



Comptroller General
of the United States

Washington, D.C. 20548

144717

Decision

Matter of: Bush Painting, Inc.--Claim for Costs

File: B-239904.3

Date: August 16, 1991

William F. Bush, Jr., for the protester.
Lt. Col. William J. Holland, Department of the Air Force, for the agency.
Mary G. Curcio, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Claimant may recover costs of filing and pursuing General Accounting Office protest to the extent they are documented and were reasonably incurred in pursuing the protest.

DECISION

Bush Painting, Inc. requests that we determine the amount it is entitled to recover from the Department of the Air Force for bid preparation costs in connection with the bid it submitted in response to invitation for bids (IFB) No. F65503-90-B-0013, and for the cost of filing and pursuing its protest in Bush Painting, Inc., B-239904, Aug. 30, 1990, 90-2 CPD ¶ 188. As discussed below, we find that Bush is entitled to recover \$1,758.75 in protest costs and \$1,000 in bid preparation costs.

In our prior decision, we sustained Bush's protest that the Air Force improperly permitted McKinley Maintenance, Inc., the low bidder, to correct a mistake in its bid. We initially recommended that the Air Force terminate the contract awarded to McKinley and award a contract to Bush, if Bush was otherwise eligible to receive the award. We also found that Bush was entitled to recover its protest costs. The Air Force subsequently informed our Office that McKinley had completed 90 percent of the contract. Bush advised our Office that it was not interested in performing 10 percent of the contract.

As a result, and because no other remedy was available, we amended our decision to permit Bush to recover its bid preparation costs in addition to its protest costs, Bush Painting, Inc.--Modification of Remedy, B-239904.2, Jan. 11, 1991, 91-1 CPD ¶ 28. We directed Bush to submit its claim directly to the Air Force.

Bush submitted a claim to the Air Force which totaled \$12,347.61 and consisted of \$8,091.61 in protest costs and \$4,256 in bid preparation costs. After a series of negotiations, the Air Force offered Bush \$4,000, consisting of \$3,000 in protest costs and \$1,000 in bid preparation costs. Bush refused the offer and submitted the claim to our Office for resolution.

PROTEST COSTS

Bush claims reimbursement for \$8,091.61 in protest costs comprised of \$1,839.86 in attorneys' fees and related expenses; \$1,878.50 paid to a consultant, Toombs & Co., Inc.; and \$4,373.25 for time spent by William F. Bush, Jr. and the firm's office manager on activities related to pursuing the protest.

A protester seeking to recover the costs of pursuing its protest must submit sufficient evidence to support its monetary claim. The amount claimed may be recovered to the extent that the claim is adequately documented and is shown to be reasonable; a claim is reasonable, if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the pursuit of the protest. Data Based Decisions, Inc.--Claim for Costs, 69 Comp. Gen. 122 (1989), 89-2 CPD ¶ 538.

Bush claims reimbursement for \$1,878.50 it paid for a consultant to advise Bush concerning the protest. The consultant, Toombs & Co., spent 28.9 hours assisting Bush and billed Bush \$65 per hour. The Air Force argues that these costs should not be allowed because Toombs is a construction contractor, not a consulting company, and because there is no indication that Bush has in fact paid this money to Toombs. The Air Force also argues generally that the costs appear to be inflated. The Air Force also appears to suggest that there was a contingent fee arrangement between Bush and Toombs because Toombs's invoice was prepared almost a month after the General Accounting Office (GAO) decided the protest.

The fact that Toombs may not be a formal consulting firm does not preclude Bush from recovering the costs it incurred in obtaining Toombs's assistance in pursuing the protest. However, the fact that the bill was submitted to Bush long after the services were rendered and after GAO had found Bush

entitled to recoup its protest costs does raise a serious question regarding whether Bush has previously agreed to pay Toombs for the consultation irrespective of the outcome of the protest. The only response provided by Bush is a statement by Toombs that its bill is "true and accurate." This does not address the Air Force's reasonable concerns, and we deny that portion of the claim.

Bush also claims reimbursement for \$1,839.86 paid to an attorney. This is comprised of \$1,610.00 in attorneys' fees and \$229.86 for photocopying, word processing, and postage. We find that these costs may not be recovered by Bush because they were not reasonably related to the pursuit of the protest. Bush filed its protest with our Office on June 1, 1990, and by letter dated June 22, submitted comments on the agency report in response to the protest. Bush did not retain the attorney until June 28. The attorney responded to Bush by letter dated July 6 in which he reviewed and analyzed the protest which Bush had submitted, gave an appraisal of the possible results and his recommendations for future procurements if the firm considers a protest appropriate. He also spoke with Bush regarding these issues. Since Bush's comments were received and the record was closed before the attorney was retained, Bush could not have considered the attorney's advice in pursuing the protest. Accordingly, the attorney's fees are not recoverable.

Bush also requests reimbursement of \$4,373.25 incurred by company employees in pursuing the protest. These costs include \$3,701.25 for 70.5 hours spent by William F. Bush, Jr. in pursuing the protest, billed at \$52.50 per hour, and \$672 for 24 hours the office manager spent on activities related to the protest, billed at \$28 per hour.

To support its claim Bush submitted a log of the 70.5 hours Mr. Bush spent on protest-related activities. Of these hours we find that Bush may not recover for 3 1/2 total hours spent on May 14 and May 24 in pursuit of the agency-level protest. See Princeton Gamma-Tech, Inc.--Claim for Costs, 68 Comp. Gen. 400, supra. Nor may Bush recover for 2 1/2 hours spent on May 31 to submit a Freedom of Information Act (FOIA) request; for 3 1/2 hours spent on June 2 to discuss the FOIA request and the protest with Toombs; for 1 1/2 hours spent on June 9 discussing with Toombs McKinley's performance under the contract; for 3 hours spent on June 11 writing the Air Force FOIA officer; or for 1 1/2 hours spent on July 13 reviewing FOIA information. These costs, with the exception of the time spent on May 31 writing a FOIA request, were incurred after Bush's protest was filed on June 1, and thus cannot reasonably be characterized as being incurred in pursuit of the protest. Concerning the 3 hours spent on May 31 writing an FOIA request, since the protest was filed on June 1, the

information requested under FOIA was not necessary to or otherwise related to the pursuit of the protest.

Bush may not recover for 3 hours spent on June 28 in reviewing the protest documents and forwarding them to his attorney or for 4 hours spent on July 3 and July 6, during which Bush reviewed a letter from his attorney and discussed a retainer with the attorney since, as discussed above, we do not believe the costs associated with the attorney were reasonably incurred in the pursuit of the protest.

Bush may not recover for 1/2 hour spent in contacting its Congressman concerning the protest since contacting congressional representatives is not reasonably related to pursuing a protest. Ultraviolet Purification Sys., Inc.--Claim for Bid Protest Costs, B-226941.3, Apr. 13, 1989, 89-1 CPD ¶ 376.

Our decision sustaining the protest was issued on August 30, 1990. Consequently, Bush may not recover the cost of 14 hours spent on various activities on September 10, September 13, and October 3, since these costs were incurred after our decision was reached and, consequently, were not incurred in pursuit of the protest. See Princeton Gamma-Tech, Inc.--Claim for Costs, 68 Comp. Gen. 400, supra.

Thus, of the 70.5 hours claimed, we find that Bush may not recover the cost associated with 37 of those hours. The remaining 33.5 hours were spent in various protest-related activities such as consulting with Toombs or contacting General Accounting Office employees. Consequently, Bush may recover for these hours \$1,758.75 (33.5 hours x \$52.50).

Bush also requests reimbursement for 24 hours its office manager spent on activities related to the protest such as typing, xeroxing, and mailing correspondence. Bush requests reimbursement at the rate of \$28 per hour.

The Air Force argues that Bush should not be allowed to recover the cost of the office manager. The Air Force asserts that Bush has not submitted anything to document that the office manager spent any time on protest-related matters and that in any case the amount of hours claimed seems excessive. The Air Force also argues that the records Bush submitted show that the office manager is paid \$13.75 per hour, and that with overhead expenses added this becomes \$15.43, not \$28. The Air Force also notes that Bush refused to submit certified payrolls to verify the office manager's rate of pay.

Bush has submitted to our Office a breakdown of the office manager's salary which, with fringe benefits and overhead, totals \$27.46 per hour. The firm states that the office manager spent 24 hours on typing the protest and other related documents, xeroxing and mailing. Bush submitted no documentation or explanation to support this claim. Bush argues that the office manager does not keep records of the time she spends on specific tasks. We recognize that because employees may not keep logs of the time they spend on specific tasks, a protester may not be able to submit contemporaneous documentation of time spent on protest related activities. Bush, however, did not attempt to reconstruct a record of the office manager's time or even explain how it determined that she spent 24 hours on protest related activities. Accordingly, we agree with the Air Force that Bush may not recover the costs of the office manager's time. See TMC, Inc.--Claim for Costs, B-230078.2; B-230079.2, Jan. 26, 1990, 90-1 CPD ¶ 111.

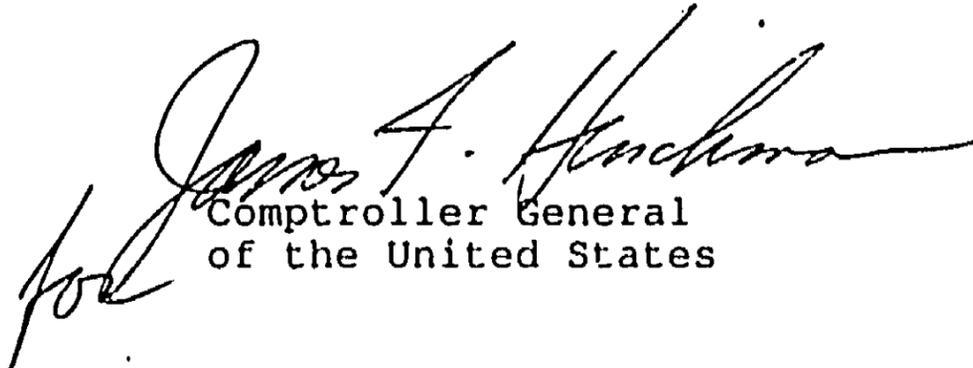
BID PREPARATION COSTS

Bush requests reimbursement of \$4,256 in bid preparation costs. According to Bush these costs consist of 26 hours of office manager time billed at \$28 per hour (\$728); 42 hours for William F. Bush, Sr. billed at \$59 per hour (\$2,478); and 20 hours for William F. Bush, Jr. billed at \$52 per hour (\$1,050).

The Air Force asked Bush to document this claim. In response Bush asserted that it did not keep records of the time spent preparing its bid. In the absence of any evidence supporting the employees' hours, we cannot conclude that the time claimed for bid preparation is reasonable. See Introl. Corp., 65 Comp. Gen. 429 (1986), 86-1 CPD ¶ 279. The Air Force has offered to pay Bush \$1,000 in bid preparation costs. Since the Air Force's offer appears reasonable, Bush may recover that amount.

CONCLUSION

We find that the Bush may recover a total of \$2,758.75, consisting of \$1,758.75 in protest costs and \$1,000 in bid preparation costs.


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