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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Baine Clark Company, Inc.--Costs

File: B-401172.4

Date: June 7, 2010

Joseph Billings, Esq., Miles & Stockbridge PC, for the protester.
Vera Meza, Esq., Department of the Army, for the agency.
Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester requesting reimbursement of protest costs must submit evidence sufficient to support its claim that those costs were incurred, reasonable, and properly attributable to filing and pursuing the protest; claimed costs that improperly aggregate allowable costs with unallowable costs or relate to settlement negotiations are disallowed.

DECISION

Baine Clark Company, Inc., of Ewing, Kentucky, requests that we determine the amount it should recover from the contracting agency for the costs of filing and pursuing its protest (and supplemental protest) of the adequacy of the price evaluation of quotations under request for quotations No. W22G1F-09-T-0026, issued by the Department of the Army for the lease of three pick-up trucks.

We recommend that the protester be reimbursed \$24,908.34.

Our Office conducted “outcome prediction” alternative dispute resolution (ADR) with the parties, reporting our anticipated decision sustaining the firm’s protests and recommending reimbursement of reasonable protest costs. The agency thereafter advised our Office that it was taking corrective action, including payment of reasonable protest costs; we dismissed the protests as academic on June 16, 2009. On or about August 5, Baine Clark submitted its claim to the agency for reimbursement of its attorneys’ fees; the fees were itemized by the firm’s initial attorney, Mr. Kirkland, and his retained co-counsel, Mr. Billings. The agency reports that, since it anticipated that any funds reimbursed would go directly to the protester, it requested proof from the firm that the fees had been paid; within a few

weeks of the request and without objection, the firm provided proof of payment. Additional time passed for clarification regarding the firm's payments, as they exceeded the amount claimed (subsequently, the protester explained that the payments included work unrelated to the protests). Baine Clark sought a total of \$26,660.34 in attorneys' fees. In response, on December 17, the agency issued a settlement offer to the firm of \$20,000 based on a reduction in the number of claimed attorney work hours for several of the work items claimed that appeared duplicative or excessive, or associated with a different protest previously dismissed by our Office.

Baine Clark filed its request for costs with our Office on December 31, objecting to the agency's reduction of claimed hours and explaining why the cited attorneys' efforts should not be considered duplicative, excessive, or unrelated to the firm's protests. The parties subsequently entered settlement negotiations in pursuit of a mutually agreeable amount; when those efforts failed, our Office requested a report from the agency responding to Baine Clark's claim, including consideration of any additional explanatory information provided by the firm that was not considered during review of the claim previously submitted to the agency after the ADR. In its report, the agency stated that the firm should receive \$22,508.34 for its attorneys' fees. This amount was calculated by subtracting the costs associated with eight work entries on the attorneys' work statements that the agency considered to be unallowable costs. The protester responded by expressing disagreement with the agency's position.

A protester seeking to recover the costs of pursuing a protest must submit sufficient evidence to support its monetary claim. John Peeples--Costs, B-233167.2, Aug. 5, 1991, 91-2 CPD ¶ 125 at 3. The amount claimed may be recovered to the extent that the claim is shown to be sufficiently related to the filing and pursuit of the protest, adequately documented, and reasonable in its nature and amount. JAFIT Enters., Inc.--Costs, B-266326.2, B-266327.2, Mar. 31, 1997, 97-1 CPD ¶ 125 at 2.

The agency here objects to reimbursement of the costs related to three of Mr. Kirkland's itemized work entries. We have reviewed the objections and the protester's response, and we agree with the agency's position. First, Mr. Kirkland describes a charge of \$1,134 (for work performed on March 17) as including work related to a previously dismissed protest (B-401172, which is not relevant here), as well as work related to the protest associated with this claim. Since the single work entry aggregates allowable and unallowable costs in a way such that we cannot tell from the record what portion is unallowable, the entire amount must be disallowed. See TRESP Assocs., Inc.--Costs, B-258322.8, Nov. 3, 1998, 98-2 CPD ¶ 108 at 4. Likewise, since a \$252 charge (for work performed on March 23) again aggregates unallowable charges (e.g., for the preparation of a letter for the contracting officer, which has not been shown to have been performed in pursuit of the protest) with allowable expenses (e.g., regarding communications about the status of the protest), the entry must be disallowed in its entirety. Id. Lastly, as the agency points out, a \$126 work entry (for work performed on April 28) must be denied, as it was not in

pursuit of the protest; the work instead involved protester counsel's efforts toward possible settlement of the protest. See Blue Rock Structures, Inc.–Costs, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190 at 6.

The agency also objects to the costs for six work entries for Mr. Billings, primarily on the basis that they involve counsel's efforts toward settlement, and thus not pursuit, of the protest. We agree with the objections to two of the work entries, Mr. Billing's invoices for \$160 (for work on April 28) and \$80 (for work on April 29), as the work concerns efforts toward possible settlement of the action, and thus are not allowable costs. See T Square Logistics Servs. Corp., Inc.–Costs, B-297790.6, June 7, 2007, 2007 CPD ¶ 108 at 10-11. The other four work entries challenged by the agency (totaling \$2,400), however, are considered allowable costs, and are included in our recommendation. The agency's assertion that these costs should not be reimbursed is unpersuasive as there is no showing that the costs related to settlement efforts or otherwise should not be allowed.

The protester also generally requests reimbursement of its costs related to the pursuit of its claim to our Office. We deny the request. Under our Bid Protest Regulations, 4 C.F.R. § 21.8(f)(2) (2010), we will recommend such payment only if it is shown that the agency failed to give reasonable consideration to, or unreasonably delayed consideration of, the protester's claim. See Blue Rock Structures, Inc.–Costs, supra at 7. Here, while the agency ultimately abandoned its initial objections, perhaps due to the additional explanation of the claim provided by the firm in its filing to our Office, there has been no showing that the agency failed to give reasonable consideration to the claim. Similarly, to the extent the protester now argues that the agency's request for proof of payment of its claimed attorneys' fees was not legally required, and thus, the request unreasonably delayed the agency's consideration of the claim, we find the protester's position unpersuasive. As the agency explains, it reasonably sought the information in order to confirm that Baine Clark was obliged to pay the claimed attorneys' fees; additionally, the firm did not object to the request, pose an alternate means to further demonstrate its obligation to pay the attorneys' fees it claimed, or immediately respond to the agency's request for the information. Rather, the record shows the protester added to the alleged delay by taking several weeks to provide the requested proof of payment. Further, the record shows that additional questions were reasonably raised by the proof of payment submitted by the protester, since the payment amount exceeded the amount claimed by the protester, requiring additional time for the agency to resolve the matter. See University of Dayton Research Institute–Costs, B-296946.7, Oct. 23, 2006, 2006 CPD ¶ 155 at 4.

Accordingly, we recommend that the agency reimburse Baine Clark a total of \$24,908.34, representing \$4,458.34 for Mr. Kirkland's fees and \$20,450 for Mr. Billing's fees.

Lynn H. Gibson
Acting General Counsel