



United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-237868.8

December 20, 1991

The Honorable Loren A. Smith
Chief Judge
United States Claims Court
717 Madison Place, N.W.
Washington, DC 20005

Dear Judge Smith:

By order of November 14, 1991, in Unified Indus., Inc. v. United States, No. 91-1441C (Cl. Ct. filed Sept. 19, 1991), you requested our recommendation concerning the amount of bid protest costs, including attorneys' fees, to which Unified Industries, Inc. (UII) would be entitled in connection with its bid protest in Unified Indus., Inc., B-237868, Apr. 2, 1990, 90-1 CPD ¶ 346, aff'd, RGI, Inc.--Request for Recon., B-237868.2, Aug. 13, 1990, 90-2 CPD ¶ 120. We find that UII incurred costs of \$46,106.37 in filing and pursuing its bid protest to which it would be entitled under the precedents of this Office.

BACKGROUND

UII filed its original protest on November 24, 1989, against the award of a contract to RGI, Inc. for automated data processing services to be performed for the Naval Personnel Command. On April 2, 1990, we sustained UII's protest on the basis that the agency had erred in the conduct of a cost realism analysis in evaluating proposals and, consequently, the award to RGI on the basis of initial offers was improper. A major problem in the Navy's cost realism analysis was the Navy's failure to account for RGI's proposal of wage rates that were less than those required by the applicable Service Contract Act (SCA) wage determination. We recommended that the Navy engage in discussions with the competitive range offerors, solicit best and final offers (BAFO) and terminate for the convenience of the government the contract awarded to RGI if, after evaluation of BAFOs, the Navy determined that RGI was no longer properly in line

for award of the contract. This decision also awarded UII the costs of pursuing its protest, including attorneys' fees.

RGI, on April 9, filed a request for reconsideration with our Office alleging that our initial decision was erroneous. We informed both UII and the Navy of the reconsideration request and of the fact that both had a right to file their views on the matter pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.12 (1991). Both UII and the Navy filed comments on the reconsideration request with our Office; the Navy agreed with RGI that our initial decision was in error. On August 13, we affirmed our earlier decision sustaining UII's protest.¹

During the pendency of RGI's reconsideration request, UII, on July 13, filed a new protest,² alleging the existence of a conflict of interest between certain individuals employed by RGI and members of the Navy's original technical evaluation panel. On August 20, the agency proposed various corrective action measures in response to the protest and requested that we dismiss the protest as academic, which we did on August 23. UII did not request reconsideration of this dismissal.

On November 14, 1990, UII again protested to our Office, alleging various defects in the Navy's amendment of the original solicitation that was issued in an effort to implement our original recommendation.³ On January 8, 1991, UII withdrew this protest.⁴

In early 1990, RGI filed an action in the Circuit Court for Fairfax County, Virginia, against UII, alleging that a former employee of RGI had breached a nondisclosure agreement between RGI and the individual in question, and that the individual and UII had conspired to harm RGI. The basis for the action was that the individual in question had

¹On August 24, RGI filed a second request for reconsideration (B-237868.4). We denied that request for reconsideration in an unpublished decision on November 13. UII did not participate in that proceeding and does not claim any costs in connection therewith.

²This protest was docketed in our Office as B-237868.3.

³This protest was docketed as B-237868.5.

⁴UII claims no costs associated with this protest.

allegedly taken certain computer diskettes containing information proprietary to RGI upon the cessation of his employment with that firm and had given the diskettes to UII sometime after becoming employed by UII. According to UII, the information on the diskettes shows that RGI was paying less than the required SCA wage rates to its employees under that firm's predecessor contract.⁵ This action was ultimately removed to the United States District Court for the Eastern District of Virginia. On February 16, 1991, the court granted summary judgment in favor of UII, finding that RGI had failed to show any damages as a result of UII having obtained the diskettes.

On September 19, 1991, UII filed its Claims Court complaint alleging that various actions of the Navy have resulted in a breach of the Navy's duty to fairly consider UII's offer in the subject acquisition. UII's complaint alleges generally that it has been damaged by the Navy's on-going course of action throughout the procurement, which it asserts is designed to disadvantage the firm in competing for the Navy's requirements. For example, UII's complaint alleges that the Navy improperly disqualified it from further consideration in the competition based upon UII's having obtained the diskettes containing information allegedly proprietary to RGI. UII also alleges that the Navy has damaged it by failing to pay the reasonable costs of filing and pursuing its bid protest before our Office.⁶

⁵RGI was the incumbent contractor.

⁶The Navy argued before GAO that UII should not be entitled to any of its bid protest costs because of its actions in receiving the diskettes. Specifically, the Navy argued that UII's use of the data contained on the diskettes--at least in the pursuit of its protest--is inconsistent with the purpose behind provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1) (1988), relating to the award of bid protest costs, since the information was allegedly proprietary data wrongfully obtained from a competitor. According to the Navy, UII's actions were inconsistent with CICA's mandate to ensure full and open competition. Since the facts concerning whether the protester wrongfully obtained the diskettes are not clear in the record before us and the matter appears to be before the Claims Court for its resolution, we express no opinion regarding the Navy's contention.

UII'S CLAIM

UII claims \$75,542.52 in protest costs, comprised of \$37,379.74 for attorneys' fees and \$38,162.78 for in-house costs. With regard to the firm's claimed outside counsel costs, \$34,846.00 represents attorneys' fees and \$2,533.74 represents various disbursements.⁷ Regarding the firm's claimed in-house costs, the entire amount claimed is comprised of salaries of various individuals, most of whom are senior-level representatives of the firm.⁸

ATTORNEYS' FEES

As to UII's claimed \$37,379.74 in attorneys' fees, the Navy largely does not take issue with either the number of hours worked by UII's counsel in pursuit of the protest and reconsideration or the reasonableness of the various lawyers' hourly rates. The Navy also does not contest the disbursements included in the attorneys' fee claim that are associated with the pursuit of the protest and reconsideration. The agency does, however, take issue with elements of UII's claim for attorneys' fees that it asserts were not incurred in UII's filing and pursuing its bid protest. We have reviewed the claimed attorneys' fees and have found that, except as discussed below, they would be reasonable and allowable.

CICA provides that a protester may be awarded the costs of "filing and pursuing" its bid protest where the Comptroller General determines that an agency's contracting actions do not comply with statute or regulation. 31 U.S.C. § 3554(c) (1) (A). We have interpreted this provision to mean that a protester may only be reimbursed its protest costs for activities directly related to the pursuit of its protest, see Ultraviolet Purification Sys., Inc.--Claim for Bid Protest Costs, B-226941.3, Apr. 13, 1989, 89-1 CPD ¶ 376, or in responding to an associated request for reconsideration. See Pacific Nw. Bell Tel. Co.; Mountain States Bell Tel. Co.--Claim for Bid Protest Costs, 67 Comp. Gen. 442 (1988), 88-1 CPD ¶ 527. Thus, we have, for

⁷ These disbursements are comprised of postage, messenger and telecopier costs, secretarial overtime, photocopying costs and computer-assisted legal research costs.

⁸ There is no indication in the record that UII's in-house costs contain any elements of indirect costs generally classified as overhead or as general and administrative expenses.

example, disallowed reimbursement of the costs incurred by a protester in meeting with congressional representatives in connection with its protest since such costs are not incurred in connection with the "filing and pursuit" of a protest. Omni Analysis--Claim for Bid Protest Costs, 69 Comp. Gen. 433 (1990), 90-1 CPD ¶ 436. We have also disallowed costs incurred in connection with the pursuit of a companion protest where the agency's corrective action rendered the companion protest academic, since, in those circumstances, our Office could not determine on the basis of the record that the agency's actions violated statute or regulation. Id.

In this case, the Navy objects to the payment of attorneys' fees of \$6,822.50 for the filing of UII's second protest (B-237868.3) on July 13 and \$1,051.50 for the conduct of settlement discussions in connection with the second protest, as well as \$258.96 in disbursements relating to the second protest.⁹ As indicated above, this second bid protest was ultimately dismissed as academic because of the agency's corrective action. We would disallow these costs because we cannot determine, based upon the record before our Office, that the agency's actions were violative of statute or regulation.¹⁰ See Omni Analysis--Claim for Bid Protest Costs, supra; see also Teknion, Inc.--Claim for Protest Costs, 67 Comp. Gen. 607 (1988), 88-2 CPD ¶ 213.

UII's attorneys' fee claim also includes \$327 for reviewing the reconsideration decision. While we have questioned costs incurred after submission of the last filing in a protest, Omni Analysis--Claim for Costs, supra, more recently we have held that the costs of pursuing a protest

⁹The Navy did not specify the amount of disbursements associated with the second protest. We calculate \$258.96 as the appropriate amount based on our analysis of the law firm's detailed bill.

¹⁰For protests filed after April 1, 1991, a protester may recover the costs of filing and pursuing a protest if an agency takes corrective action in response to a protest. 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.6(e)). In adopting this regulation our intent was to award costs where the circumstances of the case reflected that the agency unduly delayed corrective action in the face of a clearly meritorious protest. Pulse Elecs., Inc.--Claim for Costs, B-243828.2, Aug. 19, 1991, 91-2 CPD ¶ 164. We will only award such costs where we conclude that the corrective action is being taken because of a violation of statute or regulation. 56 Fed. Reg. 3762 (1991). This regulation is not applicable to UII's protest since it was filed prior to April 1, 1991.

can include reasonable attorneys' fees for review of the protest decision and some explanation and consultation with the client. Bay Tankers Inc.--Claim for Bid Protest Costs, B-238162.4, May 31, 1991, 91-1 CPD ¶ 524. The fee claimed here is for reviewing the General Accounting Office (GAO) decision and discussing it with the protester. The time spent (.3 hours for one attorney and 1.5 hours for another) was relatively brief and, we believe, reasonable. Consequently, we conclude that UII would be entitled to the amount claimed.

Finally, UII's claim includes \$1,390.50¹¹ in attorneys' fees and \$33.55 in associated disbursements for the preparation of UII's claim for filing and pursuing the protests. Under our current case law, a protester is not entitled to reimbursement of the costs associated with the preparation and pursuit of its claim for costs since such costs are not incurred in connection with "filing and pursuing" the protest.¹² Ultraviolet Purification Sys., Inc.--Claim for Bid Protest Costs, supra. Thus, we would not allow these costs.

Based on the foregoing, we find UII would be entitled to a total of \$27,822.73 in attorneys' fees and associated costs.

IN-HOUSE COSTS

UII also claims \$38,162.78 for in-house costs generated in connection with the filing and pursuing of its bid protest. This entire amount represents the labor of seven of UII's employees. The claimed amount is the sum of each employee's claimed hourly rate multiplied by each employee's claimed hours. The claimed hours are as follows:¹³

President	90 hours
Executive Vice President (EVP I)	50 hours
Executive Vice President (EVP II)	18 hours

¹¹This amount is comprised of \$1,215 claimed in UII's December 3 letter and \$175.50 claimed in its October 26 letter.

¹²Under regulations applicable to protests filed after April 1, 1991, the costs of pursuing a claim at GAO may be reimbursable in appropriate circumstances. 56 Fed. Reg. 3759 supra (to be codified at 4 C.F.R. § 21.6(f)(2)). For example, where an agency's actions, in not settling the amount of the claim, are determined to be unreasonable, we may award the costs of pursuing the claim at our Office.

¹³Since UII asserts its hourly rates are proprietary, we do not disclose these rates.

Executive Vice President (EVP III)	90 hours
Assistant Vice President (AVP)	672 hours
Technical Staff Member (TSM)	40 hours
Executive Secretary	28 hours

The Navy first argued that UII had not produced satisfactory evidence of the rates charged by UII for its various employees. UII has furnished computer-generated personnel records to our Office, which we view as sufficient evidence to establish the accuracy of the employees' hourly rates of compensation.¹⁴ Ultraviolet Purification Sys., Inc.--Claim for Costs, supra. We also find the claimed hours are adequately documented by affidavits of each of the involved employees, in which they describe their charged activities and the amount of time spent on each activity.

The Navy also generally disputed the reasonableness of the number of hours charged to the pursuit of the protest and reconsideration request. Except as outlined below, we believe the claimed in-house costs are reasonable and would be allowable.

The Navy argued that we should disallow the claimed hours of the employees' participation in pre-protest meetings during which the firm discussed its protest and prepared its initial filing.¹⁵ The agency contends that since the protester's personnel discussed during these meetings not only the pursuit of its protest in our Office, but also the other "legal alternatives" available to the firm at that time, these costs were not incurred in pursuit of the protest. In support of its position, the agency directs our attention to Techniarts Eng'g--Claim for Costs, 69 Comp. Gen. 679 (1990), 90-2 CPD ¶ 152, in which we disallowed the costs associated with a claimant's attempt to resolve a protest with the contracting officer prior to filing with our Office. See also Princeton Gamma-Tech, Inc.--Claim for Costs, 68 Comp. Gen. 400 (1989), 89-1 CPD ¶ 401 (costs of filing and pursuing an agency-level protest disallowed).

We think Techniarts and Princeton are distinguishable from the present circumstance. In those cases, it was clear that the protesters's efforts were not associated with the filing and pursuit of a protest before our Office, but rather were associated with the pursuit of the protest at the agency and otherwise persuading the agency to take corrective action.

¹⁴The Navy does not dispute the reasonableness of the hourly rates and we see no reason to find them unreasonable.

¹⁵In this regard, the agency objects to the following hours: President: 5 hours; EVP I: 5 hours; EVP II: 5 hours; EVP III: 7 hours; AVP: 5 hours; and TSM: 5 hours.

Here, we think the record indicates that the protester's personnel, while perhaps raising and discussing all of the options available to the firm, were nonetheless engaged in what amounted to the deliberative process associated with articulating and filing the firm's protest in our Office. We therefore would allow the costs associated with the protester's "prefiling" meetings.¹⁶

The agency also objected to hours spent by UII's personnel in meetings that occurred after the firm's last filing in our Office on February 1, 1990, and the date of our initial decision, April 2. According to the agency, the protester's employees engaged in an excessive number of briefings after it had submitted its last filing in our Office and these briefings are not corroborated by the firm's attorneys' bill, which shows that the last legal advice to the firm, prior to the issuance of our decision, was provided on February 5.

We would agree with the agency that the hours spent by UII's employees after the firm's counsel submitted its last filing in our Office on the initial protest are not corroborated by the counsel's billing and thus would not otherwise be allowable. Assuming the firm expended the time in question, UII did not submit persuasive evidence to establish that the expenditure of time was reasonably incurred in pursuit of the protest. See Data Based Decisions, Inc.--Claim for Costs, 69 Comp. Gen. 122 (1989), 89-2 CPD ¶ 538. In this regard, we would calculate the number of hours that would be disallowed for each employee during this period by multiplying the "hours-per-week" estimates contained in the

¹⁶In a similar vein, the agency also objected to the costs of the participation of EVP III in a meeting, which occurred among UII personnel after the firm had retained counsel but prior to the time that its retained counsel had filed an "amended protest" in our Office. According to the agency, "other legal options" were also discussed at this meeting. In our view, EVP III was merely conveying in a comprehensive manner the advice of counsel, which had been provided to him and, consequently, the costs associated with that presentation would be allowable, especially in view of the fact that ultimately the firm took no action other than pursuing its protest in our Office.

employees' affidavits by the number of weeks between February 1 and April 2 as follows:¹⁷

President	32 hours
EVP I	16 hours
EVP II	4 hours
EVP III	32 hours
AVP	112 hours
TSM	16 hours. ¹⁸

Finally, the Navy objected to the hours billed by UII's personnel for time spent working on the firm's defense during RGI's reconsideration request, and UII's second protest (B-237868.3) and the settlement negotiations conducted in connection therewith. The agency argues that since UII has aggregated the hours spent in pursuing these two activities, and since only the hours attributable to UII's request for reconsideration activities are allowable, the entire claim for these activities must be disallowed. The hours in question are:

President	20 hours
EVP I	20 hours
EVP II	6 hours
EVP III	25 hours
AVP	229 hours

We would agree with the Navy that the record does not establish which of the above hours were spent on UII's reconsideration request efforts, which would be otherwise allowable, and which were spent on the firm's second protest. Each of the concerned employees executed an affidavit, which provides that the hours in question were spent working on the reconsideration request and the second protest, including settlement negotiations. UII admits that

¹⁷The Navy's estimates for the claimed in-house hours during this period appear excessive and are not based on the documentation of record. Our calculation of the disallowed amount is based on UII's affidavits. All of the protester's employees submitted affidavits containing "hours-per-week" estimates expressed as a range. For example, the AVP attests to have spent between 12 and 14 hours per week. In calculating the hours to be disallowed, we have used the larger of the two figures stated in each of the estimates; thus, in the above example we would disallow 14 hours per week.

¹⁸Although the Navy has not specifically objected to the hours claimed for UII's TSM during the period of February 1 to April 2, the record reflects a claim of 16 hours during this period of time.

its employees do not have sufficient recollection as to how the time was divided between these endeavors. Under these circumstances, we would disallow the entire amount claimed. Omni Analysis--Claim for Bid Protest Costs, supra.

In light of the foregoing, we conclude that UII would be entitled to be reimbursed for the following in-house hours:


President	38 hours
EVP I	14 hours
EVP II	8 hours
EVP III	28 hours
AVP	331 hours
TSM	24 hours
Executive Secretary	28 hours. ¹⁹

This amounts to \$18,283.64.

Conclusion

Based on the foregoing, under our precedents, we would find UII entitled to reimbursement in the amount of \$46,106.37 for the costs of filing and pursuing its bid protest, consisting of \$27,822.73 in attorneys' fees and \$18,283.64 in-house costs.

Sincerely yours,


for James F. Hinchman
General Counsel

¹⁹The record indicates that the Executive Secretary neither participated in meetings during the February 1 to April 2 period of time nor worked on the firm's second protest. Her affidavit indicates that all her claimed time related to the initial protest and reconsideration. Thus, we would allow all her claimed hours.