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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Department of the Army; ITT Federal Services International Corporation--Costs

File: B-296783.4; B-296783.5

Date: April 26, 2006

Kevin P. Connelly, Esq., Seyfarth Shaw, for the protester.
Nancy J. Williams, Esq., U.S. Army Corps of Engineers, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Where successful protester's claim for attorneys' fees includes request for reimbursement at hourly rate above generally applicable \$150 statutory limit based on increase in cost of living, higher rate paid should be based on the consumer price index for all items rather than the index for legal services.
 2. Reimbursement of protest costs associated with use of consultant is limited to highest rate of pay for a federal employee (GS-15, step 10), even where consultant billed at higher rate.
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DECISION

The Department of the Army and ITT Federal Services International Corporation request our recommendation concerning ITT's claim for protest costs, filed in connection with our decision sustaining ITT's protest against the award of a contract to Kellogg, Brown & Root Services, Inc. for logistics support services. ITT Fed. Servs. Int'l Corp., B-296783, B-296783.3, Oct. 11, 2005, 2006 CPD ¶ __.¹ In addition to corrective action, we recommended that the Army reimburse ITT its costs of filing and pursuing the protest, including reasonable attorneys' fees. The Army objects to the amounts claimed for ITT's attorneys and consultant.

¹ The decision was subject to a protective order and no redacted version has been released to date pending the outcome of the agency's corrective action taken in response to our recommendation for corrective action.

ATTORNEYS' FEES

Under the Competition in Contracting Act of 1984 (CICA), as amended, 31 U.S.C. § 3554(c)(2)(B) (2000), successful protesters that are not small businesses are limited in their recovery of attorneys' fees to \$150 per hour, except to the extent that the agency determines, based on a recommendation from our Office on a case-by-case basis, that "an increase in the cost of living" or other special factors justify a higher hourly rate.

In its protest cost claim filed with the agency, ITT requests that it be reimbursed its attorneys' fees at a rate of \$238 per hour, to account for an increase in the cost of living. ITT calculated this upward adjustment using the Department of Labor's (DOL) Consumer Price Index for All Urban Consumers, U.S. City Average for Legal Services (CPI-L). The agency concedes that ITT is entitled to some cost of living adjustment, but argues that the increase should be calculated based on DOL's Consumer Price Index for All Urban Consumers, U.S. City Average for All Items (CPI-U); according to the agency's calculations, this would result in a rate of \$192.12 per hour.

In Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 37-43, we discussed for the first time the section 3554 ceiling on attorneys' fees and the cost of living adjustment. We found that the statute contemplates an increase in the specified \$150 per hour rate in order to offset any decrease in the value of the rate due to inflation, Sodexho Mgmt., Inc.--Costs, *supra*, at 41, and that the appropriate cost of living increase should be determined with reference to DOL's CPI. While we did not require application of a particular CPI--stating "[w]e decline to impose a requirement that a claimant do more than request an adjustment and present a basis upon which the adjustment should be calculated," *id.*--we applied the CPI-U in determining the appropriate adjustment. In doing so, we noted that this approach was consistent with that used by the courts in calculating cost of living increases in attorneys' fees claimed under an identical reimbursement provision in the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(2)(A). Sodexho Mgmt., Inc.--Costs, *supra*, at 43 n.33.

The Army cites Sodexho in asserting that the CPI-U, rather than the CPI-L, should be used here, because it is a measure of the increase in the cost of living overall, as opposed to the cost of obtaining legal representation. ITT, on the other hand, maintains that, because Sodexho does not specifically require that the CPI-U be used, and because we accepted use of a different measure in another case (in Department of State--Costs, B-295352.5, Aug 18, 2005, 2005 CPD ¶ 145, we accepted use of a regional--as opposed to a national--CPI rate for all items), we should accept use of the CPI-L here, since it provides a more accurate measurement of the increase in the actual costs being reimbursed.

We agree with the agency that the CPI-U, rather than the CPI-L, should be applied here, since it is consistent with the plain language of the statute. As noted above, the

statute provides for upward adjustment of the rate of compensation for attorneys to account for “an increase in the cost of living,” as opposed to an increase in the cost of obtaining legal representation. As noted above, this conclusion is consistent with the practice and rationale of courts applying the identical cost of living adjustment provision in EAJA; they have consistently used the CPI-U in calculating upward adjustments of claimed attorneys’ fees. See, e.g., Dewalt v. Sullivan, 963 F.2d 27, 29-30 (3rd Cir. 1992); Sullivan v. Sullivan, 958 F.2d 574, 576-78 (4th Cir. 1992).

ITT’s suggestion that our permitting use of a measure other than the CPI-U in Department of State--Costs is a basis for permitting use of the CPI-L here is without merit. Our decision in Department of State--Costs did not concern the question presented here--whether the CPI-U is the appropriate measure for cost of living adjustments versus the CPI-L (although we point out that in both cases we applied a CPI that measured increases in the cost of living, as opposed to the cost of obtaining legal representation). As discussed above, we find that the CPI-U is the appropriate measure because it is consistent with the language of the statute.

CONSULTANT FEES

In its claim filed with the agency, ITT also has requested reimbursement of consultant fees at the rate charged by the consultant--\$360 per hour (a total of \$81,744.15). The agency maintains that this amount is not warranted--that applicable statutes and regulations call for reimbursement of no more than \$446.64 per day.

CICA provides as follows:

No party (other than a small business concern) . . . may be paid, pursuant to a recommendation made under the authority of paragraph (1)--(A) costs for consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government.

31 U.S.C. § 3554(c)(2)(A).

ITT asserts that the proper measure of the “highest rate of compensation for expert witnesses paid by the Federal Government” is the rate that has been paid by any federal agency for any expert witness or consultant in any forum at any time. In support of its claimed amount, ITT has tendered evidence showing that the federal government has paid more than \$360 per hour for expert witnesses in other litigation in various federal forums.

The agency, on the other hand, asserts that Federal Acquisition Regulation (FAR) § 33.104 is dispositive of the question. That section states that agencies shall not pay consultant and expert witness fees “that exceed the highest rate of compensation for expert witnesses paid by the Government pursuant to 5 U.S.C. 3109 and Expert and Consultant Appointments, 60 FR 45649, September 1, 1995 (5 CFR 304.105).”

FAR § 33.104(h)(3)(i). The referenced provisions--5 U.S.C. § 3109 and 5 C.F.R. § 304.105--list federal pay rates, the highest of which is general schedule (GS) grade 15, step 10, which the agency calculates is equal to no more than \$446.64 per day. The agency maintains that ITT's consultant fees therefore should be reimbursed at a daily rate no greater than this amount. ITT asserts that there is no basis in section 3554 for this fee limitation.

We have not previously addressed the consultant and expert witness fee provision in section 3554. Based on our review, we agree with the agency that the appropriate rate of reimbursement for ITT's consultant is \$446.64 per day, consistent with FAR § 33.104.

While ITT maintains that the fee limitation is inconsistent with section 3554, there is nothing in the statute itself that explains the "highest rate of compensation" language, and the minimal legislative history relating to section 3554 relates to attorneys' fees rather than to consultant and expert witness fees; indeed, the legislative history does little more than restate, without elaboration, the terms of the statute itself as it relates to consultant and expert witness fees. See H.R. Conf. Rep. No. 103-712 at 191-192 (1994), reprinted in 1994 U.S.C.C.A.N. 2607, 2621-22. On the other hand, at the time the FAR guidance was issued, our Office specifically concluded that it was consistent with the statute, stating as follows:

Concerning the consultant and expert witness fee limitation, FASA [the Federal Acquisition Streamlining Act] limits the payment of these fees to 'the highest rate of compensation . . . paid by the Federal Government.' While there is some difference of opinion among the commentators [submitting comments in response to our then-proposed Bid Protest Regulations] on whether Congress intended to cap the fees at the highest rate fixed by the Classification Act Schedules, *see* 5 U.S.C. 3109, we believe the proposed FAR implementation, which limits consultant and expert witness fees to the highest rate fixed by 5 U.S.C. 3109, is appropriate and consistent with the statutory language. We are unaware of any legislative history which suggests that this implementation is contrary to congressional intent.

60 Fed. Reg. 40739 (Aug. 10, 1995).

We also have looked to court rulings for guidance in this matter. Although the courts have not addressed the matter of consultant fee reimbursement under section 3554, we again have reviewed the courts' prevailing practice in applying the similar provisions in EAJA (the language of section 3554 is identical to the expert witness provision in EAJA). That review shows that the courts routinely have based reimbursement for a successful litigant's expert witnesses not on the highest rate paid by the government in any litigation, but on the rate paid by the government for its own expert witnesses in the same litigation. See United States v. 104 Acres More or Less, Situated in Keeler Township, VanBuren Co., MI; and Dukesherer Farms, Inc.

No. K83-468, 1988 WL 29772, at 5 (W.D. Mich. Nov. 30, 1988) (defendant awarded expert witness fees at the rate paid by the government in the action); see also United States v. Adkinson, et al., 256 F. Supp. 1297, 1322 n.23 (N.D. Fla. 2003) (awarded expert witness fees did not exceed the highest rate of compensation for expert witnesses paid by the government); United States v. Aisenberg, 247 F. Supp. 2d 1272, 1295-96 (M.D. Fla. 2003) (expert witness fees claimed were reimbursed where expert's rate was lower than that of government's expert witness in the litigation). This approach could lead to a result harsher than the FAR's approach.² In view of our previously expressed view that the FAR guidance is consistent with the statute, and considering that the courts have not adopted ITT's proposed approach in EAJA cases, we conclude that the FAR guidance applies.

We recommend that the Army limit reimbursement of ITT's consultant costs to the rate of compensation for a GS-15, step 10 federal employee.³

Anthony H. Gamboa
General Counsel

² At least one court has suggested that, in cases where a prevailing party is seeking expert witness fees and the government has not presented an expert witness--and the government thus has paid nothing for an expert witness during the litigation--EAJA may require that the prevailing party be reimbursed nothing for its expert witness. Olympic Marine Servs., Inc. v. U.S., 792 F.Supp. 461, 471 (E.D. Va. 1992); cf. Celeste v. Sullivan 734 F.Supp. 1009, 1011-12 (in the absence of expert witnesses for the government, court applied statutorily-mandated per diem rate for federal witnesses).

³ The parties have not indicated during our consideration of this cost claim that there is disagreement regarding the reasonableness of the number of hours billed by the consultant. Thus, we offer no opinion here regarding that question and provide only guidance regarding the rate of compensation.