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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Blue Rock Structures, Inc.--Costs

File: B-293134.2

Date: October 26, 2005

Brent Hartness for the protester.

Richard G. Welsh, Esq., and Kenneth G. Wilson, Esq., Naval Facilities Engineering Command, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Attorney's fees need not be allocated between sustained and denied protest issues where issues were interconnected and based on common factual underpinnings.
 2. Hourly fee for attorney for small business protester that exceeds benchmark set forth in Federal Acquisition Regulation § 33.104(h)(5) is nonetheless reasonable where fee is consistent with customary rates for similar work by attorneys of similar experience in the community in which the attorney practices.
 3. Protester is not entitled to reimbursement for time spent discussing settlement since settlement discussions are not in pursuit of the protest.
 4. Protester is not entitled to recover the costs associated with preparing for and attending a debriefing since time spent by a potential protester in ascertaining whether it has a basis for protest is not time spent in pursuit of the protest.
 5. Protester is not entitled to recover profit on its employees' time.
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DECISION

Blue Rock Structures, Inc. requests that our Office recommend the amount that the Department of the Navy should reimburse it for the costs of filing and pursuing its protest in Blue Rock Structures, Inc., B-293134, Feb. 6, 2004, 2004 CPD ¶ 63. In that decision, we sustained Blue Rock's protest of the award of contracts to six other offerors under request for proposals (RFP) No. N62470-03-R-0839, for construction services at the Marine Corps Air Station, Cherry Point, North Carolina.

We recommend that the Navy reimburse Blue Rock \$19,728.52 for the costs of filing and pursuing its protest.

In our decision on the protest, we found that the source selection authority had failed to furnish an adequate rationale for his determination that lower technically rated, lower-priced proposals represented a better value to the government than the protester's higher technically rated, higher-priced one. We recommended, among other things, that the protester be reimbursed for the costs of filing and pursuing its protest. We noted that the protester's certified claim for such costs, detailing the time expended and the costs incurred, was to be submitted directly to the agency within 60 days of receipt of our decision.

Blue Rock submitted a certified claim for costs totaling \$28,774 to the agency on April 5, 2004. Later the same day, the protester supplemented its claim with a breakdown of the tax, insurance, and fringe benefit rates and the hourly wage rates for the company employees for whose time it sought reimbursement. On August 23, Blue Rock further supplemented its claim with a copy of its weekly payroll report for the week ending on April 4, 2004.

Beginning in December, the parties engaged in several exchanges of correspondence regarding various aspects of the claim, including whether activities such as attendance at the debriefing were undertaken in pursuit of the protest, the severability of the issues on which the protester prevailed from those on which it did not, the reasonableness of the hourly rate of the protester's attorney, and the reasonableness of the number of hours that corporate officers of the protester claimed to have worked on the protest. By letter dated March 15, 2005, the protester informed the agency that if the two sides were unable to reach an expedited agreement on the reimbursable costs associated with its protest, it intended to submit the matter to our Office. Approximately a week later, the agency responded that since it still did not agree with the protester as to the amount Blue Rock should recover, the protester was free to pursue the matter with our Office. On August 3, the protester asked our Office to recommend the amount that the agency should reimburse it for the costs of pursuing its protest.

Blue Rock seeks reimbursement for time expended by its own employees and corporate officers in pursuit of the protest, as well as attorney's fees. The protester also seeks reimbursement of the costs that it has incurred in pursuing its claim for costs before our Office and interest on the claim.

As a threshold matter, the Navy contends that Blue Rock's claim should be denied in its entirety because it is untimely. The agency maintains in this regard that the protester failed to submit an adequately documented claim within the 60-day period provided for in our Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1) (2005).

While we have rejected a claim as untimely where the submissions made during the 60-day filing period were so riddled with errors and gaps as to be essentially worthless, REEP, Inc.--Costs, B-290665.2, July 29, 2003, 2003 CPD ¶ 131, we do not believe that the documentation timely submitted by Blue Rock in support of its claim to the agency here may reasonably be so characterized. To the contrary and as explained in detail below, we think that the bulk of Blue Rock's claimed costs were adequately documented and should be reimbursed by the agency.

Attorney's Fees

Blue Rock seeks reimbursement in the amount of \$11,133.87 for attorney's fees, which sum represents 31.81 hours of its attorney's time at a rate of \$350/hour (plus \$.37 postage). In support of its claim, the protester has submitted a copy of a billing statement from the attorney's law firm, which identifies the dates on which services were rendered and furnishes a brief summary of the work performed on each date.

To the extent that the agency maintains that the protester is entitled to reimbursement of its attorney's fees for only those issues on which it prevailed, we disagree. As a general rule, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. CNA Indust. Eng'g, Inc.--Costs, B-271034.2, Nov. 20, 1997, 97-2 CPD ¶ 149 at 3. While we have recognized that an exception to the above rule exists in circumstances where a losing protest issue is so clearly severable from the other issues as to constitute a separate protest, Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29, we do not think that in this case the arguments on which the protester failed to prevail are clearly severable from those on which it succeeded. All of Blue Rock's arguments pertained to the reasonableness of the agency's evaluation of proposals and source selection determination; given that the protester's arguments were interconnected and based on common factual underpinnings, we do not think that the arguments may reasonably be viewed as a series of discrete claims. See TRESP Assocs., Inc.--Costs, B-258322.8, Nov. 3, 1998, 98-2 CPD ¶ 108 at 3; Main Bldg. Maint., Inc.--Costs, B-260945.6, Dec. 15, 1997, 97-2 CPD ¶ 163 at 5. Accordingly, we do not think that Blue Rock's claim should be severed.

Further, to the extent that the agency contends that the protester's attorney's hourly rate of \$350 is unreasonable, we note that while the protester has offered no evidence to support the reasonableness of its attorney's rate (other than to assert that "[t]he amount paid to the attorney representing our firm for this protest is reasonable for firms that specialize in government contract law," Letter from Blue Rock to NAVFAC Office of General Counsel, Feb. 3, 2004, at 1), neither has the agency offered evidence establishing the unreasonableness of the rate, other than to observe that the rate charged is in excess of the benchmark referred to in Federal Acquisition Regulation (FAR) § 33.104(h)(5). While that section of the FAR instructs that the cap placed on attorneys' fees for businesses other than small businesses constitutes a benchmark as to a "reasonable" level of attorneys' fees for small

businesses such as Blue Rock,¹ we have found hourly rates significantly in excess of the benchmark to be reasonable where the rates were consistent with the customary rates charged for similar work by attorneys of similar experience in the community in which the attorney practices. See, e.g., CourtSmart Digital Sys., Inc.–Costs, B-292995.7, Mar. 18, 2005, 2005 CPD ¶ 47 at 3. In determining whether the rates charged are consistent with customary rates for similar work, we will consider the fee rates found allowable by our Office in similarly complex proceedings. Id. at 2.

In CourtSmart Digital Sys., Inc.–Costs, supra, we found an hourly rate of \$475 reasonable for an attorney experienced in government procurement law who was a partner in a Washington, D.C. firm. We noted in that decision that according to an article published in the January 2003 edition of Legal Times, the hourly rates for partners from 19 Washington, D.C. area law firms surveyed ranged from \$185 to \$750. Given our approval of \$475 as a reasonable hourly rate for a partner in a Washington firm in CourtSmart, we see no basis to object to the lower rate billed by Blue Rock’s attorney, who is also a partner in a Washington firm.

With regard to the number of hours billed by the attorney, the agency disputes only one entry, i.e., the 2.2 hours that the attorney devoted to various activities, including a telephone conference with Blue Rock corporate officers regarding settlement and the “Camp Lejeune” project, on December 11, 2003. The agency contends that the “Camp LeJeune project” does not appear to be related to Blue Rock’s protest.

While we think that the discussion of the “Camp Lejeune project” arguably was related to the protest (since the “Camp Lejeune project” was the subject of a prior

¹ FAR § 33.104(h)(5) provides as follows (emphasis added):

No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (. . .), costs under paragraph (h)(2) of this section--

. . .

(ii) For attorneys’ fees that exceed \$150 an hour, unless the agency determines, based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys’ fees for businesses, other than small businesses, constitutes a benchmark as to a “reasonable” level of attorneys’ fees for small businesses.

decision by our Office cited by the protester in its pleadings, i.e., C Constr. Co., Inc., B-291792 et al., Mar. 17, 2003, 2003 CPD ¶ 73), time spent discussing settlement is not time spent in pursuit of the protest and thus is not reimbursable. Main Bldg. Maint., Inc.–Costs, supra, at 7; Price Waterhouse–Claim for Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 8. Further, where, as here, a protester has aggregated allowable and unallowable costs in a single claim, such that we cannot tell from the record before us what portion is unallowable, the entire amount must be disallowed even though some portion of the claim may be properly payable. TRESP Assocs., Inc.–Costs, supra, at 4. Thus, because it is unclear from the attorney’s billing statement how he allocated the 2.2 hours that he worked on Blue Rock’s protest on December 11 among the various activities that he performed, and at least one of those activities (settlement discussions) is not allowable, we disallow the claimed cost for 2.2 hours. Accordingly, we reduce by 2.2 the number of hours of its attorney’s time for which the protester should be entitled to reimbursement. As a result, we recommend that the agency pay Blue Rock \$10,363.87 for attorney’s fees and expenses (29.61 hours x \$350/hr., plus \$.37 for postage).

Employee Time

Blue Rock also seeks reimbursement for the time spent by its own employees in pursuing the protest, plus fringe benefits, overhead, and profit on its employees’ time.

A protester seeking reimbursement for its employees’ time must document in some manner the amount and purposes of its employees’ claimed efforts. In addition, it must establish that the claimed hourly rates reflect the employees’ actual rates of compensation, plus reasonable overhead and fringe benefits. SKJ Assocs., Inc.–Costs, B-291533.3, July 24, 2003, 2003 CPD ¶ 130 at 2-3.

In support of its claim, the protester submitted to the agency a summary of the dates on which its employees pursued protest-related activities, a brief summary of those activities (e.g., “debriefing” and “review of agency report”), the number of hours worked by each employee, and the employee’s hourly rate of compensation. As previously noted, the protester supported its claimed hourly rates with a copy of its payroll report; in addition, it furnished a breakdown of its tax, insurance, and fringe benefit rates, which showed that they represented approximately 30 percent of its direct labor costs. Blue Rock also submitted a worksheet which showed that it was seeking “field overhead” of 10 percent and “home office overhead” of 3 percent on its employees’ direct labor, “prime overhead” of 5 percent on its attorney’s work, and profit of 8 percent.

The agency argues that the protester is not entitled to reimbursement for several of the hours of employee labor claimed. In particular, the agency objects to hours claimed by the protester to prepare for and attend the debriefing and to review our decision.

We agree with the agency that the protester is not entitled to recover the costs associated with preparing for and attending the debriefing, since time spent by a potential protester in ascertaining whether it has a basis for protest is not time spent in pursuit of the protest. See SKJ Assocs., Inc.--Costs, *supra*, at 3; CNA Indust. Eng'g, Inc.--Costs, *supra*, at 5. Accordingly, we deduct from Blue Rock's claim the hours for "review and discussion of award" on October 1, 2003; the hours for compiling the request for debriefing on October 2; and the hours for attending the debriefing and discussing the debriefing notes on October 29.

We do not agree with the agency that time spent by the protester's officers in reviewing our decision should be totally non-reimbursable, however. We have previously recognized that pursuit of a protest includes time spent by an attorney in analyzing the ultimate decision and explaining it to the client. Price Waterhouse--Claim for Costs, *supra*, at 9. Given that pursuit of a protest encompasses time spent by an attorney in analyzing the decision, we see no reason that pursuit of a protest should not also encompass time spent by the protester's officers in reviewing and analyzing the decision themselves.

That said, we think that the protester should be entitled to reimbursement for time spent reviewing and analyzing our decision only to the extent that the time spent was reasonable. We think that the time claimed by Blue Rock for review of the decision here (5 hours by each of 2 corporate officers) is not reasonable. Given that our decision was neither particularly lengthy nor particularly complicated, we think that a reasonable amount of time for review of it would have been 1 hour per corporate officer. Accordingly, we recommend that the protester be reimbursed for only 2 of the 10 hours spent by its corporate officers in reviewing our decision on March 5.

We also deduct the hours claimed by the protester for telephone conferences with its attorney and internal discussions on November 6 and 17 because the protester has furnished no detail regarding the content of these conversations and their bearing on the protest, and the dates on which the telephone conferences/internal discussions occurred (after filing of the protest on November 3, but prior to receipt of the agency report on December 2) are not dates on which the protester would routinely have been expected to engage in activities in pursuit of the protest. We also note that the attorney's billing statement does not mention a telephone conference with the client on November 6 and notes a conversation of .25 hours only on November 17.

Regarding the fringe benefit, overhead, and profit rates to be added to the employees' actual rates of compensation, the agency has not challenged--and we see no basis upon which to question--the reasonableness of Blue Rock's fringe benefit rate of 30 percent. We do question the reasonableness of the addition of a field overhead rate of 10 percent to the cost of the employees' labor, however, given that none of the work in pursuit of the protest was performed in the field, and that the protester has separately sought reimbursement for home office overhead. In addition, we see no basis for the protester's addition of "prime overhead" to its attorney's fees. We also find that Blue Rock is not entitled to profit on its employees'

time. SKJ Assocs., Inc.--Costs, *supra*, at 3; Galen Med. Assocs., Inc.--Costs, B-288661.6, July 22, 2002, 2002 CPD ¶ 114 at 4.²

In summary, we find that Blue Rock is entitled to reimbursement of \$6,993.76 for its employees' direct labor in pursuing the protest, plus a fringe benefit rate of 30 percent and an overhead rate of 3 percent on that labor, for a total of \$9,364.65.

Costs of Pursuing Claim

Next, Blue Rock seeks \$1,187.50 for the cost of pursuing its claim to our Office.

Pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.8(f)(2), we may recommend that the contracting agency pay the protester the costs of pursuing its claim for costs to our Office. We will recommend payment of such costs only if it is shown that the agency unreasonably delayed consideration of the protester's claim or otherwise failed to give the claim reasonable consideration. Galen Med. Assocs., Inc.--Costs, *supra*, at 7-8.

Here, while there was some delay on the part of the agency in responding to Blue Rock's initial claim, it appears to have been attributable, at least in part, to reasonable agency concerns regarding various aspects of Blue Rock's claim. Moreover, there is no evidence in the record that the protester took steps to encourage a speedy resolution of its claim, such as contacting the agency to check on its status, at any point between August 23 and December 22. We also note that Blue Rock itself was responsible for significant delay in its pursuit of its claim, waiting more than 4 months after receipt of the agency's March 23 letter acknowledging the inability of the parties to reach agreement regarding the amount of Blue Rock's protest costs before pursuing the matter to our Office. Given these circumstances, we do not think that recovery of the protester's costs of pursuing its claim to our Office is appropriate.

Interest

Finally, Blue Rock seeks interest on its claim accruing from the date of its initial filing with the agency. Such payment is not authorized by any statute and is not recoverable. Palau Elec. Corp.--Costs, B-280048.11, July 31, 2000, 2000 CPD ¶ 122 at 11.

² With regard to the protester's claim for \$24.62, plus sales tax, for "direct materials," which we assume means out-of-pocket expenses, such expenses are reimbursable only to the extent that they are documented, Komatsu Dresser Co.--Claim for Costs, B-246121.2, Aug. 23, 1993, 93-2 CPD ¶ 112 at 8, and the protester has furnished no explanation or documentation concerning these expenses. Thus, this portion of Blue Rock's claim should be disallowed.

CONCLUSION

We recommend that the Navy reimburse Blue Rock \$10,363.87 for attorney's fees and \$9,364.65 for time spent by Blue Rock's corporate officers and employees in pursuing the protest. In sum, we recommend that the Navy reimburse Blue Rock a total of \$19,728.52.

Anthony H. Gamboa
General Counsel