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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: BAE Technical Services, Inc.--Costs

File: B-296699.3

Date: August 11, 2006

Kenneth M. Bruntel, Esq., and Amy E. Laderberg, Esq., Crowell & Moring, for the protester.

Michael O'Farrell, Esq., Department of the Air Force, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. GAO does not recommend reimbursement of costs incurred in filing and pursuing unsuccessful protest issues where issues are readily severable from successful issues, *i.e.*, are based on different core facts and legal theory.
 2. Where information submitted to support claim for reimbursement of costs is not detailed enough to establish how much of the claimed amount was incurred in pursuit of successful, versus unsuccessful, protest issues, use of "page counting" method--estimate based on the number of pages in protester's submissions devoted to particular issues--is reasonable approach to determining costs to be reimbursed.
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DECISION

BAE Technical Services, Inc. requests that we recommend reimbursement--in the amount of \$488,988.40--of the costs of filing and pursuing its protest in BAE Tech. Servs., Inc., B-296699, Oct. 5, 2005, 2005 CPD ¶ 91. In that decision, we sustained BAE's protest of the Department of the Air Force's award of a contract to InDyne, Inc., under request for proposals (RFP) No. FA9200-05-R-0001, for operation and maintenance of the Eglin Test and Training Complex (ETTC) at Eglin Air Force Base, Florida.

We recommend that the Air Force reimburse BAE in the amount of \$463,902.58 for the costs of filing and pursuing its protest.

BACKGROUND

In its protest, BAE challenged the selection of InDyne's proposal as the "best value" on the basis that the agency's conduct of discussions was improper and its evaluation of proposals under the four evaluation criteria (including mission capability, past performance, proposal risk at the mission capability subfactor level, and cost/price) was unreasonable. Specifically, BAE asserted that the Air Force had: (1) unreasonably failed to credit BAE with strengths under the mission capability evaluation factor; (2) unreasonably inflated InDyne's mission capability ratings; (3) unreasonably downgraded BAE's proposal on account of BAE's use of a business process reengineering program, the Activity Based Costing (ABC) modeling methodology, in developing and substantiating its proposed initiatives to reduce the number of full time equivalent (FTE) personnel and increase efficiency at ETTC, while at the same time unreasonably overlooking InDyne's failure to adequately substantiate its proposed FTE reductions; (4) improperly failed to evaluate the risk mitigation considerations associated with each proposal; (5) conducted unequal discussions by failing to conduct meaningful discussions with respect to BAE's ABC model and substantiation for FTE reductions, while at the same time affording InDyne detailed discussions concerning its proposed staffing; (6) unreasonably assigned BAE (the incumbent contractor) and InDyne equal ratings under the transition subfactor (under the mission capability factor); (7) performed a flawed past performance evaluation that improperly failed to account for InDyne's lack of relevant experience and unreasonably assigned both offerors the same past performance ratings; (8) improperly failed to conduct the required cost realism analysis of InDyne's proposal; (9) improperly made award to InDyne notwithstanding a deficient proposed staffing plan (with the intention of allowing InDyne to correct the deficiency during contract performance); (10) improperly failed to consider a potential organizational conflict of interest (OCI) on the part of InDyne; and (11) improperly failed to consider whether InDyne might have a potential unfair competitive advantage (through access to competitively useful inside information) due to its proposal to employ a former senior Eglin Air Force Base official.

In our October 5 decision, we sustained BAE's protest on the bases that (1) the agency had applied a more exacting standard in determining that the substantiation for BAE's proposed initiatives to reduce staffing was inadequate, while InDyne's was sufficient, and (2) the record did not support the agency's further determination that BAE's staffing profile presented a greater risk to agility, that is, the ability to respond to changes in workload, than InDyne's. We recommended that the agency take corrective action and reimburse BAE the costs of filing and pursuing its protest.

On December 2, BAE submitted to the agency a certified claim for costs in the amount of \$491,415.98. The Air Force did not formally respond to BAE's claim, and on May 8, 2006 BAE filed this claim in our Office. The Air Force challenges payment of all but \$77,963.77 of the claim. In response to the agency's objections to various aspects of its claim, BAE has reduced its claim to \$488,988.40.

ATTORNEYS' FEES

BAE seeks reimbursement in the amount of \$421,323.91 for legal services, representing 2,046.25 hours of attorney time and 179.75 hours of legal assistant time. The Air Force challenges reimbursement of all but 293.37 of the claimed hours, arguing that (1) BAE should be permitted to recover only those costs associated with the issues on which we sustained the protest, and (2) the hours claimed are excessive.

Severability of Protest Issues

The agency challenges payment of costs identified in the time sheets or bills prepared by BAE's attorneys that are associated with issues upon which BAE did not prevail, and generally calculates the appropriate reimbursement amount by multiplying the ratio of sustained to total issues--2 sustained issues out of 13 raised--by the claimed fees.

It is our view, generally, that a successful protester should recover the costs incurred with respect to all issues, not merely those upon which it prevailed. Sodexo Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29. However, we nonetheless will recommend that a protester's recovery of protest costs be limited to the issues on which the protest was sustained where the unsuccessful issues are so clearly severable as to essentially constitute a separate protest. Id. Issues are severable where they do not share a common core of facts and are not based on related legal theories. Id.

We find that the issues raised by BAE are largely intertwined parts of BAE's basic objection that the Air Force misevaluated the proposals and treated offerors unequally (including by conducting unequal discussions). Cf. AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 9 (all issues are intertwined parts of protester's basic objection that agency misevaluated proposals). However, we find that two of the issues upon which BAE did not prevail are severable from--that is, largely unrelated factually and legally to--the sustained issues: (1) whether the agency improperly failed to consider a potential OCI on the part of InDyne, and (2) whether the agency improperly failed to consider whether InDyne might have a potential unfair competitive advantage due to its proposing to employ a former senior Eglin Air Force Base official. Neither of these issues concerned the reasonableness of the evaluation of the merits of the proposals, which was the factual and legal focus of our decision, and reimbursement of the cost of pursuing them therefore is not warranted.

A protester seeking to recover its protest costs must submit evidence sufficient to support its claim that those costs were incurred, and are properly attributable to, filing and pursuing the protest. Stocker & Yale, Inc.--Claim for Costs, B-242568.3, May 18, 1993, 93-1 CPD ¶ 387 at 4. The amount claimed may be reimbursable to the

extent that it is supported by adequate documentation and is shown to be reasonable; a claim is reasonable if, in its nature and amount, it is similar to that which would be incurred by a prudent person in pursuit of the protest. SKJ & Assocs., Inc.–Costs, B-291533.3, July 24, 2003, 2003 CPD ¶ 130 at 2. In circumstances where information submitted to support a claim is not detailed enough to establish how much of the claimed amount was incurred in pursuit of the successful protest issues, we have recognized that using a “page count” method—that is, an estimate based on the number of pages in the protester’s submissions to our Office that were devoted to a particular issue—is a reasonable means of determining this amount. Intercon Assocs., Inc.–Costs, B-296697.2, June 14, 2006, 2006 CPD ¶ 95 at 4; ViON Corp.–Costs, B-256363.3, Apr. 25, 1995, 95-1 CPD ¶ 219 at 3-6.

Here, the contemporaneous records documenting the time spent on the protest by BAE’s attorneys and other legal staff are not sufficiently detailed to permit an allocation of hours to the two severable issues. It thus is appropriate to use a page count to determine the amount of the claimed costs attributable to the issues. In this regard, BAE has estimated through use of a page count (which the agency has not shown to be inaccurate) that approximately 5.5 percent of the total number of pages in its submissions to our Office were devoted to the two severable issues. Accordingly, we recommend that BAE’s claim of \$421,323.91 for legal services (including both attorney and other legal staff time) be reduced by 5.5 percent, or \$23,172.82, leaving the remaining amount of the claim at \$398,151.09.

Excessive Hours

The Air Force generally asserts that, even allowing for the fact that a hearing was held in this matter, the legal time expended in pursuing the protest—2,046.25 hours of attorney time and 179.75 hours of legal assistant time—was excessive, and that any reimbursement should be reduced accordingly.

Our Office generally accepts the number of attorney hours claimed, unless the agency identifies specific hours as excessive and articulates a reasoned analysis as to why payment for those hours should be disallowed. Data Based Decisions, Inc.—Claim for Costs, B-232663.3, Dec. 11, 1989, 89-2 CPD ¶ 538 at 3. Simply concluding that the hours claimed are excessive or suggest duplication of effort is inadequate to justify denying a claim for protest costs. Princeton Gamma-Tech, Inc.—Claim for Costs, B-228052.5, Apr. 24, 1989, 89-1 CPD ¶ 401 at 4.

Here, the Air Force in its response to BAE’s claim has annotated each time charge by each BAE attorney for each day to indicate that the agency considers the hours claimed to be excessive, but the agency has not explained the basis for its assertions. As noted above, such unsupported claims that the hours are excessive are insufficient to justify denying or reducing a claim as it relates to attorney time. The Air Force does not question whether the attorneys actually worked the hours claimed, and we note the complexity of the procurement and protest led to lengthy briefs and the holding of a 3-day hearing. Since our own review of the claimed hours

furnishes no basis for concluding that they exceeded, in nature or amount, what a prudent person would incur in pursuit of this protest, see Pulau Electronics Corp.--Costs, B-280048.11, July 31, 2000, 2000 CPD ¶ 122 at 6; Price Waterhouse--Claim for Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 5, we find no basis to question BAE's claim in this regard.

Accordingly, we recommend reimbursement of \$398,151.09 (\$421,323.91 claimed less \$23,172.82 due to segregating the two unsuccessful protest issues) for legal services.

CONSULTANTS AND WITNESSES

BAE requests reimbursement of \$32,981.57 for 231.6 claimed hours and travel expenses for two consultants who provided services related to the protest.

The Air Force questions reimbursement of any amount for the costs associated with one of these consultants on the basis that he consulted with respect to BAE's cost evaluation challenge, not with respect to the issues on which we sustained the protest. The Air Force also questions any reimbursement of costs associated with the second consultant on the basis that, while he consulted with respect to BAE's use of ABC modeling in its proposal to substantiate its proposed initiatives to reduce staffing, his hearing testimony was not directly relevant to our finding that the agency applied different standards in evaluating the substantiation for BAE's and InDyne's proposed initiatives. As discussed above, however, we consider all of the issues raised by BAE, other than the two severable issues, to be interrelated such that the costs related to these issues are reimbursable. Thus, the fact that the consultants' involvement concerned the cost and ABC modeling aspects of the protest does not provide a basis for denying reimbursement of their claimed costs.

However, we question the amount of the travel expenses claimed--\$7,357.62--for one of the consultants to travel from Texas to the Washington, D.C. area (to attend the hearing). The costs of travel in connection with the pursuit of a bid protest are recoverable only to the extent that they are reasonable. See TRESP Assocs., Inc.--Costs, B-258322.8, Nov. 3, 1998, 98-2 CPD ¶ 108 at 4-5; Armour of Am., Inc.--Claim for Costs, supra, at 9. One valid measure of what constitutes reasonable travel expenses, we think, is to look to the amount that could be recovered by a government contractor under a cost-reimbursement contract. In this regard, Federal Acquisition Regulation (FAR) § 31.205-46(a), Travel Costs, provides that the reasonable costs incurred by contractor personnel on official company business for transportation and "for lodging, meals, and incidental expenses" generally are allowable costs, subject to several limitations set forth in that section. One limitation, applicable in the absence of "special or unusual situations," states that

costs incurred for lodging, meals, and incidental expenses . . . shall be considered to be reasonable and allowable only to the extent that they do not exceed on a daily basis the maximum per diem rates in effect at the time of travel as set forth in the (i) Federal Travel Regulations,

prescribed by the General Services Administration, for travel in the contiguous United States . . .; (ii) Joint Travel Regulation, Volume 2, [Department of Defense] Civilian Personnel, Appendix A, prescribed by the Department of Defense, for travel in Alaska, Hawaii, and outlying areas of the United States; or (iii) Standardized Regulations (Government Civilians, Foreign Areas), Section 925, 'Maximum Travel Per Diem Allowances for Foreign Areas,' prescribed by the Department of State, for travel in areas not covered in (i) and (ii) of this paragraph.

FAR § 31.205-46(a)(2).

BAE calculates that applying this limitation would reduce the claimed \$7,357.62 in consultant travel expenses by \$1,392. Since the Air Force has advised our Office that it does not disagree with BAE's calculation, we accept it for purposes of our recommendation. Accordingly, we recommend that BAE be reimbursed \$31,589.57 (\$32,981.57 less \$1,392) for consultant fees and travel expenses.

BAE COMPANY OFFICIAL

BAE seeks reimbursement of \$3,024.48 for a BAE company official's expenses of traveling to Washington D.C. to testify at the hearing. The Air Force challenges any reimbursement in this regard on the basis that the company official's testimony at the hearing "was not relevant to the 2 protest issues upon which GAO sustained the protest." Air Force Comments, June 8, 2006, at 15.

The agency's objection is misplaced. The BAE official testified both as to BAE's proposed initiatives and ABC model, and as to the initiatives, efforts and conditions in place under BAE's incumbent ETTC contract. Even under the agency's narrow view of the issues upon which recovery could be made, the official's testimony was useful in reaching, and thus relevant to, our conclusions in sustaining the protest, and was cited in our decision. See BAE Tech. Servs., Inc., supra, at 10. In any case, we have previously found that reasonable travel costs associated with a client company's representative's (in addition to the party's attorney) attendance at a hearing is reimbursable. See TRESP Assocs., Inc.--Costs, supra, at 4-5.

As with the claimed travel costs for BAE's consultants, however, we find that the claimed travel costs for the BAE official are unreasonable because they exceed the amount that could be recovered by a government contractor under a cost-reimbursement contract. BAE calculates that applying the FAR limitation (see above) reduces the \$3,024.48 claimed by \$566. Again, the Air Force does not disagree with BAE's calculation, and we therefore recommend that BAE be reimbursed \$2,458.48 (\$3,024.48 less \$566) for the official's travel expenses.

OTHER EXPENSES

As reduced in response to Air Force objections, BAE requests reimbursement in the amount of \$31,703.44 for additional expenses related to court reporting services, duplicating and binding, telephone calls, facsimile transmission, messenger and delivery services, supplies, local transportation, and administrative overtime. In its response to BAE's filing of its claim with our Office, the Air Force generally questioned several of these expenses as unnecessary, excessive or otherwise unsupported, including those related to computer research, administrative expenses, the delivery of documents by BAE to the other parties and to our Office, and local transportation. In its June 23 response to the Air Force's submission, BAE withdrew some of the challenged expenses and explained the basis for other claimed expenses in more detail. Although the agency subsequently submitted an additional filing to our Office rebutting various points in BAE's June 23 filing, it did not rebut BAE's more detailed explanation of the questioned expenses. We have reviewed BAE's documentation of its claimed expenses, including both that originally submitted to the agency and our Office, and the additional documentation furnished on June 23, and we find it adequate to establish that the expenses are of a type and in an amount such that reimbursement is warranted. In this regard, we note, for example, that, in appropriate circumstances, we consider administrative overtime expenses and local travel to be reimbursable. See Pulau Elec. Corp.--Costs, *supra*, at 10; TRESP Assocs., Inc.--Costs, *supra*, at 4-5.

We therefore recommend that BAE be reimbursed \$31,703.44 for additional expenses.

COSTS OF PURSUING CLAIM

BAE requests reimbursement of the costs of filing and pursuing its claim with our Office. BAE asserts that reimbursement is warranted due to the Air Force's delay in responding to BAE's certified claim submitted to the agency. BAE explains that, although it filed its claim with the contracting officer on December 2, 2005, and made several inquiries thereafter, the Air Force had not furnished a detailed, substantive response as of the time when BAE filed with our Office on May 8.

The Air Force, in opposing BAE's request, asserts that it generally responded to the claim by orally advising BAE of its position that BAE was only entitled to reimbursement of the costs associated with the sustained issues. In addition, the agency maintains that it would have been inappropriate for it to pay BAE's claim during the pendency of a suit filed by InDyne in the U.S. Court of Federal Claims (COFC) on October 26, 2005, challenging the agency's determination to implement corrective action in response to our decision. InDyne's lawsuit continued until the court granted the firm's motion for dismissal without prejudice on March 23, 2006,

sometime after the agency had announced, on January 31, its determination again to select InDyne for award.¹

Our Regulations, 4 C.F.R. § 21.8(f)(2) (2006), provide that we may recommend reimbursement of the costs of pursuing a claim before our Office. This provision is intended to encourage the agency's expeditious and reasonable consideration of a protester's claim for costs. Pulau Elec. Corp., supra, at 11. 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.

We find no basis for concluding that the agency unreasonably delayed consideration of BAE's claim such as to warrant reimbursement of BAE's costs of pursuing its claim before our Office. See Intercon Assocs., Inc.—Costs. Since InDyne's suit in the COFC essentially challenged our finding that the original award to InDyne was unreasonable—the underlying basis for BAE's claim—we think the agency reasonably could await the results of that litigation before acting on BAE's claim. In addition, while the agency delayed providing a formal response to the claim, it did advise BAE of its position that there was a severability problem with the claim as filed; notwithstanding its admitted understanding of the agency's position in this regard, BAE made no attempt to respond to the agency's concern, either while its claim was pending at the agency, or in its initial filing with our Office. Furthermore, it is not apparent that BAE incurred any significant additional expense or effort on account of the agency's delay in furnishing a formal response to its claim; the positions of the two parties were sufficiently far apart that a settlement or other resolution of the matter without the intervention of our Office almost certainly was impossible, and an additional briefing by BAE in connection with pursuing its claim before our Office was inevitable. In these circumstances, we decline to recommend reimbursement of the costs of pursuing this claim with our Office.

In light of the foregoing discussion, we recommend that BAE be reimbursed a total \$463,902.58 in protest costs.

Gary L. Kepplinger
General Counsel

¹ The Air Force also asserts that it orally requested BAE to segregate the costs associated with the sustained issues, but that the protester refused to do so. In response to the Air Force's claim, BAE agrees that it was aware of the agency's position that BAE was only entitled to reimbursement of the costs associated with the sustained issues, but denies that the agency requested it to segregate the costs accordingly. Given our discussion above, we need not resolve this dispute.