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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

# Decision

**Matter of:** Core Tech International Corporation--Costs

**File:** B-400047.3

**Date:** June 2, 2009

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Brian A. Darst, Esq., for the protester.  
Kenneth M. Racette, Jr., Esq., Naval Facilities Engineering Command, for the agency.  
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO,  
participated in the preparation of the decision.

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## **DIGEST**

Request that GAO recommend reimbursement of attorneys' fees at a rate higher than the statutory cap of \$150 per hour based on increase in cost of living is granted where claim filed with agency presented reasonable basis for adjustment.

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## **DECISION**

Core Tech International Corporation (CTIC), of Guam, with the concurrence of the Department of the Navy, requests that we provide a recommendation as to whether attorneys' fees should be paid at a rate higher than the \$150 per hour statutory cap, in connection with CTIC's request for reimbursement of its costs of pursuing a bid protest and cost claim.

We recommend reimbursement at the higher rate.

CTIC, a large business, protested the Naval Facilities Engineering Command's (NAVFAC) award of a contract to DCK Pacific, LLC, under request for proposals No. N62742-08-R-1307, for design and construction of replacement, larger-size water lines and related work at the Naval Base, Guam. CTIC challenged the agency's evaluation of proposals and conduct of discussions. Subsequently, our Office conducted "outcome prediction" alternative dispute resolution (ADR), during which the cognizant GAO attorney stated that it was likely that CTIC's protest would be sustained based on several deficiencies in the conduct of the procurement. In this regard, the GAO attorney advised during the ADR that the agency's evaluation of past performance and experience/qualifications appeared unreasonable. NAVFAC thereupon advised our Office that it intended to undertake corrective action, resulting in GAO dismissing the protest as academic (B-400047, July 7, 2008).

Subsequently, in our decision Core Tech Int'l Corp.--Costs, B-400047.2, Mar. 11, 2009, 2009 CPD ¶ 59 at 8, we recommended reimbursement of CTIC's costs of filing and pursuing its protest. We based our recommendation on our finding that a reasonable agency inquiry into the protest allegations would have shown that NAVFAC had failed to reasonably evaluate the awardee's past performance and experience, and had conducted disparate, unequal discussions, but the agency unduly delayed taking corrective action.

Under the Competition in Contracting Act of 1984, as amended, where the Comptroller General recommends that a successful protester's costs, including reasonable attorneys' fees, be reimbursed, those fees are capped at \$150 per hour, except where the protester is a small business concern. However, this hourly rate may be increased where "the agency determines, based on the recommendation of the Comptroller General on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 31 U.S.C. § 3554(c)(2)(B) (2006).

In Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 37-43, we discussed the section 3554 ceiling on attorneys' fees and the cost of living adjustment. We found that the statute contemplates an increase in the specified \$150 per hour rate in order to offset any decrease in the value of the rate due to increases in the cost of living, Sodexho Mgmt., Inc.--Costs, *supra*, at 41, and that it was proper to determine the appropriate cost-of-living increase with reference to the Department of Labor's (DOL) Consumer Price Index (CPI). Department of the Army; ITT Fed. Servs. Int'l Corp.--Costs, B-296783.4, B-296783.5, Apr. 26, 2006, 2006 CPD ¶ 72 at 2. Since Sodexho, we have found that the justification for an upward departure from the \$150 cap is self-evident if the claimant asserts that the cost of living has increased, as measured by DOL's CPI. EBSCO Publishing, Inc.--Costs, B-298918.4, May 7, 2007, 2007 CPD ¶ 90 at 2-3; Department of State--Costs, B-295352.5, Aug. 18, 2005, 2005 CPD ¶ 145 at 2; Department of the Army; ITT Fed. Servs. Int'l Corp.--Costs, *supra*, at 2-3. Where the claimant asserts such a claim, and the contracting agency does not articulate any objection, we will grant a request for a recommendation in favor of a cost-of-living adjustment to the fee cap. Department of State--Costs, *supra*, at 2.

Here, CTIC and NAVFAC have agreed upon the elements and overall amount of CTIC's claim for the costs of pursuing the protest and claim, which are properly reimbursable. The only issue presented here is whether an enhanced attorney fee rate of \$239.74 to \$248.35 per hour (depending on the month of billing) should be applied to account for increases in the cost of living; if applied, the parties have agreed upon reimbursement in the amount of \$28,863.77. NAVFAC E-Mail to GAO, Apr. 16, 2009. In support of its claim for reimbursement at a higher rate, CTIC provides a detailed explanation of its calculation of the rates using DOL's CPI--All Urban Consumers. Use of the "All Urban Consumers" CPI for a specific area is

consistent with our decision in Sodexo, see Sodexo Mgmt., Inc.--Costs, supra, at 43 n.33, and we have reviewed CTIC's calculations in support of the higher requested fees and find that they are properly supported and reasonable. Since NAVFAC does not object to CTIC's calculations, we recommend that NAVFAC reimburse CTIC its attorneys' fees at the claimed higher rate. See Department of State--Costs, supra, at 2.

Daniel I. Gordon  
Acting General Counsel