



**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Tri Tool, Inc.--Entitlement to Costs

**File:** B-265649.4

**Date:** September 9, 1997

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Paul C. Bingaman for the protester.

Granette Trent, Esq., Department of Justice, for the agency.

Robert C. Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Reasonable bid preparation costs incurred prior to issuance of solicitation may be recovered where record shows that they were incurred directly in anticipation of competing for the specific contract eventually awarded under the solicitation.

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## DECISION

This Office has been requested by the parties to recommend the amount that the Department of Justice should pay Tri Tool, Inc. for the costs of preparing its bid under invitation for bids (IFB) No. 1PI-B-1498-95 and for the cost of filing and pursuing its sustained protest, Tri Tool, Inc., B-265649.2, Jan. 22, 1996, 96-1 CPD ¶ 14. The IFB covered the acquisition of pipe cutting components to be assembled by Federal Prison Industries, Inc., Department of Justice, for the Department of the Army.

## BACKGROUND

Our Office sustained Tri Tool's protest against the award of a contract to E.H. Wachs Company because the protester's low bid was rejected for failure to meet salient characteristics which were not set forth in the IFB. Based on status advice provided by the agency, our decision recommended termination of Wachs's contract, resolicitation of the requirements under revised specifications, and reimbursement of Tri Tool's costs of filing and pursuing its protest. Because we were later informed by the agency that its earlier advice was in error and that performance had, in fact, been completed prior to the issuance of our initial decision, we modified the recommended remedy to include bid preparation costs. Tri Tool, Inc.--Modification of Remedy, B-265649.3, Oct. 9, 1996, 96-2 CPD ¶ 139 at 2.

The parties have exchanged correspondence concerning Tri Tool's claim and report that they are unable to reach an agreement regarding the amount to which the

protester is entitled. Tri Tool claims a total of \$44,176, broken down as follows: legal fees of \$679; lost anticipated profits of \$21,890; bid preparation costs of \$17,495; and bid protest costs of \$4,112. The agency has accepted without question the claimed \$679 for legal fees and has completely disallowed the claim for anticipated profits. Further, the agency has adjusted the claimed costs for bid preparation and filing and pursuing the protest downward from \$17,495 to \$6,186 and \$4,112 to \$2,357, respectively. As a result of its analysis, the Department of Justice reports that it is prepared to pay Tri Tool \$9,222. As discussed below, we recommend that Justice reimburse Tri Tool a total of \$14,233.

#### LEGAL FEES AND ANTICIPATED PROFITS

In light of the agreement between the parties regarding the protester's documented legal fees, we need not discuss that aspect of the claim further. With respect to the \$21,890 claim for anticipated profits, the agency correctly disallowed it entirely because lost anticipated profits may not be recovered as part of protest costs, even in the presence of wrongful agency action. Gulf Elec. Constr. Co., Inc.--Claim for Costs, B-235635.2, Jan. 5, 1990, 90-1 CPD ¶ 19 at 2.

#### BID PREPARATION COSTS

With respect to bid preparation costs, Tri Tool claimed 186.0 burdened labor hours for eight individuals in engineering, sales and management capacities (with the amount claimed for each position reflecting undisputed burdened rates), as follows:

Position	Hours Claimed	Total Amount Claimed
Engineer 1	43.0	\$ 2,566
Engineer 2	13.5	\$ 1,258
Engineer 3	5.5	\$ 307 (not in dispute)
Sales 1	86.0	\$10,728
Sales 2	10.0	\$ 524 (not in dispute)
Manager 1	20.0	\$ 1,169
Manager 2	6.0	\$ 735
Manager 3	2.0	\$ 208
<b>Total</b>	<b>186.0</b>	<b>\$17,495</b>

In support of the number of hours claimed, the protester submitted a "Chronology of Events," indicating the date various tasks were performed, the nature of the

tasks, and the number of hours spent performing the tasks for each employee position.

A protester seeking recovery of its bid preparation costs must submit sufficient evidence to support its claim that those costs were incurred and are properly attributable to bid preparation. The amount claimed may be recovered to the extent it is adequately documented and reasonable. See Stocker & Yale, Inc.--Claim for Costs, 72 Comp. Gen. 193, 196 (1993), 93-1 CPD ¶ 387 at 4.

With respect to Engineer 1, the agency reduced the number of hours claimed from 43.0 to 29.0 because the chronology showed that 14 hours represented activities performed prior to the issuance of the solicitation. We have never adopted a "bright line" test which necessarily renders all costs incurred prior to the issuance of a solicitation unrecoverable. Rather, we look to see whether, under the circumstances of an individual procurement, the claimed costs were incurred in anticipation of competing for the specific contract at issue. See Stocker & Yale, Inc.--Claim for Costs, *supra*, at 4-5 (QPL qualification costs, although necessary for competing on the contract at issue, were not allowed as proposal preparation costs because the record did not show that they were incurred solely for the purpose of competing for the contract).

Here, the record supports the protester's position that the disputed costs were incurred after it learned of the upcoming procurement and that they were principally related to traveling to an Army facility in Virginia to obtain specifications for the items eventually purchased under the IFB and to study existing equipment and accessories in order to understand how to design equipment that would meet the Army's needs. Accordingly, the 14 hours disallowed by the Department of Justice are properly attributable to bid preparation for the protested procurement, and we therefore recommend that Tri Tool be reimbursed an additional \$828 for the full \$2,566 claimed for Engineer 1.

With respect to Engineer 2, the agency denied recovery for all 13.5 hours claimed, stating that the documentation did not support the conclusion that the individual's activities were related to bid preparation. We disagree. The chronology submitted by Tri Tool includes handwritten footnotes regarding the activities of the engineer detailing 9 hours spent prior to the submission of the bid performing design and bid review functions. Accordingly, we recommend that Tri Tool be reimbursed \$839 reflecting 9 of the hours disallowed by the agency for Engineer 2. With respect to the remaining 4.5 hours the agency disallowed, although it appears that this engineer performed some of them following the submission of the bid, there is nothing in the record reflecting his participation in the bid preparation process.

With respect to the 86 hours claimed for Salesperson 1, the agency allowed 29 hours, but denied recovery for 26 hours incurred prior to the issuance of the solicitation and 31 hours of costs incurred after the bid was submitted. The 26 pre-

issuance hours are appropriately recoverable because the record shows they were incurred for principally the same activities as those discussed above relating to Engineer 1. Thus, we recommend that Tri Tool be reimbursed for 55 hours (i.e., \$5,861, \$2244 more than the amount allowed by the agency) for Salesperson 1. The remaining 31 hours are not appropriately recoverable as bid preparation costs because they were incurred after the submission of the bid.

With respect to Manager 1 (the Engineering Manager) the agency denied recovery for all 20 hours claimed, stating that the record did not support the conclusion that the individual's activities were related to bid preparation. On the contrary, the record shows that Manager 1 spent 18 hours prior to the submission of the bid reviewing design parameters needed to comply with the Army's needs and working on the bid package. These 18 hours amount to \$1,052 for Manager 1. With respect to the 2 hours disallowed by the agency, the record reflects that these were incurred following the submission of the bid and are therefore not recoverable as bid preparation costs.

With respect to Managers 2 and 3, the agency disallowed the entire amount claimed on the basis that the chronology does not adequately support that their activities were related to bid preparation. The chronology does not list any hours for Manager 2 prior to the submission of the bid. The description of the 2 hours claimed for Manager 3--the Chief Financial Officer--is confusing insofar as the chronology indicates that these hours involved the Engineering and Sales departments (rather than the Chief Financial Officer) working on the bid package. Accordingly, we agree with the agency regarding the costs claim for these individuals, since it is unclear that they are related to preparing Tri Tool's bid.

The amounts discussed above, when added to the amounts not in dispute, total \$11,149, for Tri Tool's recoverable costs for its bid preparation expenses.

#### PROTEST COSTS

With respect to protest costs, Tri Tool claimed 42.5 burdened hours as follows:

Position	Hours Claimed	Total Amount Claimed
Engineer 1	1 .0	\$ 59
Engineer 2	.5	\$ 47
Engineer 3	.5	\$ 28
Sales 1	19.0	\$ 2,370
Sales 2	1.0	\$ 52

Manager 1	2.0	\$ 117
Manager 2	2.0	\$ 245
Manager 3	2.0	\$ 208
Manager 4	14.5	\$ 986 (not in dispute)
Total	42.5	\$ 4,112

The amount claimed for the costs of filing and pursuing a protest may be recovered to the extent that the claim is adequately documented and is shown to be reasonable. At a minimum, claims for reimbursement of expenses must identify and support the amounts claimed for each expense, the purpose for which the expense was incurred and how the expense relates to the protest filed with this Office. Aztec Dev. Co.--Claim for Costs, B-270275.2, Feb. 13, 1997, 97-1 CPD ¶ 73 at 2. Costs incurred filing and pursuing agency-level protests are not allowable, Diverco, Inc.--Claim for Costs, B-240639.5, May 21, 1992, 92-1 CPD ¶ 460 at 4-5, and the costs of pursuing claims before this Office are not allowable where, as here, the agency has expeditiously attempted to resolve the claim. See Manekin Corp.--Claim for Costs, B-249040.2, Dec. 12, 1994, 94-2 CPD ¶ 237 at 6-7.

With the exception of Manager 4, the agency has fully or partially disallowed the hours claimed for each individual, stating that the record does not support a conclusion that they related to participation in the General Accounting Office protest process. We have carefully examined the chronology submitted by the protester and generally agree with the agency. Except as discussed below, the chronology does not show that the activities for which costs are claimed related to the protest process here. (As explained above, to the extent that the claimed costs may arguably relate to Tri Tool's agency-level protest or its claim here, they are not allowable.)

We disagree with the agency with respect to Engineer 2 and restore the \$47 claimed because the record supports his participation in the drafting of the protest. With respect to Salesperson 1, the agency disallowed 8 hours of the 19 claimed, stating that the record only supported the conclusion that 11 hours were related to the protest before this Office. We agree.<sup>1</sup> These amounts, when added to the \$986 not in dispute for Manager 4, total \$2,405 for Tri Tool's reimbursable protest costs.

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<sup>1</sup>We note, however, that the agency apparently erred in calculating the protester's entitlement for this individual to be \$1,371, instead of \$1,372.

## SUMMARY

We recommend that Tri-Tool's claim be paid in the amount of \$679 for legal fees, \$11,149 for bid preparation expenses and \$2,405 for protest costs for a total of \$14,233.

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