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**Comptroller General  
of the United States**

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

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## **Decision**

**Matter of:** PADCO, Inc.--Costs

**File:** B-289096.3

**Date:** May 3, 2002

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Kenneth A. Martin, Esq., and Jennifer C. Adams, Esq., Martin & Adams, for the protester.

Stephanie L. Buser, Esq., U.S. Agency for International Development, for the agency.  
Louis A. Chiarella, 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. Protest challenging reasonableness of the agency's cost realism analysis of the awardee's proposed indirect costs was clearly meritorious where the agency accepted, without any analysis, the awardee's unexplained final proposed rates, which were substantially less than those initially proposed, its historical rates, and its proposed ceiling rates.
  2. General Accounting Office (GAO) recommends that protester be reimbursed the costs of filing and pursuing its initial protest where the agency unduly delayed taking corrective action in response to the initial protest, which was clearly meritorious, until almost 2 months after the initial protest was filed and after submitting a report on the protest; GAO does not recommend the reimbursement of the costs of filing and pursuing supplemental protest grounds, which were clearly severable from the initial protest bases, because the agency did not unduly delay, but took corrective action in response to these protest grounds within 2 weeks of these grounds being raised, before the agency report on the supplemental protest grounds was due.
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### **DECISION**

PADCO, Inc. requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protests challenging the award of a contract to The Louis Berger Group (LBG) under request for proposals (RFP) No. M/OP-01-003, issued by the U.S. Agency for International Development (USAID) for technical support services for the United States-Asia Environmental Partnership Program.

We recommend that USAID reimburse PADCO the reasonable protest costs of filing and pursuing its initial protest.

The RFP contemplated a “best value” award of a cost-plus-fixed-fee contract for a base period of 3 years with one 2-year option. RFP §§ B.1, B.2, M.1(a). The RFP established, in descending order of importance, five non-cost factors: acceptability, institutional capability, past performance, key personnel, and small business subcontracting participation. RFP § M.5(b). The solicitation stated that the combined weight of the evaluation factors, other than cost, was significantly more important than cost. RFP § M.5(a). The RFP also provided for the evaluation of cost realism, and contemplated that proposed costs might be adjusted based on the results of the cost realism evaluation, with the adjusted cost being used in the evaluation of cost. RFP § M.7.

Six offerors, including PADCO and LBG, submitted initial proposals by the March 16, 2001 closing date. USAID evaluated the proposals, conducted discussions, received revised proposals by August 23, and final revised proposals by September 14. A technical evaluation committee evaluated the revised proposals and assigned scores of [DELETED] points to PADCO’s proposal, and [DELETED] points to LBG’s proposal. Agency Report, Tab 6, Negotiation Memorandum, at 10. The agency performed a cost evaluation of the proposals, determined that PADCO’s final proposed cost of \$35,901,583 and LBG’s final proposed cost of \$27,938,639 were each reasonable and realistic, and made no probable cost adjustments.<sup>1</sup> Agency Report at 7; Tab 6, Negotiation Memorandum, at 12-19. USAID made award to LBG on September 27, after determining that LBG’s proposal represented the best value. Agency Report, Tab 6, Negotiation Memorandum, at 21.

On October 5, following a debriefing by USAID in which the protester learned the reasons for its nonselection for award, PADCO filed a timely protest with our Office.<sup>2</sup> PADCO protested, among other things, that the agency had failed to perform an adequate cost realism analysis of the awardee’s proposal, notwithstanding that the awardee’s final proposed cost was significantly less than its initial proposal. In this regard, PADCO alleged that USAID apparently limited its cost realism evaluation to direct cost elements, and did not determine the realism of offerors’ proposed indirect costs.<sup>3</sup> Protest at 5.

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<sup>1</sup> During the review of LBG’s September 14 final revised cost proposal of [DELETED], USAID noticed an apparent arithmetic error for which it requested clarification. On September 24 LBG submitted a corrected final revised cost proposal of \$27,938,639. Agency Report at 6.

<sup>2</sup> On November 1, the agency determined that it was in the government’s best interests to proceed with contract performance. Agency Report at 1.

<sup>3</sup> On October 15, PADCO clarified its protest grounds, particularly with regard to the agency’s failure to reasonably evaluate the offerors’ proposed indirect costs.

On November 5 the agency submitted its report responding to PADCO's protest, maintaining that the entire protest was without merit. USAID denied PADCO's allegation that the agency had failed to conduct a proper cost realism analysis, and denied the specific assertion that its analysis had not included an adequate review of LBG's proposed indirect costs. Agency Report at 8, 11-12.

PADCO filed a supplemental protest on November 13 in which it argued that LBG's proposal was unacceptable because its proposed subcontracting plan indicated its small business subcontracting effort would only be 10 percent of its total planned subcontracting, even though the solicitation required offerors to submit plans demonstrating small business subcontracting of at least 10 percent of the total contract value.

The protester filed its comments on the agency report on November 15. In addition to reiterating the grounds set forth in its initial and supplemental protests, PADCO also argued that the agency had impermissibly permitted LBG to vary from the predetermined "not to exceed" figure stated in the solicitation for "other direct costs." The protester asserted that notwithstanding the agency having informed offerors that they could not make adjustments to the "not to exceed" figure for other direct costs and should consider "not to exceed" amounts as "plug-in" costs, USAID's evaluation had permitted LBG to propose a lower cost and did not upwardly adjust this cost in the cost evaluation. Protester's Comments at 4-6.

Our Office established a due date of November 28 for the agency to respond to PADCO's supplemental protest and the comments.

On November 27, the agency requested dismissal of PADCO's protests because it had decided to take corrective action. USAID stated that its corrective action would be to request another round of proposal revisions regarding the subcontracting plan and its requirements, the meaning of "not to exceed" for other direct costs, and the need for offerors to justify all elements of costs to allow for a cost realism analysis.<sup>4</sup> We, therefore, dismissed the protests as academic on December 4.

PADCO now requests that we recommend the reimbursement of its protest costs, including attorneys' fees.

Our Bid Protest Regulations provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend that the agency pay the protester the costs of filing and pursuing the protest, including reasonable

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<sup>4</sup> The agency's corrective action also proposed to point out the solicitation requirements regarding past performance references and key personnel commitments and how they should be treated in the revised proposals. This issue was not a subject of PADCO's protests.

attorneys' fees. 4 C.F.R. § 21.8(e) (2001). We will make such a recommendation where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, B-243785.2, June 10, 1991, 91-1 CPD ¶ 558 at 2. A protest is clearly meritorious when a reasonable agency inquiry into the protester's allegations would show facts disclosing the absence of a defensible legal position (i.e., not a close question). As a general rule, so long as an agency takes corrective action in response to a protest by the due date of its protest report, we regard such action as prompt and decline to consider favorably a request to recommend reimbursement of protest costs. J.A. Jones Mgmt. Servs., Inc.--Costs, B-284909.4, July 31, 2000, 2000 CPD ¶ 123 at 4. Our rule is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. Innovative Logistics Techniques, Inc.--Costs, B-289031.3, Feb. 4, 2002, 2002 CPD ¶ 34 at 4.

USAID asserts that a recommendation by our Office that the agency reimburse PADCO's protest costs, including attorneys' fees, is unwarranted here. The agency argues that the two issues that were the actual basis for its corrective action decision--the subcontracting plan requirements and the meaning of "not to exceed" for other direct costs--were grounds first raised by PADCO in its supplemental protest and comments, respectively, and the agency's corrective action cannot be said to be unduly delayed because it was taken within 2 weeks and before the report was due on these supplemental protest grounds.<sup>5</sup>

PADCO responds that the agency's corrective action decision was not limited to the grounds first raised in PADCO's supplemental protest and comments, but also included the cost realism evaluation issue. PADCO contends that since this clearly meritorious issue was first raised in its initial protest, the agency did unduly delay taking corrective action, and we should therefore recommend that USAID reimburse the protester's costs of filing and pursuing all of its protest grounds.

As discussed below, PADCO's cost realism analysis issue was clearly meritorious because USAID's cost realism analysis unreasonably accepted as realistic, without any analysis, LBG's proposed indirect costs that were based on rates significantly below LBG's initially proposed rates, its historical rates, and its proposed indirect rate ceiling. While USAID asserts that the cost realism analysis issue was not the primary basis for its corrective action, we find this characterization irrelevant to our determination here; the fact is that the agency took corrective action on this clearly meritorious protest basis squarely raised by PADCO in its initial protest.

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<sup>5</sup> The agency contends that the other two items to be addressed in the corrective action related to matters not raised by the protester or, in the case of the indirect cost realism issue, were not clearly meritorious protest grounds.

When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated cost of contract performance should not be considered controlling since, regardless of the costs proposed by an offeror, the government is bound to pay the contractor its actual and allowable costs. Consequently, the agency must perform a cost realism analysis to determine the realism of the offeror's proposed costs and to determine what the costs are likely to be under the offeror's technical approach, assuming reasonable economy and efficiency. Federal Acquisition Regulation (FAR) § 15.404-1(d)(1), (2); The Futures Group Int'l, B-281274.2, Mar. 3, 1999, 2000 CPD ¶ 147 at 3. Proposed costs should be adjusted when appropriate based on the results of the cost realism analysis. FAR § 15.404-1(d)(2)(ii). Our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonably based. The Futures Group Int'l, *supra*.

LBG's initial cost proposal included a negotiated indirect cost rate agreement (NICRA), demonstrating that the awardee's current overhead and general and administrative (G&A) rate was [DELETED], and its total indirect cost rate was [DELETED].<sup>6</sup> LBG's Cost Proposal (March 2001), § 2, Supporting Budget: Cost and Price Information, at 15-17. As part of its revised cost proposal, LBG agreed to an overhead and G&A rate ceiling of [DELETED].<sup>7</sup> LBG's Revised Cost Proposal (Aug. 23, 2001), § III, Certification and Forecast for Indirect Costs and Proposed Ceilings, at 1. LBG's offer to cap its overhead and G&A rate resulted in a total indirect cost rate ceiling of [DELETED] being incorporated into the contract as awarded.<sup>8</sup> Agency Report, Tab 1, Contract, § B.6.

However, the record shows that the indirect costs included in LBG's final proposed costs, which USAID determined reasonable and realistic, were not based on either the awardee's negotiated indirect cost rate or its rate ceiling. In its initial proposal,

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<sup>6</sup> LBG's total indirect cost rate is the sum of its overhead and G&A rate, and its payroll additive rate ([DELETED]). (The latter figure is not at issue in this protest.) LBG's NICRA also included the awardee's historical negotiated indirect cost rates since July 1, 1991, which [DELETED].

<sup>7</sup> LBG's revised cost proposal asserted that the overhead and G&A rate ceiling of [DELETED] was [DELETED] between its current NICRA rate for these costs of [DELETED], and its projected overhead and G&A rate of [DELETED]. LBG's Revised Cost Proposal (Aug. 23, 2001), § III, Certification and Forecast for Indirect Costs and Proposed Ceilings, at 1.

<sup>8</sup> This figure is the sum of the [DELETED] rate for overhead and G&A and the [DELETED] rate for payroll additives.

LBG's direct costs were [DELETED] and its indirect costs were [DELETED].<sup>9</sup> LBG's Cost Proposal (March 2001), § 2, Supporting Budget: Cost and Price Information, at 11. Here, LBG's indirect costs were based on the ceiling rate of [DELETED] for performance in year 1 of the contract, and below its ceiling rate by [DELETED] for years 2 through 5 of the contract. *Id.* By contrast, LBG's subsequent cost proposals utilized, without any support or explanation, indirect cost rates that were increasingly below the awardee's proposed indirect rate ceiling, thereby resulting in significant reductions in the proposed indirect costs.<sup>10</sup> In its final revised offer, LBG's proposed direct costs were [DELETED], while its proposed indirect costs were [DELETED], its overhead rates having dropped to [DELETED] for the various direct cost pools, depending on the particular staff groups included in LBG's direct costs, where it had initially used the [DELETED] ceiling rate.<sup>11</sup> LBG's Corrected Final Revised Proposal (Sept. 24, 2001), at 5. Completely absent from LBG's revised cost proposals was an explanation or justification as to why its indirect rates were substantially less than its current negotiated rate, its historical rates, or its proposed rate ceiling. Moreover, as LBG's substantial decrease in proposed indirect costs was not accompanied by any decrease in its indirect cost rate ceiling, the agency's contractual obligation to pay was considerably greater than LBG's final proposed cost, if LBG's actual indirect costs ultimately exceeded those proposed.<sup>12</sup> See FAR § 42.707(c).

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<sup>9</sup> We note that what LBG identifies as "indirect costs (overhead)" in its cost proposals corresponds to the overhead and G&A costs portion of the awardee's NICRA.

<sup>10</sup> In its revised cost proposal, LBG's direct costs were [DELETED], while its indirect costs were [DELETED], having replaced the [DELETED] ceiling rate with overhead rates of [DELETED], to be applied to the various direct cost pools, depending on the particular staff group included in LBG's direct costs. LBG's Revised Cost Proposal (Aug. 23, 2001), § I, Revised Budget, at 7. In its initial final revised proposal, LBG proposed direct costs of [DELETED] and indirect costs of [DELETED], having utilized overhead rates of [DELETED], to be applied to the various direct cost pools, depending on the various staff groups. LBG's Final Revised Proposal (Sept. 14, 2001), at 6.

<sup>11</sup> We note that while LBG's total direct costs decreased between initial and final cost proposals by [DELETED] (approximately [DELETED]), its total proposed indirect costs decreased by [DELETED] (approximately [DELETED]).

<sup>12</sup> According to the protester's calculations, if the higher ceiling rates were applied to LBG's proposed direct costs instead of LBG's proposed rates, it would cause LBG's evaluated costs to increase by \$2.9 million, such that, when combined with the unfair cost advantage LBG improperly obtained by proposing costs less than the "not to exceed" figures for other direct costs, LBG's evaluated costs would be roughly equal to PADCO's proposed costs. Protester's Comments at 3.

The evaluation record provides no explanation of how USAID determined that LBG's final proposed costs were reasonable and realistic when the awardee's proposed indirect cost rates were substantially lower than its rate ceiling, as well as the initially proposed rates and its historical rates, without any explanation. In fact, the record is bereft of evidence that USAID even recognized that the awardee had proposed indirect costs that were not based on either its NICRA indirect cost rate or its indirect cost rate ceiling. In this regard, in documenting the cost evaluation supporting the award decision, USAID stated:

The most recent [LBG] Audited NICRA rate for indirect costs is [DELETED]. . . . All rates are in accordance with NICRA and appear reasonable and allocable. In addition, the Offeror will propose a Ceiling Indirect Rate, per Clause B.6. [LBG] proposed a ceiling rate of [DELETED].

Agency Report, Tab 6, Negotiation Memorandum, at 13-14. In its response to PADCO's initial protest, the agency argued that as LBG had proposed a ceiling on its indirect rates, which USAID incorporated into the awarded contract, the agency had reasonably determined that LBG's final proposed cost was realistic.<sup>13</sup> Agency Report at 11-12. The agency's belief that LBG's indirect cost rates were reasonable was thus apparently premised on the mistaken belief that the awardee's proposed indirect rates were in accordance with its negotiated rate agreement or ceiling rate.

Because the record does not reasonably support the agency's acceptance of the realism of LBG's proposed indirect rates, we conclude that the protester's challenge to the cost realism evaluation, which was raised in the initial protest, was clearly meritorious.<sup>14</sup> Moreover, we regard the agency's corrective action, undertaken almost 2 months after the initial protest was filed and well after having submitted its agency report, as unduly delayed. Had USAID undertaken a reasonable investigation into the adequacy of its cost realism evaluation in response to the initial protest, it would have seen that LBG's proposed indirect cost rates were lower than both its negotiated and ceiling rates, and the merits of PADCO's contentions here would have

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<sup>13</sup> USAID cited BNF Techs., Inc., B-254953.3, Mar. 14, 1994, 94-1 CPD ¶ 274, to support its argument that when an offeror agrees to cap certain cost items—including by means of indirect rate ceilings—then that amount can reasonably be used by the agency as the probable costs for purposes of a cost realism analysis. Id. at 12. We find that case inapposite to the present situation. In BNF, what the protester actually proposed was its ceiling rates. Here, what LBG proposed and what the agency accepted as LBG's probable costs was significantly below the ceiling rates.

<sup>14</sup> We also note that "LBG acknowledges that [the] agency failed to conduct a thorough cost realism analysis of LBG's indirect costs." Intervenor's Comments on Agency Corrective Action (Nov. 30, 2001), at 3.

been clear. Accordingly, PADCO should be reimbursed its costs of filing and pursuing its initial protest.

PADCO also requests that we recommend the reimbursement of its costs related to its protests of LBG's subcontracting plan and pricing of other direct costs. PADCO asserts that a reasonable investigation by USAID after PADCO had filed its initial protest would have disclosed the flaws that PADCO subsequently pointed out in its supplemental protest and comments.

Where, as here, a protester raises different protest grounds in multiple submissions to our Office, the filing of the initial protest establishes the appropriate date for determining the promptness of the agency's subsequent corrective action only where there is a nexus between the protest grounds set forth at that time and the corrective action. J.A. Jones Mgmt. Servs., Inc.--Costs, *supra*, at 3. The promptness of the agency's corrective action is not measured from the initial protest where the initial protest did not identify the issue on which the agency based its corrective action. *Id.* Where the issues are so clearly severable as to constitute separate protests, we will recommend reimbursement of only those costs of filing and pursuing clearly meritorious protest bases as to which the agency unduly delayed taking corrective action, and will decline to recommend reimbursement of the costs of filing and pursuing other protest grounds. See TRW, Inc.--Costs, B-282459.3, Aug. 4, 1999, 99-2 CPD ¶ 26 at 3; Browning-Ferris Indus. of Hawaii, Inc.--Costs, B-278051.2, Apr. 27, 1998, 98-1 CPD ¶ 122 at 6 n.5; Holiday Inn-Laurel--Protest and Request for Costs, B-270860.3, B-270860.4, May 30, 1996, 96-1 CPD ¶ 259 at 3 n.2.

Applying these standards to the present case, we find that PADCO is not entitled to reimbursement of its protest costs related to LBG's subcontracting plan and the pricing of other direct costs. We find no nexus between these issues and those raised in PADCO's initial protest. Moreover, USAID took corrective action no more than 2 weeks after these protest grounds were first raised and before the supplemental agency report was due. Even if we assume that these protest grounds were clearly meritorious, the agency's corrective action was not unduly delayed.<sup>15</sup>

Accordingly, we recommend that PADCO be reimbursed the reasonable costs of filing and pursuing its initial protest, including the reasonable costs of preparing that portion of the protest comments relating to its initial protest grounds. PADCO

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<sup>15</sup> While PADCO points out that it mentioned in its initial protest the substantial reduction in costs in LBG's revised proposal and argues that this was sufficient to put USAID on notice to investigate its evaluation of LBG's cost proposal, including the other direct costs, the fact is that PADCO's initial protest did not in any way reference the other direct cost issue, but challenged other aspects of the cost realism analysis of LBG's cost proposal, in particular its proposed indirect costs.

should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to USAID within 60 days of receipt of this decision.<sup>16</sup>

Anthony H. Gamboa  
General Counsel

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<sup>16</sup> To the extent that PADCO incurred additional expenses in challenging the corrective action offered by the agency, these costs are not reimbursable since they are not costs incurred in pursuing the protest (*i.e.*, in persuading the agency of the merits of the protest). Southern Techs., Inc.—Recon. and Costs, B-278030.3, Apr. 29, 1998, 98-1 CPD ¶ 125 at 7 n.3.