



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

Decision

Matter of: Berkshire Computer Products, Inc.--Claim for Costs

File: B-240327.3

Date: December 30, 1994

Heidi Roscoe for the protester.
Gregory H. Petkoff, Esq., Department of the Air Force, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester did not establish that costs claimed to have been paid to an unsalaried consultant and an attorney were related to its pursuit of the protest.
2. Claim for proposal preparation costs is disallowed where the protester was not awarded proposal preparation costs in the decision sustaining the protest and did not timely request reconsideration of the decision.

DECISION

Berkshire Computer Products, Inc. requests that we determine the amount it is entitled to recover from the Department of the Air Force for filing and pursuing its protest in Berkshire Computer Prods., B-240327, Oct. 31, 1990, 91-1 CPD ¶ 464.

In our prior decision, we sustained Berkshire's protest because the Air Force had not properly justified its sole-source purchase of computer equipment from Digital Equipment Corporation (DEC) under that firm's Federal Supply Schedule (FSS) contract. We recommended that the Air Force determine its minimum requirements concerning the equipment to be procured and clearly communicate those requirements to potential offerors in a new Commerce Business Daily synopsis of a competitive solicitation, and that the order from DEC's FSS contract be terminated if it were ultimately not the successful offeror. We also found that Berkshire was entitled to reimbursement of its costs of filing and pursuing the protest.

Berkshire requests reimbursement of \$15,459.89 for its costs of filing and pursuing the protest.¹ This amount consists of \$6,842.42 for the salary costs of its employees, \$7,895.90 for attorney's fees, and \$721.57 for other direct costs. We allow \$318.52.

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 pursuit of the protest. Data Based Decisions, Inc.--Claim for Costs, 69 Comp. Gen. 122 (1989), 89-2 CPD ¶ 538.

In support of its claimed costs for employee time, Berkshire provided a document listing by date a brief description of the work performed by two employees, Ernest J. Parsons and Elizabeth Ramos, and the amount of time spent. This document indicates that Mr. Parsons incurred 118 hours at a rate of \$57.69 per hour, and that Ms. Ramos incurred 1.75 hours at \$20.00 per hour. Berkshire also provided its accountant's "certification of salary" for Mr. Parsons that states, in part, that Mr. Parsons is an employee of Berkshire with a "current salary [of] approximately \$10,000 per month for calendar year 1990 based upon a forty hour work week." (Emphasis added.) A copy of Mr. Parsons's "W-2 Wage and Tax Statement for 1991," which shows income of \$115,000 for the year, was also provided.² Finally, Berkshire provided a copy of a check executed by Mr. Parsons on the account of "Berkshire Computer Systems" in the amount of \$109,876.30 made payable to Mr. Parsons and dated February 28, 1991.³

The Air Force objects to the payment of any costs attributable to the time incurred by Mr. Parsons, contending that he is not a salaried employee of Berkshire as represented by that firm. This objection is primarily based

¹Berkshire initially filed its claim with the Air Force, but was unable to reach agreement on the amount that it should be reimbursed.

²The W-2 Form shows no withholding for federal or state income taxes as would be expected for a full-time salaried employee.

³As noted above, the claim is by Berkshire Computer Products, Inc., and the record contains a variety of checks on that corporate account executed by a Berkshire corporate official.

on the findings of the General Services Board of Contract Appeals (GSBCA) in Berkshire Computer Prods. v. Department of the Army, GSBCA No. 12228-P, Feb. 25, 1993, 93-2 BCA ¶ 25,856, relating to a Berkshire protest of a different procurement during the same time frame as this protest. The GSBCA found, after an evidentiary hearing, including testimony from Mr. Parsons, that Mr. Parsons was not a salaried employee of Berkshire from April 1990 through 1992. He was an unsalaried consultant, who worked part-time for Berkshire while employed full-time for another company, LAGO Storage Technology. Berkshire's protest to our Office, on which this claim is based, was filed by Mr. Parsons on July 6, 1990, and our protest decision was issued on October 31, 1990.

Given the uncertainty in the record concerning Mr. Parsons's relationship with Berkshire, we asked Berkshire to explain inconsistencies between its accountant's statement of the amount of Mr. Parsons's "salary," and Mr. Parsons's W-2 form and his alleged "salary" check, and to address the GSBCA's decision that Mr. Parsons was an unsalaried consultant. While Berkshire explained the inconsistencies in Mr. Parsons's W-2 statement and the accountant's statement, it did not, despite requesting an extension of time in which to respond, address the agency's objections based upon the GSBCA's finding that Mr. Parsons was not a salaried employee.

We are persuaded, from the record before us in this case and the GSBCA's detailed decision regarding Mr. Parsons's relationship with Berkshire, that Mr. Parsons was not a salaried employee. The compensation reported to have been received by Mr. Parsons from Berkshire during the period pertinent to this protest may have been in the nature of commissions, and was not established to have been related to filing and pursuing the protest. There is no evidence in the record that Berkshire agreed to pay or in any way incurred any actual costs in connection with Mr. Parsons's actions in this protest. Accordingly, Berkshire's claim of \$6,807.42 for Mr. Parsons's time in filing and pursuing the protest is denied.⁴ See Ultraviolet Purification Sys., Inc.--Claim for Bid Protest Costs, B-226941.3, Apr. 13, 1989, 89-1 CPD ¶ 376.

⁴To the extent that Mr. Parsons's compensation was in the nature of commissions on sales, a protester may not recover labor costs that are based upon commissions. See Grammco Computer Sales, Inc., GSBCA No. 9049-C (8940-P), Apr. 5, 1988, 88-2 BCA ¶ 20,691; see also Ultraviolet Purification Sys., Inc.--Claim for Bid Protest Costs, *supra*.

The Air Force does not object to the payment of costs attributable to the time of Ms. Ramos.⁵ Accordingly, Berkshire is entitled to reimbursement of \$35.

Berkshire also requests reimbursement of attorney's fees and expenses in the amount of \$7,895.90. In support of this claimed amount, Berkshire has provided a document on legal letterhead which describes by date the particular services rendered and hours incurred by the attorney and the expenses incurred.⁶ This document shows 58.25 hours were incurred at a rate of \$140 per hour, and 326 photocopies were made at 15 cents apiece.

The Air Force argues that the claimed hours and hourly rate of the attorney were excessive and that there is no showing in the record that Berkshire's attorney was actually paid for the time purportedly incurred on Berkshire's behalf in this protest. In this regard, the attorney did not enter an appearance on Berkshire's behalf during the protest and none of the protest submissions indicated the attorney's participation. Also, Berkshire has not provided attorney time sheets or other documentation that is contemporaneous with the filing or pursuit of the protest. The Air Force contends that the number of hours claimed for research are excessive, given the lack of case citation in the protest submissions. The Air Force also objects that the attorney's claimed hours include time for unallowable items, such as for reviewing the protest decision and for consulting regarding Berkshire's claim for costs. The agency further complains that the attorney, a relatively recent law school graduate, was inexperienced in government procurement law and appeared to charge a higher legal fee rate than that of other similarly experienced counsel in the attorney's community in Shelburne Falls, Massachusetts.

Berkshire provided no specific response to the agency's objections concerning its attorney's hourly rate, but did produce four canceled checks to the attorney totaling \$6,985. The firm stated that "[d]ue to the significant amount of the attorney's fees, and Berkshire's case position the company had to pay [the] attorney . . . over a period of time." These checks do not indicate, however, that they were for services related to the protest in question. The Air Force argues that there is no evidence in the record that all of these checks represented payment for time

⁵Ms. Ramos was a temporary employee supplied by another company to which Berkshire paid \$20 per hour for Ms. Ramos's time.

⁶This document indicates that it was prepared after the protest decision.

incurred filing or pursuing this protest, inasmuch as during the time frame pertinent to the canceled checks, this attorney represented Berkshire in a number of other protests with our Office and the GSBICA; the Air Force argues that these checks could represent payment for time incurred on behalf of Berkshire in these other protests. Berkshire did not respond to this objection despite our request that it do so. There is simply no evidence in the record that these payments to Berkshire's attorney relate to this protest.

Given Berkshire's failure to respond to the agency's arguments concerning its attorney's claimed hourly rate and hours and to demonstrate that its attorney was paid or expected to be paid for the hours claimed to be incurred in relation to this protest, we disallow its claim for attorney's fees and expenses. See Ultraviolet Purification Sys., Inc.--Claim for Bid Protest Costs, supra.

Berkshire also requests reimbursement of \$721.57 for its other expenses incurred in filing and pursuing the protest. In support of this amount, Berkshire provided a document that itemized by date the particular expense incurred and the amount. Berkshire's claimed expenses consist of the costs of telephone calls and facsimile transmissions made to our Office, the GSBICA, and the Air Force; the transmission of documents by Federal Express to our Office, the GSBICA, and the Air Force; and mileage for Mr. Parsons's automobile travel to visit Berkshire's attorney (a round trip distance of approximately 164 miles) and to attend a bid protest conference at our Office (a round trip distance of 828 miles). Berkshire also provided copies of telephone bills and copies of canceled expense checks.

We have reviewed Berkshire's documentation in support of its expense claim and find that Berkshire is entitled to recover \$283.52. We disallow Berkshire's claim for expenses insofar as they relate to its earlier filing of a protest with the GSBICA or were incurred in its pursuit of its claim for costs. Costs incurred in seeking relief in another forum are not reimbursable under our bid protest process. See Diverco, Inc.--Claim for Costs, B-240639.5, May 21, 1992, 92-1 CPD ¶ 460. In addition, the costs incurred in pursuing the protester's claim for costs before the Air Force and our

Office are also not recoverable.⁷ See The Pevar Co.--Claim for Costs, B-242353.3, Sept. 1, 1992, 92-2 CPD ¶ 144. We also disallow the mileage costs for automotive visits by Mr. Parsons to Berkshire's attorney, given Berkshire's failure to show that the services claimed for its attorney relate to the protest.

Berkshire also requests reimbursement of \$515.67 for its costs of preparing its proposal. We did not, however, award Berkshire its costs of proposal preparation in our prior decision, and Berkshire's claim for these costs nearly 2 years after the date of the decision is untimely. Accordingly, Berkshire is not entitled to reimbursement of its costs of proposal preparation and this claim is denied. John Peoples--Claim for Costs, 70 Comp. Gen. 661 (1991), 91-2 CPD ¶ 125.

In sum, we find that Berkshire is entitled to recover a total of \$318.52 for its costs of filing and pursuing the protests.

for James F. Hinckley
 Comptroller General
 of the United States

⁷Although our Bid Protest Regulations now authorize us to award a protester, in appropriate cases, its costs of pursuing a claim for costs, see 4 C.F.R. § 21.6(f)(2) (1994), these Regulations were not in effect at the time Berkshire filed its protest. Under the Regulations then in effect, 4 C.F.R. § 21.6(e) (1990), such awards were not authorized. See Armour of Am., Inc.--Claim for Costs, 71 Comp. Gen. 293 (1992), 92-1 CPD ¶ 257.