



United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Shaka, Inc.--Claim for Costs

**File:** B-405552.2

**Date:** May 17, 2012

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Dirk D. Haire, Esq., Fox Rothschild LLP, for the protester.  
William A. Lubick, Esq., Department of the Army, for the agency.  
Nora K. Adkins, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. GAO recommends that protester's claim for attorneys' fees be reimbursed where the attorneys' hours charged are documented and reasonable, and the agency has not identified any specific hours as excessive or articulated a reasoned analysis as to why payment for such hours should be disallowed.
  2. Attorneys' fees incurred by subcontractor of the protester in pursuit of the protest may be reimbursed where the attorneys' fees were incurred in concert with, and on behalf of the protester pursuant to an agreement between the protester and subcontractor to split the legal costs of pursuing the protest.
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### DECISION

Shaka, Inc., of Jeannette, Pennsylvania, requests that we recommend that it be reimbursed in the amount of \$22,275 for its costs of filing and pursuing its protest challenging the rejection of its bid by the Department of the Army, U.S. Army Corps of Engineers under invitation for bids (IFB) No. W911WN-11-B-0003, for the replacement of bridge bearings and related services on the Emsworth Locks and Dam main channel service bridge on the Ohio River in Pennsylvania.

We recommend reimbursement in the requested amount of \$22,275, plus Shaka's costs of pursuing this claim at our Office.

### BACKGROUND

The agency issued the IFB, which required bidders to submit an acceptable bid bond on a standard form (SF) 24. Shaka submitted the low bid. The agency's

review of Shaka's bid showed that Shaka submitted a bid bond on the appropriate form (SF 24), with Shaka listed as the principal, with the appropriate accompanying power of attorney documents, and with a surety, Liberty Mutual Insurance Company, who was listed as an approved surety. The agency concluded that "[on] its face, the bid bond was acceptable." Agency Report (AR) at 2. Nevertheless, the agency found Shaka's bid nonresponsive because Shaka had submitted, along with its bid and bid bond, a "Bid, Performance, and Payment Bond Disclosure" letter signed by representatives of Shaka and its intended subcontractor, Joseph B. Fay Co. (Fay), which the agency concluded conditioned the surety's obligation to the Government on a contractual relationship between Shaka and Fay. Id. at 3.

We sustained Shaka's protest, finding that the agency's decision to reject Shaka's bid as nonresponsive was in error because Shaka's disclosure letter did not limit the liability of the surety, and in no way altered the surety's obligation to the Government under the bid bond. We recommended that the agency terminate its award and make award to Shaka, if otherwise responsible and eligible, as the lowest evaluated bidder. We also recommended that the agency reimburse Shaka the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. See Shaka, Inc., B-405552, Nov. 14, 2011, 2011 CPD ¶ 252 at 4.

Shaka timely submitted its certified claim for costs with the agency claiming a total of \$33,320.48 in costs: (1) \$15,450 for 47.7 hours of attorney time billed to Shaka, (2) \$12,769.50 in attorneys' fees for 45.5 hours of attorney time billed to Fay, and (3) \$5,100.98 for Shaka's labor costs incurred in assisting outside counsel in pursuing the protest. Shaka provided detailed documentation supporting each of its claimed costs.

In response, the agency stated that it was not authorized to pay attorneys' fees incurred for filing a protest at a rate above \$150 per hour in accordance with the statutory cap imposed by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(2)(B) (2006). The record does not show that the agency raised any other concerns with regard to Shaka's claimed costs.

In response, Shaka correctly noted to the agency that the cap in CICA on attorneys' fees is not applicable to small businesses. Shaka therefore requested that the agency reimburse the portion of attorneys' fees invoiced to Shaka, a small business, at each attorney's full rate and the portion of attorneys' fees incurred by Fay, a large business, at \$150 per hour. The agency declined to accept Shaka's revised claim stating that it would "need to request an opinion from GAO to pay [the full rate for Shaka's attorneys' fees] since it's over \$150/hour." Agency Email to Shaka (Jan. 23, 2012) at 1.

Shaka then filed its claim for costs with our Office requesting that we recommend the Army reimburse Shaka a total of \$27,375.98: \$15,450 for 47.7 hours of attorney time invoiced to Shaka at each attorney's full billing rate; \$6,825 for 45.5 hours of

attorney time invoiced to Fay at the \$150 per hour rate;<sup>1</sup> and \$5,100.98 for labor costs.<sup>2</sup>

In its report responding to Shaka's claim, the agency no longer disagrees with the claimed hourly rates of the attorneys, but raises certain other concerns with the claimed costs, which the agency had not previously asserted. We discuss the agency's new objections to Shaka's claim below.

## DISCUSSION

The agency first argues the claimed attorneys' hours are excessive and duplicative because the protest issue was straightforward and simplistic in nature and should not have required 93 hours of attorneys' time. We find this argument is meritless.

Our Office will examine the reasonableness of 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, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 5. A recommendation that an agency pay a protester's costs is intended to relieve protesters, with valid claims, of the burden of vindicating the public interests which Congress seeks to promote; it is not intended as a reward to prevailing protesters or as a penalty imposed upon the government. W.S. Spotswood & Sons, Inc.--Claim for Costs, B-236713.3, July 19, 1990, 90-2 CPD ¶ 50 at 3. 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. Pulau Elecs. Corp.--Costs, B-280048.11, July 31, 2000, 2000 CPD ¶ 122 at 6. An agency simply concluding that the hours claimed are excessive or suggesting there may be a duplication of effort is inadequate to justify denying a claim for protest costs. Id.

Our 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, and we find no basis to question Shaka's claim in this regard. The record shows that Shaka submitted detailed billing statements, which included the description of the work performed by each attorney. The agency has not asserted that any specific charge is inappropriate, and does not question whether the

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<sup>1</sup> Shaka did not dispute that the attorneys' fees invoiced to Fay are subject to the \$150 per hour limitation. Shaka Request at 2 n.1.

<sup>2</sup> After the agency disputed the claimed labor costs in its report, Shaka withdrew this portion of its claim "in the interest of resolving this dispute," even though Shaka states that the agency had never questioned, or previously asked for further documentation to support, this aspect of its claim. Shaka's Comments at 4.

attorneys actually worked the hours claimed.<sup>3</sup> Under the circumstances, we find the agency's assertions that Shaka's claimed attorney hours were excessive and duplicative are unsupported, and find that these arguments therefore are insufficient to justify denying or reducing Shaka's claim.<sup>4</sup> See Pulau Elecs. Corp.--Costs, supra. Furthermore, we do not agree with the agency that the issue raised by the protester was a narrow, simplistic, and uncomplicated legal issue that did not justify the hours claimed, particularly given that this was a case of first impression for our Office.<sup>5</sup>

The agency also now argues that Shaka's cost claim for the attorneys' fees incurred by Fay are not reimbursable because Fay was not a party to the protest. This argument also has no merit.

We have addressed this specific point in TMC, Inc.--Claim for Costs, B-230078.2, B-230079.2, Jan. 26, 1990, 90-1 CPD ¶ 111. As in TMC, this is not a case where the costs were incurred by a potential subcontractor acting independently of the interested party, Shaka, the actual or prospective offeror. Rather, we find the record shows that the costs were incurred by Fay acting in concert with, and on behalf of Shaka, in order to provide Shaka with legal assistance in the protest. In this regard, the record shows that Shaka and Fay had an agreement to split the legal costs of pursuing the protest, that the legal fees incurred by Fay were in fact for the pursuit of Shaka's protest, and that Shaka will reimburse the amount paid by Fay in pursuit of this protest when the amounts are recovered by Shaka. In these circumstances, we believe the purpose of the statutory provision allowing recovery of protest costs--to relieve parties with valid claims of the burden of vindicating the public interest--is best effectuated by finding Shaka entitled to recover the costs incurred by Fay in concert with and on behalf of Shaka in pursuing this protest. Id. at 3.

Thus, we recommend payment of \$22,275 of Shaka's claimed costs: \$15,450 for 47.7 hours of attorney time invoiced to Shaka at each attorney's full billing rate, and \$6,825 for 45.5 hours of attorney time invoiced to Fay at the \$150 per hour rate.

Shaka also requests reimbursement for the costs of pursuing this claim before our Office. Our Bid Protest Regulations, 4 C.F.R. § 21.8(f)(2), provide that we may

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<sup>3</sup> Shaka has also provided proof that these attorneys' fees have been paid.

<sup>4</sup> As noted above, the agency no longer disputes the attorneys' claimed hourly rates.

<sup>5</sup> The agency's arguments about the simplicity of this issue are seemingly belied by the fact that it did not reasonably interpret applicable law in rejecting Shaka's bid and responding to the protest.

recommend reimbursement of the costs of pursuing a claim before our Office. See CNA Indus. Eng'g, Inc.--Costs, B-271034.2, Nov. 20, 1997, 97-2 CPD ¶ 149 at 7. 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, B-266327.2, Mar. 31, 1997, 97-1 CPD ¶ 125 at 4. Here, given the agency's failure to reasonably consider Shaka's claim, we find that the protester may recover the reasonable costs of pursuing its claim at our Office.

The request is granted.

Lynn H. Gibson  
General Counsel