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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: University of Dayton Research Institute--Costs

File: B-296946.7

Date: October 23, 2006

Daniel A. Bellman, Esq., and William R. Wernet, Esq., for the protester.
Lt. Col. Sharon K. Sughru, Department of the Air Force, for the agency.
Eric M. Ransom and Glenn G. Wolcott, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Protester may be reimbursed for its protest expenses only to the extent that they are adequately supported by documentation reflecting the costs incurred.
 2. Protester is not entitled to recover costs associated with deciding whether to protest, or costs associated with a settlement.
 3. Protester is not entitled to reimbursement for time spent pursuing its claim for costs, where delay in the agency's consideration of claim was caused by protester's inability or unwillingness to perfect its claim.
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DECISION

University of Dayton Research Institute (UDRI) requests that our Office recommend the amount the Department of the Air Force should reimburse UDRI for the costs of filing and pursuing a protest UDRI previously filed with our Office; the agency responded to UDRI's protest by taking corrective action.¹ See University of Dayton Research Inst., B-296946, Oct. 19, 2005.

¹ The protest at issue here was filed with our Office in July 2005. In October 2005, following various conference calls conducted by this Office, the agency stated that it was taking corrective action. Accordingly, on October 19, 2005, we dismissed the protest on the basis of that pending action.

Following our dismissal of UDRI's protest, UDRI submitted a request to this Office, seeking our recommendation that the agency reimburse UDRI for the costs it had incurred in filing and pursuing the protest. In response, the agency stated that it intended to reimburse UDRI for its reasonable protest costs. Accordingly, we closed our file on UDRI's request, pending the parties' agreement regarding the properly reimbursable amount. The parties have been unable to reach agreement on that issue. On June 14, 2006, UDRI submitted a request that this Office recommend the proper amount of reimbursable costs.

We recommend that the Air Force reimburse UDRI \$74,912.17 for the costs of filing and pursuing its protest.

UDRI initially submitted its cost claim to the agency on March 21, 2006, seeking recovery of \$84,701.25, which represented attorneys' fees, UDRI employee salaries, and other expenses. The agency responded on March 27, stating that UDRI had not supplied sufficient documentation to support its costs, and requesting that UDRI further document its claim. UDRI provided some additional documentation on April 20 and, in a communication to UDRI dated June 5, the agency recognized that \$51,938.68 of UDRI's costs were properly reimbursable.

Nonetheless, in its June 5 communication with UDRI, the agency declined to accept as reimbursable the costs claimed for UDRI personnel, noting that UDRI had not provided documentation supporting those costs. The agency also challenged UDRI's calculation of attorneys' fees to the extent they exceeded the \$150 per hour rate limitation for successful large business protesters imposed by the Competition in Contracting Act of 1984 (CICA).² Finally, the agency challenged UDRI's recovery of costs that were incurred after this Office's October 19, 2005 dismissal of UDRI's protest.

On June 9, 2006, UDRI responded to the agency's June 5 communication, declining to provide any salary data to support its claimed personnel costs, stating: "[UDRI] does not release salary data directly to any sponsor, government or commercial." Letter from UDRI Counsel to Contracting Officer, June 9, 2006, at 2. Further, UDRI

² Under CICA, as amended, where the Comptroller General recommends reimbursement of a successful protester's costs of filing and pursuing a protest, including reasonable attorneys fees, such fees may not exceed \$150 per 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." 31 U.S.C. § 3554(c)(2)(B)(2000). In submitting its request to our Office, UDRI argued, among other things, that "because of the limited number of qualified attorneys in Ohio that can handle GAO protests, there should be no reduction at all." UDRI Request for GAO Recommendation, June 14, 2006, at 2.

suggested that it was the responsibility of the agency to engage an “authorized audit agency” to verify the validity of UDRI’s claim for costs in this regard. Id. at 3. Finally, UDRI argued that some of the costs incurred after the October 19 dismissal of its protest should be reimbursed, and that application of the \$150 per hour CICA rate cap was not appropriate.

On June 14, the agency reiterated its prior position with regard to the portions of UDRI’s claim it considered non-reimbursable. Later that day, UDRI filed its request with this Office, seeking our recommendation regarding the properly reimbursable amount.

Thereafter, in the interest of facilitating an agreement, this Office conducted a conference call with counsel for the parties. Following the conference call, UDRI submitted another revised claim with more extensive supporting information, including salary data for UDRI personnel, seeking total reimbursement of \$77,432.87.³ UDRI Revised Claim for Protest Costs, July 31, 2006. In response to UDRI’s revised submission, including additional supporting documentation, the agency agreed that \$70,429.93 of UDRI’s claimed costs are reimbursable.⁴ Revised Agency Response, Aug. 1, 2006, at 2. Accordingly, the only remaining issues are relatively minor matters concerning attorneys’ hours attributable to activities that the agency maintains are not reimbursable; in total, these issues concern a total of \$7,002.94.

The agency argues that, to the extent UDRI’s claim reflects costs for pre-protest activities, settlement activities, and cost claim preparation activities, UDRI should not be reimbursed. Revised Agency Response, Aug. 1, 2006, at 1. As discussed below, we agree that portions of UDRI’s claim reflect costs that are not properly reimbursed.

Based on our review of the record, we conclude that 3.5 hours for Mr. Bellman, reflecting a cost of \$667.45, were billed on July 18-20, 2005 before UDRI made the decision to protest. The work performed during these hours is described as

³ UDRI’s July 31 submission reflected a reduction in attorney fee rates, consistent with the CICA cap as adjusted by the Department of Labor’s consumer price index, as well as elimination of fees for certain non-protest related activities. More specifically, UDRI’s revised claim reflected attorneys fees of \$61,842.98 (\$44,962.98 for Mr. Bellman and \$16,880 for Mr. Wernet), \$12,770.70 for UDRI personnel costs, \$1,829.09 for miscellaneous legal expenses, and \$990.10 for costs incurred in pursuing UDRI’s cost claim.

⁴ Specifically, agency has agreed to reimbursement of \$38,950.14 in attorney fees for Mr. Bellman, \$16,880 in attorney fees for Mr. Wernet, \$12,770.70 for UDRI’s personnel costs, and \$1,829.09 for miscellaneous legal expenses.

researching and drafting activities related to a “possible” protest. UDRI Claim for Protest Costs, Mar. 21, 2005, Tab 1, attach. 3, at 1-2. In this regard, time spent by a potential protester in ascertaining whether it has a basis for protest is not generally considered to be time spent in pursuit of the protest. Blue Rock Structures, Inc.–Costs, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190 at 6. Therefore, we do not recommend that the agency reimburse UDRI for these attorneys’ fees.

We also agree with the agency that the costs claimed for 4.5 of Mr. Bellman’s hours, billed on August 11, 12, and 16, 2005, reflecting a cost of \$862.52, were incurred in connection with drafting a letter to the agency, shortly after the protest had been filed, outlining the advantages of protest settlement. Claim for Protest Costs, Tab 1, at 12. We have held that time spent discussing settlements is not generally considered to be time spent in pursuit of the protest. Blue Rock Structures, Inc.–Costs, *supra*, at 5. Accordingly, we do not recommend that the agency reimburse UDRI for these attorneys’ fees.

Finally, UDRI’s claim separately seeks reimbursement of \$990.10, reflecting time spent on preparation of UDRI’s costs claim.⁵ UDRI Revised Claim, July 31, 2006, at 4-5. We agree with the agency that UDRI’s time spent in pursuit of its cost claim is not properly reimbursable. Pursuant to our Bid Protest Regulations, we may recommend that a contracting agency pay a protester the costs of pursuing its claim for costs with our Office. 4 C.F.R. § 21.8(f)(2) (2006). However, we will recommend payment of such costs only if it is shown that the agency failed to consider, or unreasonably delayed consideration of, the protester’s claim. Blue Rock Structures, Inc.–Costs, *supra*, at 7. Here, we view the delays to have been attributable, in large part, to UDRI’s inability or unwillingness to perfect its own claim by providing reasonable supporting documentation, and we do not find that reimbursement for the costs UDRI incurred in pursuing its claim to be appropriate.

Accordingly, we recommend that the agency reimburse UDRI a total of \$74,912.17, representing \$43,433.01 for Mr. Bellman’s attorney’s fees,⁶ \$16,880 for Mr. Wernet’s attorney’s fees, \$12,770.07 for UDRI’s personnel costs, and \$1,829.09 for miscellaneous legal costs.

Gary L. Kepplinger
General Counsel

⁵ Following submission of its July 31, 2006 revised claim, UDRI submitted an additional request for reimbursement of \$4,455.35 in costs associated with pursuit of its cost claim. As discussed above, we do not recommend reimbursement of any costs UDRI incurred in pursuing its cost claim.

⁶ \$44,962.98, less \$667.45 and \$862.52, as discussed above.