

Spurgenberg



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ultraviolet Purification Systems, Inc.--
 Claim for Bid Protest Costs
File: B-226941.3
Date: April 13, 1989

DIGEST

1. Protester awarded the costs of pursuing its protest is not entitled to be reimbursed costs associated with meeting with or writing to congressmen seeking their assistance in the protest or in substantiating and pursuing the claim for the costs.

2. A successful protester who was not represented by an attorney can be reimbursed for the time its employees spent pursuing the protest, where it documents the number of hours/days spent by each employee on activities directly related to pursuing the protest and the cost elements of each claimed employee's hourly/daily charge.

3. Where a procuring agency challenges the legitimacy and reasonableness of invoices for consultant services, including attorneys' fees, submitted in support of a claim for reimbursement of the costs of pursuing a protest, and the protester does not substantively respond, the claim for these invoiced costs will not be allowed in the absence of other evidence that the consultant service costs were reasonable and incurred for activities directly related to the pursuit of the protest.

4. A manufacturer's representative's lost commission costs cannot be recovered by a protester as part of its awarded costs of pursuing a sustained protest, even if the lost commission is claimed at a putative fixed daily rate, since such costs are what might be expected to be incurred by the manufacturer's representative to ensure a sale.

5. Payment of interest on a claim for reimbursement of costs of pursuing a sustained protest is not authorized.

C-45214/138472

DECISION

Ultraviolet Purification Systems, Inc., requests our Office to determine the amount it is entitled to recover from the Bureau of Prisons (BOP), United States Department of Justice, for the costs of pursuing its protest in Ultraviolet Purification Systems, Inc., B-226941, Sept. 10, 1987, 87-2 CPD ¶ 229.

Ultraviolet claims \$16,190.12 as its costs of pursuing its protest. We allow \$5,177.99, provided Ultraviolet submits certain further verifying data as described below.

In our prior decision, we sustained Ultraviolet's protest of the issuance of sole-source purchase order No. 05-1733 to Trojan Technologies, Inc., by the Federal Correctional Institution, Otisville, New York, for an ultraviolet disinfection system for the prison's sewage disposal system. Although we found BOP had not justified the sole-source award, we did not recommend remedial action since the system had already been installed. However, we did award Ultraviolet the costs of pursuing its protest.

Shortly after our decision was issued, Ultraviolet submitted an invoice to BOP in the amount of \$13,652.31 for these costs. BOP attempted to obtain documentation for Ultraviolet's claim and negotiate a settlement. However, Ultraviolet declined to provide BOP with any documentation supporting its claim. Instead, Ultraviolet suggested that the claim be audited by the Defense Contract Audit Agency, if BOP wanted any documentation for its claim; otherwise it demanded that BOP pay the full amount of the claim. Consequently, BOP declined to settle Ultraviolet's claim.

Ultraviolet then asked our Office to resolve its claim. After BOP provided us with its comments on how the claim should be settled and after Ultraviolet was advised by our Office that it had the burden of proving its claim, Ultraviolet provided documentation supporting its claim which now totals \$16,190.12.^{1/} BOP then provided specific

^{1/} As indicated in our decision in Patio Pools of Sierra Vista, Inc.--Claim for Costs, B-228187.4, B-228188.3, Apr. 12, 1989, 89-1 CPD ¶ _____, in the future our Office will not consider claims for costs awarded by us, where, as here, an uncooperative protester fails to document its claim to the contracting agency. Also, unlike Patio Pools, we do not totally disallow this claim because Ultraviolet ultimately

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comments on the elements of Ultraviolet's documented claim and asserted that the amounts claimed were unreasonable and still not sufficiently documented. Ultraviolet did not respond on the merits to BOP's comments; instead, Ultraviolet questioned the qualifications of BOP's employees and suggested that the claim be audited or measured by an "industrial engineering work measurement."

Ultraviolet's claim consists of \$7,369.60 in direct labor costs for its president, controller, engineer, and secretary and \$8,434.31 for costs of outside consultants, that is, a legal counsel, a "government consultant" and a manufacturer's representative. Ultraviolet also claims \$389.82 in interest on the original billing for its costs.

A protester seeking to recover the cost of pursuing its protest must submit sufficient evidence to support its monetary claim. Introl Corp., 65 Comp. Gen. 429 (1986), 86-1 CPD ¶ 279; Malco Plastics, B-219886.3, Aug. 18, 1986, 86-2 CPD ¶ 193. We deny Ultraviolet's claim in part because it refused to document its claim to the agency and since it failed to substantively respond to the BOP's evaluation of its claim and provide sufficient documentation to our Office.

Ultraviolet's direct labor cost claim indicates that its president spent 6.45 days, its controller 6.20 days, its engineer 3.00 days and its secretary 4.10 days on this protest. These billed time estimates are now supported by a computer printout detailing the approximate dates and amount of time for each action taken in pursuing the protest. Ultraviolet also has documented the loaded daily rates (including taxes, benefits, and holidays) of its controller, engineer, and secretary and has partially documented the daily rates of its president.

With regard to the president, the claimed rate of \$779.06 per day includes the president's base annual salary of approximately \$100,000, bonus and applicable taxes, benefits, and holidays. BOP correctly notes that Ultraviolet has not provided any substantiation for the president's base annual salary as it did for its other employees. BOP suggests that since Ultraviolet has only

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did submit a documented claim that was subject to review and comment by the contracting agency.

documented the president's substantial bonus payment and the applicable taxes, benefits and holiday rates, the president's daily rate should be reduced to exclude the undocumented base salary amount.^{2/}

Although Ultraviolet has not substantively responded to BOP's position, we recognize that the president may have received more salary than his annual bonus and that this salary could approximate \$100,000 per year as claimed. However, the president's substantial bonus payment may not be in compliance with the Federal Acquisition Regulation (FAR) cost principles,^{3/} in that Ultraviolet has not documented that this bonus was paid in accordance with the standards of FAR § 31.205-6(f)(1) (FAC 84-15).^{4/} Therefore, if Ultraviolet documents to BOP the amount of the president's base salary and that the bonus was paid in accordance with the standards set forth in FAR § 31.206-6, it may be reimbursed for the president's time at the claimed \$779.06 per day.^{5/} Otherwise, Ultraviolet is to be

^{2/} BOP calculates this reduced rate as \$340 per day.

^{3/} We agree with the General Services Administration Board of Contract Appeals (GSBCA) that the FAR cost principles should be referenced in determining what costs are allowable. MBI Business Center, Inc., GSBCA No. 8560-C (8247-P), Mar. 11, 1987, 87-2 BCA ¶ 19,702; Amdahl Corp., GSBCA No. 7965 (7859-P), July 12, 1985, 85-3 BCA ¶ 18,283.

^{4/} FAR § 31.205-6(f)(1) provides that bonuses are reimbursable costs if reasonable and if paid or accrued: (1) "under an agreement entered into in good faith between the contractor and the employee before the services are rendered" or (2) "pursuant to an established plan or policy followed by the contractor so consistently as to imply, in effect, an agreement to make such payment, and the basis for the award is supported."

^{5/} Although we could totally disallow Ultraviolet's claim for its president's time because Ultraviolet has not documented this cost element, we decline to do so in this particular case, since our contemporaneous records confirm that the president personally and actively participated in pursuing this protest. This element of Ultraviolet's claim is contrasted with Ultraviolet's claimed consultant costs, which our records do not indicate were incurred and which we
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reimbursed for the president's time only in the amount that it substantiates. See Rocky Mountain Trading Co., GSBICA No. 9054-C (8958-P), June 27, 1988, 88-3 BCA ¶ 20,939 (claim

for time of president of protester pursuing a protest can be reimbursed at an hourly rate to the extent this rate has been documented by the protester's actual costs).

Although Ultraviolet indicates that its president spent 6.45 days pursuing this protest, we note that .95 of a day of this time was actually devoted to meeting with or writing to congressmen seeking their assistance in the protest. We agree with BOP that these costs are not reasonably related to pursuing the protest and thus are not for recovery.

With regard to the remaining 5.5 days of the president's time, BOP claims that this amount is unreasonable, considering the president's senior position in the company and the small dollar amount (\$24,900) of the purchase order. BOP suggests that only .5 of a day of the president's time should be allowed. We disagree. We do not find it unusual or unreasonable for a company president to actively participate in a bid protest, regardless of the dollar amount of the procurement action.^{6/} Moreover, our records confirm that the president did, in fact, actively participate in activities directly related to pursuing the protest and that this time may well have approximated the amount of time claimed, since a number of complex issues were involved and we solicited several supplemental reports from BOP on which Ultraviolet commented. Consequently,

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totally disallow for the reasons outlined below, primarily because Ultraviolet also did not respond to the BOP's comments regarding the legitimacy of these costs.

^{6/} Ultraviolet explains that not only did it lose this contract to an improper sole-source award, it also lost the opportunity to "network" this contract into other production contracts in this geographical area and utilize the Otisville installation as a "show piece" for displaying its technical expertise. Ultraviolet also claims that its leadership in wastewater disinfection field has been threatened by the loss of this contract. Therefore, the president's active interest in this purchase order award is understandable.

Ultraviolet may be reimbursed for 5.5 days of the president's time. This amounts to a total of \$4,284.83, presuming Ultraviolet substantiates the president's base salary and bonus as outlined above.

BOP has not challenged the documented loaded labor rates of the controller, engineer and secretary. However, much of the claimed time of the controller and secretary was for substantiating and pursuing this claim, rather than for activities directly related to pursuing the earlier protest; such costs are not reimbursable in the absence of express statute or regulation. The Howard Finley Corp., B-226984.2, Nov. 21, 1988, 88-2 CPD ¶ 492. Also, some of these individuals' time was spent contacting congressmen to solicit their assistance. As indicated above, these costs are not reimbursable, since this activity is not reasonably related to the pursuit of the protest. We find the remaining claimed 2.55 days of the controller's time and 1.3 days of the secretary's time were reasonably related to pursuing the protest and are allowed at the claimed rates.^{7/} This amounts to a total of \$696.35 for the two employees.

Ultraviolet also claims 3 days of an engineer's time were spent in pursuit of the protest. BOP responds that only 1 day could reasonably be charged. We agree with BOP. The supporting data for Ultraviolet's claim shows that the engineer's time was all spent prior to the initial protest filing. However, in this filing, Ultraviolet merely argues that the BOP sole-source action was not proper and gives no further explanation for this contention. The protester's detailed technical arguments were only made after submission of the agency report. Under the circumstances, we are not persuaded that 3 days of engineer's time were incurred prior to filing this protest. In the absence of any further explanation by Ultraviolet, we accept BOP's recommendation that 1 day of the engineer's time be reimbursed. See Fischer-White-Rankin Contractors, Inc., B-213401.3, July 22, 1986, 86-2 CPD ¶ 88. This amounts to a total of \$196.81.

Ultraviolet has also requested reimbursement for \$8,434.31 in invoices submitted by three outside consultants. For the reasons that follow, we find that it has substantiated none of these claimed costs.

First, Ultraviolet claims \$2,625 for outside legal counsel fees from a law firm (15 hours at \$175 per hour). This invoice is dated September 1987, shortly after our prior

^{7/} BOP's evaluation of the claim allowed 3 days for the controller and 1 day for the secretary.

decision was issued, and indicates that it is for "conferences and discussions" from April 1987 to June 1987 concerning the "Otisville Correctional Institute," and that no payments had been made.

Upon review, BOP commented that this invoice was inadequate to justify reimbursement of this amount. BOP notes that the "invoice" is not signed and appears to be on plain bond paper. BOP consequently questions the legitimacy of an unpaid invoice from a law firm charging \$175 per hour that does not have its own letterhead.

Since BOP has challenged the legitimacy of the invoice, the burden was on Ultraviolet to submit rebuttal evidence from the attorneys involved showing the claimed hours were incurred and reasonable and the claimed rate was reasonable. See Malco Plastics, B-219886.3, supra. Since Ultraviolet has not responded to BOP's comments, except to say that its invoices would stand up to audit, and in the absence of any other evidence that would indicate the legal fees were reasonable and incurred for activities directly related to pursuit of the protest, Ultraviolet's claim for reimbursement of the legal fees is denied. Id. In this regard, no appearance by this law firm was made before our Office during the pendency of the protest.

Ultraviolet has also submitted an invoice from a consultant for \$1,504.31 (2 days at \$500 per day plus \$504.31 in travel expenses) for "services as a government consultant regarding [the] Otisville, New York project." BOP has also questioned this invoice, since the associated travel expenses are for a trip to Connecticut (nowhere near the protester's New York facility or Otisville) and appear to be excessive and unjustified, and because Ultraviolet has not identified what this consultant did that was related to this protest.

Again, Ultraviolet did not respond to BOP's comments, nor did it furnish further documentation supporting this claim. Moreover, we note that although Ultraviolet's claim indicates that this consultant's services were associated with filing the protest on May 1, 1987, the travel vouchers are dated May 26 or 27, 1987, after the protest was filed, but before Ultraviolet received BOP's report on the protest. Therefore, we too question why these consultant services were necessary or related to the pursuit of this protest. In the absence of any explanation from Ultraviolet, we also deny reimbursement of this invoice. See Malco Plastics, B-219886.3, supra.

Ultraviolet also has submitted an invoice from its manufacturer's representative in the amount of \$4,200 (6 days at \$700 per day). However, after being advised of this invoice, BOP claimed that during negotiations to settle this claim it was told by Ultraviolet that this aspect of the claim was for the manufacturer's representative's lost commission on this sale. Consequently, BOP also questions the legitimacy of this invoice.

Here, too, Ultraviolet did not respond to or specifically dispute BOP's comments. Since the kind of assistance that a manufacturer's representative, who works on a commission basis, provides in pursuing a protest is what might be expected from him to ensure a sale, such lost commission costs, even if claimed as services at a putative daily rate, are not reimbursable as costs of pursuing a protest. See Gramcco Computer Sales, Inc., GSBICA No. 9049-C (8940-P), Apr. 5, 1988, 88-2 BCA ¶ 20,691.

Finally, Ultraviolet's claim for interest on its claim for costs is not reimbursable since payment of interest on such claims is not authorized by any statute. Fischer-White-Rankin Contractors, Inc., B-213401.3, supra, at 6.

Based on the foregoing, Ultraviolet is entitled to recover \$5,177.99 in costs of pursuing its protest, provided that it substantiates its president's compensation as stated in this decision.

for 
Comptroller General
of the United States