

DAVIS



Comptroller General
of the United States

417197

Washington, D.C. 20548

Decision

Matter of: Price Waterhouse--Claim for Costs
File: B-254492.3
Date: July 20, 1995

David R. Johnson, Esq., and David A. Levine, Esq., Gibson, Dunn & Crutcher, for the protester.
Marie N. Adamson, Esq., and Michelle Harrell, Esq., General Services Administration, for the agency.
Christine F. Davis, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester should not be paid costs incurred in filing and pursuing an unsuccessful initial protest, where that protest is readily severable from a successful supplemental protest, which rested upon a different set of facts and relied upon unrelated legal theories.
2. Excessive attorney hours are not recoverable protest costs, but an agency must identify specific hours as excessive and articulate a reasoned analysis as to why payment for such hours should be disallowed.
3. Protester may recover the costs incurred by its two attorneys, who worked together to prepare questions for witnesses testifying at a bid protest hearing, because the joint effort was necessary for the development of a coordinated hearing strategy and did not result in duplicative or excessive costs.
4. Protester may not recover the costs incurred in preparing for and conducting settlement discussions with the procuring agency regarding a protest filed at the General Accounting Office (GAO), since such costs were not incurred in pursuit of the GAO protest.
5. Protester may not recover costs incurred after its protest was sustained in evaluating how the General Accounting Office's recommendation for corrective action should be implemented, since the contracting agency, not the protester, is responsible for the details of implementing a recommendation for corrective action.

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6. Protester is entitled to recover the costs incurred after its protest was sustained for returning protected documents in accordance with a protective order and responding to unsupported agency allegations of protective order violations.

7. Costs incurred in pursuing protest claim at contracting agency are not recoverable.

DECISION

Price Waterhouse requests that our Office recommend to the General Services Administration (GSA) the amount GSA should pay for the protester's costs of filing and pursuing its bid protest, which we sustained in Price Waterhouse, B-254492.2, Feb. 16, 1994, 94-1 CPD ¶ 168.

On August 13, 1993, Price Waterhouse protested GSA's award of a contract to Arthur Andersen & Co. under request for proposals (RFP) No. FCXA-SN-92009-N. The RFP solicited audit services from an independent public accounting firm and provided for award based upon the "most advantageous" proposal, considering price and technical factors.

Price Waterhouse initially protested that the RFP established a low-priced, technically acceptable evaluation scheme, which precluded award based upon Arthur Andersen's higher-priced proposal. GSA filed its report on the protest on September 20, which showed that the agency had actually rejected Price Waterhouse's proposal as technically unacceptable because its proposed level of effort was considered insufficient. Price Waterhouse filed report comments on October 4 in which it raised several new issues relating to GSA's rejection of its proposal as technically unacceptable. In particular, the protester argued that GSA used an undisclosed minimum labor hour requirement in evaluating proposals and failed to conduct meaningful discussions in this respect. Our Office treated the protester's comments as a supplemental protest and obtained a GSA report on the matter. On December 2, our Office conducted a hearing with regard to the supplemental protest allegations, at which there was testimony from two witnesses, the contracting officer and the source selection evaluation board (SSEB) chairman, concerning how the agency evaluated offerors' proposed labor hours and how the agency communicated its labor hour expectations during discussions. On December 20, after receiving the parties' hearing comments, our Office consolidated Price Waterhouse's initial and supplemental protests. We issued a consolidated decision on February 16, 1994.

In our decision, we found that GSA failed to conduct meaningful discussions by twice requesting best and final offers (BAFO) from Price Waterhouse without apprising the firm that its otherwise acceptable proposal contained a deficiency--a proposed level of effort that was considered unacceptably low--that rendered its proposal technically unacceptable. We recommended that GSA reopen negotiations, request a new round of BAFOs, and either affirm or terminate Arthur Andersen's contract depending upon the results of the reevaluation. We also found that Price Waterhouse was entitled to recover its costs of filing and pursuing its protest, including reasonable attorneys' fees.¹

Price Waterhouse submitted a claim for costs in the amount of \$117,506.64 to the agency. GSA determined that Price Waterhouse was entitled to recover \$82,250.87. Price Waterhouse disputes GSA's determination and asks that we determine the amount to which it is entitled pursuant to 4 C.F.R. § 21.6(f)(2) (1995). We determine that Price Waterhouse is entitled to recover \$100,961.73.

ALLOCATION OF COSTS TO ISSUES

GSA first maintains that Price Waterhouse should not be reimbursed for the costs associated with filing and pursuing its initial protest allegation, *i.e.*, whether the RFP established a low-priced, technically acceptable evaluation scheme which GSA allegedly ignored in making award to Arthur Andersen. The agency claims that this allegation was rejected by our Office and is clearly severable from the protester's successful allegation that GSA conducted misleading discussions.

As a general rule, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. Omni Analysis; Department of the Navy--Recon., 68 Comp. Gen. 559 (1989), 89-2 CPD ¶ 73. Nevertheless, we will limit a successful protester's recovery of protest costs where a part of its costs is allocable to a losing protest issue that is so clearly severable as to essentially constitute a separate protest. Department of the Navy--Recon. and for Modification of Remedy, B-246784.4, Feb. 17, 1993, 93-1 CPD ¶ 147; Interface Flooring Sys., Inc.--Claim for Costs, 66 Comp. Gen. 597 (1987), 87-2 CPD ¶ 106; see Komatsu Dresser Co., 71 Comp. Gen. 260 (1992), 92-1 CPD ¶ 202.

¹The decision was issued under the coverage of a protective order because of the ongoing nature of the procurement. We subsequently requested proposed redactions from the parties and prepared a redacted version of the decision for public distribution.

Price Waterhouse argues that our Office did not reject its allegation that the RFP established a low-priced, technically acceptable evaluation scheme and that it should be considered successful on this issue. We disagree. Although we did not expressly deny this protest basis, it was obvious from our description of the RFP, which clearly set forth a "best value" evaluation scheme, that the protester's initial protest lacked merit.

In addition, we find that this issue is readily severable from the issues raised in Price Waterhouse's supplemental protest, including those on which it ultimately prevailed. Price Waterhouse's initial protest--which was filed before the September 20 agency report--was not based upon the facts and legal theories that formed the crux of its supplemental protest, namely, the agency's approach to evaluating offerors' labor hours and the agency's communication of its labor hour expectations during discussions. Price Waterhouse's supplemental protest, which stemmed from these facts, was virtually unrelated to the initial protest, aside from maintaining the initial protest ground.

The mere fact that all protest allegations challenge the award to Arthur Andersen does not intertwine the issues. Issues are intertwined where they share a common core of facts, are based upon related legal theories, and are otherwise readily severable. See Department of the Navy--Recon. and for Modification of Remedy, supra; Data Based Decisions, Inc.--Claim for Costs, 69 Comp. Gen. 122 (1989), 89-2 CPD ¶ 538; Princeton Gamma-Tech, Inc.--Claim for Costs, 68 Comp. Gen. 400 (1989), 89-1 CPD ¶ 401. Since Price Waterhouse's initial and supplemental protests do not share a common factual and legal basis, but effectively constitute discrete and severable claims, we find that the protester is not entitled to the costs that are specifically allocated to filing and pursuing the initial protest ground. We therefore disallow costs in the amount of \$5,448.75, which were incurred prior to September 20--the date Price Waterhouse received the agency report that gave rise to the supplemental protest.²

²As indicated below, the only allowable costs incurred before September 20 are the costs incurred by Price Waterhouse's in-house attorney relating to his application for admission to the protective order. Also, while the protester continued to argue its initial protest ground in its supplemental filings, the costs incurred for this reason, which appear to be relatively minimal, are not readily severable from the supplemental protest costs and are recoverable. For example, GSA disallowed the hours charged by Price Waterhouse's in-house counsel in reviewing
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REASONABLENESS OF ATTORNEYS' HOURS

GSA contends that the total attorney time billed for filing and pursuing the protest is excessive. GSA has identified several tasks that allegedly reflect unreasonably duplicative or excessive effort. GSA asks that we disallow a total of \$8,876.12 for such efforts as indicated below.³

We generally accept the number of attorney hours claimed, unless the agency identifies specific hours as excessive and articulates a reasoned analysis as to why payment for those hours should be disallowed. Omni Analysis--Claim for Costs, 69 Comp. Gen. 433 (1990), 90-1 CPD ¶ 436. Simply concluding that the hours claimed are excessive or suggest duplication of effort is inadequate to justify denying a claim for protest costs. Data Based Decisions, Inc.--Claim for Costs, supra; Princeton Gamma-Tech, Inc.--Claim for Costs, supra. We will examine the reasonableness of the attorney hours claimed to determine whether they exceed, in nature and amount, what a prudent person would incur in pursuit of his protest. Id.

GSA first disputes the time spent by Price Waterhouse's in-house counsel for various tasks.⁴ For example, GSA asserts that this counsel did not require the 13 1/2 hours claimed to prepare his application for admission to the protective order covering the protest.

While we agree that the number of hours claimed is on the high end, they have not been shown to be excessive in the circumstances. Our Office issues protective orders to allow counsel for protesters and interested parties access to confidential or proprietary information whose release may result in a competitive advantage. Protective orders are intended to protect and prevent the unauthorized release of protected information. It is very important to the integrity of the protest process for counsel, who may be unfamiliar with the terms of our protective order, to read and understand their obligations under the protective order.

²(...continued)

an affidavit of a Price Waterhouse employee, but this affidavit is in support of all of Price Waterhouse's protest contentions, including those upon which Price Waterhouse prevailed.

³Price Waterhouse objects to GSA's position in this regard on all counts, except with respect to one \$36.33 reduction in its claim, which we therefore disallow.

⁴The agency does not dispute the reasonableness of the hourly fee charged by this attorney.

Moreover, there are unique considerations regarding the admissibility of in-house counsel to a protective order issued by our Office that may require that individual to research pertinent precedent of our Office and the courts in order to ascertain whether he or she can be admitted to the protective order, and to prepare the required detailed application and affidavit seeking admission. In addition, in this case the in-house counsel's request for admission to the protective order was opposed by the agency, which required the preparation of a supplemental affidavit to overcome the agency's specific objections to his admission. Under the circumstances, we do not believe the claimed hours relating to the preparation of his application for admission to the protective order have been shown to be excessive. See Fritz Co., Inc.--Claim for Costs, B-246736.7, Aug. 4, 1994, 94-2 CPD ¶ 58.

GSA contends that the protester's in-house counsel also spent an excessive amount of time reviewing the agency's notice to authorize contract performance notwithstanding the protest, pursuant to CICA's "best interest" clause. See 31 U.S.C. § 3553(d)(2)(A)(i). The attorney billed 4.5 hours (\$653.85) for reviewing the notice, researching its impact on a possible remedy, and briefing his client on his findings. GSA contends that the attorney should have been able to accomplish these tasks in 1.5 hours. We agree. The override notice was only 1-1/2 pages long, and the research necessary to interpret it was minimal, e.g., CICA expressly discusses the impact of a "best interest" override on our recommendation. See 31 U.S.C. §§ 3553(d)(2)(A)(i), 3554(b)(2). Accordingly, we disallow payment for 3 excessive hours in the amount of \$435.90.

GSA disputes that the protester's in-house counsel needed 1 hour to review and research our notice consolidating Price Waterhouse's initial and supplemental protests, given the brevity of that document. We do not find the protester's claim to be excessive in the circumstances, since our Office does not generally consolidate protests and Price Waterhouse's counsel was not familiar with this procedure.

GSA also contends that the protester's in-house counsel did not need 15.5 hours to propose redactions to the protected decision issued by our Office on February 16, 1994. GSA states that the proposed redactions should have taken half that time (7.75 hours) and asks that we reduce the protester's claim by \$1,126.08.⁵

⁵In addition, one of the protester's outside counsel, a law firm associate, spent 2 hours (\$420) making redactions. Although GSA disallowed this amount, it has not articulated any reason as to why these costs are not allowable.

Price Waterhouse notes that a dispute arose between the parties regarding what information should be redacted from the published decision. Specifically, the agency and the interested party requested extensive redactions to the final decision, and Price Waterhouse states that not only did our Office largely adopt Price Waterhouse's suggested redactions, but it spent much of the time claimed "opposing the efforts of the GSA and Arthur Andersen to portray selectively the facts of the [d]ecision with the effect, if not the purpose, of concealing improprieties in the procurement."

We believe that Price Waterhouse has reasonably supported the time spent during the redaction process. Not only did Price Waterhouse prepare its own redactions to the decision, which our Office essentially adopted, it also incurred costs opposing the extensive redactions proposed by the agency and the interested party. We find the time spent by Price Waterhouse in proposing redactions in the final decision was not excessive in the circumstances.

The agency next argues that the protester's in-house and outside counsel (a law firm partner) duplicated each other's effort in preparing for the hearing conducted in the protest. The two attorneys worked together to prepare questions for both witnesses who testified at the hearing. GSA argues that, because the in-house counsel only questioned the contracting officer, he should not recover the costs of preparing questions for the SSEB chairman. Similarly, GSA argues that, because the outside counsel only questioned the SSEB chairman, he should not recover the costs of preparing questions for the contracting officer. GSA accordingly recommends that we reduce each attorney's reimbursement by 50 percent.⁶

Were we to deny an attorney the costs of assisting co-counsel in preparing questions for a witness, we would effectively deprive attorneys of the ability to develop a coordinated hearing strategy. We think it is unreasonable to adopt a rule that would encourage two attorneys preparing for the same hearing to work in isolation of each other. Although the number of attorneys employed may be a consideration, we have held that the essential question is

⁶The in-house counsel billed 37.5 hours preparing for the hearing for a total charge of \$5,448.75. The outside counsel billed 19.5 hours preparing for the hearing for a total charge of \$6,825. GSA requests that we reduce the total claim by 50 percent, which would amount to a \$6,136.88 reduction.

the reasonableness of the total hours billed. See Armour of Am., Inc.--Claim for Costs, 71 Comp. Gen. 293 (1992), 92-1 CPD ¶ 257. Here, GSA does not question the need for two attorneys to prepare for the hearing, nor does it specifically assert that the total number of hours billed was unreasonable. In our view, Price Waterhouse's attorneys did not spend excessive time preparing for the hearing and they may recover all costs incurred.

SETTLEMENT COSTS

GSA next contends that Price Waterhouse is not entitled to \$8,489.60 in claimed costs allegedly incurred in attempting to persuade the agency to take corrective action in response to its protest, inasmuch as these costs were not incurred "in pursuit" of the protest.⁷ See 31 U.S.C. § 3554(c)(1)(A) (1988); Techniarts Eng'g--Claim for Costs, 69 Comp. Gen. 679 (1990), 90-2 CPD ¶ 152; Diverco--Claim for Costs, B-240639.5, May 21, 1992, 92-1 CPD ¶ 460.

Price Waterhouse now concedes that it is not entitled to the costs incurred in preparing for, and attempting to reach, a negotiated settlement of its protest with GSA. However, it asserts that GSA has unreasonably disallowed all costs billed by the outside counsel on the same day as the settlement discussions, even though, as indicated on the outside counsel's supporting documentation, only a portion of these costs related to the settlement discussions and rest were in pursuit of the protest. Thus, Price Waterhouse reduced its claim by \$2,714.60 and has produced adequate documentation, in the form of a detailed affidavit from the outside counsel, establishing that the other costs incurred on those days were reasonably in pursuit of the protest.

GSA continues to assert that the entire \$8,489.60 should be disallowed because Price Waterhouse's outside counsel did not provide to GSA an adequate breakdown of the claimed hours when requested to do so by the agency. The record shows that GSA only requested a breakdown by protest issue, but did not ask that the costs associated with the settlement discussions be segregated. Since GSA does not challenge the documentation submitted, only the withdrawn \$2,714.60 in costs should be disallowed and the remainder of the costs in question should be reimbursed.

⁷The record reflects that Price Waterhouse commenced efforts to negotiate a settlement of its protest with the agency on November 22, after our Office notified the parties of our intention to conduct a hearing. Settlement discussions concluded unsuccessfully on November 30, 2 days before the hearing was held.

POST-DECISION COSTS

GSA argues that Price Waterhouse incurred certain unallowable costs after we issued our decision on February 16, 1994. Excluding the hours spent redacting our final decision, the protester charged 41.8 hours of attorneys' time after the decision was issued, for a total charge of \$10,835.10.⁸ GSA maintains that we should disallow all post-decision costs, except those incurred in analyzing the decision and preparing redactions.

As noted by GSA, our Office has recognized that the filing and pursuit of a protest includes, at least to some extent, an analysis of the ultimate decision and some explanation and consultation with the client. See Bay Tankers, Inc.--Claim for Costs, B-238162.4, May 31, 1991, 91-1 CPD ¶ 524. The record shows that Price Waterhouse's attorneys spent 4 hours doing such work for a total charge of \$683.55, and GSA has not articulated any basis for disallowing such costs.

The protester's attorneys also billed 28.25 hours, or \$7,116.10, for evaluating how to implement our recommendation for corrective action, which GSA asks that we disallow. Price Waterhouse contends that it should be reimbursed these costs because "the parties spent considerable time evaluating the decision and talking to each other about how the GAO's remedy could be implemented." Price Waterhouse argues that its consideration of how to implement the remedy was "consistent with the GAO's prescription that parties be allowed time to analyze the ultimate decision."

The details of implementing one of our recommendations for corrective action are within the sound discretion and judgment of the contracting agency. Furuno U.S.A., Inc.--Recon., B-221814.2, June 10, 1986, 86-1 CPD ¶ 540. Although GSA extended Price Waterhouse the courtesy of expressing its views on the remedy, and although it may have been in the protester's interests to do so, the protester was not responsible for implementing the remedy and may not be reimbursed for such efforts, which were unrelated to the pursuit of its protest. See KPMG Peat Marwick--Entitlement to Costs, B-251902.2, June 8, 1993, 93-1 CPD ¶ 443.

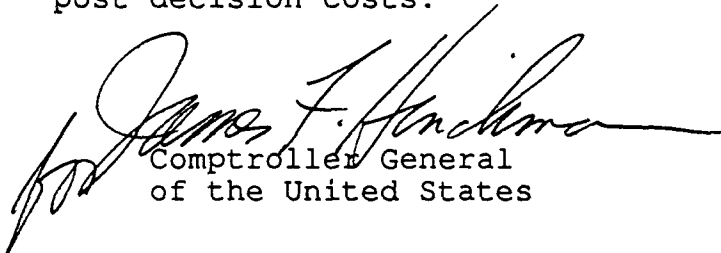
⁸Specifically, the protester's in-house counsel billed 17 hours, or \$2,470.10; the protester's senior outside counsel billed 22.55 hours, or \$7,892.50; and the protester's junior outside counsel billed 2.25 hours, or \$472.50. In addition, GSA argues that an additional \$263.23 for post-decision disbursements should be disallowed, which Price Waterhouse does not contest.

GSA next requests that we disallow \$2,405.45 for costs incurred by the protester's attorneys in complying with our protective order after the decision was issued. We decline to do so. The protester's attorneys incurred these costs returning protected documents in accordance with our protective order and responding to GSA's unsupported allegation that they had violated the protective order. Since such costs relate to the administration of our protective order, they are reimbursable. See Fritz Co., Inc.--Claim for Costs, supra.

Finally, Price Waterhouse billed 1.8 hours, or \$630, in preparing an agency-level claim for costs. A protester may not recover the costs incurred in pursuing its claim before the contracting agency. See 4 C.F.R. § 21.6(f)(2); Manekin Corp.--Claim for Costs, B-249040.2, Dec. 12, 1994, 94-2 CPD ¶ 237.

CONCLUSION

The protester should recover \$100,961.73 in bid protest costs. Of Price Waterhouse's claimed bid protest costs of \$117,506.64, we recommend that the agency not pay \$5,448.75 for filing and pursuing a clearly severable, unsuccessful protest allegation; \$472.23 for attorneys' fees shown to be excessive; \$2,714.60 for costs related to settlement discussions with the agency; and \$8,009.33 for unallowable post-decision costs.


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