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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Intercon Associates, Inc.--Costs

File: B-296697.2

Date: June 14, 2006

Patrick K. O'Keefe, Esq., Sidley Austin LLP, for the protester.
John E. Cornell, Esq., General Services Administration, for the agency.
Scott H. Riback, 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 issue where issue is readily severable from successful issue, i.e., is based on different set of facts and legal theory.
 2. Agency's use of a "page counting" method, that is, counting pages in protest brief that discussed successful protest issue, is a reasonable approach to determining amount of protest costs to be reimbursed, in absence of more probative evidence.
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DECISION

Intercon Associates, Inc. requests that we recommend reimbursement of its costs--in the amount of \$76,014.06--of successfully pursuing its protest of the terms of request for proposals (RFP) No. GS00V05PDR0021, issued by the General Services Administration (GSA) for an electronic forms (e-forms) creation capability. GSA's position is that the reimbursement should be limited to \$25,328.03.

We deny the claim for the requested amount and recommend reimbursement in the amount calculated by the agency, \$25,328.03.

BACKGROUND

In protesting the terms of the RFP, Intercon raised two allegations: the RFP was unduly restrictive because it unnecessarily precluded it from competing for the requirement, and the agency was biased in favor of another competitor, Formatta Corporation. We developed the record, and in the course of that effort, Intercon filed an objection to the agency's document production after receiving the agency

report. The thrust of Intercon's objection was that the agency had not provided adequate discovery relating to its bias allegation. In response, the agency advised our Office that it had completed its evaluation of proposals during the pendency of Intercon's protest, that it had determined that an offeror other than Formatta was the apparent successful offeror, and that, accordingly, Intercon's bias argument and related discovery request were essentially academic. We agreed with the agency and did not call for further document production in connection with Intercon's bias allegation.

Thereafter, we conducted an "outcome prediction" alternative dispute resolution (ADR) procedure, during which our attorney advised the agency that he believed that GAO would agree with the protester that the solicitation was unduly restrictive. He also noted that, because the record had been fully developed, he believed GAO would recommend that Intercon be reimbursed the costs associated with filing and pursuing its protest, should it be necessary to issue a decision. In the wake of the ADR procedure, the agency advised our Office that it intended to withdraw the statement of work included in the solicitation and issue a revised solicitation; the agency also stated that it would entertain Intercon's request for protest costs. In light of this, we dismissed Intercon's protest as academic. (B-296697, Sept. 27, 2006.)

Intercon tendered a certified claim for its protest costs to the agency, requesting reimbursement of \$76,014.06. After reviewing the claim, GSA offered to reimburse Intercon \$25,328.03. The agency disallowed \$1,818.75 of the claimed amount on the basis that those costs were incurred in connection with "lobbying" activities engaged in by Intercon in an apparent effort by the firm to achieve settlement with the agency. Intercon concedes the propriety of disallowing this amount. Intercon Request for Costs, Feb. 8, 2006, at 3. The agency disallowed \$48,867.28 of the claimed amount on the ground that this amount related to the bias allegation; because Intercon did not prevail on this issue, and because the issue was clearly severable from the unduly restrictive specification issue, the agency's view was that there was no basis for reimbursing these costs.

SEVERABILITY OF PROTEST ISSUES

Intercon takes issue with GSA's decision to disallow \$48,867.28 of its claimed costs. According to the protester, both issues in its protest arose from the same core group of facts and legal theories, and were inextricably intertwined, such that there is no reasonable basis for the agency to disallow costs relating to the bias allegation.¹

¹ Intercon seems to suggest that, since we did not expressly deny its bias allegation, it should be reimbursed for its costs of pursuing that issue. However, severability, not our failure to deny an issue on the merits, is determinative of whether we will recommend reimbursement of costs for a certain issue.

While, as a general rule, we may find that a successful protester should recover the costs incurred with respect to all issues, not merely those upon which it prevailed, Sodexho Mgmt., Inc.—Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29, 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 upon related legal theories. Id.

We agree with the agency that the issues here are severable. The core facts underlying the allegations are different. Intercon’s bias allegation focused on the agency personnel involved in preparation of the solicitation; the timing of various changes to the solicitation; various prior acquisitions for the agency’s e-forms capability; and another, apparently related, e-forms project performed by GSA on behalf of the Small Business Administration. Essentially, Intercon attempted to show that one faction of GSA personnel was biased in favor of Formatta’s proposed e-forms solution, and that this faction gained control of the subject acquisition from another faction of GSA personnel and amended the solicitation at the eleventh hour in an attempt to have Formatta win the competition. In contrast, Intercon’s restrictive specification assertion was based solely on facts relating to Intercon’s capabilities as a provider of an e-forms solution and the terms of the RFP; Intercon was able to show that it could provide what the agency required (as expressly described in its solicitation), and that aspects of the specifications improperly dictated a solution that was inconsistent with Intercon’s capabilities and proposed solution. The two assertions also were based on distinct legal theories: agencies are precluded from favoring one competitor over another, and restrictive specifications may only be used to the extent necessary to meet the agency’s actual minimum requirements. An adequate evidentiary showing under one theory may be immaterial to success under the other. In view of these considerations, reimbursement of protest costs would be appropriate only with regard to the restrictive specification protest basis.

CALCULATION OF THE ALLOWABLE AMOUNT

As noted above, the agency has agreed to reimburse Intercon \$25,328.03, which is GSA’s estimate of the costs attributable to the restrictive specification issue. This estimate is based on the number of pages devoted to that issue in Intercon’s comments, as compared to the number of pages devoted to Intercon’s bias allegation in that same pleading. (The agency used Intercon’s comments in this exercise because the ratio between the two issues in this pleading was more favorable to the firm than the ratio in its protest letter. GSA’s Contracting Officer’s Response to Intercon’s Cost Request, Jan. 10, 2006, at 2.) GSA explains that it was forced to take this approach because the attorneys’ bills Intercon presented in support of the claim were so heavily redacted that the agency was unable to determine what costs were attributable to each issue. (Intercon advanced the attorney-client privilege and attorney work product doctrine as the bases for redacting its billing statements.)

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. 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 is a reasonable means of determining this amount. ViON Corp.--Costs, B-256363.3, Apr. 25, 1995, 95-1 CPD ¶ 219 at 3-6. Accordingly, given the absence of more probative evidence from Intercon, we find that it was reasonable for the agency to use a page count to determine the amount of the claimed costs attributable to Intercon's restrictive specification argument. It follows that we have no basis to question the \$25,328.03 reimbursement proposed by the agency.

COSTS ASSOCIATED WITH INTERCON'S GAO FILING

Intercon also seeks reimbursement of an additional \$4,105.65, the cost of filing this claim with our Office. While we may recommend the payment of such costs as a means of encouraging an agency's expeditious and reasonable consideration of a claim, 4 C.F.R. § 21.8(f)(2); Pulau Elec. Corp.--Costs, B-280048.11, July 31, 2000, 2000 CPD ¶ 122 at 11, there is no indication that the agency here unreasonably delayed consideration of Intercon's claim, nor has Intercon prevailed upon any of the arguments advanced before us. Under these circumstances, we decline to recommend reimbursement of these costs.

In light of the foregoing discussion, we deny the claim for the requested amount and recommend that Intercon be reimbursed the amount proposed by GSA, \$25,328.03.

Anthony H. Gamboa
General Counsel