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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Department of the Army--Modification of Remedy

File: B-292768.5

Date: March 25, 2004

Richard B. Oliver, Esq., and Gregory M. Murphy, Esq., McKenna Long & Aldridge, for the protester.

Capt. Tami L. Dillahunt, Army Materiel Command, for the agency.

Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest costs, including attorneys' fees, need not be allocated between protest issue that was sustained and issues that were not addressed or denied in decision where all issues were related to the same core allegation, which was sustained; since issues not addressed or denied were not distinct and severable from the sustained issue, attorneys' fees relating to those issues are reimbursable.

DECISION

The Department of the Army requests that our Office modify our decision, Continental RPVs, B-292768.2, B-292768.3, Dec. 11, 2003, 2004 CPD ¶ __, insofar as that decision recommended that the protester be reimbursed the costs of filing and pursuing its protests, including reasonable attorneys' fees. The agency contends that it should not be required to pay attorneys' fees concerning protest issues on which the protester was unsuccessful.

We affirm our decision.

Continental protested the award of a contract to Griffon Aerospace, Inc. under request for proposals (RFP) No. DAAH01-02-R-0158, issued by the Army Aviation and Missile Command (AMCOM), Department of the Army, for the acquisition of an aerial remotely piloted vehicle target (RPVT) system and services. Continental argued that AMCOM's evaluation of proposals, including the evaluation of Griffon's past performance, was unreasonable and that the resulting award decision was improper.

We denied Continental's protest in part and sustained it in part. Specifically, we found that while AMCOM's evaluation of the offerors' technical proposals was reasonable and consistent with the solicitation's evaluation factors, the agency's evaluation of Griffon's past performance was not reasonable.¹ In light of our determination that the agency's evaluation of Griffon's past performance was unreasonable, and that a new evaluation and source selection decision were necessary, our decision did not address Continental's protest to the extent it claimed that AMCOM's best value determination was also flawed. We recommended that the agency reevaluate Griffon's past performance, make a new source selection decision in accordance with the terms of the RFP if necessary, and that Continental be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys' fees.

The agency now requests that we modify our recommendation with respect to the award of protest costs. Specifically, the Army argues that Continental is not entitled to reimbursement of all of its protest costs, and Continental should recover only those reasonable costs relating to the protest issue that was sustained.

Under the Competition in Contracting Act of 1984 (CICA), as amended, 31 U.S.C. § 3554(c)(1)(2000), 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. This is to relieve parties with valid claims of the burden of vindicating the public interests that Congress seeks to promote. TRS Research--Costs, B-290644.2, June 10, 2003, 2003 CPD ¶ 112 at 3; Parmatic Filter Corp.--Costs, B-285288.5, Aug. 27, 2001, 2001 CPD ¶ 148 at 3.

As a general rule, we consider a successful protester entitled to 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; Price Waterhouse--Claim for Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 3; Data Based Decisions, Inc.--Claim for Costs, B-232663.3, Dec. 11, 1989, 89-2 CPD ¶ 538 at 4. 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

¹ The solicitation required offerors to submit information for prior contracts performed which were the "same or similar" to the effort required here. The agency evaluated Continental (the incumbent contractor) and Griffon as each being of low risk under this performance evaluation factor, although the record contained no basis upon which the Army could reasonably have determined that the awardee's past performance was in fact the "same or similar" in either size or scope to the requirements here.

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 the award of protest costs to successful protesters 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., 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; Department of the Navy--Recon. and Modification of Remedy, B-246784.4, Feb. 17, 1993, 93-1 CPD ¶ 147 at 6-7.

The Army argues that the one issue upon which Continental's protest was sustained--that the agency unreasonably evaluated the awardee's past performance--was so clearly severable from the other issues raised by the protester as to essentially constitute a separate protest. In support thereof the agency points to the fact that the past performance factor was separate from the technical, operational, management, and price factors set forth in the RFP, that a separate group of agency employees performed the past performance evaluation, and that Continental was able to address each issue separately and distinctly in its protests. The Army also contends that Continental filed a supplemental protest and identified an additional ground for protest (regarding the evaluation of the awardee's technical proposal), which was denied. The Army argues that the agency should not be required to reimburse Continental for all of its costs, when the protester raised five separate issues in two different protests, and only one of those issues was sustained.

In this case, Continental raised several significant issues concerning the evaluation of proposals under various evaluation factors and the resulting source selection decision. The protester established that the Army's evaluation of the awardee's past performance was unreasonable and inconsistent with the terms of the solicitation. While our decision did not need to address Continental's protest that the award decision was also unreasonable--in light of our determination that the Army's evaluation of the awardee's past performance was unreasonable and that a new evaluation and source selection decision were necessary--it is evident that the agency's decision here was improper because it was based on a flawed evaluation.

In our view, the successful and unsuccessful contentions raised by Continental share a common core set of facts and are based on related legal theories, and therefore cannot reasonably be viewed as a series of discrete claims. Accordingly, we conclude that the issues raised are intertwined parts of Continental's basic objection

that the Army misevaluated offerors' proposals, see AAR Aircraft Servs.–Costs, supra, and we see no reason here to find Continental's various challenges to the agency's evaluation of offerors' proposals to essentially constitute separate protests. Contrary to the Army's position, we view the fact that the agency utilized a separate evaluation team and the fact that the protester discretely articulated and organized its various protest issues as of little importance in our determination of whether costs should be limited.

In sum, the fact that Continental did not prevail on every allegation related to its basic assertions that the evaluation and source selection were unreasonable makes reimbursement of costs no less appropriate, see TRESP Assocs., Inc.–Costs, supra, and we see no reason why Continental's recovery of protest costs should be limited to one or more particular issues here.

We recommend that Continental be reimbursed the reasonable of costs of filing and pursuing the protests, including those incurred here, i.e., responding to the agency's modification of remedy request. See AAR Aircraft Servs.–Costs, supra. The protester should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the Army within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1) (2003).

Anthony H. Gamboa
General Counsel