GAO for a recommendation that its protest costs be reimbursed because of unduly delayed agency corrective action on a clearly meritorious protest are allowable protest costs.

6. Attorney fee \$150 cap contained in Competition in Contracting Act, 31 U.S.C. § 3554(c)(2)(B) (2000), is not applicable to attorneys' fees paid by small business protester.

7. Protester should be reimbursed its costs of pursuing claim for costs at GAO where the agency took no steps for 6 months to consider the claim when it was pending there and for the first time in its report on the claim provided non-meritorious arguments denying the bulk of the protester's claim.

DECISION

T Square Logistics Services Corporation, Inc. (a small business concern) requests that we recommend reimbursement of \$51,611.83 in costs of pursuing its protest challenging the award of a contract to Data Monitor Systems, Inc., by the Department of the Air Force under request for proposals (RFP) No. FA6643-05-R-0006, for base operating support (BOS) services at Grissom Air Reserve Base, Indiana. T Square also requests that it be reimbursed its costs of pursuing this claim at our Office.

We recommend reimbursement in the amount of \$51,611.83, plus T Square's costs of pursuing this claim at our Office.

The RFP, issued as a small business set-aside on June 6, 2005, contemplated the award of a combined fixed-price and time-and-materials contract for 1 base year with nine 1-year options. The solicited BOS services included (1) base supply function, (2) motor vehicle management function, (3) traffic management function, (4) transient aircraft services, (5) recurring real property maintenance function, (6) fuels function, (7) airfield management function, and (8) meteorological function.

The RFP provided for offerors to meet certain minimum qualification requirements, and to submit technical proposals addressing the program management/staffing and financial plan subfactors, which would be evaluated on a "technical acceptability" basis. The RFP provided that past performance was to be evaluated for "recency," that is, currently ongoing or completed within the last 3 years; "relevancy," based on the scope, magnitude, and complexity of the contracts, including the extent of performance by teaming partners and subcontractors; and quality of performance on referenced contracts. This evaluation would result in an overall confidence performance risk assessment of the offeror's ability to successfully perform the proposed effort. The possible confidence ratings, listed in descending order of quality, were "high confidence," "significant confidence," "confidence," "unknown confidence," "little confidence," and "no confidence." RFP § M-3.4.

Ten firms, including T Square and Data Monitor, submitted offers by the closing date for receipt of proposals. The agency conducted written discussions with the nine offerors who submitted acceptable proposals. After discussions were concluded, final proposal revisions were requested and evaluated. Data Monitor was the lowest priced offeror of the three offerors that received the best performance risk

assessment awarded of “significant confidence.” Although T Square submitted a lower price than Data Monitor, it received an overall performance risk assessment of “little confidence.”

The source selection authority concluded that despite “the Very Relevant contracts with Exceptional performance data which covered [most] of the eight functions,” T Square warranted an overall performance risk assessment of “Little Confidence,” because of “substantial doubt in [T Square’s] ability to perform due to lack of performance data in [certain functions].” Agency Report, Tab 10, Source Selection Decision, at 2. T Square’s evaluated lack of experience in these functional areas was not mentioned to it during discussions. The agency determined that Data Monitor’s proposal represented the best value to the government, and Data Monitor was awarded the contract.

In its initial protest and two supplemental protests, T Square basically argued that the agency either misevaluated its proposal by unreasonably penalizing it for certain alleged gaps in experience in certain BOS functions, which possibly represented unequal treatment of its proposal as compared to Data Monitor’s, or improperly failed to communicate in discussions its significant concern that T Square lacked experience in these BOS functions, in which case T Square would have added subcontractors with the requisite experience in a revised proposal.

The due date established for the Air Force report in response to the three protests was January 26, 2006. On January 23, the agency submitted an “advance document production” consisting of relevant documents pertaining to T Square’s protest. No contracting officer’s statement and legal memorandum responding to the protester’s arguments or justifying the agency actions were provided at that time.

On the following day, the agency attorney contacted the GAO attorney assigned to these protests, and requested “outcome prediction” alternate dispute resolution (ADR).¹ The agency attorney has characterized his request as a cost-saving measure for all parties involved, because if our Office’s attorney had conducted outcome

¹ In outcome prediction ADR, the GAO attorney handling a protest convenes the parties, at their request or at GAO’s initiative, and explains what the GAO attorney believes the likely outcome will be and the reasons for that belief. A GAO attorney will engage in this form of ADR only if she or he has a high degree of confidence regarding the outcome. Where the party predicted to lose the protest takes action obviating the need for a written decision (either the agency taking corrective action or the protester withdrawing the protest), our Office closes the case. Although the outcome prediction reflects the view of the GAO attorney, and generally that of a supervisor as well, it is not an opinion of our Office, and it does not bind our Office, should issuance of a written decision remain appropriate. See T Square Logistics Servs. Corp., B-297790.4, Apr. 26, 2006, 2006 CPD ¶ 78 at 3 n.1.

prediction ADR in advance of the complete agency report, and predicted that the protest was a “probable sustain,” then the Air Force could have taken corrective action in advance of the agency report due date, and the protester could have saved the attorneys’ fees incurred in reviewing the full agency report and preparing written comments on the agency report, thus saving the agency from exposure from a recommendation from our Office that it pay T Square’s protest costs, including attorneys’ fees. See Air Force Report on Claim at 2.

On January 25, the protester objected to our Office conducting ADR before it had an opportunity to review an agency report, including a contracting officer’s statement and legal memorandum, and before our Office had considered the protester’s comments on the report, because in its view the record was incomplete. On January 26, the agency counsel renewed his request that our Office conduct outcome prediction ADR, and the protester renewed its objection. The GAO attorney declined to conduct outcome prediction ADR before she had an opportunity to review the agency’s legal memorandum and the contracting officer’s statement, as well as the protester’s comments, explaining to the parties that, in the absence of a more developed record, this was not an appropriate case for outcome prediction ADR.

On January 27, the agency produced a contracting officer’s statement and legal memorandum defending the agency’s actions. On February 2, the Air Force produced certain additional documents timely requested by the protester, which the Air Force argued were irrelevant, but which were deemed relevant by the GAO attorney.² The protester filed comments on the agency report on February 6.

After reviewing the fully developed record, the GAO attorney contacted the parties and stated that she was prepared to conduct outcome prediction ADR if the parties were interested. She did this in view of the previously expressed interest by the Air Force in ADR, and because, consistent with our criteria for conducting ADR, she and her supervisor had a high degree of confidence regarding the outcome of the protest. The parties agreed and the ADR was conducted on February 13.

During the ADR conference, the parties were informed by the GAO attorney that from her review of the record, it was clear that meaningful discussions were not conducted by the agency, where the protester was not informed of the agency’s concern that the firm lacked certain experience that resulted in a “little confidence” rating, which was apparently the sole basis for not selecting T Square’s proposal for award. The parties were informed of the GAO attorney’s view that the likely outcome of the protest was that it would be sustained, and that the likely protest

² These documents pertained to the communications/discussions that the agency held with the awardee regarding past performance. In its protest, the protester raised the possibility of unequal discussions regarding past performance, so the GAO attorney determined this documentation was relevant.

recommendation would be that the agency reopen negotiations, conduct further discussions with T Square and the other offerors, request revised proposals, and make a new source selection decision, fully documenting the basis for that decision.

The Air Force did not immediately respond to the ADR, but on March 3 (almost 3 weeks after the ADR and less than 2 weeks before the 100-day deadline for our Office to issue a decision on the protest), the Air Force informed our Office and the parties that the agency had decided to take corrective action in response to the outcome prediction ADR, consisting of the following: (1) assign a new evaluator, (2) re-evaluate all offerors that received a “Go” in the “Go/NoGo” technical proposal evaluation for past performance relevance and performance risk, (3) assign a “neutral” performance risk rating for those functional areas in which an offeror lacks past performance experience, (4) re-assess the confidence assessment, (5) prepare a new past performance/cost trade-off analysis and best value determination, (6) prepare a new source selection document, and (7) if any offeror other than the current awardee was determined to be the best value, then terminate the award to Data Monitor, and make award to that offeror. On March 7, the protester objected to the agency’s proposed corrective action. On March 8, the GAO attorney asked the agency counsel to confirm whether the agency intended to stay performance during the conduct of corrective action and whether it might re-open discussions during the proposed corrective action. On March 9, the agency responded that it would stay performance during corrective action and that, as it proceeded with the proposed corrective action, it had the discretion to re-open discussions if it later concluded that such action was warranted. Given that T Square could receive the award as a result of the proposed corrective action, our Office dismissed T Square’s protest as premature and academic on March 14. T Square Logistics Servs. Corp., B-297790 et al., March 14, 2006.³

On March 23, T Square timely requested that we recommend, pursuant to section 21.8(e) of our Bid Protest Regulations, that it be reimbursed its costs of filing and pursuing its protests. 4 C.F.R. § 21.8(e) (2007). On March 29, the Air Force was requested to respond to the request. The GAO attorney then performed further ADR by advising the parties of the general rule that where an agency took corrective action on a protest, based upon outcome prediction ADR indicating that the protest would likely be sustained, after the agency had submitted its report, our Office would ordinarily recommend that the costs of pursuing the protest be reimbursed. See, e.g., National Opinion Research Ctr.–Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3; Millar Elevator Serv. Co.–Costs, B-284870.3, Aug. 3, 2000, 2000 CPD ¶ 126 at 3. Rather than negotiating or replying to the request for entitlement or claim for

³ In dismissing the protest, we observed, “In the event that it does not receive the award, the protester may protest this decision, including the nature of the corrective action.” T Square Logistics Servs. Corp., B-297790 et al., *supra*, at 2.

costs with T Square, the Air Force informed our Office that it “decided not to reply to” T Square’s request. Facsimile Transmittal from Air Force to GAO (Apr. 10, 2006).⁴

In T Square Logistics Servs. Corp., B-297790.4, supra, we recommended that T Square be reimbursed the reasonable costs of filing and pursuing its protests, including those incurred in its request for a recommendation for reimbursement of protest costs. In so doing, our Office adopted the analysis previously provided to the parties by the GAO attorney that indicated that the protest was clearly meritorious, in that meaningful discussions were not conducted with T Square on the subject of past performance. That decision also found that the Air Force had unduly delayed taking corrective action after it had submitted an agency report on the protest. The Air Force did not request reconsideration of our decision.

After the agency again selected Data Monitor for award without conducting discussions, T Square again protested on May 31 the Air Force’s evaluation of its and Data Monitor’s past performance as well as the Air Force’s failure to conduct discussions. In response to this protest, the Air Force again took corrective action that this time included termination of the contract awarded to Data Monitor and reopening of discussions.⁵ We therefore dismissed this protest on June 14.

Meanwhile, on June 9, T Square timely filed its certified claim for costs with the agency in the amount of \$51,611.83, consisting of \$51,166.50 in attorneys’ fees and \$445.33 in reimbursable expenses incurred by the attorneys. T Square submitted detailed documentation in support of its claim, including billing statements describing the work performed and time spent by each attorney, and invoices, as well as evidence supporting the reasonableness of the billing rates charged. During the subsequent 6 months, the agency failed to consider T Square’s claim, despite repeated follow-up calls by T Square’s counsel.⁶

This claim was filed at our Office on December 6. In its report filed in response to the claim, the Air Force disputes the bulk of T Square’s claimed costs and indicates that only \$1,328.17 should be reimbursed. Air Force Report on Claim at 12.

⁴ We note that the Air Force did not at that time (or now) dispute that the protests were clearly meritorious or that the agency had unduly delayed taking corrective action.

⁵ As discussed earlier, this was the remedy suggested by the GAO attorney in the ADR conference with regard to the previous protests of the award.

⁶ On September 12 (3 months after it had been filed), the Air Force advised T Square that it would not then consider the claim because of a reverse protest filed by Data Monitor in the Court of Federal Claims (COFC). After the COFC complaint had been denied, T Square again repeatedly and unsuccessfully attempted to get the Air Force to consider its claim, until it filed at our Office on December 6.

The agency first objects to reimbursing T Square for any costs incurred past the point at which T Square's counsel objected to the Air Force's initial request for outcome prediction ADR, except for the costs of T Square's counsel's actual participation in the February 13 outcome prediction ADR teleconference, and the time that T Square's counsel took to review the decision of our Office dismissing the protest in response to this ADR. The agency argues that T Square's opposition to its initial ADR request, and our denial of the ADR request prior to receipt of the agency report, were unreasonable, and needlessly exposed the agency to reimbursing T Square's protest costs. Air Force Report on Claim at 2.⁷

While we are sensitive to an agency's desire to save resources and money, we take very seriously our responsibility under the Competition in Contracting Act (CICA), to decide bid protests "concerning an alleged violation of a procurement statute or regulation," 31 U.S.C. §§ 3552, 3553(a) (2000), and our Office's attorneys will therefore not conduct outcome prediction ADR unless we determine that the record has been adequately developed and that there is a very likely outcome.⁸ The decision to use outcome prediction ADR in a particular case is a question that is left to the discretion of the GAO attorney assigned to the case, in consultation with her/his Assistant General Counsel. Generally, for outcome prediction ADR to be meaningful, it is necessary to develop the record, which means allowing the agency to make a filing and then allowing the protester, and the intervenor, to respond. See Daniel I. Gordon, "GAO's Use of 'Negotiation' and 'Outcome Prediction' as ADR Techniques," Fed. Contr. Rep. (BNA), Jan. 19, 1999 ("Because the GAO attorney needs to be able to form an opinion about the likely outcome in order to engage in outcome prediction, this type of ADR is unlikely to be invoked before the agency has had a chance to respond to the protest in its report. . . . In general, . . . outcome prediction ADR will occur after the agency report and the protester's comments on that report have been received.").

Here, without notice to GAO or the parties, the agency delivered a large quantity of documents to our Office only 3 days before the agency report was due and only then requested outcome prediction ADR based upon the documents, without providing an agency response to the protest grounds in the form of a contracting officer's statement and legal memorandum. Our Office's attorney decided that she would not be in a position to conduct outcome prediction ADR, if at all, until she had reviewed

⁷ Our Office has held that where an agency takes corrective action prior to receipt of the agency report, we generally will not recommend the payment of protest costs. Veda Inc.--Entitlement to Costs, B-265809.2, July 19, 1996, 96-2 CPD ¶ 27 at 2.

⁸ We note that the agency may, at any time during the pendency of the protest, take corrective action before the due date of the agency report based upon its own assessment of the record, where it believes such action is appropriate.

the complete agency report, namely the agency's legal memorandum and the contracting officer's statement responding to the protest grounds, and the protester's comments. Also, the protester objected to our Office conducting ADR before receipt of the complete agency report and its comments; while a party's objection to ADR is not determinative, it is a factor in our determination concerning whether or not ADR is appropriate. See Bid Protests at GAO: A Descriptive Guide, 8th ed., at 35. Here, the GAO attorney agreed with the protester's counsel that the record was not adequate to permit ADR based on the documents submitted by the Air Force. Under these circumstances, our Office's attorney appropriately decided not to conduct outcome prediction ADR. In any event, neither the fact that the protester initially opposed the Air Force's ADR request, nor the fact that our Office initially declined to conduct ADR, can serve as a basis to disallow otherwise reasonable protest costs.

The agency also now argues that T Square should recover only those reasonable costs relating to the protest issue that the GAO attorney identified as a "probable sustain" during the outcome prediction ADR, that is, the Air Force's failure to conduct meaningful discussions. The Air Force argues that because T Square did not attempt to separate the costs relating to this issue from the other issues it raised, all of its claimed costs should be disallowed.⁹

As a general rule, we consider a successful protester entitled to be reimbursed costs incurred with respect to all issues pursued, not merely those upon which it prevails. AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 9. 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 CICA. AAR Aircraft Servs.--Costs, *supra*; TRESP Assocs., Inc.--Costs, B-258322.8, Nov. 3, 1998, 98-2 CPD ¶ 108 at 2. Nevertheless, failing to limit the recovery of protest costs in all instances of partial or limited success by a protester may also result in an unjust award determination. Accordingly, in appropriate cases, we have limited our recommendation for the award of protest costs where a part of their costs is allocable to a protest issue that is so clearly severable as to essentially constitute a separate protest. See, e.g., BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3; Interface Floorings Sys., Inc.--Claim for Attorneys' Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106 at 2-3. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, we consider, among other things, the extent to which the claims are interrelated or intertwined—i.e., the successful and unsuccessful claims share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. See Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29.

⁹ During the 6-month period the claim was pending at the agency, the Air Force never communicated this concern to the protester's attorney, and raised it for the first time in its report to our Office on the claim.

We do not find that in this case the arguments on which the protester failed to prevail are clearly severable from those on which it succeeded. Here, all of T Square's arguments pertained to the reasonableness of the agency's evaluation of proposals under the past performance factor and the Air Force's failure to conduct meaningful discussions based on its evaluation, such that the protester's arguments were interconnected and based on common factual underpinnings.¹⁰ See TRESP Assocs., Inc.-Costs, supra, at 3. Under the circumstances, we find that T Square's counsel was not required to separate costs associated with its arguments relating to the agency's failure to conduct meaningful discussions from costs associated with the other arguments it raised in its protests.¹¹

Next, the Air Force argues that attorney time spent pursuing these protests was excessive and represented an unreasonable duplication of effort. Air Force Report on Claim at 8. Our Office generally accepts the number of attorney hours claimed, unless the agency identified specific hours as excessive and articulates a reasoned analysis as to why payment for those hours should be disallowed. Pulau Elecs. Corp.-Costs, B-280048.11, July 31, 2000, 2000 CPD ¶ 122 at 6. Simply concluding that the hours claimed are excessive or suggest duplication of effort is inadequate to justify denying a claim for protest costs. Id. We will examine the reasonableness of the attorney hours claimed to determine whether they exceed, in nature and amount, what a prudent person would incur in pursuit of his or her protest. Price Waterhouse-Claim for Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 5. We have examined the reasonableness of the claimed attorney hours in light of the agency's generalized objections, and find them to be adequately documented as to the work performed and time spent by each attorney, and reasonably incurred in pursuit of the protests.

The agency also makes specific objections to hours charged for various claimed activities. Specifically, the agency argues that the protester is not entitled to reimbursement for 1.2 hours where its attorney was "reviewing debriefing materials" and "conferring with client regarding protest and began to review documents regarding same," because "time spent by a potential protester in ascertaining

¹⁰ We note that the agency tacitly acknowledged the obvious interrelationship of these issues by the nature of its corrective action in response to the ADR. That is, the agency did not reopen discussions on past performance, which was the remedy suggested in the ADR, but reevaluated past performance without reopening discussions.

¹¹ In addition, the agency did not argue, when the protester's request for reimbursement of its protest costs was pending at our Office, that the protest costs were severable, nor did the Air Force request reconsideration of our decision that did not recommend severance of protest costs.

whether it has a basis for protest is not time spent in pursuit of the protest.” Air Force Report on Claim at 4-5, quoting from Blue Rock Structures, Inc.–Costs, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190 at 6. However here, as explained by the protester, it had already decided to file a protest, and the time that its attorney spent reviewing the notes from the debriefing attended by his client and conferring with his client was to formulate and focus the factual basis that would be contained in the protest that was to be filed. Declaration of Protester’s Counsel (Feb. 7, 2007) ¶ 5. Thus, these hours—spent in discussing and preparing the protest filing—are reasonable costs of filing and pursuing the protest, and should be reimbursed.

The Air Force also challenges the attorney’s charge of 1.7 hours on December 27, 2005 for “confer[ing] with GAO Regarding Notification of Agency; Drafted Redacted Version of Protest,” arguing that any time spent conferring with GAO should not be reimbursable. Agency Report on Claim at 5. However, as explained by the protester, the portion of this time spent “conferring with GAO” was to ascertain whether GAO had or would timely notify the agency of the protest so that a statutory stay of performance would apply. Attorney’s Counsel Declaration (Feb. 7, 2007) ¶ 6. We agree with the protester that this was a reasonable precaution, particularly given the possible understaffing at GAO and the agency during the holiday period, and was a reasonable cost of pursuing the protest.

The Air Force also challenges the attorney’s charge of .5 hours to review certain documents that the Air Force did not believe were relevant, but which GAO determined were relevant. Air Force Report on Claim at 7. The Air Force argues that this charge was unreasonable because this was incurred in search of supplemental protest issues. We find that the costs incurred in a protester’s review of documents that have been provided by the agency in the course of pursuing its protest to be reasonable costs of pursuing a protest. The agency’s disagreement with the GAO determination that the documents were relevant and should be provided to the protester does not provide a basis to disallow the protester’s costs of reviewing these documents.

The Air Force also disputes attorneys’ hours charged for challenging the agency’s request to dismiss the protests on the basis of the corrective action proposed by the Air Force on March 3, 2006 in response to the ADR. The protester primarily questioned the proposed corrective action because it did not include reopening discussions as recommended in the ADR. The Air Force essentially argues here that since our Office ultimately dismissed the protest based on the Air Force’s proposed corrective action, the hours charged for this challenge were not reasonable costs of pursuing the protest. We disagree. A protester may reasonably incur costs in pursuit of its protest to ensure its rights are protected in the disposition of the protest. The success or lack of success of such objections or requests by a protester does not necessarily control whether the costs incurred in making these requests are reimbursable. In fact, in response to the protester’s filings here, the Air Force indicated that it might conduct discussions as part of its corrective action. In our

view, these costs incurred during the pendency of the protest were reasonable costs of pursuing the protest.

Finally, the Air Force challenges the 1.7 hours charged for drafting the request for our Office to recommend reimbursement of the protester's costs of pursuing the protest, arguing that it was "erroneous as a matter of law" for our Office to recommend that such costs be reimbursed. Air Force Report on Claim at 10-11.¹² We regard these costs as reasonable costs of pursuing a protest that has been dismissed by our Office on the basis of agency corrective action under section 21.8(e) of our Bid Protest Regulations. See, e.g., Georgia Power Co.; Savannah Electric and Power Co.—Costs, B-289211.5; B-289211.6, May 2, 2002, 2002 CPD ¶ 81 at 12; York Bldg Servs., Inc.; Olympus Bldg. Servs., Inc.—Costs, B-282887.10, B-282887.11, Aug. 29, 2000, 2000 CPD ¶ 141 at 6 (reimbursability of such protest costs recognized).¹³ Section 21.8(e) requires a protester to file a request for a recommendation that it be reimbursed its protest costs within 15 days after our Office has dismissed a protest based upon an agency's corrective action in order for our Office to find that the protester should be reimbursed its protest costs where the agency unduly delayed corrective action in response to a clearly meritorious protest. See TRS Research—Costs, B-290644.2, June 10, 2003, 2003 CPD ¶ 112 at 3. This section is authorized by CICA, 31 U.S.C. § 3554(c)(1), which provides that our Office may recommend that the protester be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees, where we find that a solicitation or the award of a contract does not comply with a statute or regulation. Thus, a protester's timely request to our Office for a recommendation that protest costs be reimbursed is simply a step needed to obtain the remedy allowed if we find the protest was clearly meritorious, and that award did not comply with a statute or regulation. See Georgia Power Co.; Savannah Electric and Power Co.—Costs, *supra*, at 7-9. T Square should be reimbursed its costs of preparing the request for a recommendation that its protest costs be reimbursed.

The Air Force also contends that the protester's attorneys' hourly rates were unreasonable and should be capped at the statutory rate for attorneys' fees of

¹² The Air Force does not explain why it takes this position.

¹³ The fact that we had already dismissed T Square's protest based upon proposed corrective action does not bar recovery of these costs as protest costs. Costs incurred after a decision on a protest has been issued on a protest can be reimbursable protest costs. See, e.g., Blue Rock Structures, Inc.—Costs, *supra*, (pursuit of a protest includes time spent by an attorney in analyzing the ultimate decision and explaining it to the client); Department of the Navy—Modification of Remedy, B-284080.3, May 24, 2000, 2000 CPD ¶ 99 at 4 (costs incurred defending against an agency's request for modification of remedy are reimbursable protest costs).

\$150 per hour. Air Force Report on Claim at 6. This argument fails to recognize that the referenced statutory cap is only applicable where the protester is not a small business. 31 U.S.C. § 3554(c)(2)(B). In this case, the protester is a small business, which here competed on a small business set-aside. We note that the protester offered with its claim detailed evidence supporting the reasonableness of its claimed attorneys' rates. The Air Force has not questioned this evidence, but only asserts that the claimed rates exceed the inapplicable statutory cap. Based on the record, there is no basis to question the reasonableness of the claimed rates.

The Air Force also contests T Square's request for its costs of pursuing this claim at our Office. Our Bid Protest Regulations, 4 C.F.R. § 21.8(f)(2), provide that we may recommend reimbursement of the costs of pursuing a claim before our Office. Pulau Elecs. Corp.—Costs, supra, at 11. This provision is intended to encourage the agency's expeditious and reasonable consideration of a protester's claim for costs. JAFIT Enters., Inc.—Claim for Costs, B-266326.2, Mar. 31, 1997, 97-1 CPD ¶ 125 at 4. The costs of pursuing a claim before our Office are recoverable if by their nature and amount they do not exceed that which would be incurred by a prudent person in a similar pursuit. Main Bldg. Maint., Inc.—Costs, B-260945.6, Dec. 15, 1997, 97-2 CPD ¶ 163 at 10.

The Air Force explains that the delay in considering the claim was related to both (1) the "reverse protest" filed by Data Monitor in the COFC and (2) its belief that "the parties are so far apart with respect to what the Protester is seeking in terms of protest costs and what the Agency considers to be reasonable that there was no reasonable likelihood that any amount of discussions would have resulted in a settlement without your Office's involvement." Air Force Report on Claim at 11. While we have taken into account a COFC action as a legitimate reason for an agency's delay in considering a claim for protest costs, we consider other factors as well in deciding whether to award the cost of pursuing a claim. BAE Tech. Servs., Inc.—Costs, supra. In this case, there is no suggestion in the record that the Air Force communicated to T Square, during the pendency of the claim at that agency, that it regarded T Square's claim as excessive or that it believed that the claim could not be resolved. If it had done so, T Square presumably could have filed its claim with our Office at a much earlier date; instead, the record showed that the Air Force's counsel repeatedly advised T Square's counsel over a 6-month period that the Air Force would consider the claim and the record shows that this was never done. Moreover, as explained above, the Air Force's defenses to the claim for protest costs are entirely without merit. Given the Air Force's failure to reasonably consider T Square's cost claim, we recommend that the firm be reimbursed the reasonable costs of pursuing its claim before our Office.

In sum, we recommend that the Air Force reimburse T Square its claimed costs of \$51,611.83 for pursuing the protest plus the costs it incurred in pursuing this claim at our Office.

Gary L. Kepplinger
General Counsel