Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Innovative Refrigeration Concepts--Claim for Costs

File: B-258655.2

Date: July 16, 1997

Richard D. Lieberman, Esq., Sullivan & Worcester, for the protester.
Gregory H. Petkoff, Esq., Department of the Air Force, for the agency.
Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where a protester, seeking the recovery of its bid preparation and protest costs incurred by its employees, fails to adequately document its claim to show that the hourly rates, upon which its claim is based, reflect its employees' actual rates of compensation plus reasonable overhead and fringe benefits, but not profit, the costs cannot be recovered.

2. Attorneys' fees and costs incurred by the protester after the agency offered to settle the protest of the award of the fully performed contract by reimbursing the protester's bid preparation and protest costs were essentially unnecessary and should not be reimbursed where under the circumstances the rejected settlement offer provided all the relief that could have been obtained through the protest process.

DECISION

Innovative Refrigeration Concepts (IRC) requests that our Office determine the amount it is entitled to recover from the Department of the Air Force for its costs of preparing its bid under invitation for bids (IFB) No. F28609-94-B-0030 and for filing and pursuing its protest in Innovative Refrigeration Concepts, B-258655, Feb. 10, 1995, 95-1 CPD ¶ 61.

The IFB, issued as a total small business set-aside, sought bids for a chiller on a brand name or equal basis. Although the IFB identified the make and model of a large business for the brand name, the IFB required that the small business bidders offer only products manufactured by a small business. We sustained IRC's protest that the awardee's bid was nonresponsive because the awardee proposed to furnish the product of a large business in violation of the small business set-aside provisions of the IFB. As the chiller had been delivered and installed soon after

award,[1] corrective action was not feasible, and we instead awarded IRC its costs of bid preparation and of filing and pursuing the protest, including reasonable attorneys' fees.

IRC, as directed by our decision, submitted its claim for costs to the agency, supported by an itemized accounting of the claimed costs of IRC's employees as well as those for its attorney. The parties were unable to reach an agreement concerning the amount IRC is entitled to be reimbursed for its costs, and IRC has requested that we determine the amount of its entitlement pursuant to the then-applicable provisions of our Bid Protest Regulations, 4 C.F.R. § 21.6(f)(2) (1995).

For the costs incurred by its employees, IRC listed the services performed, dates of performance, hours performed, and hourly rate for each employment position. IRC claimed that its employees incurred costs of $5,367 for 47 hours of bid preparation and incurred costs of $3,707.50 for 32 hours of pursuing its protest. The Air Force objects to the reimbursement of any of IRC's costs claimed for its employees, because, despite the Air Force's request, IRC did not provide any information to establish that its employees' claimed hourly rates reflect actual rates of compensation.

A protester seeking to recover the cost of pursuing its protest must submit sufficient evidence to support its monetary claim. McNeil Techs., Inc.--Claim for Costs, B-254909.3, Apr. 20, 1995, 95-1 CPD ¶ 207 at 5. The amount claimed may be recovered to the extent that it is adequately documented and shown to be reasonable. Id. Although we recognize that the requirement for documentation may sometimes entail certain difficulties, we do not consider it unreasonable to require a protester to document in some manner the amount and purposes of its employees' claimed efforts and to establish that the claimed hourly rates reflect the employees' actual rates of compensation plus reasonable overhead and fringe benefits. W.S. Spotswood & Sons, Inc.--Claim for Costs, 69 Comp. Gen. 622, 623 (1990), 90-2 CPD ¶ 50 at 3.

Here, despite the agency's request, the documentation submitted by IRC does not demonstrate how IRC's hourly rates were calculated or that the claimed rates reflect actual rates of compensation. Rather, the record reflects that for one of the employees, namely IRC's president and chief engineer, the claimed rate represents a "market rate" as a professional consulting engineer, which presumably includes profit as an element. Moreover, given the high hourly rates claimed for the remaining employment positions ($65 to $85 per hour), it appears likely that the

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[1]The Air Force did not suspend performance of the contract because IRC's protest was not filed at our Office within 10 calendar days of award.

other claimed rates also represent "market rates" that may well include profit as an element.

A protester may not recover profit on its own employee's time in filing and pursuing its protest or preparing its bid, and therefore claimed rates must be based upon actual rates of compensation, plus reasonable overhead and fringe benefits, and not market rates. See John Peeples--Claim for Costs, 70 Comp. Gen. 661, 663 (1991), 91-2 CPD ¶ 125 at 3. Since the protester has not provided evidence, either to our Office or the Air Force, to show how the hourly rates claimed for each of IRC's employees were calculated and how the rates relate to the employees' actual rates of compensation plus reasonable overhead and fringe benefits, but not profit, the costs IRC claims its employees incurred for bid preparation and pursuing the protest cannot be recovered.[2] W.S. Spotswood & Sons, Inc.--Claim for Costs, supra, 69 Comp. Gen. at 624, 90-2 CPD ¶ 50 at 4.

IRC also requests reimbursement of $4,466.07 for fees and costs it claims were incurred by its attorney in filing and pursuing the protest.

The Air Force does not object to $1,542.94 of the attorneys' fees and costs IRC claims it incurred prior to November 1, 1994, which was the date on which the Air Force offered to settle the protest by reimbursing IRC its bid preparation and protest costs. However, the Air Force argues that it should not have to reimburse IRC the remaining $2,923.13 of attorneys' fees and costs the protester claims it incurred after the date of the settlement offer because IRC was aware at the time of the settlement offer that no corrective action was feasible--the contract had been fully performed--and that it could receive no relief other than reimbursement of the types of costs offered by the Air Force.

Where, as here, our Office determined that the award of a contract did not comply with a statute or regulation, the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1)(A) (1988), provided, at the time of our decision on this protest, that our Office "may declare an appropriate interested party to be entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees." (Emphasis supplied.) Given the discretion thus vested in our Office, we may, in appropriate circumstances, disallow claimed protest costs, even where they were incurred by the protester. See Sterling Fed. Sys., Inc. v. Goldin, 16 F.3d 1177, 1182, 1186-1187 (Fed. Cir. 1994) (CICA is a permissive fee-shifting statute which allows the administrative forum deciding protests the discretion to allow or disallow,

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[2]While IRC complains that the Air Force should have had its claimed rates audited by the Defense Contract Audit Agency, we agree with the Air Force that it was not obligated to conduct such an audit and that it was the protester's obligation to explain and substantiate its claimed rates, as requested by the Air Force.

where appropriate, claimed protest costs). In deciding whether to recommend that protest costs be reimbursed, we, consistent with the approach of the Court of Appeals for the Federal Circuit, will balance "the competing policies of encouraging litigation of procurement conflicts" and controlling "litigation costs." Id. at 1187. For example, we will recommend that protesters recover costs attributable to hours spent in pursuit of a protest only if those costs were reasonably necessary to the protest effort. See JAFIT Enters., Inc.--Claim for Costs, B-266326.2; B-266327.2, Mar. 31, 1997, 97-1 CPD ¶ 125 at 2-4; Fritz Cos., Inc.--Claim for Costs, B-246736.7, Aug. 4, 1994, 94-2 CPD ¶ 58 at 4 (claims for protest costs disallowed to the extent the hours were deemed excessive).

On balance, we agree with the Air Force that the attorneys' fees and costs incurred by IRC after the Air Force's settlement offer were essentially unnecessary and should not be reimbursed. When it realized that IRC's protest may have merit, the Air Force made a good faith offer to settle this protest by reimbursing IRC's costs.[3] This was the only possible relief available to the protester, inasmuch as the contract had been fully performed when the settlement offer was made. IRC rejected the offer and requested a decision on the merits by this Office, notwithstanding its knowledge that this was the maximum relief that our Office could provide in issuing a decision. Under such circumstances, while the protester was entitled to request and receive a decision on the merits, we do not believe the public should pay for IRC's intransigence in failing to settle a protest that could yield it no other relief than the offered reimbursement of costs.[4]

In conclusion, we find that IRC is entitled to reimbursement of the $1,542.94 in attorneys' fees and costs it incurred in filing and pursuing its protest prior to the date of the Air Force's November 1, 1994, settlement offer.[5]

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[3]This offer exceeded the amount we recommend be reimbursed in this decision.

[4]We note that a contrary view would provide little incentive for agencies to reasonably settle protests of fully performed contracts. See generally Tidewater Marine, Inc.--Request for Costs, B-270602.3, Aug. 21, 1996, 96-2 CPD ¶ 81 at 4-6.

[5]Regarding the Air Force's question as to whether, in making payment, the Air Force should honor the assignment by IRC of its claim to its attorney, we direct the Air Force's attention to the provisions of the Assignment of Claims Act, 31 U.S.C. § 3727 (1994).