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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: CourtSmart Digital Systems, Inc.--Costs

File: B-292995.7

Date: March 18, 2005

James H. Roberts, III, Esq., Van Scoyoc Kelly, for the protester.
Seth Binstock, Esq., Social Security Administration, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where the contracting agency challenges the reasonableness of hourly rates claimed for outside legal services for both attorney and legal assistant fees, GAO will recommend reimbursement of actual costs claimed to the extent relevant evidence establishes that the actual costs reflect customary rates charges for similar services; to the extent customary rates for costs claimed are not established, GAO will recommend reimbursement of a portion of the costs by applying rates that the record establishes as customary rates charged for similar services.

DECISION

CourtSmart Digital Systems, Inc. requests that our Office recommend that the Social Security Administration (SSA) reimburse CourtSmart \$189,748.50 in costs incurred pursuing its protest in CourtSmart Digital Sys., Inc., B-292995.2, B-292995.3, Feb. 13, 2004, 2004 CPD ¶ 79.

We recommend that the agency reimburse CourtSmart \$187,108.50 in protest costs.

We sustained CourtSmart's protest because the agency's evaluation of quotations and the source selection decision were improper under the regulations for orders under the Federal Supply Schedule, and were otherwise unreasonable under the terms of the solicitation. We recommended that the agency cancel the order that was issued and conduct a new source selection process. We also recommended that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees.

On April 8, 2004, CourtSmart filed a documented and certified claim with SSA seeking \$213,434 as reimbursement of total costs of pursuing its protest.¹ On July 1, after receiving no response from SSA, CourtSmart filed this request in our Office. SSA responded to the claim for the first time on September 3 in a report to our Office, in which the agency took the position that CourtSmart was entitled to recover only \$70,717. CourtSmart responded by accepting reductions for costs not related to pursuing the protest as identified by SSA on September 3, and by reducing the claimed hourly rate for reimbursement of costs attributed to legal assistant fees. The parties now agree that the following portions of CourtSmart's claim should be reimbursed: (1) internal costs in the amount of \$13,937.25; and (2) outside counsel costs for 324.15 hours of attorney services and 243 hours of legal assistant services. The only remaining disputes that we consider here concern the reasonableness of the hourly rates billed by outside counsel for the attorney and legal assistant, and CourtSmart's recovery of costs of pursuing this claim.

A protester seeking to recover its protest costs must submit sufficient evidence to support its monetary claim; our Office will base our decision for a cost claim upon the facts and circumstances of that claim. Armour of Am.--Costs, B-237690.2, Mar. 4, 1992, 92-1 CPD ¶ 257 at 5. The amount claimed may be recovered to the extent that the claim is adequately documented, and is shown to be reasonable. Id. We will determine the reasonableness of hourly rates for legal fees by considering the customary fee charged for similar work in the community, as well as the experience, reputation and ability of the practitioner. Id. at 7; KPMG Peat Marwick, LLP--Costs, B-259479.4, July 25, 1996, 96-2 CPD ¶ 43 at 5 (attorneys' fees); E&R, Inc.--Costs, B-255868.2, May 30, 1996, 96-1 CPD ¶ 264 at 5-6 (non-lawyer representative fees). In doing so, where relevant and appropriate, we will consider the fee rates found allowable by our Office in similarly complex proceedings. See KPMG Peat Marwick, LLP--Costs, supra; Bay Tankers, Inc.--Costs, B-238162.4, May 31, 1991, 91-1 CPD ¶ 524 at 3.

Attorney's Fees

CourtSmart incurred \$153,971.25 for its attorney's services at an hourly rate of \$475. SSA generally alleges that the rate is above the reasonable rate charged for these services.² In response, CourtSmart submitted information from a 2002 national

¹ CourtSmart's certified claim for costs included detailed records identifying the internal costs incurred by CourtSmart, as well as the specific hours billed and corresponding services performed for outside legal services throughout the protest period, which included a hearing conducted at our Office. CourtSmart states that it has paid all of the costs incurred.

² In its September 3 filing, the agency objected to this rate on the basis that it exceeded the \$150 per hour cap imposed by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(2)(B) (2000), as amended by the Federal

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billing rate survey. Specifically, CourtSmart identified the ranges of hourly billing rates for partners and for associates from 19 firms in the Washington, D.C. area, as published in the January 2003 edition of Legal Times. The hourly rates for partners reported by these firms ranged from \$185 to \$750. CourtSmart Submission (Oct. 1, 2004) at 2, encl. 4. The highest rates for partners for all but two of these firms were in excess of \$500. CourtSmart states that a breakdown of billing rates by specific practice area was not available. CourtSmart's attorney states that he has 30 years of experience in federal procurement law in the Washington, D.C. area, and has the expertise, reputation and ability commensurate with partners at the high end of the billing rate range. CourtSmart asserts that, since the \$475 rate billed by its attorney is within the range billed by firms in the community, the hourly rate is reasonable.

SSA has not challenged the applicability of the survey for the purpose of determining the reasonableness of the attorney's hourly rate billed here. SSA has also not challenged the asserted expertise, reputation and ability of the attorney.

Here, the work was performed by the attorney from November 2003 through February 2004, which is within approximately 1 year of the billing rate survey. Although the survey does not provide hourly rate information for attorneys practicing in federal procurement law or related areas of practice, SSA does not challenge the relevance of the information submitted. On this record, we find the attorney's billed hourly rate of \$475 was reasonable. See KPMG Peat Marwick, LLP--Costs, *supra*, at 5-6; Bay Tankers, Inc.--Costs, *supra*. Therefore, we find \$153,971.25 (i.e., 324.15 hours x \$475 per hour) that CourtSmart claims for attorney's fees is reasonable and recoverable.

Legal Assistant's Fees

CourtSmart incurred \$38,970 for services performed by outside counsel's legal assistant at hourly rates of \$100 for a portion of the protest period and \$200 for the remainder of that period. SSA asserts that these rates are unreasonably high. SSA contends that a reasonable rate is reflected in the corresponding rate for services performed by SSA's paralegals, which are compensated on the General Schedule (GS) at the GS-11 rates. SSA states that a reasonable rate for these services would

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Acquisition Streamlining Act of 1994 (FASA). See KPMG Peat Marwick, LLP--Costs, *supra*, at 3-5. In response, CourtSmart asserted and provided evidence that it was a small business concern. Under CICA, the cap does not apply to small business concerns within the meaning of section 3(a) of the Small Business Act. 31 U.S.C. § 3554(c)(2). The agency no longer questions CourtSmart's small business status. Accordingly, the record provides no basis to apply the fee cap to the protester's legal costs.

be the GS-11, step 5 hourly rate of \$27.47,³ which it has increased by 22.2 percent to reflect overhead costs,⁴ for a total hourly rate of \$33.57. Agency Response to Cost Claim at 3. Our Office requested that the parties provide relevant recent billing rate surveys to support or refute the hourly rates claimed. In response, SSA provided no further evidence and CourtSmart reduced its claimed hourly rate for the legal assistant to \$91 for a total claimed amount of \$21,840 (\$91 x 240 hours).⁵ While CourtSmart asserts that \$100/\$200 were its customary and actually paid billing rates for the legal assistant, who was going to law school, it did not provide the requested rate survey information. Instead, CourtSmart referenced our decision in Pulau Elec. Corp.–Costs, B-280048.11, July 31, 2000, 2000 CPD ¶ 122 at 9-10, where we found the protester was entitled to recover costs at an \$80 hourly rate for a paralegal employed by a major Washington, D.C. law firm representing the protester in the protest, to which figure CourtSmart applied the markup indicated by the Consumer Price Index and Inflation Calculator, to arrive at its revised \$91 hourly rate. SSA has offered no response to CourtSmart’s revised claim.

While we would have preferred production of recent billing rate surveys in support of this claim, as indicated above, we have and will consider, in determining the reasonableness of claimed fees for protests, the rates charged in similar proceedings. See KPMG Peat Marwick, LLP–Costs, *supra*, at 5-6; Bay Tankers, Inc.–Costs, *supra*; E&R, Inc.–Costs, *supra*. Thus, we think that the \$80 rate allowed in Pulau for paralegal services by a Washington, D.C. law firm, with expertise in public contracts law, in support of a similarly complex protest, is relevant in determining the reasonableness of the paralegal rates being charged here. In fact, we find this evidence to be more relevant than the \$33.57 rate referenced by SSA for paralegals employed by SSA in that the SSA rates only include the employees’ actual salaries and an unexplained 22.2 percent overhead rate, which may not fully reflect the salaries, profit and other markups included in a law firm’s billing rates. Cf. Sodexo Mgmt., Inc.–Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 39 n.30 (comparison of government attorneys salaries to private law firm billing rate is “apples to oranges”).

CourtSmart would rely on our decision in Sodexo as a basis to increase the \$80 rate used in Pulau to account for intervening cost-of-living increases by applying an inflation rate using the Consumer Price Index. We find CourtSmart’s argument

³ This rate is from the Office of Personnel Management (OPM), General Schedule of hourly rates that was in effect for the calendar year 2004 with locality pay adjustment for the Washington-Baltimore area. See OPM webpage, www.opm.gov/oca/04tables/html/dcb_leo_h.asp.

⁴ SSA does not explain how it arrived at this overhead rate.

⁵ CourtSmart reduced its claimed hours for the legal assistant from 243 to 240 in its final revised claim.

unpersuasive. Our decision in Sodexho was based on a specific statutory provision under FASA for adjusting the \$150 per hour cap on attorneys' fees incurred by other-than-small-business protesters to reflect factors such as increases in the cost of living. Id. at 37-38. That cap does not apply either to CourtSmart or to legal assistant fees, and we find that the FASA provision concerning cost-of-living adjustments to the attorneys' fee cap is not relevant here. CourtSmart has not shown that the \$80 paralegal rate used in the Pulau decision is no longer within the range of customary rates, such that upward adjustment would be appropriate here, nor otherwise shown that any of its claimed rates for the legal assistant were appropriate for reimbursement purposes. Furthermore, applying a cost-of-living adjustment here would provide protesters with an unintended opportunity to "shop" for the better of actual current customary rates, or relevant rates from prior decisions adjusted for inflation, where a protester has not otherwise shown that its claimed rates are appropriate for reimbursement purposes.

We thus find CourtSmart is entitled to recover \$19,200 (i.e., \$80/hour x 240 hours) in legal assistant costs.

Costs of Pursuing Claim for Costs

CourtSmart also requests that our Office recommend that SSA pay CourtSmart's costs of pursuing this claim for costs. Our Bid Protest Regulations, 4 C.F.R. § 21.8(f)(2) (2004), provide that we may declare a protester entitled to reimbursement of the costs of pursuing its claim at our Office. This provision is designed to encourage expeditious agreement between a successful protester and the contracting agency as to the quantum of recoverable costs. SKJ & Assocs., Inc.—Costs, B-291533.3, July 24, 2003, 2003 CPD ¶ 130 at 4. Given that SSA did not consider or substantively respond to CourtSmart's documented and certified claim until 5 months after it was submitted and only after our Office requested a report on the matter, and given that we have found the bulk of the disputed claimed costs recoverable, we recommend that CourtSmart be reimbursed the costs of pursuing its claim at our Office.

In conclusion, we recommend that SSA reimburse protest costs of \$13,937.25 for CourtSmart's internal costs, \$153,971.25 for its attorney's fees, and \$19,200 for the legal assistant's fees, for a total reimbursable cost of \$187,108.50. In addition, we recommend that CourtSmart be reimbursed the costs of pursuing its claim at our Office.

Anthony H. Gamboa
General Counsel