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Decision

Matter of: 6K Systems, Inc.--Costs

File: B-408124.6

Date: December 16, 2014

Alex Colon, Esq., Law Offices of Alex Colon, for the protester.
Jacqueline Posner, Esq., Office of Personnel Management, for the agency.
Cherie J. Owen, Esq., and David A. Ashen, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. GAO recommends that protester's claim for attorneys' fees be reimbursed where the attorney hours charged are documented and reasonable, and the agency has not identified any specific hours as excessive or articulated a reasoned analysis as to why payment for such hours should be disallowed.
 2. Reimbursement of attorneys' fees sought by a successful small business protester is recommended at a rate exceeding \$150 per hour, since the statutory cap on hourly rates for attorneys' fees that can be reimbursed for successful large business protesters does not apply to attorneys' fees incurred by successful small business protesters.
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DECISION

6K Systems, Inc., of Leesburg, Virginia requests that we recommend that it be reimbursed in the amount of \$27,112.50 for its costs of filing and pursuing its protests challenging the establishment of a blanket purchase agreement (BPA) under request for proposals (RFP) No. OPM2613R0002, issued by the Office of Personnel Management (OPM) for knowledge portal services.

We recommend reimbursement in the amount of \$25,818.75, plus 6K's costs of pursuing this claim at our Office.

BACKGROUND

On November 1, 2012, OPM issued the solicitation seeking offerors to provide a knowledge management portal, government online learning center, and e-Training

program for the agency's Human Resources Solutions enterprise. 6K protested the award, arguing that the awardee's price proposal was incomplete, and that the agency's price evaluation was flawed and failed to provide a reasonable basis to assess the price of the competing proposals. 6K Sys., Inc., B-408124, B-408124.2, June 17, 2014. After the filing of the agency report and the protester's comments, the agency advised that it was taking corrective action, and the protests were dismissed as academic.

After the agency completed a new evaluation and made a new award decision, 6K again protested, challenging the reevaluation and award. The protester also requested that we recommend that the agency reimburse the costs of filing the protest challenging the initial award decision. See 6K Sys., Inc.--Protest and Costs, B-408124.3, B-408124.4, Dec. 9, 2013. We sustained the protest, finding that the agency's price evaluation was unreasonable and that the agency failed to engage in meaningful discussions. Id. We also recommended that 6K be reimbursed the costs of pursuing its protests with our Office, including reasonable attorneys' fees. Id. at 14.

6K submitted its claim for costs with the agency, claiming a total of 120.5 hours of attorney work at the billing rate of \$225 per hour in pursuing its protests with our Office, for a total of \$27,112.50. In response, the agency offered to reimburse the protester for 82.05 attorney hours at a rate of \$150 per hour.¹ Agency Response to Request for Costs at 1. When the parties were unable to agree on the amount that 6K was to be reimbursed, 6K filed its claim for costs with our Office requesting that we recommend the agency reimburse 6K a total of \$27,112.50 for 120.5 hours of attorney time invoiced to 6K at \$225 per hour.

DISCUSSION

6K requests reimbursement for 120.5 hours of attorney work at the billing rate of \$225 per hour for a total of \$27,112.50. OPM challenges the protester's request for costs, but has provided no substantive support for its position. In this regard, our Office requested that the agency provide a substantive basis for its position that protester's attorney is not entitled to the entire amount claimed. In response, OPM provided a one-page filing that set forth the chronology of the agency's negotiations with protester's attorney, but did not provide any basis for its position that the protester should be reimbursed for less than the total number of claimed hours.

¹ Although the protester correctly noted to the agency that the \$150 per hour statutory cap imposed by 31 U.S.C. § 3554(c)(2)(B) is not applicable to small businesses, the agency nevertheless advised that it would only reimburse the protester for attorneys fees at the rate of \$150 per hour, rather than the attorney's actual rate of \$225 per hour. See Agency Response to Request for Costs at 1.

Our Office will examine the reasonableness of attorney hours claimed to determine whether they exceed, in nature and amount, what a prudent person would incur in pursuit of his or her protest. Shaka, Inc.--Costs, B-405552.2, May 17, 2012, 2012 CPD ¶ 160 at 3; Price Waterhouse--Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 5. A recommendation that an agency pay a protester's costs is intended to relieve protesters with valid claims of the burden of vindicating the public interests which Congress seeks to promote; it is not intended as a reward to prevailing protesters or as a penalty imposed upon the government. W.S. Spotswood & Sons, Inc.--Costs, B-236713.3, July 19, 1990, 90-2 CPD ¶ 50 at 3. Our Office generally accepts the number of attorney hours claimed, unless the agency identifies specific hours as excessive and articulates a reasoned analysis as to why payment for those hours should be disallowed. Shaka, Inc.--Costs, *supra*; Pulau Elecs. Corp.--Costs, B-280048.11, July 31, 2000, 2000 CPD ¶ 122 at 6. An agency simply concluding that the hours claimed are excessive or suggesting there may be a duplication of effort is inadequate to justify denying a claim for protest costs. Shaka, Inc.--Costs, *supra*; Pulau Elecs. Corp.--Costs, *supra*.

Number of Attorney Hours

OPM has provided no basis for its position that 6K is entitled to reimbursement for less than the number of hours 6K's attorney claims were required to pursue this protest. Further, our review of the claimed hours furnishes no basis for concluding that they exceeded, in nature or amount, what a prudent person would incur in pursuit of this protest, and we find no basis to question 6K's claim in this regard. The record shows that 6K submitted detailed billing statements, which included the description of the work performed by the attorney. The agency has not asserted that any specific charge is inappropriate, and does not question whether the attorney actually worked the hours claimed. Under the circumstances, we find the agency's assertions that 6K should not be reimbursed the full amount of its claim to be unsupported and insufficient to justify denying or reducing 6K's claim.

As part of our independent review of the billing documents, we have identified three exceptions to our general conclusion that the hours claimed appear to be reasonably related to the pursuit of 6K's protest. First, on the invoice dated September 10, 2013, there are two charges related to preparing for, and attending, the debriefing. The first charge, dated August 7, 2013, is 0.75 hours billed for "research price realism/ and prepare debriefing questions." Cost Claim at 6. The second charge, dated August 9, 2013, is 1.5 hours billed for "Attend Debriefing." *Id.* Time related to attending a debriefing is not reimbursable because these hours were not reasonably incurred in pursuit of the protest. SKJ & Assoc., Inc.--Costs, B-291533.3, July 24, 2003, 2003 CPD ¶ 130 at 3. We note that the August 7 charge relates to price realism research (potentially allowable) and debriefing preparation (unallowable). However, as a general rule, where a protester has aggregated allowable and unallowable costs in a single claim, such that we cannot tell from the record before us what portion is unallowable, the entire amount must

be disallowed even though some portion of the claim may be properly payable. TRESP Assoc., Inc.--Costs, B-258322.8, Nov. 3, 1998, 98-2 CPD ¶ 108 at 4; Armour of Am., Inc.--Costs, B-237690.2, Mar. 4, 1992, 92-1 CPD ¶ 257 at 8. Therefore, we disallow the 2.25 hours of attorney time that are related to preparing for, and attending, the debriefing.

Second, on the invoice dated January 30, 2014, the protester's attorney billed 0.75 hours for "conference call with 6K Executive Team re decision research remedies (CFC)" and 1.75 hours for "CFC case research," on December 12, 2013. Cost Claim at 5. Research related to pursuing additional litigation at the Court of Federal Claims, which was conducted after the issuance of our decision in these protests, cannot properly be considered a cost related to the pursuit of a protest with our Office. Therefore, we disallow the 2.5 hours charged on December 12, 2013.

Third, on January 28, 2014, the protester's attorney billed 1 hour of time for a "meeting to discuss post-decision steps." Cost Claim at 6. This charge is also disallowed. See generally TRESP Assoc., Inc.--Costs, *supra*, at 3-4 (discussing post-decision attorneys' fees). Therefore, we disallow a total of 3.5 hours of attorney time for unallowable post-decision activities. As a result of our decision to disallow 3.5 hours of time for post-decision activities, and 2.25 hours of time for pre-protest activities, we conclude that 6K is entitled to reimbursement for 114.75 attorney hours (120.5 - 5.75).

Hourly Rate

Next we address OPM's assertion that the rate of reimbursement here should be \$150 per hour. In this regard, OPM argues generally that "in accordance with FASA and the FAR, OPM calculates the hourly attorney fee at \$150." OPM Response at 1.

From the passage of the CICA until 1994, no cap on hourly rates applied to the reimbursement of attorneys' fees for successful protesters; however, such fees could only be reimbursed to the extent they were reasonable. Public Communications Servs., Inc.--Costs, B-400058.4, June 25, 2009, 2009 CPD ¶ 131 (citing S. Rep. No. 103-258 (May 11, 1994), as reprinted in 1994 U.S.C.C.A.N. 2561, at 2568). In 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), which amended certain parts of CICA, including, as relevant here, the provisions concerning reimbursement of protest costs. Pub. L. No. 103-355, 108 Stat. 3243, at 3289 (1994). Since the enactment of FASA, CICA imposes a cap on legal fees for large businesses of \$150 per hour; small businesses, however, are specifically excluded from this limitation. CICA provides that "[n]o party (other than a small business concern . . .) may be paid . . . costs for attorneys' fees that exceed \$150 per hour. 31 U.S.C. § 3554(c)(2).

OPM does not dispute that 6K is a small business, and acknowledges that the protester raised this fact during its negotiations regarding the reimbursement of attorneys' fees. OPM Response at 1. It simply states that the agency "calculates the hourly attorney fee at \$150," without providing a basis for this position. Id. In arguing that the rate should be capped at \$150 per hour, which, as discussed above, is not required by CICA for small businesses, OPM has raised no contention--nor have we seen any basis to conclude--that the attorney's rate of \$225 per hour is unreasonable. In this regard, OPM does not argue that the rate is unreasonable for legal services in the Washington, D.C. metropolitan area or that it is outside the range of what a company would reasonably expect to pay counsel in government contracts litigation. Further, our Office has previously found rates higher than \$225 per hour to be reasonable for government contracts litigation in the Washington, D.C. area. See Blue Rock Structures, Inc.--Costs, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190 (finding rate of \$350 per hour to be reasonable where the protester offered no evidence to support the reasonableness of its attorney's rate, but the agency offered no evidence establishing the unreasonableness of the rate); see also Public Communications Servs., Inc.--Costs, supra (finding experienced senior partner's rate of \$705 per hour reasonable for government contracts litigation in Washington, D.C. area); CourtSmart Digital Sys., Inc.--Costs, B-292995.7, March 18, 2005, 2005 CPD ¶ 47 (finding rate of \$475 per hour reasonable for federal procurement law attorney in the Washington, D.C. area). Therefore, we see no merit in OPM's position.

RECOMMENDATION

Of the claimed \$27,112.50, we recommend that OPM reimburse 6K Systems \$25,818.75 in protest costs, calculated as 114.75 attorney hours at a rate of \$225 per hour.

The request is granted.

Susan A. Poling
General Counsel