S. Riback
B-246132

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Armour of America, Inc.--Claim for Costs

File: B-237690.2

Date: March 4, 1992

Debra J. Moore, Esq., Watkiss & Saperstein, for the protester.
Adam C. Striegel, Esq., General Services Administration, for the agency.
Scott H. Riback, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office declines to adopt a mandatory ceiling on allowable protest costs based upon the dollar value of the acquisition; there exists no necessary correlation between the dollar value of an acquisition and the complexity of the issues involved in a bid protest, and such a ceiling would be inconsistent with the congressional aim of facilitating the enforcement of the procurement statutes.

2. Protest costs incurred in connection with agency-level protest are unallowable, as such costs are unrelated to protester's filing and pursuit of its protest before General Accounting Office.

3. In considering claim for protest costs, General Accounting Office will examine the reasonableness of the claimed number of hours spent by attorneys for the protester where agency identifies specific hours as excessive and articulates reasoned analysis as to why hours are excessive; the hours determined to be excessive will not be allowed.

4. Reimbursement of protest costs will be based upon the customary hourly rate charged by counsel performing similar work in counsel's community; the fact that protester's counsel charges less than counsel in other communities is irrelevant and does not form a basis to reimburse protester for hours which are otherwise determined to be excessive and therefore unallowable.

5. Where record does not reflect that protest-related work was performed during hours of travel, protester seeking reimbursement for protest costs may not be reimbursed at counsel's full, customary hourly rate for time spent in travel.

6. Where successful protester claims in-house personnel costs which the agency argues are attributable, at least in part, to agency-level protest proceedings, and protester does not rebut allegation, entire amount, other than the time attributable to actual participation in protest conference at the General Accounting Office, will be disallowed from claim for protest costs even though a portion may properly be reimbursed.

DECISION

Armour of America, Inc. requests that our Office determine the amount it is entitled to recover from the General Services Administration (GSA) for the costs of filing and pursuing its bid protest in Armour of Am., B-237690, Mar. 19, 1990, 90-1 CPD ¶ 304. We determine that Armour is entitled to recover $19,798.03 out of a total claim of $33,494.20 for the cost of filing and pursuing its bid protest.

We sustained Armour's original protest against GSA's award of a purchase order--in the amount of $17,849.28--under request for quotations (RFQ) No. QPU-B-QY575-1 because we found that the agency, in awarding the purchase order for body armour vests, had relaxed a number of material specification requirements for the awardee. We also found that GSA's relaxation of those requirements was prejudicial to Armour because the protester demonstrated that it could have significantly reduced its price of $24,868 had it been afforded the opportunity to base its offer on the relaxed requirements. Although we were unable to recommend corrective action in the case because the contract had been fully performed by the time of our decision, we found that Armour was entitled to the costs of filing and pursuing its bid protest, including attorneys' fees.

By letter of May 22, 1991, Armour requested that our Office determine the amount to which it was entitled for filing and pursuing its bid protest. Armour claims a total of $28,096.45 in bid protest costs; this amount, which includes $623 for the cost of preparing its claim, is comprised of $20,682.50 in attorneys' fees, $4,980.65 in attorneys' expenses (such as telephone bills and travel expenses), and $2,433.30 in in-house expenses. By separate letter dated August 6, Armour claims an additional $5,397.75, comprised of $4,884 in attorneys' fees and $513.75 in attorneys'

expenses, for costs associated with pursuing this claim. In all, Armour claims $33,494.20 as the costs of filing and pursuing its bid protest and claim.

GSA argues that the amount claimed by Armour is per se unreasonable because it exceeds the amount which a reasonably prudent business would expend in pursuit of a protest involving a purchase order with a dollar value of only $17,849.28. The agency also argues that the amount in question is excessive because a significant portion of the claim is for attorneys' fees and expenses which were incurred either as a result of lack of experience in the area of government contract law, as shown by excessive time charged to learn basic protest procedures and procurement law concepts, or as a result of unnecessary duplication of effort on the part of more than one attorney. With respect to the claimed duplication of effort, GSA questions the necessity for more than one attorney where the case in question is, allegedly, relatively simple. Furthermore, GSA specifically contends that Armour is seeking reimbursement for the time of a supervising attorney who did not substantively participate in the litigation, did not participate in any legal research or writing, and only attended status meetings at which the supervising attorney was kept abreast of developments in the case by the attorney primarily responsible for handling the matter.

In addition to these general challenges to the reasonableness of Armour's claimed bid protest costs, GSA argues that various particular costs are unallowable. Specifically, GSA alleges that all costs claimed for Armour's counsel for the period prior to October 18, 1989, are unallowable because they relate to an agency-level protest which GSA denied on October 18. GSA also objects to all costs claimed by Armour in pursuing its claim for bid protest costs.

Armour denies that its claim is excessive in light of the results achieved, as well as the overall purpose of the Competition in Contracting Act's (CICA) cost provision. The firm argues that although the amount of the purchase order at issue in the protest was small, the protest was significant as a means of ensuring that Armour is treated fairly in its future dealings with GSA and also as a means of vindicating the overall public interest in ensuring that procurements are conducted in accordance with law and regulation. With respect to the specific allegations of an excessive number of hours billed for its attorneys, Armour states that its counsel may have been unfamiliar with this field of law and that the agency may have been billed for additional hours as a result of that unfamiliarity. Armour maintains, however, that the cost of any additional hours is offset by the lower hourly-rate charged by the firm as compared to firms in other cities specializing in government procurement

law. As for the time claimed for its supervising attorney, Armour asserts that the attorney participated substantively in pursuing the protest and that his time has been adequately documented. Armour further argues that it is entitled to its claimed costs incurred before October 18, when GSA denied the agency-level protest, because these costs in fact were incurred in pursuit of its General Accounting Office (GAO) protest. As to the costs incurred in pursuit of its claim, Armour argues that we should award these costs because the agency has "forced" it to incur them.

STANDARD

The Competition in Contracting Act (CICA), 31 U.S.C. § 3554(c)(1)(A) (1988), authorizes our Office to declare that an appropriate interested party is entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees. The underlying purpose of CICA's provisions relating to the entitlement to bid protest costs is to relieve protesters of the financial burden of vindicating the public interest as defined by Congress in the Act. Hydro Research Science, Inc.--Claim for Costs, 68 Comp. Gen. 506 (1989), 89-1 CPD ¶ 572. In this regard, the bid protest process, as mandated by CICA, "was meant to compel greater use of fair, competitive bidding procedures 'by shining the light of publicity on the procurement process, and by creating mechanisms by which Congress can remain informed of the way current legislation is (or is not) operating.'" Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1104 (9th Cir. 1988), quoting Ameron v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 984 (3rd Cir. 1986). The Congress believed that the prospect of successful protesters being reimbursed their bid protest costs was necessary to enhance the effectiveness of the bid protest process. See H.R. Rep. No. 98-1157, 98th Cong., 2nd Sess. 24-25 (1984). In essence, entitlement to bid protest costs relieves a protester of the financial demands of acting as a private attorney general where it brings to light an agency's failure to conduct a procurement in accordance with law and regulation.

Although GSA argues for a general limit on the recovery of protest costs based upon the amount of the contract at issue, we believe this would be inconsistent with the congressional purpose for the cost entitlement provisions of CICA. While there may be a relationship in some instances, there is no necessary correlation between the complexity and importance of the issues involved on the one hand, and the size of the procurement on the other. A mandatory ceiling on allowable protest costs based upon the amount of the contract would discourage protesters from bringing prejudicial violations of the procurement laws to our

attention where, irrespective of the importance of the issue to the procurement community or the protester itself, the contract amount is less than the possible costs of filing and pursuing a protest. In short, a reasonably prudent business in pursuit of a bid protest could in appropriate circumstances incur costs which exceed the value of the acquisition. See Federal Acquisition Regulation § 31.201-3(a).

In our view, a standard formula or ceiling for the determination of allowable protest costs would be inappropriate; entitlement to costs should be based upon the facts and circumstances in each case. As we have previously stated, a protester seeking to recover its protest costs must submit sufficient evidence to support its monetary claim. Patio Pools of Sierra Vista, Inc.--Claim for Costs, 68 Comp. Gen. 383 (1989), 89-1 CPD ¶ 374. The amount claimed may be recovered to the extent that the claim is adequately documented, and is shown to be reasonable, that is, does not exceed that which would be incurred by a prudent person in the pursuit of its bid protest. Id.

COSTS OF PURSUING THE CLAIM

We find that Armour is not entitled to amounts claimed for pursuing its bid protest costs. Under the Bid Protest Regulations applicable to this case, 4 C.F.R. § 21.6(f)(2) (1990), protesters were not entitled to costs associated with the pursuit of a claim for protest costs. See Ultraviolet Purification Sys., Inc.--Claim for Bid Protest Costs, B-226941.3, Apr. 13, 1989, 89-1 CPD ¶ 376. Regulations applicable to protests filed after April 1, 1991 provide that the costs associated with the pursuit of a claim are allowable under the cost-award provision of CICA in appropriate circumstances. 4 C.F.R. § 21.6(f)(2) (1991). We have not applied the new provision retroactively. In our view, contracting agencies were entitled to advance notice of the new rule since awareness of the change could well have affected agencies' negotiating positions in considering claims in the first instance. The application of the revised regulations, promulgated in January 1991, 56 Fed. Reg. 3759 (1991), to protests filed after April 1, 1991, provided a reasonable and necessary notice period. See Hadson Defense Sys., Inc.--Claim for Protest Costs, B-227285.8, Mar. 13, 1991, 91-1 CPD ¶ 274. We therefore disallow the entire amount of $6,020.75 claimed for the cost of pursuing the firm's claim.

COSTS OF AGENCY-LEVEL PROTEST

We conclude that attorneys' fees and expenses incurred by Armour prior to October 18 are not allowable because they are associated with the firm's agency-level protest. Technical Eng'g--Claim for Costs, 69 Comp. Gen. 679 (1990), 90-2 CPD ¶ 152. The agency-level protest filed on October 10 was denied by agency decision dated October 18 (and received by Armour on October 23). Notwithstanding the agency's specific challenge to the expenses claimed for the period prior to and including October 18, Armour has not furnished any specific evidence (e.g., affidavits from the protester's employees or attorneys) to show that the costs were incurred in connection with preparing Armour's protest to our Office rather than with the agency-level protest.

We therefore disallow Armour's claim for costs incurred on or before October 18, amounting to $842.02, for 9.3 hours of attorneys' fees and related expenses.

ATTORNEYS' FEES

We will examine the reasonableness of the claimed number of hours spent by attorneys for the protester to determine whether they are excessive where an agency identifies specific hours as excessive and articulates a reasoned analysis as to why payment for those hours should be disallowed. Princeton Gamma-Tech, Inc.--Claim for Costs, 68 Comp. Gen. 400 (1989), 89-1 CPD ¶ 401.

Here, GSA questions approximately 86.2 of the approximately 205.3 attorney hours remaining after elimination of the hours claimed for the period on or before the October 18 agency denial of the protest and for pursuing the claim. GSA identifies 6.8 attorney hours claimed for the period after October 18 which it asserts resulted from inexperience and unfamiliarity with government contract law and bid protest procedures, and another 25 hours for excessive research, writing and travel time; the remaining time challenged is attributable either to the supervising attorney, who GSA believes did not substantively participate in the litigation, or to meetings by other counsel with him.

Regarding GSA's objection to the hours billed for the supervising attorney's participation, we note that although he may not have signed any pleadings or actively participated in the bid protest conference, the time sheets submitted for him by Armour otherwise document his participation. We do not find it unreasonable that the attorney performing most of the work reports to, and is assisted by, a supervising attorney. Indeed, we note that GSA itself was represented by more than one attorney. Although the number of attorneys

employed may be a consideration, we believe that the essential question is the reasonableness of the total number of hours billed.

Regarding Armour's argument that the cost of the additional hours is offset by its billing lower rates than charged by counsel in other localities who are more experienced with government procurement law, we do not find this argument persuasive. As noted previously, Armour concedes that the unfamiliarity of its counsel with bid protests may have resulted in additional attorney hours expended. Armour has made no showing that the rates billed for its counsel, who practice in Utah, are below the customary fee for similar work in that community. As the court stated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), when calculating the "reasonable attorneys' fee" recoverable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1988), the customary fee for similar work in the community should be considered in determining allowable costs. We conclude that a similar standard in determining the allowable attorneys' fees under CICA should be applied because both statutes provide for the award of "reasonable attorneys' fees." The rates charged by counsel in other communities are irrelevant and do not form a basis to reimburse Armour for hours which are otherwise determined to be excessive and therefore unallowable.

We agree with GSA that, whether or not attributable to attorney inexperience, the total number of attorney hours billed is excessive. For example, as the agency points out, Armour's initial seven-page letter of protest and document request, for which its attorneys billed approximately 36 hours, addressed a significant number of issues that were clearly untimely, and contained no argument regarding either the timeliness of those issues or why we should consider them even if untimely.

In light of the foregoing, we disallow one-fourth of Armour's attorneys' hours attributable to legal research and writing. We calculate the number of hours attributable to legal research and writing to be 109.9, for a total dollar value of $10,008; we therefore allow only 82.4 hours, for a total of $7,506.[1]

Armour's counsel also has billed a total of $6,045 for 62 hours spent in preparation for, and travel to and from, the informal bid protest conference held at our Office. We

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[1]Different hourly rates were applicable to different attorneys. We think the fairest method of determining the dollar value of the disallowance is to pro-rate the disallowance among the four attorneys in question.

find the amount billed excessive. In our view, Armour's counsel may not properly be reimbursed their full hourly-rate for time spent traveling to and from the conference, since their bill does not show that any other legal work relating to the protest was done during the hours of travel. See Shirley v. Chrysler First, Inc., 773 F.Supp. 856 (N.D. Miss. 1991) (in calculating attorneys' fees reasonable under Title VII, the hourly rates of attorneys are reduced for travel time and performing purely administrative tasks). We therefore disallow one-third of the total amount claimed, and allow payment for these hours only in the amount of $4,030.

We allow payment for the remaining 33.4 billable hours, which are neither directly attributable to legal research nor to travel time, of the protester's claim for attorneys' fees for a total dollar value of $3,355.

IN-HOUSE PERSONNEL COSTS

Armour claims a total of $1,670.30 in salaries for four in-house employees participating in the protest process. Although Armour has provided payroll records for the employees in question, substantiating the hourly rates of pay claimed for them, see Ultraviolet Purification Sys., Inc.--Claim for Bid Protest Costs, supra, it has only generally described what activities were performed during the time billed for the employees. Thus, Armour claims: (1) 40 hours for the first employee, including 24 hours for attendance at the informal bid protest conference and 16 hours for participation in conferences related to the protest; (2) 16 hours for the second employee for time spent in conferences related to the protest; (3) 10 hours for the third employee for time spent in "correspondence and research"; and (4) 8 hours for the fourth employee for time spent in "correspondence and research."

GSA argues that we should disallow the entire amount of the claim for in-house personnel costs associated with conferences (other than the bid protest conference), correspondence, and research because there is no way to determine what portion of the hours claimed relate to pursuit of the protest to our Office and what portion relate to the pursuit of the agency-level protest.

As a general rule, where a protester has aggregated allowable and unallowable costs into a single claim, such that we cannot tell from the record before us what portion of the claim is allowable and what portion is unallowable, the entire amount must be disallowed even though some portion of the claim may be properly payable. Omni Analysis--Claim for Bid Protest Costs, 69 Comp. Gen. 433 (1990), 90-1 CPD ¶ 436.

Here, although the agency specifically questioned the apportionment of the employees' hours between the agency-level protest and the protest to our Office, Armour has failed to submit evidence, such as affidavits from the employees in question, documenting in detail the various activities which were performed during the claimed time. Thus, while some or all of the hours claimed for conference, correspondence and research may be allowable, Armour has not met its burden of demonstrating which hours claimed are allowable. Consequently, we find Armour is entitled to recover only $405.60 for in-house personnel costs, which represents the salary costs for the first employee's preparation for and attendance at the bid protest conference.

OTHER COSTS

Finally, Armour claims a total of $5,743.65 in additional expenses, comprised of $2,842.64 in travel expenses (including phone calls) for three individuals to attend the bid protest conference, $153.07 in additional long-distance telephone calls, $114.30 for photocopying, $82 for overnight mail delivery and $2,551.64 for computer-assisted legal research.

With regard to the travel expenses, GSA objects to the payment of all amounts claimed for meal expenses and telephone calls made during the travel, and it questions the airfare for one of the protester's lawyers. Our review of the documents submitted by Armour leads us to conclude that the firm has documented and demonstrated an entitlement to $2,414.97 in travel expenses. This amount is comprised of $1,406 for airfare, $952.97 for hotel accommodations, meals and telephone calls, and $56 for taxicab fares and parking. We are aware of no legal authority which would preclude the payment of the reasonable costs of meals and telephone calls incurred during business travel in connection with the pursuit of a bid protest; we conclude that these costs are allowable.

Regarding Armour's claim of an additional $153.07 for telephone calls, the agency questions the charges for calls occurring either on or before October 18, 1989, when the agency issued its decision denying Armour's agency-level protest, and calls occurring on March 24, 1990, after our decision was issued. We conclude that Armour is entitled to be reimbursed $110.55 for telephone call charges. We disallow the cost of all calls occurring on or before October 18, 1989, which amounts to $42.52, because the protester has furnished no evidence showing that those calls were related to the protest to our Office rather than to the pending agency-level protest. See generally Techniarts Eng'g--Claims for Costs, 69 Comp. Gen. 679 (1990), 90-2 CPD ¶ 152. Regarding the $3.10 in telephone charges incurred on

March 24, 1990, we conclude that these costs are allowable because they were incurred in connection with Armour's obtaining the advice of counsel in interpreting our decision. See Bay Tankers, Inc.--Claim for Bid Protest Costs, B-238162.4, May 31, 1991, 91-1 CPD ¶ 524. The agency has not objected to the charges for photocopying ($114.30), and overnight mail service ($82), and we conclude, based upon the record, that the amounts claimed are otherwise proper.

The agency challenges Armour's claim of $2,551.64 for computer-assisted legal research on the grounds that this amount includes research in connection with the firm's pursuit of its claim and is otherwise excessive. We believe that Armour is entitled to recover $1,779.61. Of the original claim, we disallow $178.83 because the expenditure was incurred during research sessions relating to the firm's pursuit of its claim. Ultraviolet Purification Sys., Inc.--Claim for Bid Protest Costs, supra. Of the remaining $2,372.81 in computer-assisted legal research charges, we disallow 25 percent, or $593.20, on grounds that this amount represents excess costs incurred by counsel.

In light of the foregoing, we determine that Armour is entitled to $19,798.03 as the cost of filing and pursuing its bid protest.

Milton J. Socolar

for Comptroller General
of the United States