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Decision

Matter of: GOV National Healthcare Drive, LLC

File: B-419258.4

Date: October 7, 2021

Paul F. Khoury, Esq., Richard B. O’Keeffe, Jr., Esq., and Lindy C. Bathurst, Esq., Wiley Rein LLP, for the protester.

Alicia M. Harrington, Esq., Department of Veterans Affairs, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that agency reimburse a greater portion of the protester’s costs than the agency has agreed to pay is granted, in part, and denied, in part; record shows that agency unreasonably rejected many—but not all—of the protester’s claimed costs.

DECISION

GOV National Healthcare Drive, LLC, a small business of Huntington, New York, requests that our Office recommend that it be reimbursed certain additional costs associated with preparing its proposal in response to request for lease proposals (RFP) No. 36C10F18R0659, issued by the Department of Veterans Affairs (VA) for the lease of premises to be used for a community-based outpatient clinic in Daytona Beach, Florida. GOV also requests that we recommend that it be reimbursed certain additional costs associated with filing and pursuing a bid protest challenging the award of the lease under the RFP to Carnegie Management and Development Corporation. Following an earlier decision from our Office sustaining GOV’s protest and recommending that it be reimbursed the aforementioned costs, GOV submitted its certified claim for such costs to the VA. The agency has agreed to pay a total of \$197,730.50 of this claim and our decision here addresses only the disputed portion of the claim, as detailed below.

We grant the request, in part, and deny it, in part.

BACKGROUND

In September 2020, after conducting a competition, the VA executed a 20-year lease with Carnegie. After being advised of the agency's source selection decision, GOV filed a protest with our Office, arguing that the agency miscalculated proposals, failed to engage in meaningful discussions, and made an unreasonable source selection decision. We sustained GOV's protest allegation relating to the agency's conduct of discussions, concluding that, although the agency opened discussions with the offerors, it failed to bring any of the deficiencies or weaknesses identified by the agency in the protester's proposal to its attention. *GOV National Healthcare Drive, LLC, B-419258 et al.*, Jan. 13 2021, 2021 CPD ¶ 25.

As we noted in our earlier decision, under the circumstances presented by the case, we ordinarily would have recommended that the agency reopen the acquisition, conduct discussions, solicit, obtain, and evaluate revised proposals, and make a new source selection decision, terminating the lease awarded to Carnegie for the convenience of the government, if appropriate. However, because the lease executed between Carnegie and the agency did not include a termination for convenience clause, we were unable to make such a recommendation. Instead, we recommended that the agency pay GOV the costs associated with preparing its proposal in response to the RFP, as well as the costs associated with filing and pursuing its protest with our Office, including reasonable attorneys' fees. *GOV National Healthcare Drive, LLC, supra.* at 7.

In the wake of our decision, GOV timely submitted its certified claim to the agency, detailing what GOV claimed was the time spent and the costs incurred in connection with preparing its proposal and filing and pursuing its bid protest. GOV's claim included total proposal preparation costs of \$269,804 and total bid protest costs of \$209,664.25 for a total claim of \$479,468.25. GOV's Agency-Level Claim, at 1, 6, 9. After an exchange of additional information between the agency and GOV, VA agreed to pay GOV \$24,688 in proposal preparation costs and \$173,042.50 in bid protest costs, for a total claim amount of \$197,730.50. *Id.* exh. 4, at 2, 4, 11. After receipt of the agency's decision, GOV filed a claim with our Office. In addition to the \$197,730.50 amount already agreed to by VA, GOV's claim with our Office seeks an additional \$246,832, or a total amount of \$444,562.50.¹

¹ GOV's initial claim filed with our Office included inconsistencies on its face, as well as an inconsistency in its claim as between pleadings. As noted, its initial claim filed with the agency included proposal preparation costs of \$269,804. In filing its claim with our Office, GOV states that it has withdrawn its claim for certain proposal preparation costs totaling \$10,985. GOV Initial GAO Claim at 5, n.3 (\$269,804 - \$10,985 = \$258,909). Elsewhere in its initial claim filed with our Office, however, GOV represents that its total claim for proposal preparation costs amounts to only \$258,142. *Id.* at 12. Because the agency already offered to reimburse GOV \$24,688 of its proposal preparation costs, its initial claim with our Office represented that GOV was seeking a net amount of

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DISCUSSION

The agency has advanced various bases for its refusal to pay certain of GOV's costs, and GOV, for its part, has responded to those arguments. We have reviewed all of the parties' arguments and conclude that certain of GOV's costs are properly reimbursable, while others are not. We discuss our findings in detail below; our discussion is divided between claimed costs associated with GOV's proposal preparation efforts, and claimed costs associated with filing and pursuing its protest.

Claimed Proposal Preparation Costs

The agency objects to certain of GOV's claimed proposal preparation costs for several different reasons. The agency's first objection relates to the entity that incurred the costs; the second objection relates to certain costs incurred before issuance of the RFP; and the third objection relates to certain proposal preparation costs that the agency maintains may not actually have been incurred. We discuss each of the agency's objections in turn below.

Costs Incurred by Different Legal Entities

The agency has an overarching objection relating to a portion of GOV's proposal preparation costs relating to the entity that incurred the expenses. The record shows that certain proposal preparation costs were incurred before the establishment of GOV as a legal entity, and those costs were incurred by a different entity called DAB 551, LLC. According to the agency, because the costs in question were incurred before the establishment of GOV as a legal entity, it should not have to reimburse the costs incurred by DAB 551 in connection with preparation of the GOV proposal. Significantly, the agency does not generally object to reimbursement of these costs on any other ground (except as discussed below); this objection relates solely to the identity of the

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\$233,454. *Id.* However, in a subsequent filing with our Office, GOV represented that it is seeking a net amount of \$236,289. GOV Comments at 10.

In addition to these inconsistencies, GOV's initial claim includes another inconsistency. GOV's claim includes a table listing total amounts claimed of \$258,142 in proposal preparation costs and \$185,192.50 in bid protest costs. GOV Initial GAO Claim, at 12. The sum of those two amounts is \$443,334.50. That amount differs from the sum of the amount agreed to by the agency (\$197,730.50) plus the additional amount claimed elsewhere in the same table (\$246,832), which totals \$444,562.50.

Separately, GOV's initial claim with the agency included bid protest costs totaling \$209,664.25. In its claim with our Office, GOV now seeks total bid protest costs of \$185,192.50. GOV states that this lesser amount excludes certain bid protest costs that GOV maintains are allowable, but that are, in GOV's view, not worth contesting at this juncture.

entity incurring the costs. For the reasons below, we find no merit to the agency's position.

The record shows that GOV was established on January 21, 2020, through the filing of a certificate of formation with the Delaware Secretary of State, and that the details of the company's composition and operation are memorialized in a February 7, 2020 operating agreement that describes GOV essentially as a single-purpose limited liability company. Agency Report (AR) exh. 14, GOV Technical Proposal, at 93-107, GOV National Healthcare Drive, LLC Operating Agreement.² The purpose of establishing the company was to construct, own and operate a VA outpatient clinic in the city of Daytona, Florida if awarded the lease the agency was soliciting. *Id.* at 93. GOV is comprised of two member entities, DAB 551, and Hamstra Builders, Inc. *Id.* at 106. Ownership of GOV is divided between the two member entities; DAB 551 owns 99 percent of GOV, and Hamstra Builders, Inc. owns 1 percent of GOV. *Id.* at 107.

There is nothing unusual about establishing a single-purpose legal entity to compete for, and perform, a particular government contract. See e.g. *Savannah River Technology and Remediation, LLC; Fluor Westinghouse Liquid Waste Services, LLC*, B-415637, *et al.*, Feb 18, 2018, 2018 CPD 70 at 5. Here, the record clearly establishes that, although GOV was nominally the offering entity, the real parties in interest are DAB 551, the 99-percent owner of GOV, and Hamstra, the 1-percent owner of GOV.

As noted, the agency does not advance any objections (beyond those discussed below) to the payment of proposal preparation costs incurred by GOV beyond its position that DABS 551 and Hamstra are not the offering entity. In fact, the agency has taken the position that certain of GOV's proposal preparation costs are properly payable based on the date they were incurred, notwithstanding the fact that all of the costs in question were actually billed either to DABS 551 or to Hamstra, not to GOV.

For example, the record shows that GOV claimed a total of \$4,209 for costs incurred in connection with zoning work performed by a particular law firm. The agency objects to the payment of \$3,501 of those costs based on its position that this portion of the costs was incurred before the establishment of GOV as a legal entity, but the agency has agreed to payment of \$708 of these same costs because they were incurred after the establishment of GOV as a legal entity. However, the record shows that all of the costs in question were actually billed to DABS 551, not to GOV.³ GOV's Agency-Level Claim, exh. 1.

² The references in this paragraph to the agency report are to the agency report filed by the agency during the original protest.

³ In a similar vein, and again by way of example, the record shows that GOV incurred a cost of \$16,000 associated with the preparation of a maintenance plan that was included with its proposal, and a cost of \$5,700 for performance of a cultural resources assessment survey. GOV Agency-Level Claim, exhs. 6, 11. The agency has agreed that both costs are properly reimbursable in their entirety as part of GOV's proposal

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In sum, the agency's position focuses on form over substance. Furthermore, the agency has taken inconsistent positions with respect to paying proposal preparation costs. For example, the agency has agreed to pay proposal preparation costs billed to DABS 551 or to Hamstra after issuance of the RFP that were incurred after GOV was formed, but not what amounts to the same costs incurred after issuance of the RFP but before the formation of GOV. While the agency agrees that the costs incurred after the RFP was issued are otherwise allowable, it objects solely on the basis of whether the costs were incurred before or after the formation of GOV, not on the basis of the entity actually incurring or paying those costs.⁴ Under the circumstances, we conclude that this is not a legitimate basis to deny any of GOV's proposal preparation costs.⁵

Based on our conclusion that the date of GOV's formation is not dispositive of the question about costs incurred before that date, but after issuance of the RFP--and reasonably related to responding to the RFP--we find the following enumerated costs to be properly reimbursable as proposal preparation costs: zoning legal fees, \$4,209; proposal preparation support \$75,000 (discussed further below); maintenance plan \$16,000; environmental site assessment \$2,100; building design (1) \$3,165; building design (2) \$50,000; building design (3) \$21,600; and cultural resources assessment \$5,700.

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preparation costs, even though the invoice for the first cost was billed to DABS 551, and the invoice for the second cost was billed to Hamstra, the other member of GOV. Apparently the VA believes this is appropriate based on the dates the services were provided.

⁴ In apparent recognition of the inconsistency of its position, the VA, in response to the zoning work element of GOV's claim, contemporaneously stated: "Even though the entirety of this cost item is contained in one invoice and only billed in the name of DAB 551, LLC, in the interest of fairness, VA is assuming the costs incurred after formation of GNHD [GOV] on January 21, 2020, are for the benefit of the joint venture LLC." Agency Final Decision on GOV's Claim, at 2, n.2.

⁵ The agency also objects, in part, to payment of \$81,000 in costs incurred in connection with GOV's response to an agency request for expressions of interest based on the fact that the costs were incurred before the formation of GOV. While this reason does not provide a basis for our Office to object to payment of that cost, as discussed below, we conclude that the cost is not properly reimbursable as a proposal preparation cost for a different reason--*i.e.*, because the costs were incurred prior to issuance of the RFP. Finally, the agency objects to payment of \$8,705 in legal fees incurred in connection with establishing GOV's ownership interest in the property that it offered. GOV, however, withdrew its claim for that cost (along with additional legal fees of \$2,280), so the agency's objection is academic in light of that withdrawal.

Proposal Costs Incurred Prior to the Issuance of the RFP

The VA objects to the payment of \$81,000 in costs associated with responding to an expression of interest that was issued prior to the time when the agency issued the RFP. GOV's Cost Claim Comments, exh. 2, Agency Request for Expressions of Interest. The record shows that GOV retained the services of a firm called Cambridge Development Group LLC to assist it in responding to the expression of interest. Cambridge prepared GOV's response to the agency's expression of interest, *id.* exh. 3, Cambridge Expression of Interest, and engaged in communications with the agency after submitting that response in an effort to clarify questions posed by the agency. *Id.*, exh. 4, Agency Questions to Cambridge. The agency argues that, since these costs were incurred prior to issuance of the RFP, they are not properly reimbursable as costs associated with preparation of the GOV proposal. We agree.

Our Office's authority is limited to recommending that a protester be reimbursed the costs associated with bid or proposal preparation. 31 U.S.C. § 3554(c)(1)(B); *Lockheed Martin Systems Integration--Owego--Costs*, B-287190.5, Mar. 20, 2002, 2002 CPD ¶ 49 at 3. Section 31.205-18 of the Federal Acquisition Regulation (FAR) defines bid and proposal costs as costs incurred in preparing, submitting, and supporting bids and proposals on potential government contracts. In contrast, the FAR defines "direct selling costs" as follows:

Direct selling efforts are those acts or actions to induce particular customers to purchase particular products or services of the contractor. Direct selling is characterized by person-to-person contact and includes such efforts as familiarizing a potential customer with the contractor's products or services, conditions of sale, service capabilities, etc. It also includes negotiation, liaison between customer and contractor personnel, technical and consulting efforts, individual demonstrations, and any other efforts having as their purpose the application or adaptation of the contractor's products or services for a particular customer's use.

FAR 31.205-38(b)(5). Where an agency merely seeks information relating to the suitability of a firm's products or services, but has not actually issued a solicitation for proposals or otherwise led a firm to believe that a contract would be awarded as a result of the agency's inquiries, any expenses incurred in connection with activities engaged in by the firm cannot be characterized as bid or proposal preparation costs. *Lockheed Martin Systems Integration--Owego--Costs*, *supra*. Rather, such costs are more appropriately characterized as direct selling costs, and are not properly reimbursable as bid or proposal preparation costs. *Id.*; FAR 31.205-38(b)(5).

Here, the agency's request for expressions of interest was clear on its face and provided as follows:

Notice: This advertisement is a notice of a potential opportunity. This advertisement is not a solicitation for offerors, nor is it a request for proposals. . . . **Respondents are advised that the Government**

assumes no responsibility to award a lease based upon responses to this advertisement.

GOV's Cost Claim Comments, exh. 2, Agency Request for Expressions of Interest, at 1. The agency therefore was clear that, in issuing the notice seeking expressions of interest, it was not soliciting proposals and did not intend to award a lease based on responses to the notice.

In addition, the record shows that all of the services provided by Cambridge were rendered before the date the RFP was issued, and all of the costs associated with Cambridge's work were incurred and billed prior to that date. GOV's Agency-Level Claim, exh. 4, Cambridge Agreement and Invoices, at 10, 12. Accordingly, we conclude that these costs were incurred as direct sales costs rather than as proposal preparation costs. We therefore agree with the agency that these costs are not properly reimbursable as proposal preparation costs.

Proposal Costs the Agency Maintains May Not Have Been Incurred

Finally, the agency objects to the payment of \$15,000 in costs claimed in connection with proposal preparation support services. GOV claims a total of \$75,000 based on a contract between DABS 551 and The Hamstra Group, Inc. GOV Agency-Level Claim, exh. 5, The Hamstra Group Contract. A review of that contract shows that it contemplated the payment of a total sum of \$75,000 to be paid in three installments, \$25,000 payable upon signing the agreement, \$35,000 payable upon submission of the initial proposal and \$15,000 payable upon "first Best and Final Submission." *Id.* at 2. The agency argues that, because revised proposals were never solicited, it should not be required to pay the final \$15,000 installment on that contract.

GOV responds that the contract was a fixed-price agreement that required payment of the entire sum of \$75,000 and, although payment was to be made in three installments, it actually was required to pay the full amount under the terms of the contract. GOV also points out that the reason we sustained its protest was precisely because the agency failed to engage in meaningful discussions which, by extension, would necessarily have included soliciting and obtaining final proposal revisions. GOV maintains that the agency should not be able to avoid paying the amount at issue because of its improper actions. Finally, GOV points out that, even though the agency did not ultimately solicit final proposal revisions, GOV nonetheless engaged in extensive proposal preparation activities after submission of its initial proposal, preparing a cultural impact study, and a temporary parking lot design in response to VA's inquiries that were made after submission of initial proposals.

We conclude that the \$15,000 is properly reimbursable to GOV. The agency has not suggested or shown that GOV was not contractually bound to pay the full amount due under the contract, or that it was otherwise somehow excused from the contractual obligation with The Hamstra Group. The record also supports GOV's representation that it engaged in post-initial-proposal preparation activities in response to the agency's inquiries. AR, exh. 37, Temporary Parking Lot Design Plan. We also agree that the

decision by the agency to not solicit final proposal revisions was improper, given the fact that it had engaged in discussions with the offerors. See FAR 15.307(b) (agencies are required to afford offerors an opportunity to submit final proposal revisions at the conclusion of discussions). Given these circumstances, we conclude that entire \$75,000 amount is properly reimbursable as a proposal preparation cost.

Bid Protest Costs

We turn now to the agency's objections relating to GOV's bid protest costs. These objections relate to payment of certain legal fees incurred by GOV in connection with filing and pursuing its protest. The record shows that GOV originally claimed legal fees incurred by three different law firms in connection with filing and pursuing its protest, and the agency objects to some or all of the requested costs from each firm based on a variety of reasons. We discuss the disposition of the legal fees by law firm below.

Wiley Rein LLP Costs

The agency objects to payment of certain legal costs incurred in connection with the services provided by the law firm of Wiley Rein LLP for several reasons. First, the agency objects to four billing entries for costs incurred before the date GOV's initial protest was filed.⁶ GOV Agency-Level Claim, exh.12, Wiley Rein Invoice No. 1580221, at 2. Each entry in the firm's bill to which the agency objects is identified as work performed in preparing to file the protest. For example, one such entry states that the costs were incurred to: "Review and analyze VA Request for Lease Proposals, Unsuccessful Offeror Notification, and debriefing in preparation for client phone call re potential protest." *Id.* The agency maintains that because these costs were incurred prior to the filing of GOV's protest, and because they make reference to a "potential protest," the costs were not incurred in connection with GOV's filing and pursuit of the protest.

We find no basis for the agency to refuse to reimburse these costs. All of the costs in question were incurred in connection with activities of protester's counsel that led directly to the filing of GOV's protest with our Office. We conclude that the costs at issue here are more analogous to situations where the costs were incurred outside of the dates between when the protest was filed and when we issued our decision, but were nonetheless properly related to filing and pursuing a protest.

For example, in *Price Waterhouse--Costs*, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 10, we found reimbursable certain costs associated with time spent by counsel analyzing our decision and explaining it to the client, even though those costs were incurred after the conclusion of our bid protest process. See also *Armour of America*,

⁶ The agency's objection relates to four entries for a total of 15.75 hours of time spent by three different Wiley Rein lawyers that are each billed at different hourly rates. The total amount at issue is \$12,150.

Inc.--Costs, B-237690.2, Mar. 4, 1992, 92-2 CPD ¶ 292 at 9-10 (costs incurred in connection with obtaining the advice of counsel in interpreting our decision were reimbursable, even though the costs were incurred after the conclusion of the bid protest process). In these cases, we found these costs reimbursable even though, strictly speaking, they were not incurred in active pursuit of the protest. Instead, the costs were incurred in connection with the final steps reasonably taken at the conclusion of the protest process.

Here, the agency does not challenge the reasonableness of the costs that were incurred with the law firm shortly before the protest was filed, but argues only that, because they were incurred to obtain the advice of counsel in connection with a “potential protest,” they necessarily should be unallowable.⁷ However, the agency has not explained, and it is not apparent, how counsel for the protester would actually prepare the protest without first spending some reasonable amount of time engaged in activities associated with familiarizing themselves with the facts and circumstances surrounding the acquisition. Similar to the decisions cited above, GOV was obtaining the advice of counsel before the initiation of the protest process, rather than after the conclusion of the protest process, but the costs nonetheless are directly related to GOV filing and pursuing its protest. Accordingly, we conclude that such costs are properly reimbursable because they were clearly incurred in connection with GOV’s filing and pursuing its protest.⁸

⁷ The sole basis for the VA’s objection appears to be that the words “potential protest” appear in these entries. For reasons that the VA has not explained, the agency does not object to a billing entry for costs incurred on October 2 that references “potential protest grounds.”

⁸ As a final matter, we point out that the agency, in support of this objection, has directed our attention to our decision in *Blue Rock Structures, Inc.--Costs*, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190 at 6, where we disallowed the costs associated with an employee of the protester attending a debriefing because we concluded that those costs were incurred in connection with ascertaining whether the firm had a basis for protest. However, there are important factual differences between this case and the *Blue Rock Structures, Inc.* case that lead us to conclude that the finding in *Blue Rock Structures, Inc.* is inapplicable here. First, the *Blue Rock Structures, Inc.* decision involved reimbursement of a company employee’s expenses, not the expenses incurred by attorneys representing the protester engaged in activities directly relating to filing and pursuing the protest. Second, the costs were incurred in connection with the employee’s attendance at a debriefing held shortly after award of the contract. Attendance at the debriefing is not an activity relating to filing and pursuing the protest but, rather, merely an opportunity to learn about the agency’s award decision and to investigate whether there may be a basis to protest. Here, the costs at issue relate directly to the protest-related activities of GOV’s attorneys.

Second, the agency objects to the costs associated with three billing entries because it maintains that the activities at issue were not activities in pursuit of the protest. GOV Agency-Level Claim, exh.12, Wiley Rein Invoice No. 1580221, at 5-6. Two of the three entries are for costs incurred by one Wiley Rein attorney to prepare for and participate in telephone conferences with the client and co-counsel. The third entry is for the same attorney to review and analyze decisions of the U.S. Court of Federal Claims and the Court of Appeals for the Federal Circuit relating to seeking injunctive relief in the event that our Office did not recommend termination of the lease awarded to Carnegie.⁹ GOV Agency-Level Claim, exh.12, Wiley Rein Invoice No. 1580221, at 5-6.

We conclude that the costs associated with all three entries are not properly reimbursable as costs associated with GOV filing and pursuing its protest. The first two entries are not sufficiently detailed in describing the activities for which GOV was billed. For example, one entry for services provided on October 15 states only as follows: "Prepare for and participate in telephone conversation [w]ith [client and co-counsel] and confer with [other co-counsel] re same."¹⁰ GOV Agency-Level Claim, exh.12, Wiley Rein Invoice No. 1580221, at 5. These two entries do not describe the activity in sufficient detail for us to determine that they involved protest-related activities. See *Ryan P. Slaughter--Costs*, B-411168.4, Dec. 14, 2015 2015 CPD ¶ 391 at 3 (protesters are required to adequately document protest-related costs, and such documentation must show that the costs are properly attributable to filing and pursuing the protest). Under the circumstances, we conclude that these costs are not reimbursable.

We also agree that the third entry is not properly reimbursable, but for a different reason. As noted, the costs were incurred in connection with performing research relating to the case law of different forums. Because the costs were incurred in connection with performing research that had as its purpose pursuing legal action in a different forum in the event of a particular outcome at our Office, the costs were not incurred in connection with GOV's filing and pursuing its protest at our Office. We therefore conclude that the cost incurred for that activity is not properly reimbursable as a cost incurred by GOV in filing and pursuing its protest with our Office.

Third, the agency objects to an additional series of entries for two Wiley Rein attorneys because, according to the agency, the entries also are so heavily redacted that it cannot determine whether the costs are protest related.¹¹ GOV Agency-Level Claim, exh.12,

⁹ The first two entries are for a total of 1.75 hours at a rate of \$840 per hour, and the third entry is for a total of 2 hours at the same rate. The total amount at issue is \$3,150.

¹⁰ We have redacted the names of individuals identified in the entry.

¹¹ The agency objects to a total of 10 billing entries, nine entries for one attorney totaling 8 hours billed at a rate of \$1,170 an hour (amounting to \$9,360 in costs); and one entry for a second attorney for 1.5 hours billed at a rate of \$840 (amounting to \$1,260 in costs) for a total amount at issue of \$10,620.

Wiley Rein Invoice No. 1580221, at 5; Invoice No. 1584794, at 3,-5; Invoice No. 1588794, at 2; Invoice No. 1592315, at 2.

We find these costs were incurred in connection with GOV filing and pursuing its protest. As noted, where a protester seeks to recover the costs associated with filing and pursuing its protest, those costs must be adequately documented and the documentation must show that the costs are properly attributable to filing and pursuing the protest. *Ryan P. Slaughter--Costs, supra*. Although the agency is correct that the entries are partially redacted, it is nonetheless clear that the billing entries are for costs incurred for protest-related work.

For example, one of the entries provides as follows: "Review and analysis of new TEB [technical evaluation board] report and confer with [co-counsel] re potential supplemental protest based on same; telephone conversation with [co-counsel] and [client] re [REDACTED] and e-mail to [client] re same." GOV Agency-Level Claim, exh. 12, Wiley Rein Billing Invoice No. 1584794, at 5.¹² While the entries challenged by the agency do include redactions, the activities in question are clearly protest-related. We therefore conclude that these costs are properly reimbursable as costs incurred in connection with GOV filing and pursuing its protest.

Finally, the agency objects to one cost incurred by a Wiley Rein attorney because the billing entry, in addition to referencing protest-related activities, also makes reference to a potential media campaign.¹³ GOV Agency-Level Claim, exh.12, Wiley Rein Invoice No. 1584794, at 5. The agency argues that, because this billing entry aggregates allowable and unallowable costs, the entire cost is not properly reimbursable as a protest-related cost. We agree.

Where a claim aggregates allowable and unallowable costs, and we cannot tell from the record which portion of the claim is allowable, the entire element of the claim is unallowable. *System Studies & Simulation, Inc.--Costs*, B-409375.5, May 8, 2015, 2015 CPD ¶ 155 at 3-4. Here, because the billing entry aggregates allowable protest-related costs with unallowable costs associated with pursuing a potential media campaign, and because we cannot tell from the entry which portion of the cost is allowable, we conclude that the entire amount of this element of the claim is not properly reimbursable as a cost incurred in connection with GOV filing and pursuing its protest.

¹² The original of this document has a black mark obscuring some of the text. We have inserted the word 'redacted' in the quotation where the black mark appears and also have redacted the names of the individuals identified in this quotation.

¹³ The billing entry in question is for 1.75 hours for one attorney billed at a rate of \$585 per hour; the total amount at issue is \$1,023.75.

Curran Legal Services Group, Inc.

The record shows that GOV claimed costs incurred by one attorney at the Curran Legal Services Group, Inc., and the agency objects to certain of the claimed costs. First, the agency objects to six entries from the Curran bill because the agency maintains that none of the work performed was in pursuit of GOV's protest.¹⁴ GOV Agency-Level Claim, exh. 13, Curran Legal Services Group Invoice N0 232, at 2, 4.

We have reviewed these six entries and agree with the agency that, with respect to five of the six entries, the work described either was clearly not performed in connection with GOV's filing and pursuing its protest, or is described so vaguely that we are unable to determine conclusively that the work was performed in connection with GOV filing and pursuing its protest. We conclude that the sixth entry is properly reimbursable.

For example, one of the five entries for work performed on October 16, 2020, states as follows: "Research: Search files for Lease Amendment firming up soft term (often in settlement context) and request final such LAs [lease amendments] from two clients (fully executed); Research FAR and GSA [General Services Agency] Leasing Desk Guide for option exercise guidance and save to client file." GOV Agency-Level Claim, exh. 13, Curran Legal Services Group Invoice No 232, at 4. GOV has not explained what this work had to do with filing and pursuing its protest, and it is not evident from a reading of the entry how this work was related to filing and pursuing the protest. We therefore agree with the agency that the costs incurred in connection with the five billing entries identified by the agency are not properly reimbursable as protest-related costs.

With respect to the sixth entry, the work in question was directly related to filing the protest because it was performed in connection with gathering information relating to the status of the agency's award decision and initiating work on the protest. The entry,¹⁵ provides as follows: "Research: Research Gov't databases to discern status of award, download relevant documents and prepare same to send to [client] and attorney team mates." GOV Agency-Level Claim, exh. 13, Curran Legal Services Group Invoice No. 232, at 2.¹⁶ This work was clearly performed during the initial stages of preparing GOV's protest. We therefore conclude that this cost is properly reimbursable.

¹⁴ The six entries are for the services of a single attorney at Curran totaling 3.62 hours, billed at \$450 per hour for a total of \$1,629.

¹⁵ The entry in question was for 1.45 hours of work performed on October 3 at a rate of \$450 per hour for a total amount of \$652.50.

¹⁶ As we did above, we have redacted the name of the GOV employee in question.

Second, the VA argues that six other entries from the Curran legal bill should not be reimbursed because they aggregate allowable and unallowable costs.¹⁷ GOV Agency-Level Claim, exh. 13, Curran Legal Services Group Invoice N0 232 at 6; Invoice No. 277 at 1-2.

We have reviewed all of the billing entries identified by the agency and agree that they are not properly reimbursable as costs incurred by GOV in filing and pursuing its protest. As noted, where a claim aggregates reimbursable and unreimbursable costs, and we cannot tell from the record which portion of the claim is reimbursable, the entire element of the claim is unreimbursable. *System Studies & Simulation, Inc.--Costs supra*.

For example, one entry from November 10 states as follows: "Phone call: Call from [client] concerning options and determination of direction for Protest and discuss lease extension (ending in October 2021) with the VA." GOV Agency-Level Claim, exh. 13, Curran Legal Services Group Invoice No. 232, at 6. While this entry makes reference to GOV's protest, it also makes reference to discussing an extension of the lease that was previously in place for the facility,¹⁸ a topic clearly unrelated to GOV filing and pursuing its protest. Under these circumstances, we conclude that the costs associated with these six entries identified by the agency are not properly reimbursable as costs incurred by GOV in filing and pursuing its protest.

Third, the agency has identified 14 additional entries from the Curran legal bill as so heavily redacted that they contain insufficient information for the agency to determine whether the work was performed in connection with GOV filing and pursuing its protest.¹⁹ GOV Agency-Level Claim, exh. 13, Curran Legal Services Group Invoice No. 232, at 3, 4, 6, 7; Invoice No. 277 at 1-2. We agree with the agency about these entries as well.

As noted, where a protester seeks to recover the costs associated with filing and pursuing its protest, those costs must be adequately documented and the documentation must show that the costs are properly attributable to filing and pursuing the protest. *Ryan P. Slaughter--Costs, supra*.

Here, as noted by the agency, the billing entries identified are so heavily redacted that we cannot determine from the record if the claimed costs were incurred by GOV in filing and pursuing its protest. For example, one entry from November 10 provides only as

¹⁷ The six entries are for the services of a single attorney at Curran totaling 2.32 hours billed at \$450 per hour for a total of \$1,044.

¹⁸ The facility offered by GOV during the competition was previously the location of the VA facility.

¹⁹ The 14 entries are for the services of a single attorney at Curran totaling 4.95 hours billed at a rate of \$450 per hour for a total of \$2,227.50.

follows: “Review: Provide return email to [client] concerning no comments [redacted].” GOV Agency-Level Claim, exh. 13, Curran Legal Services Group Invoice No. 232, at 6. This entry--and the other 13 billing entries identified by the agency--is so cryptic that we are not able to determine whether this cost was incurred by GOV in filing and pursuing its protest. We therefore conclude that the costs associated with the 14 identified entries are not properly reimbursable as costs incurred in connection with GOV filing and pursuing its protest.

Finally, the agency argues that an additional 12 billing entries from the Curran legal bill should be disallowed because they were not for work in pursuit of GOV’s protest.²⁰ GOV Agency-Level Claim, exh. 13, Curran Legal Services Group Invoice No. 232 at 4, 7, Invoice No. 277 at 1-2.

We have reviewed the 12 entries and conclude that some of the costs properly are reimbursable while other costs are not. Of the 12 billing entries, six are for costs incurred in connection with services provided after GOV filed its initial and first supplemental protests, but before the VA made any filings. The VA argues that these costs are not properly reimbursable because they were not incurred in connection with filing and pursuing the protest, and instead were incurred during a period when GOV’s counsel would not ordinarily be required to take action on the protest. However, these entries reflect activities related to pursuing the protest such as monitoring the docket for the case, preparing and submitting protective order applications, and reviewing the protective order applications from other attorneys working on the case such as the intervenor’s counsel. GOV Agency-Level Claim, exh. 13, Curran Legal Services Group Invoice No. 232, at 4. Inasmuch as these activities are a necessary part of filing and pursuing the protest, we conclude these costs are properly reimbursable.

Two of the entries are for costs incurred in connection with services provided on November 18 and 19. GOV Agency-Level Claim, exh. 13, Curran Legal Services Group Invoice No. 232, at 7. Those dates were after the protester filed comments and a supplemental protest on November 16, but before the agency filed a response to the supplemental protest on November 23. Once again, the agency objects to these costs because, according to the agency, they were incurred at a time when such costs ordinarily would not be incurred in connection with the protest.

Regardless of the time when these costs were incurred, we conclude that these costs are otherwise not properly reimbursable because we cannot tell what services were provided. For example, an entry for November 19 states only: “Correspondence: Note [co-counsel] email update and [client] response to put off any call until Monday.” GOV Agency-Level Claim, exh. 13, Curran Legal Services Group Invoice No. 232, at 7. Because we cannot tell what activities were involved with these billing entries, we

²⁰ The 12 entries are for the services of a single attorney at Curran totaling 4.39 hours billed at a rate of \$450 per hour for a total of \$1,975.50.

conclude that the costs are not adequately documented and therefore not properly reimbursable. *Ryan P. Slaughter--Costs, supra.*

Finally, four entries are for costs incurred in connection with services performed well after we issued our decision on January 13. GOV Agency-Level Claim, exh. 13, Curran Legal Services Group Invoice No. 277, at 2. These four entries are for services performed on January 21 and 26. Although protesters are entitled to the costs associated with having counsel analyze and explain our decision, *Price Waterhouse--Costs, supra*, these entries do not describe such activities. As such, the costs associated with these entries are not properly reimbursable.

In sum, we conclude that six of the remaining 12 entries identified by the agency are for costs that are properly reimbursable, while six of the entries are for costs that are not properly reimbursable.

Cobb Cole P.A.

Finally, the agency filed an objection to payment of legal fees incurred by a third law firm, Cobb Cole P.A. The record shows that GOV initially claimed \$2,914.50 in protest-related costs incurred by Cobb Cole. GOV Agency-Level Claim at 8 and exh. 14, Cobb Cole Invoices. However, in its claim filed with our Office GOV did not claim these costs. Accordingly, we need not consider these costs.

Costs Associated with Pursuing the Cost Claim

Finally, GOV requests that we recommend that it be reimbursed the costs associated with pursuing its cost claim with our Office. Our Bid Protest Regulations, 4 C.F.R. § 21.8(f)(5), provide that we may recommend reimbursement of the costs associated with pursuing a claim before our Office. This provision is designed to encourage agencies to expeditiously and reasonably consider a protester's claim for costs. *Shaka, Inc.--Costs*, B-405552.2, May 17, 2012, 2012 CPD 160 at 5.

Here, the record shows that, of the \$269,804 GOV initially sought in proposal preparation costs, the agency offered to reimburse GOV just \$24,688. As for GOV's protest costs, the record shows that GOV initially sought \$209,314.25, and the agency offered to reimburse GOV \$173,042.50. As discussed above, while certain of the agency's objections are reasonable, many of them are not. Under the circumstances, we conclude that GOV should be reimbursed the costs associated with pursuing its claim with our Office.

RECOMMENDATION

As noted above, the record here includes various inconsistencies in the amounts claimed by GOV. We recommend that the agency reimburse GOV its proposal

preparation and bid protest costs in a manner that is consistent with the discussion above; we leave it to the parties to determine the precise amount of the claim.

The request for proposal preparation and protest costs is granted, in part, and denied, in part.

Edda Emmanuelli Perez
General Counsel